

Examiner of Statutory Rules

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

**29 May 2015
NIA 250/11-16**

Committee for Agriculture and Rural Development	S.R. 2015 No. 248
Committee for Culture, Arts and Leisure	S.R. 2015 No. 239
Committee for Employment and Learning	S.R. 2015 No. 243
Committee for Enterprise, Trade and Investment	S.R. 2015 No. 249
Committee for the Environment	Draft S.R.: The Planning (Amount of Fixed Penalty) Regulations (Northern Ireland) 2015 S.R. 2015 Nos. 231, 238, 242
Committee for Justice	S.R. 2015 Nos. 236, 241
Committee for Regional Development	S.R. 2015 Nos. 244, 253
Committee for Social Development	S.R. 2015 No. 207

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 –

 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 Social Security (Application of Reciprocal Agreements with Australia, Canada and New Zealand) (EEA States and Switzerland) Regulations (Northern Ireland) 2015 (S.R. 2015/207)

3. **I draw the attention of the Committee for Social Development and the Assembly to the Social Security (Application of Reciprocal Agreements with Australia, Canada and New Zealand) (EEA States and Switzerland) Regulations (Northern Ireland) 2015 (S.R. 2015/207) on the ground that they are of doubtful vires, having been purportedly made by the Department for Work and Pensions (as a statutory rule not subject to laying and subject to no Assembly procedure) under section 2(2) of the European Communities**

Act 1972. The Department for Work and Pensions acknowledges the error. Regulations made by DWP under section 2(2) of the European Communities Act 1972 should have been made by statutory instrument and laid before Parliament, in this case under the negative resolution procedure there (in common with the corresponding Regulations for Great Britain). Alternatively, in this case, they could have been made by the Department for Social Development by statutory rule subject to negative resolution. So the Regulations are “neither fish nor fowl, nor good red herring”, as it were, and accordingly are of doubtful vires. The Department for Social Development intends to regularise the position by revoking the Regulations and making fresh Regulations, by statutory rule, under section 2(2) of the European Communities Act 1972 subject to negative resolution.

<p>The Hazardous Waste (Amendment Regulations (Northern Ireland) 2014 (S.R. 2014/238)</p>
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4. **I draw the attention of the Committee for the Environment and the Assembly to the Hazardous Waste (Amendment Regulations (Northern Ireland) 2014 (S.R. 2014/238) on the ground that they are defectively drafted in one respect, acknowledged by the Department of the Environment.** Regulations 2(2), 3(2), 4(2)(a), 5(2)(a), (3) and (4)(c) make amendments containing references to provisions of EU instruments intended to be construed as references to those provisions as amended from time to time (ambulatory references). Accordingly, the preamble should have recited this and invoked the power in paragraph 1A of Schedule 2 to the European Communities Act 1972 in addition to the power in section 2(2) of that Act. Cf SSI 2015/188, which makes broadly similar amendments for Scotland. The Department intends to make further Regulations correcting this, and I understand that work its well advanced on this. To do this the Department will, it seems, need to make the amendments again (and revoke these amending Regulations for good measure): that is because the preamble to these Regulations cannot be amended since its purpose is merely to set out the circumstances of the making of the Regulations at the time when they are made. I understand that the Department intends to proceed in this way.
5. **I also draw attention to a breach of the 21-day rule, explained by the Department of the Environment.** The Regulations were made on 1 May 2015, were laid on 13 May 2015 and came into operation on 1 June 2014 (to meet an EU deadline). The Department has apologised for the breach, which was caused by an unforeseen delay in the delivery of the printed copies. In future the Department intends to lay typescript copies when time is relatively tight, and indeed that is the in accordance with general guidance.

W G Nabney
Examiner of Statutory Rules

29 May 2015

Appendix

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

Draft statutory rule requiring the approval of the Assembly

The Planning (Amount of Fixed Penalty) Regulations (Northern Ireland) 2015

Statutory rule subject to affirmative resolution

The Londonderry Harbour (Variation of Limits) Order (Northern Ireland) 2015 (S.R. 2015/244)

Statutory rules subject to negative resolution

The Environmental Liability (Prevention and Remediation) (Amendment) Regulations (Northern Ireland) 2015 (S.R. 2015/231)

The Explosives (Appointment of Authorities and Enforcement) Regulations (Northern Ireland) 2015 (S.R. 2015/236)

The Hazardous Waste (Amendment) Regulations (Northern Ireland) 2015 (S.R. 2015/238)

The Fisheries (Amendment) Regulations (Northern Ireland) 2015 (S.R. 2015/239)

The Crown Court (Amendment) Rules (Northern Ireland) 2015 (S.R. 2015/241)

The Motor Vehicles (Driving Licences) (Amendment No. 2) Regulations (Northern Ireland) 2015 (S.R. 2015/242)

The Student Fees (Amounts) (Amendment) Regulations (Northern Ireland) 2015 (S.R. 2015/243)

The Less Favoured Area Compensatory Allowances (Amendment) Regulations (Northern Ireland) 2015 (S.R. 2015/248)

The Electricity and Gas (Ownership Unbundling) Regulations (Northern Ireland) 2015 (S.R. 2015/249)

The Glenavy Road/Ballinderry Road, Lisburn (Stopping-Up) Order (Northern Ireland) 2015 (S.R. 2015/253)

Statutory rule subject to laying and not subject to Assembly proceedings (purportedly)

The Social Security (Application of Reciprocal Agreements with Australia, Canada and New Zealand) (EEA States and Switzerland) Regulations (Northern Ireland) 2015 (S.R. 2015/207)



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