

BIRMINGHAM COMMONWEALTH GAMES BILL

MEMORANDUM FOR THE JOINT COMMITTEE ON HUMAN RIGHTS

Introduction

1. This Memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Birmingham Commonwealth Games Bill (“the Bill”).
2. Lord Ashton of Hyde, Parliamentary Under-Secretary of State at the Digital, Culture, Media and Sport has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.
3. This memorandum deals only with those provisions of the Bill which raise issues arising under the ECHR or relating to human rights contained in other international obligations of the United Kingdom.

Summary of the Bill

4. The Bill will bring forward a number of temporary operational measures needed to support successful delivery of the Birmingham Commonwealth Games (“the Games”) in 2022.
5. The measures contained in the Bill:
 - a. enable HMG to continue to provide financial assistance to the Birmingham Organising Committee for the 2022 Commonwealth Games Ltd (“the OC”). The OC is a private company limited by guarantee established for the purpose of delivering the Games. It is wholly owned by the Secretary of State and is an arm’s length body of the Department for Digital, Culture, Media and Sport;
 - b. criminalise the unauthorised resale of Games tickets in a public place, in the course of a business or for profit;

- c. safeguard public investment in the Games by introducing restrictions to protect the commercial value of any association with the Games. In particular they prohibit unauthorised association with the Games, a breach of which is enforceable by the Organising Committee as if it were a breach of an exclusive right of the Committee, with the same remedies available as for infringement of a property right. They also create criminal offences for unauthorised street trading and advertising in the vicinity of Games locations during specified periods; and
 - d. support successful transport operations during the Games by introducing a number of measures to ensure road regulation for Games purposes can be delivered and to ensure effective coordination between the relevant transport and traffic authorities.
6. The measures sought are in line with those introduced for previous major multi-sport events, including the London 2012 Olympic and Paralympic Games (“the London Games”) and the Glasgow 2014 Commonwealth Games (“the Glasgow Games”). Those measures were introduced by the London Olympic Games and Paralympic Games Act 2006 (“the 2006 Act”) as amended by the London Olympic Games and Paralympic Games (Amendment) Act 2011, the Glasgow Commonwealth Games Act 2008 (“the 2008 Act”) and the Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009 (“the 2009 Order”), made under the Scotland Act 1998.

ECHR issues raised by the Bill

- 7. The Bill engages Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life), Article 10 (Freedom of expression) and Article 1 of the First Protocol (“Article 1 Protocol 1”) (Protection of property) of the ECHR but is compatible with the rights set out in those Articles.
- 8. We set out below the ECHR issues raised by the Bill, arranged by reference to each relevant part of the Bill.

9. The Bill is divided into 5 Parts. For the avoidance of doubt, it is considered that Part 1, which deals with the provision of financial assistance to the OC, Part 5, which contains provisions on commencement, extent and other final provisions, and Schedule 1, which makes provision about the application of clause 9 in relation to persons providing information society services, do not engage human rights considerations and accordingly are not addressed in this Memorandum.

Part 2: Association with the Games

10. Part 2 provides for measures in respect of a restriction on unauthorised representations that suggest an association with the Games, including in relation to civil enforcement by the OC. Similar measures were included for both the London Games (see schedule 4 of the 2006 Act) and the Glasgow Games (see the 2009 Order). This Part engages Article 6, Article 8 and Article 10 and Article 1 Protocol 1 of the ECHR.

11. The purpose of Part 2 is to prevent the use of inventive tactics by those trying to gain commercial benefit from an association with the Commonwealth Games without having made the financial or other commitments of an authorised business. This in turn aids in the protection of the integrity of the Games by ensuring they do not become over-commercialised, as well as protecting the reputation and rights of others, such as sponsors whose financial contributions are key to reducing the financial burden of the taxpayer to the Games.

12. Clause 2(6)(b) provides that the prohibition contained in clause 2(1) is only enforceable by the OC in civil proceedings. In those proceedings the court would be able to grant any relief that is available in respect of the infringement of a property right as well as the enforcement measures set out in clause 5. Enforcement will take place within the existing civil courts system with the attendant procedural safeguards including rights of appeal. It is considered that this provision is compatible with Article 6(1) of the ECHR.

