

Examiner of Statutory Rules

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

**6 September 2013
NIA 127/11-15R**

Committee for Enterprise, Trade and Investment	S.R. 2013 Nos. 199, 206, 207, 208
Committee for the Environment	S.R. 2013 Nos. 170, 183, 196, 197, 198, 205, 210
Committee for Health, Social Services and Public Safety	S.R. 2013 Nos. 172, 178, 180, 204
Committee for Justice	Draft: S.R: The Lands Tribunal (Salaries) Order (Northern Ireland) 2013 S.R. 2013 Nos. 202, 203
Committee for the Office of the First Minister and deputy First Minister	S.R. 2013 Nos. 171, 181
Committee for Regional Development	S.R. 2013 No. 188
Committee for Social Development	S.R. 2012 No. 159 ;S.R. 2013 Nos. 182, 190, 191, 209, 211

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 Fuel Allowances Payments Scheme Regulations (Northern Ireland) 2012
(S.R. 2012/159)**

3. **I draw the attention of the Committee for Social Development and the Assembly to the Fuel Allowances Payments Scheme Regulations (Northern Ireland) 2012 (S.R. 2012/159) on the ground that they were laid in breach of the 21-day rule (that is to say, the well-established rule of practice whereby a department or other rule-making authority should, in the case of a statutory rule that is subject to negative resolution, allow at least 21 days between the laying of the rule and its come into operation):** in this case the statutory rule was made on 20 March **2012** and came into operation on the same day; it was eventually laid nearly 16 months later on 9 July **2013**. The Department for Social Development has apologised to the Committee, I understand. The Department has put its hands up to this one and there is perhaps little than can be said at this late stage other than that it is perhaps an object lesson in how **not** to make and lay a statutory rule. That statutory rule has long since served its purpose. In fact, it seems that Regulations setting out the scheme were in fact made after the payments had actually been made because the timing had to be coordinated with the Social Security Agency and the Department for Work and Pensions computer system within a very short statutory time period running close to the end of the financial year. Ideally, of course, the Regulations should have been made, have been laid and have been in operation before the payments were made (say, by February 2012, given the events that happened).

There are probably lessons to be learnt there for all departments involved in the making of regulations such as these.

4. It seems that the designation of the Department for Social Development as the relevant department (and presumably also the determination required from the First Minister and deputy First Minister, acting jointly, under section 1(1) of the Financial Assistance Act (Northern Ireland) 2009) was made on 20 December 2011). **This brings me to a point I have stated in previous reports – in fact in all cases to date where the powers under Financial Assistance Act (Northern Ireland) 2009 have been exercised.** It seems to have fallen largely on deaf ears – or perhaps that should be blind eyes – across the departments. **It is a condition precedent of the exercise of powers under section 1 of the 2009 there must a determination in accordance with section 1(1) of that Act that the required circumstances have occurred; and the scheme must be made by the relevant department within 3 months of the determination. It seems to me, therefore, that the date of the determination should be recited in the preamble/recital of powers.** Here is what I said in my Twelfth Report for Session 2008/2009 (11 March 2009), when I offered a precedent by way of guidance to departments. I think it is worth repeating now:

“This is the first exercise of powers under the Financial Assistance Act and it seems to me that it might be useful by way of guidance to Departments if I were to set out my view as to how the preamble should look in regulations such as these Regulations that are made under that Act by a department other than the Office of the First Minister and deputy First Minister (OFMDFM) (two conditions precedent — that is to say, the determination and the designation, followed by the exercise of the powers by the relevant department, followed by the approval of OFMDFM), thus:

“The First Minister and deputy First Minister, acting jointly, made on [date of determination] a determination under section [1(1)][2(1)] of the Financial Assistance Act (Northern Ireland) 2009(a); and, acting jointly, they have designated the Department [xxxxxxxxxx] as the relevant department under section [1(3)(a)][2(3)(a)] of that Act.

Accordingly, the Department [xxxxxxxxxx] [, having consulted [name of public body] in accordance with section [1(6)][2(6)] of that Act,] makes the following Regulations in exercise of the powers conferred by sections [1(2)][2(2)] and 3 of that Act.

OFMDFM approves the Regulations in accordance with section [1(4)][2(4)] of that Act.”.

That seems to me to be the logical order for the preamble in light of the structure of the enabling provisions in the Act (in this case, section 1), which provisions are perhaps rather unusual. I mention also that the exercise of the powers are time-bound from the date of the determination (3 months under section 1; 6 months under section 2), so that it would be advisable to recite the date of the determination on the face of the preamble for completeness of statement, lest any question were to arise on this. I hope that Departments find this helpful for the future, should the need to exercise the powers arise. (It does not arise in this case, but I merely mention for completeness the requirement for consultation under sections 1(6) and 2(6) of the Act where the scheme contained in the regulations imposes functions on a public body other than the Department: where such a requirement arises, that could be recited at a suitable place — perhaps in the second paragraph of the preamble)”

5. Accordingly, I draw attention to the breach of the 21-day rule and also reiterate my guidance on setting out the recital of powers/preamble in respect of regulations made under the Financial Assistance Act (Northern Ireland) 2009.

