

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

58th Report of Session 2017–19

**Birmingham Commonwealth
Games Bill [HL]**

**Non-Domestic Rating (Public
Lavatories) Bill [HL]**

**Parliamentary Buildings
(Restoration and Renewal) Bill**

Ordered to be printed 26 June 2019 and published 1 July 2019

Published by the Authority of the House of Lords

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

Registered Interests

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Publications

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Fifty Eighth Report

BIRMINGHAM COMMONWEALTH GAMES BILL [HL]

1. The Bill, which had its Second Reading on 25 June, contains a number of measures intended to support the delivery of the 2022 Commonwealth Games which are due to be held predominantly in Birmingham and venues across the West Midlands in July and August of 2022. The Department for Digital, Culture, Media and Sport has provided the Committee with a delegated powers memorandum.¹

Clause 12—Regulations concerning advertising in Games locations

2. Clause 12(1) makes it an offence for a person to carry out Games location advertising. The expression “Games location advertising” is defined in subsection (2) to mean the doing of something in, or in the vicinity of, a specified Games location at any time during a specified period, where the thing is being done wholly or partly for the purpose of promoting a product, service or business specifically to members of the public who are either in, or in the vicinity of, the Games location, or watching or listening to a broadcast of a Games event.
3. Where “specified” is used in clause 12(2), it means specified in regulations made by the Secretary of State. Accordingly, clause 12 confers power on the Secretary of State to make regulations specifying the Games locations to which the advertising offence applies and also the period during which the offence will apply. In the latter case subsection (3) sets out the maximum limits for the period: it cannot start earlier than 21 days before the Games begin, and it cannot end more than five days after the Games finish.
4. Clause 12(4) confers further regulation-making powers in connection with the advertising offence. It allows the Secretary of State to make provision as to when a person is, or is not, to be treated as doing something or being in, or in the vicinity of, a Games location.
5. The Department’s reasons for taking the powers in clause 12 are set out in paragraphs 20 to 25 of the memorandum. The primary reason is flexibility. Operational planning for the Games is still underway, and it is not yet known where all the Games locations will be or when they will be needed for Games events. Leaving to regulations the detail of the specific Games locations, and the period during which the advertising offence will apply, will allow the offence to be shaped so that it does not go beyond the minimum necessary.
6. Regulations under clause 12 are subject to the negative resolution procedure. The Department argues this is appropriate because the powers are narrowly drawn.² They are limited to dealing with matters of detail; namely, the specific dates, times and areas for which advertising will be restricted. The power is further restricted because the limit on the period in clause 12(3) ensures that the advertising provisions, including the provision made by the regulations, will only operate during a relatively short period of time. Also,

1 Department for Digital, Culture, Media and Sport, [Birmingham Commonwealth Games Bill \[HL\] Delegated Powers Memorandum](#)

2 *Ibid.*, paras 26–28

the negative procedure is appropriate because it would allow urgent action to be taken to accommodate last minute changes in the schedule for the Games.