13. Clause 3(1) of the Bill provides that the prohibition is not breached by a representation made in accordance with an authorisation granted by the OC.

Such an authorisation can be made subject to conditions, may be revoked and must be in writing. As an arm's length body of the Department for Digital, Culture, Media and Sport decisions of the OC will be amenable to challenge by judicial review. It is considered that this suffices to meet the requirements of Article 6(1) of the ECHR, should it be engaged by a decision of the OC, in this context.

14. Clause 2(1) prevents persons, acting in the course of business, from freely making representations that suggest to the public that goods and services, or a person providing such goods or services, are associated with the Games. This has the potential to impact on the way in which a person might carry out their business, thereby engaging Article 8 of the ECHR. The restrictions are designed to be proportionate: clause 4(3) explicitly permits use in accordance with honest practices in industrial or commercial matters of a person's name or address, representations about the nature or characteristics of goods or services and representations referring to an authorised person's goods or services. These exceptions are designed to reflect the protections available under section 11(2) of the Trade Marks Act 1994 (limits on effect of registered trade mark). In addition, clause 4(4) excepts representations for the purposes of reporting, or sharing information about, the Games and clause 4(4)(d) explicitly provides that incidental references in literary work, etc., does not breach the prohibition. Clause 4(7) further ensures that the restrictions do not affect those who deal in authorised goods, by permitting the onward sale of goods bearing an authorised representation. Even where these other exceptions do not apply, clause 4(2) ensures that a person who, in the course of business, uses a representation that would normally breach clause 2(1), will not be in breach of that clause where they have continuously used the representation in the course of business since before the Games were awarded to Birmingham. These safeguards help to ensure that the restriction on making unauthorised representations is proportionate and therefore compatible with Article 8 ECHR.
15. The prohibition in clause 2(1) also engages Article 10 of the ECHR, which provides for a qualified right of freedom of expression. Article 10 of the ECHR extends to commercial speech, however, the rights under this article can be

made subject to formalities, conditions, restrictions or penalties where this is in the public interest. Clause 2(1) only precludes the making of representations in the course of business, accordingly it is only commercial speech that will be affected. In order to protect other types of speech, exceptions are included at clause 4(4), including for incidental inclusion of a representation in a literary, dramatic, or artistic work. Authorisations can be sought from the OC if individuals or companies wish to make such representations in the course of a business. A person who, in the course of business, uses a representation that would normally breach clause 2(1), will not be in breach of that clause where they have continuously used the representation in the course of business since before the Games were awarded to Birmingham. Finally, the restriction on unauthorised representations is time limited - any such representations made after 31 December 2022 will be permitted, as sections 2(1-3), 3 and 4 will cease to have effect on 1 January 2023. It is therefore considered that this provision is compatible with Article 10 of the ECHR as any interference with commercial speech caused by clause 2(1) is proportionate and justified in the public interest.

16. A court may, under clause 5, order the delivery up, modification, destruction or forfeiture of goods or documents that infringe the restriction on unauthorised association with the Games or are designed to produce goods that would infringe that restriction. Such an order would be a measure taken to enforce the restriction created by clause 2(1), however it would engage Article 1 Protocol 1 of the ECHR. However such an order would be made by a court, who would retain the power to order the return of any property that had been delivered up. Where an order under clause 5 is sought the application will have to be served on all identifiable persons with an interest in the property. Those persons will be entitled to appear in proceedings and appeal against any order made in respect of that property. Finally an order for destruction or forfeiture of goods or documents could only be made where there is no adequate alternative remedy and, even then, the order cannot take effect during the notice period for an appeal from that order or, where such a notice is made, while an appeal is ongoing. It is therefore considered that any

interference with Article 1 Protocol 1 rights caused by enforcement action taken in relation to clause 2(1) is compatible with the ECHR.

17. Clause 4 sets out a number of exceptions to the prohibition on unauthorised association with the Games, including an exception for registered trademarks, registered designs and other intellectual property rights that subsisted immediately before Royal Assent. It is considered that this safeguard ensures that the provisions of Part 2 are compatible with Article 1 Protocol 1.

