Subordinate Legislation Committee

15th Report, 2012 (Session 4)

Subordinate Legislation

Published by the Scottish Parliament on 21 March 2012
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

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Subordinate Legislation Committee

15th Report, 2012 (Session 4)

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The Committee reports to the Parliament as follows—

1. At its meeting on 20 March 2012, the Committee agreed to draw the attention of the Parliament to the following instruments—

   • Civil Legal Aid (Scotland) Amendment Regulations 2012 (SSI 2012/64); and
   • Food Hygiene (Scotland) Amendment Regulations 2012 (SSI 2012/75).

2. The Committee’s recommendations in relation to these instruments are set out below. The instruments that the Committee determined it did not need to draw the Parliament’s attention to are set out at the end of this report.
POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Civil Legal Aid (Scotland) Amendment Regulations 2012 (SSI 2012/64) (Justice Committee)

3. These Regulations amend the Civil Legal Aid (Scotland) Regulations 2002 (“the principal Regulations”) so as to disapply certain requirements on the Scottish Legal Aid Board (“the Board”) to make payments to individuals if it is unsuccessful in making payment within five years of first trying to do so.

4. The Regulations are subject to the negative procedure and come into force on 30 March 2012.

5. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 1.

6. Section 17(2B) of the Legal Aid (Scotland) Act 1986 provides that, where a person receives legal aid to raise or defend proceedings to recover or to preserve property, and that person is liable to make a contribution, the Board is entitled to be paid the contribution out of the property which has been recovered or preserved before any other creditor’s debts are met.

7. Regulation 40 of the principal Regulations supplements section 17(2B), for example by restricting the ability of the assisted person to dispose of the property until the contribution has been paid. The property may also be paid to or made over to the Board itself. In those circumstances, regulation 40(4) applies.

8. Regulation 40(4)(d) obliges the Board to deposit money paid to it (including money arising from the sale of moveables) into a general account with a bank or building society. This is distinct from the Board’s other financial arrangements, and in particular is separate from the Scottish Legal Aid Fund (“the Fund”). Regulation 40(4)(e) requires the Board to pay into the Fund any contribution owed by the assisted person. If the Board is left holding surplus funds then it is obliged to pay them over to the person entitled to them (i.e. the assisted person), potentially with interest.

9. The Scottish Ministers advise that, despite the Board’s best efforts, it is not always able to return surplus funds to the person entitled to them – perhaps because the person can no longer be traced. At present, the Board continues to hold those funds in the general account and to accrue interest on them.

10. These Regulations form part of a scheme which permits the Board to transfer funds from the general account to the Fund, where they may be used for the ordinary purposes of the Board, once a period of five years has elapsed from the first attempt to make payment of the surplus. Accordingly, they insert a new paragraph (5A) into regulation 40 of the principal Regulations which disapplies the parts of regulation 40(4)(e) which require the Board to make payment to the person entitled to the Funds once that period has elapsed.

11. The Regulations are further to be supplemented by a Determination made by the Scottish Ministers. A draft Determination has been provided with the
Regulations for information. It provides that, where regulation 40(3)(e)(i) and (ii) have been disapplied by regulation 40(5A), the Board is to pay into the Fund the surplus monies and interest which it is no longer obliged to pay to the person entitled to them.

12. These Regulations insert a new paragraph (5A) into regulation 40 which disapplies only a very limited aspect of regulation 40: the duties contained in regulation 40(4)(e)(i) and (ii) to pay over the surplus funds and to pay interest. Accordingly, the obligation in regulation 40(4)(d) continues to apply, even when paragraph (5A) operates. The Scottish Ministers, in their response, confirm that this is the case and that the monies require to be retained by the Board in a general account subject to other provision that is made for their dispersal.

13. The Committee considers that the only mechanism for dispersal of the monies is contained in regulation 40(4)(e). The Scottish Ministers consider that they can create an alternative dispersal method by making a Determination that these monies, as receipts of the Board, should be paid into the Fund.