7. We do not agree that the powers are narrowly drawn:
 - The powers will allow Ministers to determine the places where the ban will apply. Although the power is limited to Games locations, that term is given a wide meaning and is not limited to places used for Games events but also includes other places used in connection with the Games.³
 - Through clause 12(4), the regulations will be able to determine what is meant by a person doing something or being in the vicinity of a Games location. The expression “in the vicinity of” is capable of a broad range of meanings, and therefore it gives Ministers a broad discretion in determining the extent of the areas around Games locations which are to be covered by the advertising offence. Also, the powers will allow actions, which might not themselves be done in the vicinity of a Games location, to be treated as if they had been done in a Games location.
8. Not only are the powers wide but their exercise is also liable to have a significant impact because the offence covers such a wide range of activities. The definition of advertising in clause 12 is very broad. It covers all forms of advertising. The only restriction is that it is done wholly or partly for the purpose of promoting a product, service or business specifically to members of the public who are in, or in the vicinity of, a Games location. It would therefore cover advertising of any services, products etc. aimed at persons in the relevant area irrespective of whether or not the thing being advertised had any connection with the Games.
9. We acknowledge that the limit placed on the period for which the advertising offence may apply mitigates against the width of the powers. However, we are not convinced that this is sufficient to make the negative procedure appropriate.
10. One of the points made by the Department is that the negative procedure will provide the flexibility to accommodate the fact that the schedule for the Games is not yet known and may be subject to last minute changes. However, it seems to us that this could be addressed in the same way that this issue was addressed in the London Olympic Games and Paralympic Games Act 2006. Initially, the advertising regulations under that Act were subject to the affirmative procedure in all cases. However, changes were subsequently made in the London Olympic Games and Paralympic Games (Amendment) Act 2011, which allowed the negative procedure to apply where the Secretary of State considered there was an urgent need for the regulations to be made without a draft first having been approved by Parliament. We consider the same approach should be adopted here.
11. **Accordingly, we recommend that any exercise of powers under clause 12 should be subject to the affirmative procedure, unless the Secretary of State certifies that by reason of urgency the negative procedure should apply instead.**

³ See clause 23(1) for the definition of “Games location”.

Clause 15—Regulations concerning trading in Games locations

12. Clause 15 makes provision in relation to trading in Games locations which is very similar to that made by clause 12 for advertising. It makes it an offence for a person to carry out Games Location trading, with the definition of “Games location trading” having many similarities to the definition of “Games location advertising”. The definition provides for the offence to apply to trading in, or in the vicinity of, Games locations specified in regulations and during a period specified in the regulations, with the same limit on the length of that period. Clause 15 also contains a provision, equivalent to clause 12(4), which allows the regulations to make provision as to when a person is, or is not, to be treated as doing something or being in, or in the vicinity of, a Games location.
13. In our view, similar considerations apply here as apply to clause 12 and the provisions on advertising. The range of matters caught by the trading offence is very broad and is not limited to activities connected to the Games. Also, as with the advertising regulations, wide powers are conferred on the Minister to determine the places to which the trading ban will apply and the extent of the areas over which the ban will apply.
14. **Accordingly, we recommend that any exercise of powers under clause 15 should be subject to the affirmative procedure, unless the Secretary of State certifies that by reason of urgency the negative procedure should apply instead.**

Clause 24—Power of Secretary of State to direct a person to prepare a Games transport plan

15. Clause 24 confers a power on the Secretary of State to direct a person (“the directed person”) to prepare a Games transport plan. It is stated in paragraph 57 of the memorandum that the purpose of the plan is:

“to facilitate and deliver integrated “Games time” transport planning and operations in a clear and practical way. The purpose of such a Plan would be to set out a strategic approach to the planning and coordination of transport to support the Games, covering the transportation of spectators, athletes and the Games Family, whilst at the same ensuring that any disruption to everyday users of the relevant transport networks is kept to a minimum.”

By virtue of clause 24(6), each local traffic authority for a road affected by the plan is under a duty to exercise their functions with a view to securing the implementation of the plan.

16. The functions of the directed person are not limited to preparing a Games transport plan but also include the power to make traffic regulation orders etc. under section 14 of the Road Traffic Regulation Act 1984 (“the 1984 Act”) (which allows a traffic authority temporarily to restrict or prohibit the use of a road). Clause 25 modifies section 14 of the 1984 Act to allow action to be taken under that section for the purposes of implementing a Games transport plan, and for the purposes of facilitating transport services in connection with the Games and travel by persons connected with the Games. Clause 26 allows the directed person to take action under section 14 in respect of a road as if that person were the local traffic authority for

the road concerned (although any such action can only be taken with the consent of the local traffic authority for the road).

