

Constitutional Affairs Committee

Report: CA(3)-19-10 : 8 July 2010

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Time: 1.00 pm

Venue: Committee Room 4, Tŷ Hywel

Assembly Members in attendance

Janet Ryder, North Wales (Chair)

Alun Davies, Mid and West Wales

Kirsty Williams, Brecon and Radnorshire

William Graham, South Wales East

Rhodri Morgan, Cardiff West

There were no apologies.

The Chair welcomed Kirsty Williams AM to the Committee.

The Committee reports to the Assembly as follows:

Instruments in respect of which the Assembly is not invited to pay special attention under Standing Order 15.2 or 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

- **CA458** - The National Health Service (Miscellaneous Amendments Relating to Independent Prescribing) (Wales) Regulations 2010

Procedure: Negative

Date made: 21 June 2010

Date laid: 23 June 2010

Coming into force date: 19 July 2010

Instruments and Draft Instruments in respect of which the Assembly is invited to pay special attention under Standing Orders 15.2 and/or 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

- **CA459** - The Eggs and Chicks (Wales) Regulations 2010

Procedure: Negative

Date made: 22 June 2010

Date laid: 25 June 2010

Coming into force date: 16 July 2010

The Committee agreed the Report under S.O.15.3 and S.O. 15.2 on this Instrument, which is attached as an Annex.

Other Business

Review of Standing Orders – Committees

The Committee agreed to defer this item until next week's meeting on the 15 July.

Committee Correspondence

The Committee noted Correspondence from the Deputy First Minister

Janet Ryder AM

Chair, Constitutional Affairs Committee

8 July 2010

Annex

Constitutional Affairs Committee Report

CA459

Title: The Eggs and Chicks (Wales) Regulations 2010

Procedure: Negative

These Regulations revoke and replace the Eggs and Chicks (Wales) Regulations 2009. As in the 2009 Regulations, they make provision for the enforcement and execution of directly applicable EU marketing standards relating to eggs for hatching and farmyard poultry chicks and directly applicable EU marketing standards relating to eggs in shell for consumption. They also make a new provision for the enforcement of directly applicable EU controls for Salmonella serotypes with public health significance in relation to the marketing and use of eggs in shell for human consumption.

Technical Scrutiny

Under Standing Order 15.2 the Assembly is invited to pay special attention to the following instrument:-

1. Sub-paragraphs (3) (a) and (b) of Regulation 24 (Record-keeping requirements) of the English text refer to directions to be given by the Welsh Ministers on or before 16 January 2011, and sub-paragraphs (3) (c) and (d) of Regulation 24 refer to directions to be given by the Welsh Ministers on or after 17 January 2011, whilst sub-paragraphs (3) (a) and (b) of Regulation 24 of the Welsh text refer to directions to be given by the Welsh Ministers on or before 16 January 2010, and sub-paragraphs (3) (c) and (ch) (which equates to “d” of the English alphabet) of Regulation 24 of the Welsh text refer to directions to be given by the Welsh Ministers on or after 17 January 2010.

(Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts, and Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements).

The Government has responded as follows on the above points:

The Government accepts this point and confirms that the incorrect date that appears in Regulation 24 (3) (a) - (ch) of the Welsh text will be corrected on publication of the Regulations.

2. Sub-paragraph 4 of Regulation 19 (Powers of entry) states that admission to any premises used only as a private dwelling house may not be demanded as of right unless 24 hours notice of the intended entry has been given to the occupier or the entry is in accordance with a warrant granted under this regulation. The addition of “or” means no warrant is required if 24 hours notice has been given, and regulation 38 (1) (b) means that it is possible to give notice by leaving it at the premises. Consequently if the householder is away for the weekend, officers could leave a notice at empty premises and go back 24 hours later and enter without a warrant, as specified in regulation 19 (3).

These Regulations replace the Eggs and Chicks (Wales) Regulations 2009 that contained no similar provision. As the 2009 Regulations relied on the power of entry contained in section 32 of the Food Safety Act 1990, which contained the safeguard of a requirement to obtain a warrant from a magistrate who had to be satisfied of certain requirements, it is not apparent why the power of entry provision in these Regulations has no equivalent safeguard, and why the omission of such a safeguard has occurred.