14. The Committee accepts that the Scottish Ministers have power to make such a Determination. However, it considers it doubtful whether a Determination can be used to override the express statutory requirement contained in regulation 40(4)(d) to deposit funds in a general account. The Committee considers it significant that the Scottish Ministers felt the need expressly to disapply regulation 40(4)(e)(i) and (ii). It observes that, if it is necessary expressly to disapply the obligations to make payment, then it appears to be necessary also to disapply the obligation in regulation 40(4)(d) to deposit the funds.

15. It accordingly appears to the Committee that, in the circumstances where regulation 40(5A) applies, the Board will simultaneously be under a continuing obligation to deposit funds in a general account (in accordance with regulation 40(4)(d) of the principal Regulations) and also be required to pay those funds into the Fund in terms of paragraph 3 of the Determination.

16. The Scottish Ministers’ clearly stated policy is that funds in the hands of the Board which cannot be returned to their rightful owners, despite the Board having made efforts to do so for a period of five years, should be appropriated to the Fund. The Committee considers that it is doubtful whether this instrument, even when read together with the proposed Determination, achieves that policy aim. The Scottish Ministers themselves concede that the obligation in regulation 40(4)(d) subsists. Their position appears to be that the Determination impliedly disapplies that obligation. The Committee takes the view that it is doubtful whether this is actually the case, particularly considering their decision expressly to disapply other aspects of regulation 40(4). Accordingly, two conflicting provisions appear to apply at the same time. The Committee therefore takes the view that this instrument appears to be defectively drafted.

17. The Committee draws the instrument to the attention of the Parliament on reporting ground (i).

18. The instrument appears to be defectively drafted, in that it appears not to deliver the intended policy of transferring certain monies from a general
account held by the Scottish Legal Aid Board to the Scottish Legal Aid Fund. While the instrument expressly disapplies obligations to make payment of those monies contained in regulation 40(4)(e)(i) and (iii) of the Civil Legal Aid (Scotland) Regulations 2002, it does not disapply the obligation to deposit the monies in a general account contained in regulation 40(4)(d). Furthermore, it appears doubtful whether reliance can be placed on a determination made by the Scottish Ministers impliedly to disapply the express obligation in regulation 40(4)(d).
Food Hygiene (Scotland) Amendment Regulations 2012 (SSI 2012/75) (Health and Sport Committee)

19. This instrument amends the Food Hygiene (Scotland) Regulations 2006. The 2006 regulations are the means by which the directly applicable European Union rules on food hygiene are enforced in Scotland. They provide authorisation to various bodies to enforce the EU and national rules and various tools in order to require food business operators to rectify non-compliance. They also create criminal offences in relation to non-compliance.

20. The purpose of this instrument is to amend the 2006 regulations to:

- provide enforcement measures in relation to a number of new directly applicable EU regulations concerning food hygiene;
- provide that amendments to any annexes to the EU instruments specified in Schedule 1 of the 2006 regulations will automatically be captured by the enforcement measures contained in those regulations (without the need for further amending regulations);
- extend the use of remedial action notices as a means of requiring compliance with food hygiene law to food businesses which are not required to be approved (those which do not manufacture products of animal origin);
- provide for compensation to be payable to a food business operator who has suffered loss by complying with a remedial action notice where that notice is subsequently cancelled on appeal;
- specify the form of special health mark which is to be applied to meat from animals which have been subject to emergency slaughter outside a slaughterhouse; and
- provide for enforcement of the rules relating to the sale of meat from animals subject to emergency slaughter.

21. This instrument is subject to the negative procedure. It comes into force on 1 April 2012.

22. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 2.

23. The Committee is concerned with the effect of regulation 2(6) and (8) and Schedule 2 of this instrument which insert new regulations 32A and new Schedule 6A into the Food Hygiene (Scotland) Regulations 2006.

24. These new provisions concern the special health mark which is to be applied to meat derived from animals which have been subject to emergency slaughter outside the slaughterhouse. They also create new criminal offences in connection with the marketing of meat products derived from such animals.
25. These provisions are necessary in order to allow for the lawful marketing of meat from such animals from establishments which require to be approved under EU hygiene regulations. (They do not apply to the supply of meat directly to shops which supply meat to the final consumer.)