The Specified Products from China (Restriction on First Placing on the Market) Regulations (Northern Ireland) 2013 (S.R. 2013/180)

6. **I draw the attention of the Committee for Health, Social Services and Public Safety to the Specified Products from China (Restriction on First Placing on the Market) Regulations (Northern Ireland) 2013 (S.R. 2013/180) on the ground that they were laid in breach of the 21-day rule.** The explanation put forward by the Food Standards Agency that the Regulations had to be in place by 4 July 2013 to meet EU obligations under the relevant Commission Decision (Decision 2013/287/EU) appears to be reasonable. The Regulations were made on 2 July 2013, were laid on 3 July 2013 and came into operation on 4 July 2013, and is in line with regulations in other parts of the United Kingdom.

The Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/209)

7. **I draw the attention of the Committee for Social Development and the Assembly to the Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/209) on the ground that they were defectively drafted in one respect as drawn to my intention by the Department for Social Development.** The Department drew my attention to the erroneous reference to “rent officer” in regulation 3(4) (substituted paragraph 2(11) to the 2008 Regulations being amended): this should have been a reference to “the Executive” (the Northern Ireland Housing Executive). The intention seems reasonably clear from the context and the Department intends to correct the reference in a set of Regulations to be made later this year.

The Charities Act 2008 (Transitional Provision) Order (Northern Ireland) 2013 (S.R. 2013/211)

8. **I draw the attention of the Committee for Social Development and the Assembly to the Charities Act 2008 (Transitional Provision) Order (Northern Ireland) 2013 (S.R. 2013/211) on the ground that it was laid in breach of the 21-day rule.** It was made quickly in light of a decision of the Charity Tribunal in May 2013. In accordance with an earlier Transitional Provision Order, the Tribunal held that a body treated as a charity had to be not only granted charitable status for tax purposes by HMRC but also to have been established under the law of Northern Ireland for charitable purposes only. This did not accord with the policy intention and the Department strove to have the amending Order in place as soon as possible so that bodies so treated as charities come within the remit of the Charities Commission pending a decision on their registration under the 2008 Act. The Order was made and laid on 11 August 2013 and came into operation on 19 August 2013. In the circumstances the Department’s explanation seems to be reasonable.

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)

Draft statutory rule requiring the approval of the Assembly

Draft S.R.: The Lands Tribunal (Salaries) Order (Northern Ireland) 2013

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

The Child Support and Claims and Payments (Miscellaneous Amendments and Changes to the Minimum Amount of Liability) Regulations (Northern Ireland) 2013 (S.R. 2013/190)

Statutory rules subject to negative resolution

The Fuel Allowances (Payments Scheme) Regulations (Northern Ireland) 2012 (S.R. 2012/159)

The Motor Vehicles (Driving Licences) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/170)

The Inquiry into Historical Institutional Abuse Rules (Northern Ireland) 2013 (S.R. 2013/171)

The New Firefighters' Pension Scheme (Amendment No. 2) Order (Northern Ireland) 2013 (S.R. 2013/172)

The Healthy Start Scheme and Day Food Scheme Care (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/178)

The Specified foods from China (Restriction on First Placing on the Market) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/180)

The Sex Discrimination Code of Practice (Equal Pay) (Appointed Day) Order (Northern Ireland) 2013 (S.R. 2013/181)

The Child Support (Miscellaneous Amendments) Regulations (Northern Ireland) 2013 (S.R. 2013/182)

Local Government (Severance Payments to Councillors) Regulations (Northern Ireland) 2013 (S.R. 2013/183)

The Frome Street, Belfast (Abandonment) Order (Northern Ireland) 2013 (S.R. 2013/188)

The Social Fund Winter Payment (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/191)

The Road Traffic (Fixed Penalty) (Offences) (Amendment No. 2) Order (Northern Ireland) 2013 (S.R. 2013/196)

The Road Traffic (Fixed Penalty) (Amendment No. 2) Order (Northern Ireland) 2013 (S.R. 2013/197)

The Smoke Control Areas (Exempted Fireplaces) Regulations (Northern Ireland) 2013 (S.R. 2013/198)

The Employer's Liability (Compulsory Insurance)(Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/199)

The Rules of the Court of Judicature (Northern Ireland) (Amendment No. 2) 2013 (S.R. 2013/202)

The Optical Charges and Payments (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/204)

The Smoke Control Areas (Authorised Fuels) Regulations (Northern Ireland) 2013 (S.R. 2013/205)

The Biocidal Products and Chemicals (Appointment of Authorities and Enforcement) Regulations (Northern Ireland) 2013 (S.R. 2013/206)

The Biocidal Products and Chemicals (Fees and Charges) Regulations (Northern Ireland) 2013 (S.R. 2013/207)

The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations Northern Ireland) 2013 (S.R. 2013/208)

The Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/209)

Planning (General Development) (Amendment No. 2) Order (Northern Ireland) 2013 (S.R. 2013/210)

The Charities Act 2008 (Transitional Provision) Order (Northern Ireland) 2013 (S.R. 2013/211)

Statutory rules not subject to a laying requirement and not subject to Assembly proceedings

The Magistrates' Courts (Domestic Proceedings) (Amendment) Rules (Northern Ireland) 2013 (S.R. 2013/203)



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