



## The Advertising Association

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### **SUBMISSION OF SUPPLEMENTARY WRITTEN EVIDENCE BY THE ADVERTISING ASSOCIATION**

#### **TO THE JOINT COMMITTEE ON THE DRAFT GAMBLING BILL**

##### **Introduction**

The Advertising Association (AA) is a federation of 25 trade associations and professional bodies representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the United Kingdom. It is the only body that speaks for all sides of an industry that was worth over £16.7 billion in 2002. Further information about the AA, its membership and remit, can be found at the following location:

<http://www.adassoc.org.uk>

The AA welcomes the opportunity the Joint Committee has given the Association to appear before it on 24 February to provide oral evidence. These additional written comments relate to that material published on 5 February by the Department for Culture, Media & Sport (DCMS), which has implications for advertising. As the Committee will be aware, a draft Section 31 (Advertising) to appear within Part 3 (General offences) of the draft Bill, which will contain the principal offences, has yet to be published. The AA notes that this Part will contain delegated powers for the introduction of subordinate legislation, if required. In addition to a draft Section 31 on advertising, the AA awaits a clause on credit and inducements and further detail relating to newspapers and other publications being permitted to run forecasting competitions as well as further guidance on the definition of lotteries, as they relate to prize competitions. The AA is therefore unable to provide additional comment on these areas than is given in its submission of 10 December 2003 to the Joint Committee.

This supplementary submission makes reference to Policy Note 6 - Advertising of Gambling (contained within the DCMS's *Supplementary Policy Memoranda* document), the consolidated draft Gambling Bill and the *Memorandum on Delegated Powers*, all of which were published on 5 February 2004. In addition, the AA makes reference to its own original submission to the Joint Committee of 10 December 2003 (Document Ref. DGB 52).

##### **Para 6: Policy objectives**

The AA has long supported the DCMS's policy objective of replacing the existing patchwork of provisions in current gambling legislation as it relates to advertising with new measures that reflect better the evolution since the 1960s of gambling into an acceptable leisure activity. The AA also welcomes the Government's intention to allow gambling operators to advertise in the same way as other businesses, which are currently subject to regulation by the Advertising Standards Authority (ASA) and the Office of Communications (Ofcom).

##### **Para 9: Definition of an "advertisement"**

The AA agrees with the definition of an "advertisement" that the Government proposes to make use of in relation to gambling and the media that might carry such a commercial communication, as set out in Paragraph 9 of *Policy Note 6*.

##### **Paras 12-15: Rules for the content and conduct of advertisements for legal gambling**

The AA supports the need for rules on the content and conduct of advertisements for legal gambling to be contained within advertising codes. The AA agrees that an undertaking to abide by them should be made a condition of licence for those gambling operators regulated by the Gambling Commission (GC). That these advertising rules should be in line with the general licensing objectives as set out in Section 1 of the draft Bill appears sensible.

Where the AA diverges from the DCMS view is as regards the proposal that the GC should set and enforce requirements as to the manner and content of the advertising for gambling product and premises, particularly in relation to non-broadcast advertising. The AA would refer the Joint Committee to the Association's comments in its submission of 10 December 2003 and the section headed "Role of the Gambling Commission in the Regulation of Gambling Advertising" for a fuller exposition of this divergence of views and the reasons behind it.

Furthermore, the AA proposed in that submission a number of alternative regulatory models / solutions for consideration. The AA also questions why the regulation of non-broadcast advertising should be treated so differently from broadcast advertising, as set out in Paragraph 15 of *Policy Note 6*.

#### **Regulation of non-broadcast advertising for gambling products and premises**

The AA notes from Paragraph 14 of *Policy Note 6* that it is intended to provide the Secretary of State with reserve powers to prescribe matters in relation to the advertisement and promotion of any form of legal gambling via secondary legislation. It would appear, from Paragraph 15 of *Policy Note 6*, that such powers would not apply to broadcast advertising. The AA questions why in principle there should be any difference in approach. The AA does note, however, from the DCMS's *Memorandum on Delegated Powers* that "...there would be no intention to exercise them [reserve powers], but they have been provided as contingency measures to deal with circumstances which may, but need not, arise." [Source: DCMS *Memorandum on Delegated Powers*, 2004: Paragraph 32]. The AA would strongly endorse the Government's intention not to make use of such a reserve power unless all other efforts to resolve a problem area have failed.

