



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

38th Report, 2012 (Session 4)

Scottish Civil Justice Council and Criminal Legal Assistance Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

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)

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Subordinate Legislation Committee

38th Report, 2012 (Session 4)

Scottish Civil Justice Council and Criminal Legal Assistance Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 12 and 26 June 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Scottish Civil Justice Council and Criminal Legal Assistance Bill¹ (“the Bill”) at Stage 1. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Scottish Civil Justice Council and Criminal Legal Assistance Bill was introduced in the Parliament on 2 May 2012 by Kenny MacAskill MSP. It is a Government Bill which establishes the Scottish Civil Justice Council and makes provision about contributions in respect of criminal legal assistance.

3. The Scottish Government has provided a Delegated Powers Memorandum (DPM)² setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.

4. In the consideration of the memorandum at its meeting on 12 June, the Committee agreed to write to the Scottish Government to raise questions on a number of the delegated powers. This correspondence is reproduced in the Annex.

DELEGATED POWERS PROVISIONS

5. The Committee considered each of the delegated powers provisions in the Bill.

¹ Scottish Civil Justice Council and Civil Legal Assistance Bill. Available at: http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd.pdf

² Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/DPM.pdf

Subordinate Legislation Committee, 38th Report, 2012 (Session 4)

6. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections 6, 17 (inserting new section 8A(1A) of the Legal Aid (Scotland) Act 1986, 18(1) (inserting new section 9(2)(dda) of that Act, section 20 (inserting new section 25AD of that Act), section 22 (inserting new section 33ZA of that Act), section 23(4), section 23(5), section 23(9), and section 25.

7. The Committee's comments and, where appropriate, recommendations on the other delegated powers are detailed below.

Section 18(2) – new section 9B of the 1986 Act (scheme of eligibility)

| | |
|---------------------------------|--|
| Power conferred on: | the Scottish Legal Aid Board |
| Power exercisable by: | scheme (not by Scottish statutory instrument) |
| Parliamentary procedure: | no parliamentary procedure |

| | |
|---------------------------------|-----------------------------------|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | directions |
| Parliamentary procedure: | no parliamentary procedure |

Background

8. The delegated power which is inserted by section 9(2)(dda) of the 1986 Act will enable the Scottish Ministers to disapply the existing eligibility criteria for assistance by way of representation ("ABWOR") and replace them with the criteria in sections 9A and 11A of the 1986 Act. One of the criteria in section 9A(2)(a) is that the scheme of eligibility provides that the fees and outlays of the ABWOR cannot be met without undue hardship to the client or the dependants of the client. "Scheme of eligibility" means a scheme approved under section 9B(3).

9. Section 9B(1) makes provision for the preparation and publication of a scheme of eligibility by the Scottish Legal Aid Board ("the Board"). It is to set out the financial circumstances which the Board considers would constitute undue hardship for a client or the dependants of that client if they were required to meet the fees and outlays in respect of ABWOR. The scheme requires to be submitted to the Scottish Ministers for approval (section 9B(2)) and they may approve it with or without modification (section 9B(3)). Provision is also made for the Ministers to approve a modification to an approved scheme, or to withdraw approval at any time (section 9B(4)).

10. Separately, the Scottish Ministers may give the Board directions as to the preparation and publication of a scheme of eligibility, and the Board must comply with those directions (section 9B(5)).

Scheme of eligibility

11. The Committee asked the Scottish Government to explain why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given its stated position (in paragraph 17 of the DPM) that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny. As noted above, the Scottish Government response is set out in the Annex.

Subordinate Legislation Committee, 38th Report, 2012 (Session 4)

12. Section 9B involves the delegation of power to the Board to prepare and publish the scheme of eligibility, subject to approval of the scheme by the Scottish Ministers. That delegation is not by way of a power to make subordinate legislation. As a result, the scheme of eligibility will not be subject to any parliamentary procedure. It will not be laid before the Parliament and it is not subject to the usual publication requirements for Scottish statutory instruments, although the scheme is required to be published in some form.

13. The response to the Committee explained that the intention underlying the new section 9A(1) of the 1986 Act is that the solicitor acting will have discretion to carry out the assessment of undue hardship. In turn, it is intended that the scheme setting out the financial circumstances which consist of undue hardship will be within the Board's discretion to define, from time to time. This will be subject to approval of (and possible later withdrawal by) the Scottish Ministers. This is intended to be analogous to the Board's existing non-statutory guidance which is issued on undue hardship in relation to criminal legal aid cases. The scheme will require to be rather complex. It may set out other circumstances which may amount to undue financial hardship, apart from an applicant's income level. The scheme is intended to take into account information on average case costs, and could summarise what is treated as income and capital, when calculating a particular applicant's resources.