Part 3: Touting, Advertising and Trading Offences

18. Part 3 introduces restrictions on the unauthorised resale of tickets and on trading and advertising in and in the vicinity of Games locations during specified periods. Again similar measures were included in legislation for the London Games (see ss.19, 25 and 31 of the 2006 Act) and Glasgow Games (see ss.2, 10 and 17 of the 2008 Act). These provisions engage Article 6, Article 8, Article 10, and Article 1 Protocol 1 of the ECHR.

19. The overarching aim of the advertising and trading restrictions in Part 3 is to help ensure that the Games are not over-commercialised, and that the private rights of sponsors and the OC are protected, as well as to prevent spectator congestion around Games locations and help ensure the Games are not cluttered by unofficial or unsuitable trading. These considerations feed back into the public interest by minimising the costs of the Games to the taxpayer through encouraging sponsorship. The ‘touting’ offence also helps ensure that tickets to the Games are affordable and accessible to a wide range of people.

20. Part 3 of the Bill contains three new criminal offences. The first, at clause 9 makes it an offence to sell, offer to sell, or expose or advertise for sale, a Games ticket without an authorisation where that activity is carried out in a public place, in the course of a business or for profit. Clause 12(1) makes it an offence for a person to carry out advertising, or to arrange or permit such advertising, in or in the vicinity of a specified Games location during a specified period (see also the definition of “Games location advertising” in clause 12(2)). Clause 15(1) criminalises Games location trading in a relevant public place (see the definition in clause 15(8)) in the vicinity of a Games

location during a specified period (see also clause 15(2)). In the case of both the advertising and trading offences, the prohibited activity will only be criminalised when it takes place in a location and during a time period to be specified by the Secretary of State in regulations. Any such period must begin no earlier than 21 days before the Opening Ceremony and end no later than five days after the day of the Closing Ceremony. The Secretary of State can also specify in regulations when a person is, or is not, to be treated as doing something in, or in the vicinity of, a Games location for the purposes of the advertising and trading offences and can make provision in regulations for exceptions to these offences. The Secretary of State is required to undertake consultation before making regulations that specify exceptions. A 'Games location' is defined in the Bill at clause 23(1). The advertising and trading offences will apply to those Games locations that are specified in regulations made by the Secretary of State. All three offences in Part 3 are summary offences and will be tried in existing criminal justice systems in the relevant UK jurisdiction. It is considered that they are compatible with Article 6 of the ECHR.

21. In respect of the restrictions on the resale of tickets, advertising and trading under Part 3, the OC can provide an authorisation that allows a person to conduct activity (resale of tickets, advertising or trading) that would otherwise be prohibited. The decisions of the OC in respect of authorisations will be amenable to judicial review. To the extent that such decisions engage Article 6(1) of the ECHR, it is considered that the availability of judicial review suffices to meet the requirements of the ECHR.
22. The restrictions that will be placed on advertising and street trading during the Games have the potential to interfere with the ability of existing businesses to conduct trade in their usual manner, thereby engaging Article 8 of the ECHR insofar as it encompasses activities of a professional or business nature. However any restrictions will be in place for a limited time and will only affect Games locations and places that are in the vicinity of those locations. An application to the OC for authorisation can be made free of charge and there will be a duty on local authorities to provide a copy of that guidance to relevant traders (see the definition in clause 22(5)) who may be affected by

the trading restrictions, along with any other information the authority considers appropriate for the purpose of helping the relevant trader to mitigate any impact. It is therefore considered that these measures are compatible with Article 8 of the ECHR.

23. The restrictions on advertising set out in the Bill will only affect rights protected under Article 10 of the ECHR insofar as an expression is being used to promote a product, service or business (clause 12(2)(b)). Furthermore, the advertising restrictions will be time-limited and confined to specified Games locations and their vicinity. The circumstances in which a person will be treated as doing something, or as being, in or in the vicinity of a Games location will be specified in regulations in due course. These restrictions can only be in place for a limited time - a specified period for the purpose of the offence cannot begin earlier than 21 days before the day of the Opening Ceremony and must end no later than five days after the day of the Closing Ceremony. Finally the Secretary of State has the power to add exceptions to the offence and an individual that wishes to advertise in the specified locations while restrictions are in place can seek an authorisation from the OC. It is therefore considered that this provision is compatible with Article 10 of the ECHR as any interference with commercial speech arising from clause 12(1) is proportionate and justified in the public interest.