26. In order to adopt the practice of marketing emergency slaughter meat, member states require to make national measures in a manner that is compatible with the option to do so provided in the EU regulations. In particular, the Committee considers that in order to implement this measure effectively Scots law requires to adopt a uniform approach to UK products. The Committee accepts that these provisions would be capable of doing so if similar national measures existed in the rest of the United Kingdom. Unfortunately, they presently do not.

27. The Committee is concerned that it would not be possible for this difference in approach to the national measure between Scots law and the law of the rest of the UK to be maintained long term. This would not appear to be compatible with what the EU hygiene rules permit.

28. The Committee recognises that to achieve a uniform UK approach requires action in other jurisdictions beyond the scope of the Scottish Ministers’ powers. The committee also recognises that this situation is not of the Scottish Ministers’ making as the decision not to proceed on the same timetable does not appear to have been notified by the other administrations until it was too late. That does not however address the question of what is to be done about the situation that has arisen. The Committee considers that it is the Scottish Ministers’ responsibility to consider whether remedial action should be taken to address this in light of the delay in the rest of the United Kingdom.

29. The Food Standards Agency as the national food safety authority has taken what it considers to be a pragmatic approach to prevent enforcement of these measures and deter prosecutions for non-compliance being brought. It has issued recommendations to that effect to enforcement agencies and the prosecution service. The Committee considers it implicit from this action that the FSA recognises that it can no longer continue with the adoption of the national measure in Scotland in isolation from the rest of the United Kingdom.

30. The Committee notes that it is not of course possible for the FSA to direct how the prosecution service exercises its functions. In addition, the Committee considers that it is not satisfactory to maintain laws which the Government does not intend to enforce whether temporarily or not. It considers that it is an important principle of the criminal law that there is certainty as to which actions are subject to criminal sanction and those which are not. The Committee is therefore most dissatisfied with the approach to resolution of this situation adopted by the Food Standards Agency. The Committee is also dissatisfied with the lack of co-ordination at a United Kingdom level in bringing forward complementary and contemporaneous legislation to achieve a national marking scheme.

31. The Committee draws this instrument to the attention of the Parliament on reporting ground (f). It raises the following devolution issue.
32. The national measures in relation to the specification of the special health mark for meat from animals which have been subject to emergency slaughter and the prohibitions on marketing meat products from such animals set out in new regulation 32A and new Schedule 6A have been brought into force in relation to Scotland in advance of such measures having been made in respect of the rest of the United Kingdom.

33. The provision made by this instrument is capable of recognising similar measures in the rest of the United Kingdom but those measures do not presently exist. In the absence of objective justification, it is incompatible with EU law for the United Kingdom as a whole to discriminate between producers in Scotland and the rest of the UK when implementing the national measure provided in respect of emergency slaughter in EU Regulations 853/2004 and 854/2004. It would not therefore be possible to maintain this position indefinitely.

34. The Committee acknowledges that this situation occurred as a result of the remaining administrations in the United Kingdom delaying their implementation after the Scottish Ministers had made these regulations rather than as a result of a fault with these regulations themselves. Nevertheless the situation that has arisen requires to be addressed as regards Scotland.

35. In recognition of the difference of treatment between Scotland and the rest of the UK which results, the Food Standards Agency will be writing to enforcement authorities and the Crown Office and Procurator Fiscal Service to advise that no enforcement action should be taken until equivalent provisions are in force throughout the UK.

36. The Committee considers it most unsatisfactory to adopt a policy of ignoring the effect of subordinate legislation and electing not to enforce it. It is important that there is certainty as regards what actions are to be subject to criminal sanction and those which are not.