17. Provisions similar to clauses 24 to 26 were contained in the London Olympic Games and Paralympic Games Act 2006 and the Glasgow Commonwealth Games Act 2008. However, in both those cases the functions of preparing the Games transport plan and exercising road traffic regulation powers were conferred on bodies specified on the face of the primary legislation, respectively the Olympic Delivery Authority and the Organising Committee of the 2008 Commonwealth Games.
18. Nothing is said in the memorandum to explain why in this case it is not possible to specify on the face of the primary legislation the body which is to exercise the functions of the directed person, nor why such a broad discretion is conferred on the Secretary of State to decide who is to exercise these functions. Clause 24 simply refers to the Secretary of State directing “a person” to prepare a Games transport plan without placing any limits on who that person may be. **In the absence of any explanation justifying why it is needed, we consider the delegation of this power to the Secretary of State to be inappropriate.**

Paragraph 16 of Schedule 2—Compensation for damage to property

19. Clause 19 provides for the offences under Part 3 (ticket touting offences, the advertising offence and the trading offence) to be enforced primarily by local weights and measures authorities. Further provision is made in Schedule 2 about enforcement which includes powers of seizure and detention of property and documents.
20. Paragraph 15 of Schedule 2 makes provision for compensation to be paid where a person’s property is damaged as a result of the exercise of an enforcement power, where the exercise was unlawful or any force used in the exercise of the power was unreasonable. Paragraph 15 sets out the basis on which the amount of the compensation is to be determined.
21. The rest of the provisions about compensation are left to be set out in regulations. Paragraph 16 sets out the scope of the regulation making power which is expressed broadly as a power to supplement the provisions of paragraph 15. Paragraph 16 provides that the regulations may (among other things) include provision about:
 - how and to whom a claim is to be made;
 - the person or body which is to determine whether a person making a claim is entitled to receive compensation;
 - rights of review or appeal.

Regulations under paragraph 16 are subject to the negative resolution procedure.

22. The Department justifies the scope of the powers and the use of the negative procedure on the basis that the regulations deal with matters of procedural detail with the most important element of the compensation scheme (that is,

how the amount of compensation is to be calculated) being set out on the face of the bill.⁴

23. We consider it wrong to describe the regulations as solely dealing with matters of procedural detail. The regulations include the power to determine:
- which person or body is to have the function of determining claims for compensation (without imposing any requirements or limits on the person or body on whom this function may be conferred);
 - whether or not there is to be a right of review or appeal and (if so) to whom the review or appeal may be made and what the grounds of appeal would be available.

All of these are matters which will have a significant impact on the nature, structure and operation of the provisions on compensation.

24. **Given the wide scope of the powers, and the fact that they affect the determination of the rights of individuals to compensation, we take the view that the affirmative rather than the negative procedure should apply to regulations under paragraph 16 of Schedule 2 and recommend accordingly.**

NON-DOMESTIC RATING (PUBLIC LAVATORIES) BILL [HL]

25. There is nothing in this Bill which we would wish to draw to the attention of the House.

PARLIAMENTARY BUILDINGS (RESTORATION AND RENEWAL) BILL

26. There is nothing in this Bill which we would wish to draw to the attention of the House.

ACKNOWLEDGMENT

27. On 1 July 2019, following the decision of the Committee of Selection,⁵ six members of the Committee were rotated off. They were: Lord Flight, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler. The Committee wishes to express its gratitude for their contribution to its important scrutiny work, and the support and insight they provided.

4 Department for Digital, Culture, Media and Sport, [Birmingham Commonwealth Games Bill \[HL\] Delegated Powers Memorandum](#), para 90

5 Committee of Selection, [Rotation rule and the length of the current session](#) (1st Report, Session 2017–19, HL Paper 388)

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 26 June 2019, Members declared no interests.

Attendance

The meeting on the 26 June 2019 was attended by Lord Blencathra, Lord Flight, Lord Jones, Lord Lisvane, Lord Moynihan and Lord Thurlow.