24. The restrictions on advertising and trading in and in the vicinity of Games locations have the potential to interfere with Article 1 Protocol 1 property rights where, for example, a person normally sells advertising on their property or holds a trading licence or similar permit. As outlined above any restrictions will be in place for a limited time and will only affect Games locations and places that are in the vicinity of those locations. An application for an authorisation can be made that would allow them to continue to advertise or trade while the restrictions are in place can be made free of charge to the OC, who will be required to publish guidance on the operation of these provisions. The Bill also places a duty on local authorities to provide the OC's guidance to relevant traders who the authority considers may be affected by the trading offence, and any other information to help them mitigate any impact. It is therefore considered that any interference with Article 1 Protocol 1 property

rights caused by these provisions is proportionate and compatible with the ECHR.

Part 4: Transport

25. Part 4 of the Bill addresses transport measures. This Part engages Article 6, Article 8, and Article 1 Protocol 1 of the ECHR.
26. The overarching aim of the provisions in Part 4 is to support successful transport operations during the Games by introducing a number of measures to ensure that road regulation for Games purposes can be delivered. The measures will also safeguard effective coordination between the relevant transport and traffic authorities. Similar provision was made for both the London Games (see ss.14-15 of the 2006 Act) and the Glasgow Games (see ss.38-39 of the 2008 Act).
27. Clause 25 allows for the making of Temporary Traffic Regulation Orders and Notices pursuant to section 14 of the Road Traffic Regulation Act 1984 for Games purposes. An Order or Notice made pursuant to Section 14 of the 1984 Act is enforced by civil proceedings in certain areas but contravention can also lead to a criminal penalty (see s.16 of the 1984 Act). Where civil enforcement is used this will be conducted within the existing civil law statutory systems. Procedural safeguards are provided via an appeals mechanism. In the first instance representations can be made to the issuing authority based on grounds outlined within the relevant regulations. Adverse decisions can then be appealed (based on the same grounds) to the Environment and Traffic Adjudicators for notices issued in London or, elsewhere in England, to the Traffic Penalty Tribunal. Where a contravention is to be tried as a criminal offence, it will be tried in the relevant existing criminal justice system with the necessary safeguards, including provisions to appeal and procedural guarantees. This provision of the Bill is considered to be compatible with Article 6 of the ECHR.
28. Pedestrian access to premises will not be affected by restrictions on transport networks but these may hinder vehicular access to property. This has the potential to interfere with both Article 8 and Article 1 Protocol 1 rights.

However any restrictions will be temporary and it is anticipated that permit schemes and operational measures will be introduced during the Games period to ensure that vehicular access to property is not unduly restricted by any necessary traffic regulation measures. Any interference with Article 8 or Article 1 Protocol 1 rights regarding vehicular access to property will be for a limited period and proportionate to the public interest in ensuring that Games venues are secure and can be accessed by spectators and the Games family. It is therefore considered that these provisions are compatible with both Article 8 and Article 1 Protocol 1 of the ECHR.

Schedule 2: Further provision about enforcement

29. Clause 19 and Schedule 2 deal with the enforcement of the touting, trading and advertising offences set out in Part 3 of the Bill. The touting offence may be enforced by a local weights and measures authority in Great Britain, or the Department for the Economy in Northern Ireland. The advertising offence and the trading offence may be enforced by a local weights and measures authority in England. The Bill provides that investigatory powers contained in Schedule 5 of the Consumer Rights Act 2015 can be used to enforce offences under Part 3 of the Bill. Additional provision about the enforcement of these offences is set out in Schedule 2 (clause 19(6)). These provisions engage Article 6, Article 8, Article 10, and Article 1 Protocol 1 of the ECHR.
30. Enforcement powers are necessary to ensure that the criminal offences set out in Part 3 can be effectively enforced. The aims of these powers are therefore tied to the legitimate aims of the new offences in Part 3 of the Bill as set out above. Similar enforcement powers were contained in legislation for the London Games (see ss.22, 28, and 31(9) of the 2006 Act) and the Glasgow Games (see ss.21-33 of the 2008 Act).
31. Paragraph 15 of Schedule 2 provides that a person whose property is damaged by the exercise of an enforcement power is entitled to compensation under certain circumstances, specified in that paragraph. Paragraph 15 also sets out the amount of compensation payable where a person is entitled to it. The procedure for claiming compensation will be detailed in regulations to be made by the Secretary of State pursuant to

