

IN THE MATTER of the Gambling Act 2003

AND a complaint under section 81(3)
concerning **TOUCAN BAR AND
BISTRO** and **AOTEAROA
GAMING TRUST**

BEFORE THE GAMBLING COMMISSION

Members: S W Hughes KC (Chief Gambling Commissioner)
S C L Pearson
W A Acton
S T Shaw
C M Risk

Date of Complaint: 4 June 2024

Date of Decision: 9 August 2024

Date of Notification of Decision: 15 August 2024

**NOTICE OF GAMBLING COMMISSION'S VIEW UNDER SECTION 81(3) CONCERNING
HANDLING BY SECRETARY FOR INTERNAL AFFAIRS OF COMPLAINT ABOUT CONDUCT
OF CLASS 4 GAMBLING AT TOUCAN BAR AND BISTRO AND AOTEAROA GAMING TRUST**

Introduction

1. This document is notice of the view reached by the Gambling Commission in considering a complaint made on behalf of Feed Families Not Pokies Aotearoa Inc ("**FFNPA**") against the Secretary for Internal Affairs ("**Secretary**") under section 81 of the Gambling Act 2003 ("**Act**", all statutory references are to the Act).
2. As this is the first complaint under section 81 made to the Commission, this notice addresses the scope and workings of section 81 and is published as a guide for future reference.

Section 81 – operation and scope

3. Section 81 provides as follows:

81 Complaints to Secretary

- (1) This section applies if a person makes a complaint to the Secretary about the conduct of class 4 gambling at a particular venue or by the holder of a class 4 operator's licence.

- (2) The Secretary must, as soon as practicable after receiving a complaint, investigate the complaint and notify the complainant, if possible, as to whether any action has been, or will be, taken in respect of the complaint and the nature of any action taken.
 - (3) The complainant may complain to the Gambling Commission about the way the Secretary has handled the complaint.
 - (4) The Gambling Commission must then—
 - (a) require the Secretary to provide a report about the way the complaint was handled; and
 - (b) consider the matter in light of the Secretary's report; and
 - (c) report to the Minister about the matter if the Gambling Commission considers that the Secretary did not handle the complaint appropriately; and
 - (d) notify the complainant and the Secretary of its view and any report to the Minister.
4. Section 81 provides, as a first step, for complaints to be made to the Secretary about the conduct of class 4 gambling at a particular venue or by the holder of a class 4 operator's licence. As soon as practicable after receiving a complaint, the Secretary must investigate the complaint and notify the complainant whether any action has been, or will be, taken.¹
 5. A complainant dissatisfied with the response from the Secretary may complain to the Commission. The Commission must obtain a report from the Secretary about how the complaint was handled, consider the response to the complaint, and notify the complainant and the Secretary of its view. If it considers that the Secretary did not handle the complaint appropriately, the Commission must report that to the Minister.²
 6. The focus of a complaint to the Commission under section 81(3) is "the way the Secretary has handled the complaint" and the ultimate test is whether it was handled "appropriately" (as set out in section 81(4)(c)). The broad language suggests an "in the round" assessment of what the Secretary did in response to the complaint, including the action taken (or not taken), which will encompass both the Secretary's procedural compliance with section 81(2) and the substantive appropriateness of the Secretary's action in response to the complaint.

The initial section 81(1) complaint to the Secretary

7. On 15 May 2024, David Hay, Chairperson of FFNPA, lodged a complaint with the Secretary concerning the continuing operation of Toucan Bar & Bistro, at 235 Dairy Flat Highway, Albany ("**Venue**") after the expiration of its alcohol on-licence. The complaint attached a hearings report of the Auckland District Licensing Committee, which included

¹ Gambling Act 2003, section 81(2).

² Gambling Act 2003, section 81(4).

a Police report on the operation of the Venue. The Police report stated that, after the Venue's tavern on-licence expired on 8 August 2023, the operator continued to sell alcohol at the Venue, in breach of the alcohol legislation, until the Venue was closed by the Police on 17 November 2023. It also stated that, in the same period, the Venue had operated class 4 gambling in breach of the Act (sections 70 and 101). In reliance on the last statement, the complaint alleged that the Venue had conducted class 4 gambling in breach of a statutory licence condition under section 70(1)(i). Because the Venue appeared in the Department's list of venues as at 31 December 2023, Mr Hay assumed that the licence holder had failed to notify the Secretary, as required by section 71(d) and (g). The former relates to the venue manager ceasing to hold the position or becoming incapable of performing the duties of the position, while the latter concerns a period of gambling inactivity for more than 4 weeks.

8. A condition of the class 4 venue licence for the Toucan Bar stipulated as follows:

Primary Activity Must Be Available

The holder of a class 4 venue licence must not conduct class 4 gambling at the venue specified on the licence unless the primary activity at the venue is offered and available at that time.

The licence did not specify a primary activity but recorded the Venue Description as "Tavern".

