

Examiner of Statutory Rules

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

**11 January 2013
NIA 90/11-15R**

Committee for Agriculture and Rural Development	S.R. 2012 Nos. 452, 456, 458, 459
Committee for Education	S.R. 2012 No. 444
Committee for Enterprise, Trade and Investment	S.R. 2012 Nos. 450, 454
Committee for the Environment	S.R. Nos. 437, 441, 442, 451, 453
Committee for Finance and Personnel	S.R. 2012 No. 455
Committee for Health, Social Services and Public Safety	S.R. 2012 No. 403
Committee for Justice	S.R. 2012 Nos. 430, 431, 446
Committee for the Office of the First Minister and deputy First Minister	S.R. 2012. No. 462
Committee for Regional Development	S.R. 2012 No. 448
Committee for Social Development	S.R. 2012 Nos. 426, 427, 428, 438, 439

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

Mental Health (Private Hospitals) Regulations (Northern Ireland) 2012 (S.R. 2012/403)

3. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Mental Health (Private Hospitals) Regulations (Northern Ireland) 2012 (S.R. 2012/403) on the ground that the Regulations are defectively drafted in one respect, acknowledged by the Department of Health, Social Services and Public Safety.** The point is simply that the paragraphing structure in paragraph 3(3)(p) to (x) is inconsistent with that adopted before and after in that paragraph (with a consequentially confusing numbering structure). The Department has acknowledged the point and intends to revoke and remake the Regulations tidying the numbering .
4. I made several other suggestions, including the omission in modified form of Article 28(5) (b) (further reference to guardianship, which seemed to be out of line with the other modifications) of the Mental Health Order alongside the omission of Article 28(6)(a), and I understand that is content to make that change also in the new version of the Regulations.

The Child Support (Meaning of Child and New Calculation Rules) (Consequential and Miscellaneous Amendments) Regulations (Northern Ireland) 2012 (S.R. 2012/438)

5. **I draw the attention of the Committee for Social Development and the Assembly to the Child Support (Meaning of Child and New Calculation Rules) (Consequential and Miscellaneous Amendments) Regulations (Northern Ireland) 2012 (S.R. 2012/438) on the**

ground that the Regulations are defectively drafted in one respect, acknowledged by the Department for Social Development.

6. I am grateful to the Joint Committee on Statutory Instruments at Westminster for drawing attention to the point in relation to the corresponding provisions for Great Britain (contained in S.I. 2012/2785) in its Fourteenth Report for Session 2012 – 13, published on 18 December 2012. The Joint Committee commented adversely on the structure and paragraphing of a definition of “arrears of child support maintenance” in regulation 1(6) for the Regulations for Great Britain. The definition was in following terms, using the corresponding definition in regulation 1(2) of the Regulations for Northern Ireland:

“arrears of child support maintenance” means—

- (a) any payment of child support maintenance which has become due in relation to a maintenance assessment, or a maintenance calculation made under the 2003 scheme rules, and not paid; and
- (b) the Department is arranging for the collection of that maintenance under Article 29 of the Child Support (Northern Ireland) Order 1991;”.

Taking the explanation from the Department for Work and Pensions and the Joint Committee's conclusions, it seems that the definition should be structured along the following lines:

“arrears of child support maintenance” means any payment of child support maintenance—

- (a) which has become due in relation to a maintenance assessment, or a maintenance calculation made under the 2003 scheme rules, which has not paid; and
- (b) for which the Department is arranging collection under Article 29 of the Child Support (Northern Ireland) Order 1991;”.

I understand that the definition is to be amended for both Great Britain and for Northern Ireland in a package of regulations to be made later this year.

The Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2012 (S.R. 2012/453)
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7. **I draw the attention of the Committee for the Environment and the Assembly to the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2012 (S.R. 2012/453) on the ground that the Regulations appear to be *ultra vires* because of a procedural defect in their making, acknowledged by the Department of the Environment.**
8. The Regulations are made under Article 4(1) of the Environment (Northern Ireland) Order 2002 using the negative resolution procedure provided for in Article 4(6). But they contain provision (in regulation 36(2)(a)) increasing a penalty on summary conviction from a fine not exceeding £30,000 to a fine not exceeding £50,000. That, in my view, has the effect of requiring them (that is, the whole regulations) to be made under the draft affirmative procedure (that is to say, the regulations cannot be made unless a draft of the regulations has been laid before, and approved by resolution of, the Assembly): see Article 4(7) and (8)(b) of the 2002 Order. Accordingly, since the regulations were made subject to negative resolution, the whole regulations seem to be *ultra vires* in that they were made without regard for a mandatory requirement (a necessary precondition or condition precedent) that they be made under the draft affirmative procedure, and I raised this with the Department.
9. The Department has indicated that, on further reflection, it considers it prudent to revoke and re-enact the Regulations by the draft affirmative procedure; and it undertakes to do so as soon as possible. That, with respect, seems to be most satisfactory: it also deals with another element of Article 4(7) and (8)(b) of the 2002 Order that I was not minded to