37. The Committee considers it would be possible to resolve the matter were the implementation of these measures to be postponed until the point at which it has been agreed that identical measures should be made throughout the rest of the United Kingdom.
NO POINTS RAISED

38. At its meeting on 20 March 2012, the Committee also considered the following instrument and determined that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

**Education and Culture Committee**

General Teaching Council for Scotland (Legal Assessor) Rules 2012 (SSI 2012/86)
APPENDIX 1

Civil Legal Aid (Scotland) Amendment Regulations 2012 (SSI 2012/64)

On 8 March 2012, the Scottish Government was asked:

1. These Regulations insert a new paragraph (5A) into regulation 40 of the Civil Legal Aid (Scotland) Regulations 2002 ("the principal Regulations"), the effect of which is to disapply the obligations in paragraph (4)(e) on the Board to make payment if it is unable to do so within a period of five years from when it first endeavours to do so. However, paragraph (4)(d) imposes an obligation on the Board to deposit money paid to it in "one general account with a bank or building society". That obligation is not disapplied by paragraph (5A). The Scottish Government is accordingly asked whether the obligation imposed by paragraph (4)(d) is intended to subsist, notwithstanding the apparent intention of these Regulations that the Board be able to pay such monies into the Scottish Legal Aid Fund.

(a). If the obligation in paragraph (4)(d) subsists, then the Scottish Government is asked to explain the basis on which it purports to make the Ministerial Determination accompanying these Regulations (which requires the Board to pay into the Scottish Legal Aid Fund monies to which paragraph (4)(e) has ceased to apply), given that the Determination appears to contradict the obligation in paragraph (4)(d) requiring those funds to be deposited in a general account?

(b). If the obligation in paragraph (4)(d) is considered not to subsist, the Scottish Government is asked to explain the basis for that view, in the absence of any provision which disapplies it expressly and in the absence of anything in the wording of paragraph (4)(d) itself which suggests that it is of limited duration or effect only?

The Scottish Government responded as follows:

In relation to (a), the Scottish Government’s view is that the obligation subsists in the sense that the monies require to be retained by the Board in a general account subject to other provision that is made for their dispersal whether through the principal Regulations or provision that may be made under other Ministerial powers in the Legal Aid (Scotland) Act 1986 ("the Act"). The Board is a creature of statute and only has the power to intromit with monies as specified in provision made by virtue of primary and secondary legislation.

Currently dispersal is provided for by paragraph (4)(e) of the principal Regulations if the Board can identify the correct recipient of the monies, permitting the payment of the monies to the recipient.

The Regulations deal with the situation where the Board has not been able to pay those monies to the correct recipient over a period of 5 years. At present, the Board is unable to utilise these monies.
It would not have been possible to provide in the Regulations that the monies should in these circumstances now be paid into the Legal Aid Fund as none of the circumstances set out in section 4(3)(a) to (d) of the Act apply (monies which can be paid into the Fund) and there are, therefore, no subordinate legislation powers which the Board could use to pay the monies into the Fund.

However, Ministers have a separate power under section 4(3)(e) of the Act to determine that other receipts of the Board shall be paid into the Fund. The monies that are held under regulation 40(4)(e) are receipts of the Board. Scottish Ministers, therefore, have power under the Act to determine that these monies can be paid into the Fund provided the circumstances set out in new regulation 40(5A) apply.

This means that dispersal of the funds from the general account is now provided for by regulation 40(4)(e) and by the Determination made under section 4(3)(e) of the Act in circumstances where regulation 40(4)(e) is disapplied by new regulation 40(5A).

The Explanatory Note to the Regulations explains the basis upon which the Determination has been made by Ministers and where it can be accessed.
APPENDIX 2

Food Hygiene (Scotland) Amendment Regulations 2012 (SSI 2012/75)

On 9 March 2012 the Scottish Government was asked:

(1) When will mutual recognition arrangements for the special mark provided by new regulation 32A and new Schedule 6A be brought into force in the rest of the United Kingdom?

(2) Why it is considered competent under EU law to make provision for a new national measure laying down the format of a special health mark to be applied to carcases of animals which have undergone emergency slaughter outside the slaughterhouse when the measure only applies to Scotland and in the absence of mutual recognition arrangements within the UK national law does not permit such meat to be marketed throughout the UK Member State or provide for the health mark specified for Scotland to be recognised in the rest of the UK?

(3) What is the practical effect of the absence of mutual recognition arrangements for Scottish producers and can prosecutions be brought for non-compliance with the regulations or EU law in this respect?