The absence of such a safeguard in the new Regulations may constitute an infringement of Article 8 of the European Convention of Human Rights (“ECHR”) which provides for the right to respect for private and family life, and home and correspondence and section 81 of the Government of Wales Act 2006 (“GOWA”), which states that Welsh Ministers have no power to make subordinate legislation which is incompatible with any of the Convention Rights.

(Standing Order 15.2 (i) that there appears to be doubt as to whether it is intra vires).

The Government has responded as follows on the above points:

Regulation 19 (1) creates a power of entry of any authorised officer to any premises at any reasonable hour for the purpose of ensuring the provisions of the Regulations are being complied with.

Regulation 19(4) specifies that admission to a private dwelling house may not be demanded as of right unless 24 hours notice of the intended entry has been given to the occupier or the entry is in accordance with a warrant granted under regulation 19.

At paragraph 2 above legal advisors to Constitutional Affairs Committee have raised concerns that the regulation would allow an authorised officer to serve a notice of intended entry by leaving the notice at empty premises pursuant to regulation 38(1)(b) (which it should be noted corresponds with section 50(1) of the Food Safety Act 1990) and thereafter return to those

empty premises 24 hours later and gain entry without the permission of the occupier of that dwelling house.

They query whether that action would be an infringement of Article 8 of the European Convention of Human Rights.

Regulation 19(4) does not create a power for an authorised officer to enter a private dwelling house in the scenario outlined within paragraph 2 above, namely, without the occupier's consent and in the absence of the occupier. In the absence of the occupier to gain entry, an authorised officer would have to exercise force and there is no provision for the use of such force within regulation 19(4).

In contrast, regulation 19(5) clearly states that a warrant issued by a justice of the peace may permit an authorised officer to enter any premises if needs be by reasonable force.

Regulation 19(11) specifically provides for a situation in which an occupier is temporarily absent. If waiting for the occupier to return would defeat the object of the entry that is one of the grounds which would justify the issuing of a Magistrates' warrant to authorise entry.

Further, regulation 19(3) requires an authorised officer to produce a duly authenticated document showing his or her authority prior to being admitted to the premises, if so required by the occupier.

Regulation 19(9) & (10) provide that if admission to the premises is refused or is likely to be refused that is further grounds justifying the issuing of a Magistrates' warrant to authorise entry with, if necessary, reasonable force.

We respectfully submit that the scenario outlined within paragraph 2 above and the doubts over the legal vires of regulation 19(4), in particular concerns over potential breaches of Article 8 of the ECHR are mis-conceived.

The report compares the powers of entry contained within Regulation 19 to the powers of entry available under section 32 of the Food Safety Act 1990. Section 32(1) provides that admission to premises used only as a private dwelling-house is subject to 24 hours notice of intended entry to the occupier. Section 32(2) of the Act provides that a Justice of the Peace may issue a warrant authorising entry with reasonable force, in the satisfaction of certain grounds (admission is refused, refusal is apprehended, an application for admission or giving notice would defeat the object of the entry or the premises are

unoccupied or the occupier is temporarily absent). Similar grounds apply to the issuing of a warrant under regulation 19(5), as set out in paragraphs (8) to (11) of that regulation. The Government submits that the powers contained in regulation 19 correspond with those in sections 32 (1) & (2) of the Food Safety Act 1990 . Further they correspond to provisions within the Eggs & Chicks (England) Regulations 2009 (SI 2009/2163) which came into force on 14th September 2009.

Merits Scrutiny

Under Standing Order 15.3 the Committee is invited to pay special attention to the following instrument:-

1. The carrying out of a search on a private dwelling house without a warrant pursuant to 19 (4) of these Regulations, must be legitimate in order to secure the aim to be achieved. There are a number of matters for consideration:-

- The entry can only be exercised at “any reasonable hour”, however this could be open to interpretation and what may amount to a reasonable hour for one person may amount to an unreasonable hour to another person.

The Government has responded as follows on the above point:

The Government submits that the use of this term is standard drafting practice and mirrors exactly the terms of the powers of entry contained within section 32(1) of the Food Safety Act 1990 which are expressed as a right of entry “at all reasonable hours” and is therefore already part of the law applying within Wales.