The DCMS cites examples in Paragraph 14 of instances when the Secretary of State might contemplate making use of their reserve powers in this area. The AA considers that such detail is best dealt with in codes of practice wherever possible, rather than via secondary legislation. With reference to the possible use of "wealth/health" warnings specifically, the AA has already set out its views in its submission of 10 December 2003 to the Joint Committee. These views can be found in the section headed "Monitoring of advertising and possibility of introducing 'health/wealth' warnings".

It also appears appropriate here to deal with DCMS's concerns as they relate to those gambling operations, such as family entertainment centres and clubs with a gaming permit, which will not fall under the regulatory remit of the GC. Whilst such operators might not be licensed by the GC, their advertisements would still need to be in compliance, for example on misleadingness, with the relevant advertising codes covering them or risk being subject to an array of sanctions. In the case of non-broadcast advertising, whilst the system is self-regulatory, the ASA has effective sanctions at its disposal. These are set out fully in sections 61.1-61.15 of the Committee of Advertising Practice (CAP)'s *The British Code of Advertising, Sales Promotion and Direct Marketing*. The sanctions available include: refusal by the non-broadcast media to publish an advertisement that the ASA has ruled against; the generation of adverse publicity for the advertiser; the compulsory pre-vetting of advertisements for persistent offenders; and, possible referral to the Office of Fair Trading (OFT) under the Control of Misleading Advertisements Regulations 1988 (as amended). Advertising agencies and the constituent parts of the non-broadcast media, by virtue of their membership of inclusive trade associations, are committed to abiding by independent ASA adjudications.

#### **Regulation of broadcast advertising for gambling products and premises**

The AA notes in Paragraph 15 of *Policy Note 6* that it is the DCMS's intention that the kind of interventionist regulation that the Secretary of State could be empowered to introduce in relation to non-broadcast advertising will not apply to broadcast advertising. The DCMS considers that Ofcom will be able to regulate effectively the advertising of gambling products and premises, following suitable consultation with the GC, under the Communications Act 2003. The AA welcomes such a policy stance, but considers that the same approach should be adopted for non-broadcast advertising.

As the Joint Committee and the DCMS will be aware from the AA's earlier submission, Ofcom is at present actively considering contracting out responsibility for the regulation of broadcast advertising to the ASA under a co-regulatory mechanism. It is therefore noteworthy that the statutory regulator with a specific communications role and direct remit in advertising holds such a different view from the DCMS about the ASA's effectiveness.

#### **Para 19: Scope for co-regulation of advertising for gambling products and premises**

Notwithstanding the AA's concerns expressed above about the regulation of non-broadcast advertising for gambling products and premises, the Association is greatly encouraged by some of what the DCMS states in Paragraph 19 of *Policy Note 6* regarding the scope for adopting a co-regulatory approach.

The AA has always agreed that all relevant stakeholders should be involved in the drawing up of any codes for the advertising of gambling products and premises. Indeed the AA has long endorsed the idea that an organisation such as GamCare should be consulted on the gambling provisions contained within any advertising codes. Similarly, the AA has also always shared the DCMS's concerns that the scope for regulatory overlap and duplication of regulation and all the attendant problems that such outcomes bring, as discussed in greater depth in the Association's submission of 10 December 2003 to the Joint Committee. The statement within *Policy Note 6*, which the AA finds the most encouraging, however, is: "If, for example, as a result of such consultations [between the GC, ASA and other relevant bodies] it were possible for existing regulators to amend their own codes in a way which fully met the Commission's requirements as to substance and clarity of definition, it would not be necessary for the Commission to impose licence conditions beyond one requiring operators to observe those codes. Such a condition would be needed to ensure that the Commission itself had an enforceable sanction against its licensees if enforcement action by other regulators under their codes were not sufficient, as breach would constitute an offence." [DCMS *Policy Note 6*, 2004: Paragraph 19]

