



Constitutional and Legislative Affairs Committee

Report: CLA(4)-14-11 : 5 December 2011

The Committee reports to the Assembly as follows:

Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA63 - The Agricultural Holdings (Units of Production) (Wales) Order 2011

Procedure: Negative.

Date made: 22 November 2011

Date laid: 24 November 2011

Coming into force date: 21 December 2011

Affirmative Resolution Instruments

None

No Procedure Instruments

CLA62 - The Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) (Wales) (Partial Revocation) Order 2011

Procedure: No Procedure.

Date made: 16 November 2011.

Date laid: 18 November 2011.

Coming into force date: 9 December 2011

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

None

Affirmative Resolution Instruments

CLA61 - The London Olympic Games and Paralympic Games (Advertising and Trading) (Wales) Regulations 2012

Procedure: Affirmative.

Date made: not stated.

Date laid: not stated.

Coming into force date: in accordance with regulation 1(2)

The Committee agreed a report under Standing Order 21.2 on this statutory instrument, which is attached as Annex 1.

Other Business

Protection of Freedoms Bill (Legislative Consent Motion)

The Committee considered a Legislative Consent Memorandum regarding amendments to the Protection of Freedoms Bill. The Committee agreed to report to the Assembly that it saw no reason why the Legislative Consent Motion in respect of the changes should not be approved.

Committee Correspondence

CLA31 - The National Curriculum (Assessment Arrangements on Entry to the Foundation Phase) (Wales) Order 2011 and CLA32 - The National Curriculum (End of Foundation Phase Assessment Arrangements and Revocation of the First Key Stage Assessment Arrangements) (Wales) Order 2011

The Committee noted the Minister's response to the Chair's letter dated 14 November 2011, which had asked the Minister to reconsider his decision not to inform the Committee separately if the powers under Article 5 of the original Orders are used again in future.

Resolution to Meet in Private

In accordance with Standing Order 17.42(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on the Inquiry into the Granting of Powers to Welsh Ministers in UK Laws and the issues emerging from that evidence.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

5 December 2011

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-14-11)

CLA61

Constitutional and Legislative Affairs Committee Report

Title: The London Olympic Games and Paralympic Games (Advertising and Trading) (Wales) Regulations 2012

Procedure: Affirmative

These draft regulations made under sections 19, 20, 22 (8), 25, 26 and 28 (6) of the London Olympic Games and Paralympic Games Act 2006, control advertising and outdoor trading around the only Olympic event centre in Wales, the Millennium Stadium, Cardiff, during periods when Olympic events take place in the stadium. They are intended to uphold the Host City Contract that both the UK and Welsh Governments promised to implement by preventing ambush marketing. The regulations enable the Olympic Delivery Authority (“ODA”) and the London Organising Committee (“LOC”) to determine what trading takes place and advertising is displayed within a designated ‘event zone’ around the Millennium Stadium, although the regulations contain exemptions to allow businesses to trade and advertise with minimal disruption.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this draft instrument.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 (ii) in respect of this draft instrument – that it gives rise to issues of public policy likely to be of interest to the Assembly.

Background

This is the first time that the powers to regulate advertising and trading in the vicinity of Games events in the London Olympic Games and Paralympic Games Act 2006 have been exercised in Wales. Similar regulations are being made in England and Scotland.

A joint consultation was issued with England and Scotland between 07 March and 30 May 2011.

In total there were 50 responses, none of which specifically related to Wales

Matters identified by the Welsh Government as being of special interest to the Constitutional Affairs Committee

None

Other issues

A number of issues have been brought to the attention of the Committee within written correspondence.

Wide definition of Ambush Marketing

Both “advertisement” and “ambush marketing campaign” are defined in Regulation 5 (1).

Advertisement includes any word, letter, image (including logos and other forms of branding), mark, sound, light, model, sign, placard, board, notice, screen, awning, blind, flag, device, costume or representation, whether illuminated or not, which is in the nature of, and employed wholly or partly for the purposes of, promotion, advertisement, announcement or direction.

The regulations define an ambush marketing campaign (whether of one or many acts) as a campaign intended specifically to advertise goods or services or a person who provides goods or services in an Event Zone during an Event Period.

The explanatory memorandum states that the regulations are necessary to give effect to the host city contract which requires ambush marketing to be combatted.

The regulations provide that within the event zones during the event periods, a person wishing to engage in advertising activities, subject to certain exceptions will require a specific prior authorisation from London Olympic Game Organising Committee (LOCOG). The authorisation process will ensure that only advertising which is consistent with the aims of the Regulations is permitted. The regulations provide many exceptions to allow businesses to operate as normal from their premises with advertising that does not conflict with the aims of the Regulations. There are also other exceptions to various specific forms of advertising which don't conflict with the aims of the Regulations.

For groups other than non - official sponsors licensees and partners LOCOG will operate a public application process for which there will be no charge.

The general position is that so long as you are not seeking to mislead the public into thinking that there is an association between your business and the 2012 games or their sponsors, and you comply with the 2011 regulations then you should not face prosecution.