14. The Committee noted, however, that the Scottish Government's response did not offer a satisfactory explanation why making the scheme by Scottish statutory instrument would not be sufficiently flexible to enable the ABWOR scheme to operate. It also did not offer an explanation why it is not appropriate that the Parliament should be required to approve, or have power to annul, the scheme. The statement of the circumstances which amount to undue hardship has significant consequences for the operation of the ABWOR arrangements and the payments which will be made to applicants. One of the criteria for ABWOR to be available in terms of the inserted section 9A(1) and (2) is that the solicitor is to be satisfied that the fees and outlays of the assistance cannot be met without the undue hardship.

15. The Committee also noted that what a scheme will set out is defined in the inserted section 9B(1). It is to set out the financial circumstances in which the Board considers that paying the fees and outlays in respect of assistance by way of representation will result in undue hardship for a client or their dependants. That provision does not include discretionary elements within it. The scheme is proposed to define the relevant financial circumstances which amount to undue hardship.

16. The Committee also noted that it would appear to be technically possible to provide that the scheme could be made in the form of a Scottish statutory instrument, whether made by the Board with approval of the Scottish Ministers or made by the Ministers.

Conclusion

17. The Committee considers that the proposed power to make a scheme of eligibility is a power of significance which it appears could be expressed as a power to make subordinate legislation by means of making a Scottish statutory

instrument. The Committee considers that the Scottish Government has not justified in satisfactory terms within the DPM, or in response to the questions raised, why the power to make this scheme should not be subject to the approval of the Parliament. The Committee would accept that if there are good reasons why the scheme should not be subject to the affirmative procedure but rather the negative procedure – for example, that a modification could be required within the dates when the Parliament is in recess – then it is possible that the negative procedure could be applied as suitable for scrutiny of the scheme. However, taking into account the Government's response on this power, the Committee's view is that the scheme should at least be capable of annulment by the Parliament.

18. The Committee considers that the power in section 18(2) (inserting section 9B of the 1986 Act) enabling the Scottish Legal Aid Board to make a scheme of eligibility with the approval of the Scottish Ministers is a significant power which would be more appropriately expressed as a power to make subordinate legislation, by means of a Scottish statutory instrument. The Committee considers that, unless there is good reason to the contrary, a draft scheme should be laid subject to affirmative procedure.

19. The Committee accordingly asks the Scottish Government to consider this further in advance of Stage 2. It also requests that the Government indicates in response to this report whether it considers that any difficulties would arise with the suggestion that the scheme could be subject to the affirmative procedure.

Direction-making power in the inserted section 9B(5) of the 1986 Act

20. The Committee also asked the Scottish Government to explain why the direction-making power in the inserted section 9B(5) of the 1986 Act is necessary, given its extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility.

21. The Scottish Government's response explains that the proposed direction-making power is not intended to amount to any further powers of the Scottish Ministers to modify the contents of the scheme. It is intended to enable directions on the procedural matters of possible consultation requirements when preparing the draft scheme, or the method of publication.

22. The Committee is satisfied that this power of direction should not be exercisable in the form of a Scottish statutory instrument. However, the Committee considers that this power in the inserted section 9B(5) is generally framed to permit any directions which the Board must comply with in the course of preparing and publishing the scheme.

23. The Scottish Government's response to the Committee has clarified that the power is intended to cover any consultation or method of publication (and so procedural) requirements only. From the viewpoint of users' understanding and accessibility of this provision, the Committee considers that the Scottish Government should consider in advance of Stage 2 of the Bill whether the power to direct in the inserted section 9B(5) could be more clearly or narrowly drawn, so that the power enables directions on consultation, method of publication or other procedural requirements.

24. The Committee therefore recommends that the Scottish Government should consider in advance of Stage 2 of the Bill whether the power of direction in section 9B(5) of the 1986 Act (inserted by section 18(2)) should be more clearly or narrowly drawn. The Scottish Government has indicated to the Committee that this power is intended to relate to consultation, method of publication or other procedural arrangements in preparing and publishing the scheme of eligibility, rather than generally allow any direction which the Board must comply with in carrying out such preparation and publication.

Section 24 – ancillary provision

| | |
|---------------------------------|---|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | order |
| Parliamentary procedure: | affirmative procedure where making textual amendments to primary legislation, and otherwise negative procedure |

Background

25. Section 6 of the Bill specifies the composition of the Scottish Civil Justice Council, in terms of maximum number of members and categories of members. Section 6(3) enables the Scottish Ministers to vary by order the maximum number of members on the Council, and to vary the minimum number in a category of membership. This power has attached to it its own ancillary provision in section 6(5). This permits the making of such supplementary, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

26. It is expressly provided, however, in section 6(6) that these powers may not be used to modify the description of a category of membership or to add a category of membership. Section 6(4) requires the Ministers to consult with the Lord President before making an order under section 6(3).