The AA has long argued the merits of such an approach, which might resemble very closely the current CAP/ASA - OFT model, whereby the former is recognised by the latter, Government and the Courts as the primary 'established means' of consumer protection in non-broadcast marketing communications. Thus the OFT would continue to act as the backstop regulator to ensure compliance with the general misleading advertising provisions, but with the GC acting as the backstop regulator for the specific gambling provisions. The CAP/ASA should consult with the GC in preparing or amending its code insofar as it relates to gambling and have in their possession the option of referring transgressors to the Commission. The GC would then ultimately have the power to revoke a licence if it so desired and, by extension, the gambling operator would not subsequently be permitted to operate legitimately in Great Britain or advertise here.

The DCMS has iterated its concern on a number of occasions, including in Paragraph 19 of *Policy Note 6*, that the GC should be in a position to develop its own rules on technical content in advertisements, where other regulators could not be expected to have an expertise. One of the examples the DCMS provides of this in *Policy Note 6* is in relation to statements in advertising about relative odds. It is, however, the AA's understanding that the ASA already has experience and a proven track record of dealing with precisely such technical content, as well as the more general areas of advertising. Additionally, the CAP/ASA system draws on outside experts to advise on technical areas when and where necessary - for example in relation to health products. Consequently, the AA considers that it would be helpful if the DCMS (or any shadow GC) could explicitly set out, and as soon as possible, the technical issues it considers could not be addressed by the CAP/ASA. The CAP/ASA could be invited to propose how it would deal with such issues, rather than the Government pre-supposing they would be unable to do so, which in any case appears misplaced, given the Authority's proven ability to handle statements in advertisements about relative odds.

The AA does not support the replication of a Financial Services Authority (FSA) model for gambling advertising. This is because the AA has real concerns over the way the FSA currently regulates financial services advertising. The reasons behind these concerns are discussed in the section headed "Role of the Gambling Commission in the Regulation of Gambling Advertising" in the AA's submission of 10 December 2003 to the Joint Committee.

The AA is, however, heartened by the concluding sentence of *Policy Note 6*, which reads: "But it is proposed that the Bill should provide flexibility for the degree of co-regulation to depend on the outcome of the Commission's consultations." [DCMS *Policy Note 6*, 2004: Paragraph 19] The AA's reading of it is that any GC will only come to a final decision on this issue once it has been vested with its powers and based on the all evidence and the outcome of the consultations it holds with relevant bodies, most obviously the ASA.

#### **Paras 8-11: Offence of advertising illegal gambling**

##### ***Advertisements originating from Great Britain***

The AA agrees with the DCMS statement in Paragraph 8 of *Policy Note 6* that advertising a gambling premises and/or product, which was itself illegal in Great Britain, should constitute an offence. The AA also agrees that this offence should be applicable to all the persons specified in Paragraph 9 of *Policy Note 6* and have the purposes designated therein. The AA is, however, reassured by the Government's intention to include defences in the Bill for those persons specified in Paragraph 10 of *Policy Note 6*.

##### ***Advertisements originating from overseas generally***

The AA welcomes the DCMS's general proposition that: "It would not be an offence under this provision to advertise here gambling provisions provided abroad since they would not be illegal within Great Britain." [Source: DCMS *Policy Note 6*, 2004: Paragraph 8] The AA supports the pragmatic approach the Government intends to adopt in relation to the advertising of gambling operators based overseas. The AA considers that punters, both British and foreign, will be reassured that gambling operators based in Great Britain will be effectively regulated by the GC and may thus be encouraged to avoid those disreputable operators that might be located elsewhere.

