

**Examiner of Statutory Rules**

**Report of the  
Examiner of Statutory Rules  
to  
the Assembly  
and  
the Appropriate Committees**

**9 April 2014  
NIA 171/11-15**

Committee for Agriculture and Rural Development	S.R. 2014 No. 96
Committee for Employment and Learning	S.R. 2014 Nos. 88, 97
Committee for the Environment	S.R. 2014 No. 77
Committee for Finance and Personnel	S.R. 2014 No. 99
Committee for Regional Development	S.R. 2014 No. 91
Committee for Social Development	S.R. 2014 Nos. 98, 101, 102, 103, 105



1. In accordance with the delegations in respect of the technical scrutiny of statutory rules under Standing Order 43(4)(b) given to the Examiner of Statutory Rules by the appropriate Committees on 25, 26 and 31 May and 1 June 2011 for this mandate of the Assembly, I submit my report on the statutory rules listed in the Appendix.
2. My terms of reference are essentially set out in Standing Order 43(6) (taken with the delegations under Standing Order 43(4)(b)). They are as follows:
  - “(6) In scrutinising an instrument the appropriate Committee shall inter alia consider the instrument with a view to determining and reporting on whether it requires to be drawn to the special attention of the Assembly on any of the following grounds, namely, that –
    - (a) it imposes a charge on the public revenues or prescribes the amount of any such charge;
    - (b) it contains provisions requiring any payment to be made to any Northern Ireland department or public body in respect of any approval, authorisation, licence or consent or of any service provided or to be provided by that department or body or prescribes the amount of any such payment;
    - (c) the parent legislation excludes it from challenge in the courts;
    - (d) it purports to have retrospective effect where the parent legislation confers no express authority so to provide;
    - (e) there appears to have been unjustifiable delay in the publication of it or in the laying of it before the Assembly;
    - (f) there appears to be a doubt whether it is intra vires or it appears to make some unusual or unexpected use of the powers conferred by the parent legislation;
    - (g) it calls for elucidation;
    - (h) it appears to have defects in its drafting;

or on any other ground which does not impinge on its merits or the policy behind it.”.

## Statutory rules to which attention is drawn in this report

**The Sea Fishing (Financial Assistance to Fishing Boats) Regulations (Northern Ireland) 2014 (S.R. 2014/96)**

3. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Sea Fishing (Financial Assistance to Fishing Boats) Regulations (Northern Ireland) 2014 (S.R. 2014/96) on the ground that they were laid in breach of the 21-day rule.** The regulations were made on 21 March 2014, were laid on 26 March 2014 and came into operation on 26 March 2014. But the urgency is clear, and is expressly referred to in the Explanatory Memorandum. Accordingly, the Department seems to have acted reasonably in laying the Regulations as it did.
4. I also commend the Department for the way in which it set out the preamble/recital to the Regulations, reciting both the determination of the First Minister and deputy First Minister and the designation of the Department so as to reflect the Financial Assistance Act (Northern Ireland) 2009.. I had suggested this in a number of previous reports. I am happy to say that this accords with my suggestions.

**The Housing Benefit (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/98)**

5. **I draw the attention of the Committee for Social Development and the Assembly to the Housing Benefit (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/98) on the ground that they were laid in breach of the 21-day rule, explained by the Department for Social Development.** The Regulations were made on 26 March 2014 and were laid on the same day. They came into operation on 1 April 2014 and the same time as the corresponding Regulations for Great Britain (S.I. 2014/539), made on 6 March 2014. The Department had earlier (4 March 2014) submitted its policy proposal (SL1) to the Committee and there had been some discussion between the Department and the Committee at the meetings of the Committee on 6 and 20 March 2014 (a meeting on 13 March 2014 having been adjourned). The Committee had deferred consideration of the proposed statutory rule at both those meetings and had sought further clarification. (I note from the Committee minutes that there was a vote on the proposal on 20 March 2014 to the effect that a majority of members voting were not then content for the proposal to proceed, and that further clarification was sought on that basis.) The next available meeting was 27 March 2014, but the Committee was, it seems, discussing its forward work plan at that meeting and was not taking other business. The Department accordingly took the decision, based on long-standing parity considerations (parity of timing and substance in social security matters), to make and lay the Regulations on 26 March 2014 so as to have them in operation on 1 April 2014. Additionally, the Regulations were a consequence of the United Kingdom Government's policy on immigration. In the circumstances of this, I consider that all I can do is to put the chronology of this, as presented to me by way of explanation from the Department on the breach of the 21-day rule, succinctly before the Committee and the Assembly. Technical scrutiny expressly lies outside the policy and merits of a statutory rule and accordingly outside my terms of reference under my delegated authority.