Paragraph 16 of Schedule 2. In making these regulations the Secretary of State will be obliged to have regard to Article 6(1) of the ECHR when making regulations pursuant to Paragraph 16 of Schedule 2. It is therefore considered that Paragraphs 15 and 16 of Schedule 2 are compatible with Article 6(1) of the ECHR.

32. Paragraph 13 of Schedule 2 has the effect of extending the offences of obstructing an enforcement officer and of purporting to act as an enforcement officer contained in Schedule 5 of the Consumer Rights Act 2015, so that they apply to the enforcement provisions of the Bill. These offences would be tried in existing criminal justice systems with the attendant procedural safeguards. It is therefore considered that this provision is compatible with Article 6 of the ECHR.

33. The powers that can be used to enforce Part 3 of the Bill will engage both Article 8 and Article 1 Protocol 1 of the ECHR. The powers set out in Schedule 5 to the Consumer Rights Act 2015 include the power to make test purchases, to break open containers, to enter premises at a reasonable time with a warrant, and to enter premises other than a dwelling without a warrant at a reasonable time. Schedule 5 also empowers enforcement officers to inspect, seize and detain documents and goods. These powers are subject to safeguards to ensure that they are exercised in a proportionate manner, for example, a premises cannot be entered without a warrant where it is being used as a dwelling and, where goods or documents are seized the enforcing officer must have regard to relevant codes of practice made under the Police and Criminal Evidence Act 1984 (see Paragraphs 28(6) and 29(5) of Schedule 5).

34. Schedule 2 to the Bill extends the circumstances in which the powers for seizure and detention under Schedule 5 to the Consumer Rights Act 2015 can be used (Paragraph 2) and provides for additional powers to seize and detain goods (Paragraph 3) and for the retention and disposal of seized items (Paragraphs 9-11) (including perishable goods which may lose their commercial value before they are returned to the person). Schedule 2 also gives enforcement officers the power to conceal or, where concealment or

seizure is not practical, to destroy or deface advertisements that infringe the relevant restrictions (Paragraph 12). As with the investigatory powers contained in Schedule 5 to the Consumer Rights Act 2015, these powers are subject to safeguards. For example, legally privileged items may not be seized. Where seized goods or documents are retained, a person may seek access or apply to a court for an order requiring its release, and Schedule 2 expressly states that the power to search does not confer the power to search a person. A key safeguard in respect of all enforcement powers exercised in relation to Part 3 of the Bill is the availability of compensation, in certain circumstances, for property damage arising from the exercise or purported exercise of enforcement powers where the use of the power was unlawful or any force used in the exercise of the power was unreasonable. The Bill also provides for the disposal of seized items (Paragraph 11); the power to dispose is limited and may only be exercised where the authority has made reasonable efforts to return the goods. Given the extensive safeguards contained in both Schedule 5 of the Consumer Rights Act 2015 and in the Bill itself, it is considered that the investigatory and enforcement powers provided for are compatible with Article 8 and Article 1 Protocol 1 of the ECHR.

35. Where these enforcement powers are exercised in relation to an advertisement there would be an interference with Article 10 of the ECHR, which extends to commercial speech. It is considered that this interference would be justified as a legitimate mechanism to enforce the advertising prohibitions contained in the Bill, noting the public interest aims of those restrictions. In addition there are controls on the use of these powers: for example, where an advertisement is concealed, it must not be concealed for any longer than is necessary to prevent the commission of an offence and defacement or destruction of an advertisement can only be used where other steps are not reasonably practicable. It is therefore considered that any interference with freedom of expression caused by the enforcement powers contained in Schedule 2 is compatible with Article 10.

Department for Digital, Culture, Media and Sport

June 2019