- A notice period of 24 hours must be given to the occupier, however if the occupier is not present at the premises when notice is served, then it is possible that no notice may be received by the occupier prior to an entry being carried out, which would be tantamount to a power of entry demanded as of right. At least when a warrant is applied for, the justice of the peace must have reasonable grounds that certain conditions are met before the warrant is issued. Compliance with the conditions is not a prerequisite for the power of entry where 24 hours notice is deemed to have been given.

The Government has responded as follow on the above point:

The Committee is respectfully referred to the Government response to paragraph 2 of the Technical Scrutiny section of this report on pages 2 & 3 above.

- Is the entry and intrusion of privacy proportionate to the legitimate aim being pursued? The legitimate aim being pursued would be ensuring compliance with the Regulations, and therefore the prevention of a crime. A person guilty of contravening regulation 24 (Record-keeping requirements) and of obstructing a person acting in the execution of their duty pursuant to regulation 19 (4) would be liable on summary conviction to a fine not exceeding level 5 on the standard scale. Consequently is a power of entry without notice proportionate to the severity of the crime, namely the failure to comply with record keeping requirements? Compare, for example the situation where Police can only enter premises without a warrant if a serious or dangerous incident has taken place, such as a breach of the peace or prevention thereof, enforcing an arrest warrant, arresting a person in connection with certain offences, recapturing someone who has escaped from custody and save life or prevent serious damage to property.

The Government has responded as follows on the above point:

The Egg & Chicks (Wales) Regulations 2010 make provision for the enforcement of EU controls for Salmonella serotypes with public health significance. They also make provision for the enforcement and execution of directly applicable EU marketing standards relating to eggs in shell for human consumption. Those marketing standards ensure eggs sold within the EU for human consumption are fully traceable back to the production site.

The legitimate aims being pursued by the Regulations are

- *food safety;*
- *protection of public health;*
- *consumer protection; and*
- *prevention of fraud.*

In relation to the final aim the Egg Marketing Inspectorate has confirmed that they have recently been involved with a large scale fraud involving eggs mis-labelled as free range when they are in fact from a cage production system. The most serious recent case resulted in a 3 year custodial sentence, a £3,000,000 fine and £250,000 costs order. They have current investigations ongoing.

Once again the Government respectfully refers the Committee to paragraph 2 of the Technical Scrutiny Section of this report on pages 2 & 3 above. The Government reiterates that the only circumstances in which an authorised officer can gain entry to a private dwelling house is either under 24 hours notice if the occupier allows entry or with a Magistrates' warrant.

- These Regulations replace the Eggs and Chicks (Wales) Regulations 2009 that contained no similar provision. As the 2009 Regulations relied on the power of entry contained in section 32 of the Food Safety Act 1990, which contained the safeguard of a requirement to obtain a warrant from a magistrate who had to be satisfied of certain requirements, it is not apparent why the power of entry provision in these Regulations has no equivalent safeguard, and why the omission of such a safeguard has occurred. The addition of such a safeguard would have ensured a number of requirements have been met and that the justice of the peace had reasonably believed that the issue of a warrant was necessary. The addition of having this safeguard would help to ensure that any intrusion into a dwelling house was proportionate to the aim to be secured and consequently less likely to offend against Art 8 ECHR. The Explanatory Memorandum does not give any reason for the change.

If the entry is shown to be disproportionate to secure the legitimate aim to be achieved then there would be a potential breach of Article 8 of the ECHR and section 81 of GOWA 2006

The Government has responded as follows on the above point:

The Committee is respectfully referred to the final paragraph of the Government's Response to paragraph 2 of the Technical Scrutiny on page 3 of this report. The Government re-iterates that the powers created in regulation 19 correspond with those set out in section 32 of the Food Safety Act 1990.