##### ***Advertisements originating from elsewhere in the EU/EEA***

The AA has always understood that advertising originating from other European Union (EU) / European Economic Area (EEA) Member States would be protected by European statute and as now set out in Paragraph 11 of *Policy Note 6*. The AA notes that the Government intends to word the draft Gambling Bill in such a way that, under the certain limited circumstances and only following the certain procedure provided for in the relevant Directives, it would be allowed to apply a reserve power to derogate from them. The AA also notes that such a reserve power would only be made use of if the need arose and on a case-by-case basis. Clearly, whilst European statute may allow for such an outcome, the AA considers that the Government should only proceed down such a drastic route in the event that all other attempts at bilateral solutions failed. Similarly, the Bill should be worded such that the case for continuing any such derogations would be reviewed on a regular basis and positively reaffirmed or revoked, as necessary.

## **Paras 16-18: The reserve power to prohibit advertising by remote gambling operators**

### ***Advertising by remote gambling operators based in Great Britain***

The AA welcomes the inclusion of the statement in Paragraph 16 of *Policy Note 6* relating to those remote gambling operators, as defined by Section 3 of the draft Bill, based in Great Britain and licensed by the Gambling Commission as being free to advertise.

### ***Advertising by remote gambling operators based elsewhere in EU/EEA***

Notwithstanding the AA's earlier comments in relation to Paragraph 11 of *Policy Note 6*, the AA notes in Paragraph 17 of *Policy Note 6* that it would not ordinarily be possible to prohibit advertising by remote gambling operators based within another EU/EEA jurisdiction.

### ***Advertising by remote gambling operators based in third countries***

The AA welcomes the implication of Paragraph 16 of *Policy Note 6* that the starting point should be that advertising in Great Britain by remote gambling operators based in all third countries should be legal. The AA notes the Government's intention to hold a reserve power to prohibit advertising from particular jurisdictions. This should serve to encourage other jurisdictions to ensure that the gambling activities they oversee and allow to be promoted (and which benefit from having legal access to the British market) are conducted in an appropriate manner. Again, the AA welcomes the statement by DCMS that it would only make use of such a reserve power where: the activity is accessible from Great Britain; is of a type designated by the Secretary of State; and, originates from a jurisdiction prescribed in regulations by them. Equally, the AA is encouraged by the Government's position that it would only make use of such a reserve power on a case-by-case, rather than blanket, basis. As with its earlier comments in relation to Paragraph 11 of *Policy Note 6* and advertising by operators based within EU/EEA Member States, the AA would argue that such prohibitions should only be made use of as a final resort. Equally such prohibitions should be subject to regular review in order that bans would have to be actively reaffirmed or revoked, perhaps on an annual basis. This would punish offending jurisdictions, but encourage them to improve, if they want the operators they oversee to benefit from access to the British market.

The AA notes that the DCMS is presently examining with the Home Office the scope of the reserve power discussed above to render liable persons in the foreign jurisdiction who originate the advertising, or only their agents in Great Britain. The AA considers that, if the Government finds it is able to achieve this, it should take account of the need to seek to apply the spirit of the 'country of origin' approach in relation to remote gambling operators and not undermine it. (The principle that a 'country of origin' approach should essentially apply to remote gambling operators is set out in Paragraphs 58-61 of the DCMS's *Memorandum of Delegated Powers* as it relates to Section 32 of the draft Bill, which concerns the provision of unlawful facilities abroad). The AA also considers that the defences set out in Paragraph 10 of *Policy Note 6* should equally apply here.

### ***Advertising by 'offshore' betting operators***

Finally, in this context, the AA is pleased to see that DCMS remains in discussions with HM Customs & Excise (HMC&E) over the restrictive provisions contained within Section 9(1) of the Betting & Gaming Duties Act 1981. The AA would, however, take this opportunity to highlight the fact that this restriction was extended by Section 14 of the Finance Act 2002 and considers that this area also merits further discussion between the DCMS, HMC&E and HM Treasury. The AA would ask for the same pragmatic approach to be applied here as it has with the rest of the complex area of advertising by gambling operators based overseas.

Advertising Association 18 February 2004