27. Section 24 contains general ancillary powers for the Bill. Section 24(1) allows the Scottish Ministers to make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Bill. Section 24(2) provides that such an order may make different provision for different purposes. Section 24(3) provides that this power may be used to modify this or any other enactment. Section 24(5) provides that, where the power is exercised so as to amend any part of the text of an Act, then the affirmative procedure applies. Otherwise, negative procedure applies.

28. The Committee accepted those scrutiny procedures applying to the powers.

29. The Committee asked the Scottish Government whether, given the existence of the specific power in section 6(3) to modify that section and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24. It also asked whether, if that is not the case, the Scottish Government intends to exclude the possibility of using an order under section 24 to modify section 6.

Subordinate Legislation Committee, 38th Report, 2012 (Session 4)

30. As noted above, the Scottish Government's response is reproduced in the Annex.

Comments

31. On the face of it, section 24 may modify any provision of the Bill, including section 6. Section 6(3) confers a very specific power to modify aspects of section 6. Section 6(6) is then expressed as a specific limitation on that power: it does not include power to modify the description of a category of membership or to add a new category. The response by the Scottish Government acknowledges that an order under section 24 which purported to augment the power in section 6(3) by modifying categories of membership would circumvent the clear intent of section 6(6), and would be contrary to the Act. The Committee welcomes this view. However, it observes that the views and intentions of the present administration cannot be determinative of the matter when the unrestricted section 24 power will appear on the statute book until it is repealed, and so will be available to any future administration, including one which took a different approach to this matter.

32. For this reason, and from the viewpoint of the reader and in the interests of the accessibility of the provisions, the Committee considers that it would be preferable to put the matter beyond doubt by providing that an ancillary order under section 24 should not be capable of modifying or repealing the specific exclusion made by section 6(6) on the categories of membership.

33. The Committee considers that it should be made clearer within section 24 that the powers in that section to make ancillary provisions for the purposes of or in connection with the Bill do not include the power to modify or repeal the specific restriction which is contained in section 6(6), as to the description of the categories of membership of the Scottish Civil Justice Council.

Correspondence with the Scottish Government

On 12 June 2012, the Subordinate Legislation Committee wrote to the Scottish Government as follows:

**Scottish Civil Justice Council and Criminal Legal Assistance Bill
at Stage 1**

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 12 June and seeks an explanation of the following matters:

Section 18(2) – new section 9B of the 1986 Act (scheme of eligibility)

Power conferred on: the Scottish Legal Aid Board
Power exercisable by: scheme
Parliamentary procedure: no parliamentary procedure

Power conferred on: the Scottish Ministers
Power exercisable by: directions
Parliamentary procedure: no parliamentary procedure

2. Section 18(2), which inserts new section 9B into the Legal Aid (Scotland) Act 1986, enables the Scottish Ministers to disapply the existing eligibility criteria for assistance by way of representation.

3. A new scheme of eligibility, prepared and published by the Scottish Legal Aid Board, would have to meet certain criteria, including on the avoidance of undue hardship to clients or their dependants. Separately, the Scottish Ministers may give the Board directions as to the preparation and publication of a scheme of eligibility, and the Board must comply with those directions.

4. The Committee asks the Scottish Ministers to explain:

- why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given their stated position that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny; and
- why the direction-making power in section 9B(5) of the 1986 Act is necessary, given the Scottish Ministers' extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility?

Section 24 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure where making textual amendments to primary legislation, and otherwise negative procedure

5. Section 24 allows the Scottish Ministers to make such ancillary provision as they consider necessary or expedient for the purposes of or in connection with this

Subordinate Legislation Committee, 38th Report, 2012 (Session 4)

Bill. However, there is an overlap between this provision and the bespoke ancillary powers provision in section 6(5), which may be used when making provision under section 6(3) on the number of members of the Scottish Civil Justice Council.

6. The Committee asks the Scottish Government:

- whether, given the existence of the specific power in section 6(3) to modify that section, and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24; and
- if that is not the case, whether it intends to exclude the possibility of using an order under section 24 to modify section 6.

On 19 June 2012, the Scottish Government responded as follows:

Section 18(2) – new section 9B of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”)

You have asked that the Scottish Government explain why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given our stated position is that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny; and why the direction-making power in section 9B(5) of the 1986 Act is necessary, given the Scottish Ministers’ extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility.

