

Constitutional Affairs Committee

(CA(3)-21-10)

CA469 - The Plant Health (Wales) (Amendment) Order 2010

Constitutional Affairs Committee Report

Title: The Plant Health (Wales) (Amendment) Order 2010

Procedure: Negative

This Order amends the Plant Health (Wales) Order 2006 (“the Principal Order”) in order to implement Council Directive 2007/33/EC on the control of Potato Cyst Nematodes and repealing Directive 69/465/EEC.

The purpose of Council Directive 2007/33/EC is to determine the distribution of potato cyst nematodes (which is recognised as a harmful organism of potatoes) to prevent their spread and control them. The previous Directive 69/465/EEC was found to be ineffective and Directive 2007/33/EC provides for the adoption of more stringent requirements by Member States.

Technical Scrutiny

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

1. Article 5 of the Plant Health (Wales) (Amendment) Order 2010 substitutes Article 38 of the Principal Order. Article 38 concerns ‘power to enter premises used wholly or mainly as a dwelling’ The substituted provision in subsection (1) provides that “Articles 31, 33 and 37 do not apply to admission to any premises used only as a private dwelling house 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 article.”
2. The corresponding provision in the Principal Order provided that “The power to enter premises conferred by articles 31, 33 and 37 may be exercised by an inspector to enter premises used wholly or mainly as a dwelling only if he or she has been granted a warrant by a justice of the peace.”
3. The effect of the change is to remove a requirement to obtain a warrant before entering a dwelling house by providing for an alternative of giving 24 hours’ notice. Article 35 provides that notice may be given by posting it to or leaving it at specified premises. It may therefore not come to the notice of the occupier of the dwelling.

4. Article 8 of the European Convention of Human Rights (“ECHR”) 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 states that Welsh Ministers have no power to make subordinate legislation which is incompatible with any of the Convention Rights.

5. The power to enter a private dwelling-house without a warrant is a potential breach of Article 8, and therefore of the Government of Wales Act.

The Special Attention of the Assembly is therefore drawn to the Order under Standing Order 15.2(i) “that there appears to be doubt whether it is *intra vires*”.

Merits Scrutiny

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

6. As is set out above, the protection afforded by the requirement to obtain a warrant before entering a private dwelling-house has been diluted by the changes made to article 38 of the Principal Order.

7. The Explanatory Memorandum provided with the Order makes no reference to this significant change to the provisions relating to the power of entry. It is of considerable concern that no justification or explanation has been provided for this change. Indeed, no reference at all is made to the amendment to article 38 of the Principal Order.

8. The Explanatory Memorandum does refer to the consultation undertaken by DEFRA in the spring of 2009. However, that consultation again made no reference to any proposal to amend powers of entry in this way.

9. Recent litigation has highlighted the importance of proper consultation, and the omission from the consultation in this case of what might be considered the most controversial aspect of the proposed legislation raises doubts as to the validity of the consultation.

10. The decision report published on the Welsh Government website on the 12th July 2010 sets out the factual information provided to the Minister in support of the Order. This again makes no reference to the issue of changing the protection afforded to private dwelling houses. Interestingly, it does state that equivalent legislation is to be introduced in England, Scotland and Northern Ireland. However, examination of the corresponding Scottish Order shows that the provision relating to entry into a dwelling-house is very different –

“The power to enter premises conferred by articles 4(1), 4A(1), 5(1) and 8(1) may be exercised by an inspector to enter premises used wholly or mainly as a dwelling only if the inspector has been granted a warrant by a sheriff or a justice of the peace.” (Article 8 of the Plant Health (Potatoes) (Scotland) Amendment Order 2010.)

11. The special attention of the Assembly is therefore drawn to this Order under Standing Order 15.3(ii) “that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.”

Government Response

The Government has responded to the above points as follows:

The Plant Health (Wales) (Amendment) Order 2010

Technical Government response

Article 5 of the Plant Health (Wales) (Amendment) Order 2010 inserts new provisions in respect of premises used wholly or mainly as a dwelling into the Plant Health (Wales) Order 2006 in order to allow any authorised officer to enter premises for the purpose of ensuring the provisions of the Order are being complied with.

Article 38(1), as inserted, clarifies 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 this regulation.

At paragraph 3 above legal advisors to Constitutional Affairs Committee have raised concerns that the new article 38 would allow an authorised officer to serve a notice of intended entry by leaving the notice at empty premises pursuant to regulation 38(2) 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.

Article 38(2) does not create a power for an authorised officer to enter a private dwelling house in the scenario outlined within paragraph 3 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 article 38.

In contrast article 38(2) clearly states that a warrant issued by a justice of the peace may permit an authorised officer to enter any premises if necessary by reasonable force.

Notwithstanding article 35, the powers of entry must be exercised in accordance with article 38, article 38(2)(d) specifically provides for a situation in which the premises are unoccupied or an occupier is temporarily absent. If waiting for the occupier to return would defeat the object of the entry that is sufficient grounds to obtain a Magistrates' warrant to authorise entry.

We respectfully submit that the scenario outlined within paragraph 3 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.

Merits' Government response

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

In relation to the points raised in paragraphs 7 and 8 of the Technical Scrutiny the Government wishes to clarify that a person wishing to commercially trade in plant material either through propagation or trade would need to be registered with the Food and Environment Research Agency (FERA). Part of this registration process would include an understanding that the Plant Health and Seed Inspectorate (PHSI) be would be able to inspect the fields intended for planting as well as subsequent crop inspections. Such crop inspections are standard practice in the production of small seed and seed potatoes and are carried out with the agreement of the farmer. An authorised official would not normally require access to private dwelling houses as crops are not grown within the dwelling and it is not policy to gain entry by force. It is for this reason why this was not discussed in the consultation or explanatory memorandum.

The Government does not agree that the protection afforded by the requirement to obtain a warrant before entering a private dwelling-house has been diluted. Article 38 makes new provision in respect of powers of entry, but it does not allow entry by force or entry in the absence of notification to an occupier, save where a warrant has been obtained.

Equivalent provision is made to article 38 of the Plant Health (England) Order 2005 by article 5 of the Plant Health (England) (Amendment) Order 2010 (SI 2101/1510). The equivalent legislation in Northern Ireland has not yet been laid.

Committee Consideration

The Committee noted:

- The report and views of its legal advisers;
- The Government's response;
- The views of the Minister for Rural Affairs, in relation to a previous Committee report relating to powers of entry (a copy of this letter is attached).

The Committee agreed that:

- Reliance on warrants to grant entry to private property was well tested and should be the norm unless there were sound public policy reasons for doing otherwise;
- The nature of the regulations did not suggest any urgent or overriding threat to public health or to protect the public good that might require a power of entry unsanctioned by warrant;
- There was, therefore, doubt whether the power was proportionate in the circumstances and this appeared to raise doubts whether the Order was *intra vires*;
- The human rights implications of the powers concerned suggested that the Order gave rise to issues of political or legal importance or issues of public policy likely to be of interest to the Assembly;
- The Chair should write to the Minister setting out the Committee's concern that powers of entry should generally be authorised by warrant unless there were sound public policy reasons for doing otherwise; and
- The Committee should report accordingly to the Assembly under Standing Orders 15.2 and 15.3.