The Scottish Government responded as follows:

(1) The detailed specifications of the special health mark provided by new regulation 32A and new Schedule 6A have been agreed by the 4 UK administrations and the special health mark will be identical throughout the UK. It was originally intended that all 4 administrations would make implementing provisions to come into force on 1 April 2012, in relation to the special health mark, and all the other provisions now contained within the Food Hygiene (Scotland) Amendment Regulations (“the Scottish Regulations”). England proceeded with 2 separate draft Regulations, to allow the time required for clearance with regulatory committees. In February 2012 they confirmed revised timetables, with the Regulations implementing the provisions relating to hygiene, including the special health mark, to come into force on 1 April, and the Regulations implementing the provisions on remedial action notices, to come into force on 6 April.

In Scotland it was decided to continue to combine into one instrument, to come into force on 1 April 2012, all of the provisions dealing with remedial action notices, food hygiene amendments and the special health mark. This decision was made to avoid the necessity of 2 separate Regulations coming into force on 1 and 6 April, both amending the Food Hygiene (Scotland) Regulation 2006, which it was felt would have been an inefficient use of parliamentary time, which might attract criticism, and in addition, would be confusing to food business operators.

It was only on 2 March 2012, after the Scottish Regulations had been made on 29 February 2012 and laid on 2 March, that the Food Standards Agency in Scotland were advised that the timetables for the English Regulations had slipped further. England now intend to bring into force in May 2012 their Regulations which deal with the special health mark, and those dealing with remedial action notices as
soon as they have passed all parliamentary scrutiny. Wales has considered its position and aims to follow a similar timetable to England. Northern Ireland has considered its position and aims to implement the provisions relating to remedial action notices by 6 April 2012 and those relating to Hygiene, including the special health mark, during May 2012.

Whilst this situation is not ideal, the Scottish Government takes the view that there will still be only a short gap, of a few weeks, when the provisions relating to the special health mark in Scotland are in force, before the provisions for the rest of the UK come into force.

For the intervening period, and as explained in the answer to question 3, below, the Food Standards Agency will be writing to stakeholders, local authorities and COPFS to advise that no enforcement action should be taken until legislation in the rest of the UK has come into force. Once that legislation in the rest of the UK is in force, an identical special health mark will be required throughout the UK. Accordingly, there is no need for a mutual recognition provision and the measure will be fully implemented under EU law.

(2) This instrument provides for a "special health mark" as required by paragraph 9 of Chapter VI of Section I of Annex III to EC Regulation 853/2004 and paragraph 7 of Chapter III of Section I of Annex I to EC Regulation 854/2004. These EC Regulations do not prohibit a mark being implemented in one part of a member state in advance of another part. In terms of EU law, this measure has been implemented in Scotland.

(3) In the meantime, to fully cover the period between 1 April 2012 and the date that equivalent legislation comes into force in the rest of the UK, the Food Standards Agency in its capacity as Central Competent Authority, will be writing to stakeholders, local authorities and the Crown Office and Procurator Fiscal Service, in advance of the application date of 1 April, to advise that no enforcement action should be taken until equivalent provisions are in force throughout the UK. The letter will also give general advice advocating a graduated approach to enforcement for these new provisions, once they are adopted in each of the UK countries.

With respect to the practical effect of the new provisions, in so far as they relate to special health marks applied to carcases of animals subject to emergency slaughter, a square health mark has been in use in the UK for these purposes since 2006 when the EU provisions took effect. FSA guidance is provided in the UK Manual for Official Controls. Application of the special health mark has been custom and practice in all UK countries since then. The Scottish Regulations simply set out the formal legal basis for the format of the mark, as required by the EU, for controls that have been consistently applied since 2006. Therefore there will be no practical effect for the Scottish Regulations providing a new legal basis for this, a few weeks in advance of the rest of the UK.

With respect to the practical effect of the application of the new identification mark on further processed minced meat and meat products and meat preparations derived from emergency slaughtered meat, this will be a new requirement. However the overall number of emergency slaughtered animals is relatively small. A large proportion of these carcases are supplied directly to the final retail butcher
for delivery directly to the final consumer sector, and an identification mark will not be required. In light of the small numbers involved, and the effect of the letter being sent to all local authorities advising against enforcement until the equivalent legislation is in force throughout the UK, there will be no practical adverse effect of the earlier introduction of the legislation in Scotland.
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