**The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014 (S.R. 2014/102)**

6. **I draw the attention of the Committee for Social Development and the Assembly to the Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014 (S.R. 2014/102) on the ground that they were laid in breach of the 21-day rule arising from a drafting defect, acknowledged by the Department for Social Development.** The Regulations were made and laid on 31 March 2014 and came into operation on 1 April 2014, matching the commencement of the corresponding Regulations for Great Britain. There appeared on the face of the Regulations, as laid, to be no breach of the 21-day rule since the Regulations were (purportedly) made under the confirmatory procedure (requirement to obtain approval of Assembly before the expiration of six months from their coming into operation) rather than under the negative resolution procedure. Unfortunately, the Department had wrongly assumed that the confirmatory procedure was available to it, the corresponding Regulations for Great Britain having been made under the draft affirmative procedure at Westminster; and that would normally have been the case under social security legislation (where statute specifically provides for the confirmatory procedure). But these Regulations (and the corresponding Regulations for Great Britain) were made under section 2(2) of the European Communities Act 1972 and under no other power: under section 2(2), the Regulations may be made either using the draft affirmative procedure or negative resolution. So, not having been made under the draft affirmative procedure, the Regulations were necessarily subject to negative resolution, and the purported use of the confirmatory procedure had no effect whatsoever. The Department

now acknowledges this (and hence the breach of the 21-day rule). At my suggestion, it has substituted a version of the statutory rule that does not bear the italicised header wrongly indicating the confirmatory procedure. I would add that these Regulations were made at a particularly busy period for the Department and that the use of section 2(2) of the European Communities Act 1972 (rather than powers under social security legislation) was a rare event for the Department. But clearly departments must follow the procedures laid down by the legislature. Fortunately for the Department, there was no effect on the validity of the Regulations in this case.

**W G Nabney**

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## Appendix

*(The attention of the appropriate Committees and the Assembly is drawn to those statutory rules marked in bold)*

### Statutory rule requiring the approval of the Assembly (confirmatory procedure)

The Employment Relations (Northern Ireland) Order 1989 (Blacklists) Regulations (Northern Ireland) 2014 (S.R. 2014/88)

### Statutory rules subject to negative resolution

The Fluorinated Greenhouse Gases (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/77)

The Trewmount Close, Killyman, Dungannon (Abandonment) Order (Northern Ireland) 2014 (S.R. 2014/91)

#### **The Sea Fishing (Financial Assistance to Fishing Boats) Regulations (Northern Ireland) 2014 (S.R. 2014/96)**

The Education (Student Support) (No. 2) Regulations (Northern Ireland) 2009 (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/97)

#### **The Housing Benefit (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/98)**

The Registered Rents (Increase) Order (Northern Ireland) 2014 (Northern Ireland) 2014 (S.R. 2014/101)

#### **The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-Employed Earner) Regulations (Northern Ireland) 2014 (S.R. 2014/102)**

The Secure Tenancies (Notice) Regulations (Northern Ireland) 2014 (S.R. 2014/103)

The Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2014 (S.R. 2014/105)

### Statutory rule required to be laid but not subject to Assembly proceedings

The Pensions Increase (Review) Order (Northern Ireland) 2014 (S.R. 2014/99)





Published by Authority of the Northern Ireland Assembly,  
Belfast: The Stationery Office

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Printed in Northern Ireland by The Stationery Office Limited  
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ISBN 978-0-339-40430-4