Penalties

Advertising or Trading without the necessary permit in contravention of the regulations will be an offence under Section 22 of the London Olympic Games and Paralympic Games Act 2006 and will be punishable by a fine of up to £20 000.00. The Act rather than these regulations provides for the criminal offence.

Guidance

The Olympic Delivery Authority has recently issued guidance on trading and advertising during the games which can be found [here](#)¹

Reverse Burden

The regulations provide that a person who has an interest in or is responsible for a business, goods or service, will be liable for a contravention of the regulations by the business, or if the contravention relates to the goods or service. Similarly, a person who owns or occupies land will be responsible for any contravention of the Regulations that takes place on the land.

In both cases a person can escape liability if they prove that the contravention took place without their knowledge or despite them having taken all reasonable steps to prevent a contravention from occurring, continuing or recurring.

The Regulations therefore reverse the normal burden of proof in criminal offences.

Within the human rights assessment at Appendix B of the explanatory memorandum the UK government accept that the Regulations “*could be said to interfere with the right to be presumed innocent affirmed by Article 6 (2) ECHR.*” The following justification is provided.

An interference with the right to be presumed innocent will be justified where it is confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” Putting this another way, an

¹ <http://www.london2012.com/documents/oda-publications/detailed-provisions-of-the-advertising-and-trading-regulations.pdf>

interference will be justified where it furthers a legitimate aim and is reasonably proportionate to that aim.

In paragraph 12 above, we have set out the three general objectives of the Regulations. The reverse onus provision is intended to contribute to the achievement of those objectives. In addition, it is specifically intended to ensure that people who are responsible for businesses that contravene the Regulations, or goods or services in relation to which a contravention occurs, or land on which a contravention takes place, are held accountable for the contravention or, at least, take reasonable steps to prevent a contravention occurring.

The reversal of onus is reasonably proportionate to those objectives. The onus (to prove a lack of knowledge or reasonable preventative steps) will only transfer to an accused once the prosecution has proven that a contravention of the regulations has occurred (that is, that there has been advertising or trading activity in contravention of the regulations). The prosecution would also have to prove that the contravention was undertaken by a business for which the defendant was responsible, or that it related to a good or service for which the person was responsible, or that it occurred on land which the person owned or occupied. Accordingly, the prosecution will be required to make out the main elements of an offence before the onus shifts to the defendant.

In addition, once the onus is reversed, the matters that a person is required to prove in order to benefit from the defence are peculiarly within the knowledge of the person – that they did not know about the trading or advertising or that they took reasonable steps to prevent the trading or advertising from occurring. The burden on the accused person would, accordingly, not be difficult for a person to discharge if they have no knowledge of the advertising or trading at issue or have taken steps to prevent

The Joint Committee on Human Rights in their fifteenth report on the London Olympic Games and Paralympic Games Bill stated:-

“We accept that, in light of the guidance recently given by the House of Lords on assessing the compatibility of reverse onus provisions (Sheldrake -v- DPP), this clause is compatible with the presumption of innocence in Article 6 (2) ECHR because the matters in relation to which the defendant bears a legal burden of proof (knowledge of, or efforts made to prevent, and advertisement) are not arbitrary, but matters within his particular knowledge, and do not go beyond what is reasonable for the defendant to establish.”²

Charity/not-for profit bodies

² Joint Committee on Human Rights – Fifteenth Report 20 March 2006

Regulation 7 provides an exemption to the advertising restrictions in relation to a not for profit body that engages in activity intended to demonstrate support for or opposition to the views or actions of a person or body of persons, publicise a belief, cause or campaign, or mark or commemorate an event.

A “not for profit body” is defined in regulation 5 as a body that is required to use its funds for charitable or public purposes and is prohibited from distributing its assets to members (other than for charitable or public purposes).

Goods Deliveries

Whilst the draft regulations which were consulted on in March 2011, only provided limited exceptions for goods deliveries, the current regulations provide an exemption to the restrictions on trading at regulation 14 (1) (c) to “*selling or delivering an article to a person in premises adjoining a highway*”. This would allow for example a pizza delivery or catalogue courier to engage in that activity in the event zone during the event period without contravening the regulations.

Proportionality

The Welsh Government state in the explanatory memorandum that the Regulations contain a trade-off between seeking to achieve the common aims of the regulations which are to ensure:-

- The games have a consistent look and feel across London and the UK;
- To prevent ambush marketing within the vicinity of venues, and
- Spectators and those participating in the Games can get in and out of venues easily and safely.

And seeking to maintain ‘business as usual’ for those organisations located within the event zone, and to maintain the same extent of controls as those in the other administrations.

The restrictions are in place for a total of 13 days, and extend no further than 500 metres from avenue entrance where this is along a main access route and substantially less otherwise.

The explanatory memorandum goes on to state:-

“If the regulations are not made it will mean the Host City Contract cannot be fulfilled in Wales and there is a risk that the football matches would be moved to an alternative stadium in England”.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

5 December 2011