In answer to the first part of the question, the Scottish Legal Aid Board (“the Board”) currently applies the ‘undue hardship’ financial eligibility test in relation to summary and solemn criminal legal aid applications and in doing so has discretion about what constitutes ‘undue hardship’ in each and every application. The Board requires this discretion as application of the ‘undue hardship’ test is very dependant on an individual’s case and circumstances. The Scottish Ministers are prevented under section 3 of the 1986 Act from giving any directions to the Board in relation to individual cases.

The Board currently issues guidance to the profession on how it applies the undue hardship test to applications for criminal legal aid and the kind of factors it takes into consideration. This guidance is non-statutory. Its status as guidance allows the Board to be as specific as it can be, in order to assist and inform practitioners, without limiting its discretion to consider all the circumstances of a case. Being guidance the Board can also alter it as necessary to reflect changes in what it considers would be undue hardship, for example as a result of changing financial circumstances in Scotland generally.

At present solicitors assess financial eligibility for Assistance By Way of Representation (“ABWOR”) in certain criminal manners, most notably where a plea of guilty has been tendered. In carrying out the financial assessment, solicitors refer to regulations which prescribe what is counted as capital and

Subordinate Legislation Committee, 38th Report, 2012 (Session 4)

income and other figures that are fixed by the Scottish Government and set out in the Board's Advice and Assistance Keycard ("the Keycard").

Section 18 of the Bill inserts a new section 9A into the 1986 Act which provides for a new financial eligibility test for certain criminal ABWOR proceedings to be based on undue hardship. The assessment of undue hardship will be carried out by the solicitor. The Bill proposes that a scheme of eligibility ("the scheme"), which would be analogous to the Board's existing non-statutory guidance for criminal legal aid cases, would be prepared and published by the Board and would be used by solicitors where applying the undue hardship test. However, section 18 also provides for a new regulation making power which will allow Scottish Ministers to prescribe the proceedings in which the new provisions about criminal ABWOR are to apply. These regulations will be subject to the affirmative procedure thereby ensuring thorough Parliamentary scrutiny.

Scottish Government officials have been discussing with the Board what will be in the scheme of eligibility. The scheme will probably be similar in approach to the ABWOR Keycard currently available to practitioners and the non-statutory guidance for criminal legal aid cases. It is expected that the scheme will set out when discretion may be exercised to grant criminal ABWOR even where the applicant appears to have too much income. This could occur where there are other circumstances of the case which would mean that undue hardship would be caused if criminal ABWOR were not provided. This discretion will only be exercised by the Board upon an application made to them either by the solicitor or the applicant. The scheme will include information on average case costs, so that a practitioner can factor in the likely total cost of a case in assessing the undue hardship of the applicant paying for his/her own representation. It is likely that the scheme will also summarise what is provided for in regulations about what should be treated as capital and income when calculating an applicant's financial resources.

In answer to the second part of the question, the powers of Scottish Ministers to approve, reject or modify a scheme (under section 9B(4)) are different to the power (in section 9B(5)) to make directions about the preparation or publication of a scheme. For example, Scottish Ministers might direct the Board to consult with the Law Society of Scotland when preparing the scheme, or to publish the scheme in a particular way to ensure the widest possible knowledge of it. The direction making power could be used to achieve both these things.

Section 24 – Ancillary provision

You have also asked whether, given the existence of the specific power in section 6(3) to modify that section, and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24; and if that is not the case, whether the Scottish Government intends to exclude the possibility of using an order under section 24 to modify section 6.

In response, it is considered that it would be possible for the order making power in section 24 to be used to modify any of the sections of the Act including section 6

Subordinate Legislation Committee, 38th Report, 2012 (Session 4)

provided that any modifications are consistent with the power in section 24 – necessary or expedient for the purposes of or in connection with the Act.

However, the power in section 24 must be read in the light of other specific provisions and powers in the Bill. In particular, the general power's applicability will be excluded in any instance where there is a specific power which already makes similar provision.

Section 6 provides a specific order making power for use in amending the numbers in any membership category in section 6(1). The Scottish Government considers that section 24 could therefore not be used to amend section 6(1) in the same way as section 6(3) provides. Similarly, the Scottish Government considers that the power in section 24 could not be used to amend out the specific limitation contained in section 6(3). An order under section 24 is to be used only "for the purposes of or in connection with the Act". It is clear that the Act, in being explicit in section 6(6) as to the limitation on the use of the order making power in section 6(3), does not envisage the use of the power in section 6(3) to effect the modification or addition of a category of membership. Accordingly the Scottish Government is of the view that any order under section 24 which purported to augment the power in section 6(3) by modifying categories of membership would circumvent the clear intent of section 6(6) and would be contrary to the Act and not within the powers in section 24.

The Scottish Government does not consider that it is necessary to exclude the possibility of using section 24 in different circumstances relevant to section 6 as the position is covered adequately by the normal rules of statutory interpretation.

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