9. On 29 May 2024, the Secretary responded to the complaint as follows:
- (a) When notified by the Police about the on-licence issue, the Department of Internal Affairs ("**Department**") was already investigating other compliance concerns with the Venue.
 - (b) As a result, the Department had issued a proposal to suspend the venue licence for a period of 7 days.
 - (c) The Department had refused a request to agree to extend the period of permitted non-activity and had asked the licence holder to surrender the class 4 venue licence. The class 4 venue licence for Toucan Bar had been surrendered on 30 January 2024. The proposal to suspend the licence had been withdrawn once the licence was surrendered.
 - (d) A new application for a class 4 venue licence had since been received and was then being assessed.

The section 81(3) complaint against the Secretary

10. On 4 June 2024, following a clarifying email exchange, after Mr Hay had copied the Commission into an email communication with the Department, a complaint under section 81(3) was made to the Commission. In the complaint, Mr Hay stated that he was not satisfied that the Secretary had investigated his complaint as section 81(2) requires or taken any action as section 81(2) requires. It also referred to the prior investigations mentioned in the response, saying that he was left with several unanswered questions, being:
- (a) When was DIA notified by the Police?
 - (b) What were the “other compliance concerns” that DIA was investigating?
 - (c) When did DIA request that Aotearoa Gaming Trust (**AGT**) surrender the venue licence?
 - (d) On what date was a new class 4 venue licence application submitted?
 - (e) Was the application submitted by AGT or another corporate society?
 - (f) Were the same venue operators listed on the application?
11. Mr Hay then set out three further “unanswered” questions, querying the decision to propose suspension rather than cancellation of the venue licence, whether consideration had been given to cancelling the class 4 operator’s licence for breach of the obligation to ensure that the Venue was not used mainly for operating gambling machines, and when the Department considered that the venue licence was “held”. The latter inquiry was said to be of interest because, if a territorial authority consent were now required, it would not be given. Mr Hay expressed concerns about the manner in which the Secretary generally interpreted the word “held” in sections 92 and 98. He asked the Commission to take that concern into account when considering the complaint.

Secretary’s report under section 81(4)(a)

12. On 19 June 2024, the Secretary provided a report to the Commission setting out the factual background and explaining the response to the original complaint. In summary, it was contended that the response to Mr Hay’s complaint was appropriate in the circumstances and that the “unanswered questions” were outside the scope of both the original complaint and section 81.

Analysis

13. The Commission must consider the section 81(3) complaint in light of the report provided by the Secretary.
14. Looking first at compliance with section 81(2), it considers that the Secretary complied with the procedural requirements. The complaint was made to the Secretary on 15 May 2024, it was investigated and was the subject of a comprehensive written response on 29 May 2024. The response advised that the Secretary had become aware of concerns with the venue licence well prior to receiving the complaint and that the class 4 venue licence had been surrendered more than 3 months prior to receipt of the complaint, such that further action was neither contemplated nor required to deal with the matters raised in the complaint. The response accordingly advised that no further action would be taken in response to the complaint. The Secretary's response was given within a reasonable time having regard to the nature of the complaint and the fact that the reported circumstances were no longer current.
15. Looking at the substance of the lack of action notified, the Commission considers that the actions taken were appropriate in the circumstances as they in fact were (as opposed to what the complainant had assumed them to be). As the complaint alleged a state of affairs which was no longer current and the licence which was the subject of the complaint was no longer in existence, no further action by the Secretary was required.
16. The complaint to the Commission suggested no substantive basis for the assertion that the Secretary had failed to investigate the original section 81(1) complaint and the Commission concluded, from the Secretary's response to the complainant and the report to the Commission, that the allegation was without foundation. Once it was established that the complaint concerned historical rather than current matters and related to a licence which was no longer in existence, no further investigation of the matters complained about was necessary.
17. The Commission observes, incidentally, that the allegation of breach of the main purpose condition of the venue licence did not appear to be established by the Police report. The report did not suggest that class 4 gambling continued after the tavern operation had ceased but rather that the tavern operation had continued, in the absence of an alcohol licence, while class 4 gambling operated.
18. What were described as "unanswered questions", which generally concerned Departmental investigations and actions undertaken prior to the complaint and how the Secretary intended to deal with a subsequent application, are clearly outside the scope of the original section 81(1) complaint and the scope of sections 81(1) and (3). Section 81

provides for complaints to the Secretary (concerning conduct at venues or by licence holders) and to the Commission (concerning the Secretary's response to the first complaint) but the scope of the complaints provided for is limited by the statutory language. For that reason, they are not addressed by the Commission. In addition, it would be inappropriate for the Commission to express views on matters which are said to be the subject of an application currently before the Secretary.

Conclusion

19. In respect of the section 81(3) complaint, having formed the view that the Secretary's handling of the original complaint was appropriate, the complainant and the Secretary are hereby notified of that view. No report to the Minister is required accordingly.



Susan Hughes KC
Gambling Commissioner

for and on behalf of the
Gambling Commission

15 August 2024