2. The Committee may wish to consider the following:-

The Code of Practice under the Powers of Entry Bill which applied to private premises as well as business premises stated that "Any exercise of a power of entry to private property is likely to involve a conflict with the right to private life guaranteed by Article 8 of the ECHR." A power of entry without consent should only be used when it is necessary to achieve its purpose, and the way in which the power is used must be proportionate to that purpose. The Bill has not become law, but it was intended that the Bill provide for the regulation of the power of entry in respect of both specified primary and secondary legislation within the Bill.¹

The European Court of Human Rights takes a robust approach to powers of entry, search and seizure. These powers are invasive and must be accompanied by clear justification in order to meet the requirements of Article 8(2) ECHR that any interference with the right to respect for private life and the home is necessary. The legislative framework for these powers must afford adequate and effective safeguards against abuse in practice. Whether the safeguards in the

Bill are adequate to meet the requirements of Article 8(2) ECHR will depend on the nature, scope and duration of the proposed powers of entry, search and seizure, the circumstances in which they will be authorised, the identity of the individuals authorised to conduct them, and the remedies provided by national law. An individual adversely affected by the exercise of these powers must have access to an effective remedy for any alleged breach of their Convention rights as guaranteed by Article 13 ECHR.²

The Joint Committee on considering the Tribunals Courts and Enforcement then Bill found that the Bill proposed that, in certain circumstances, a certified enforcement agent would be able to enter any "relevant premises" without a warrant.[99] Relevant premises are any premises where an enforcement agent "reasonably believes" that the debtor "usually lives" or carries on a trade or business (including third party premises). If powers of entry without a warrant are intended to be limited to the premises identified by the information in the relevant judgment, warrant or writ, then the Committee considered that this should be clearly expressed on the face of the Bill. The Committee recommended that the Bill be amended accordingly and stated that it is important to ensure that these new statutory powers are not misunderstood, or misrepresented, in order to protect the rights of debtors' families and third parties against unnecessary or disproportionate invasions of their right to respect for their private life.

The Committee welcomed the Government's amendment to clarify that the use of force to gain re-entry to premises used to carry out a trade or business without a warrant did not extend to the use of force to enter a dwelling or to do anything in a dwelling. The Committee considered that this amendment would ensure that reasonable force is not used by any certified enforcement agent to access any premises used in whole, or in part, as a residential property, without prior judicial authorisation, and that the amendment would provide a valuable safeguard for the rights of debtors and third parties to respect for private life and home, as guaranteed by Article 8 ECHR.

With the above in mind the carrying out of a search on a private dwelling house without a warrant pursuant to 19 (4) of these Regulations, may not be proportionate to secure a legitimate aim under these Regulations, and consequently may be disproportionate to the legitimate aim pursued and breach Article 8 of the ECHR.

The Government responds has responded as follows on the above points:

The Committee is respectfully referred to our response to paragraph 2 of the Technical Scrutiny section of this report on pages 2 & 3 above. The Government reiterates that an

authorised officer may only enter a private dwelling house pursuant to Regulation 19 (4) if the occupier allows the officer entry. If the occupier does not permit entry the authorised officer may obtain a Magistrates' warrant pursuant to Regulation 19(5).

Committee's Consideration of the Government's Response

The Committee noted that the Government intended to correct the reporting points under Standing Order 15.2 (vii) (inconsistencies between the meaning of its English and Welsh texts) and Standing Order 15.2 (vi) (drafting appears to be defective or it fails to fulfil statutory requirements) on publication.

The Committee **agreed** that the issues identified by the Committee were sufficiently significant to require correction by amending regulations. The Committee expects these to be brought forward at the earliest opportunity.

On the remaining reporting point under Standing Order 15.2(i), and the merits issues raised under Standing Order 15.3, the Committee noted that the Government did not accept the advice of the Committee's legal advisers while the Committee's advisers continued to have doubts as to whether the regulations were *intra vires*.

The Committee was unable to come to an authoritative conclusion on the difference of opinion between legal advisers to the Committee and the Government. However, the Committee **agreed** that the difference of opinion in itself constituted doubt as to whether the Regulations were *intra vires* and that both points of view should be included in its report to the Assembly under Standing Order 15.2(i).

Given that there were grounds for doubts as to whether the Regulations were *intra vires*, and the nature of the issues concerned, the Committee also **agreed** that the Regulations raised issues of legal importance likely to be of interest to the Assembly should be reported to the Assembly under Standing Order 15.3(ii).

Constitutional Affairs Committee July 2010

Notes:

1. House of Lords Session 2007-2008
2. Joint Committee on Human Rights Fifth Report