raise, namely, the possible creation of new offences: the Department had largely persuaded me that the Regulations in effect re-enacted existing offences but I had perhaps some lingering doubts about this, which the Department's decision to re-enact the draft affirmative procedure now fully allays. Accordingly, I commend the Department for the sensible approach it proposes to take. It is ultimately for the Department to ensure that what it enacts has the intended effect.

The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/462)

10. **I draw the attention of the Committee for the Office of the First Minister and deputy First Minister and the Assembly to the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/462) 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 body should, in the case of the a statutory rule that is subject to negative resolution, allow at least 21 days between the laying of the statutory rules and its coming into operation.** In this case, the Regulations were made and laid on 21 December 2012, and came into operation on the same day – so that they were also in operation before they were laid.
11. It was obvious from the outset that there would be a breach of the 21-day rule, given that the consultation ran from 29 October 2012 to 5 December 2012, and given that the amendment of the Sex Discrimination (Northern Ireland) Order 1976 had to be in place on 21 December 2012 meet the terms of the European Court of Justice's judgment in *Test-Achats v Council of Ministers* and its effect on the Gender Directive. But even if the consultation had run a few weeks earlier it seems likely that there would still have been a breach of the 21-day rule: I understand that the OFMdFM revised its Regulations in light of the corresponding regulations for Great Britain made on 29 November 2012, and plainly the Regulations had to be closely considered as they directly amended primary legislation; and that indeed seems to be the gist of OFMdFM's explanation as set out in paragraph 11.1 of the Explanatory Memorandum. Accordingly, the timing of the Regulations is perhaps reasonable in all the circumstances.

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 subject to affirmative resolution

Mental Health (Private Hospitals) Regulations (Northern Ireland) 2012 (S.R. 2012/403)

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

The Child Support Maintenance Calculation Regulations (Northern Ireland) 2012 (S.R. 2012/427)

The Child Support Maintenance (Changes to Basic Rate Calculation and Minimum Amount of Liability) Regulations (Northern Ireland) 2012 (S.R. 2012/428)

Statutory rules subject to negative resolution

The Occupational Pensions (Revaluation) Order Northern Ireland) 2012 (S.R. 2012/426)

The Rules of the Court of Judicature (Northern Ireland) (Amendment No. 3) 2012 (S.R. 2012/431)

The Producers Responsibility Obligations (Packaging Waste) (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/437)

The Child Support (Meaning of Child and New Calculation Rules) (Consequential and Miscellaneous Amendments) Regulations (Northern Ireland) 2012 (S.R. 2012/438)

The Child Support (Management of Payments and Arrears) (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/439)

The Strangford Lough (Sea Fishing Exclusion Zones) Regulations (Northern Ireland) 2012 (S.R. 2012/441)

The Water Framework Directive (Priority Substances and Classification) (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/442)

The Education (Levels of Progression for Key Stages 1, 2, and 3) Order Northern Ireland) 2012 (S.R. 2012/444)

The Police Act 1997 (Criminal Records) (Amendment No. 3) Regulations (Northern Ireland) 2012 (S.R. 2012/446))

The Greystone Road, Limavady (Abandonment) Order Northern Ireland) 2012 (S.R. 2012/448)

The Health and Safety (Miscellaneous Revocations) Regulations (Northern Ireland) 2012 (S.R. 2012/450)

The Motor Vehicles (Driving Licence) (Amendment No. 3) Regulations (Northern Ireland) 2012 (S.R. 2012/451)

The Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/452)

The Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2012 (S.R. 2012/453)

The Gas (Meter testing and Stamping) Regulations (Northern Ireland) 2012 (S.R. 2012/454)

The Superannuation (Victims and Survivor Service Limited) Order Northern Ireland) 2012 (S.R. 2012/455)

The Less favoured Areas Compensatory Allowances Regulations (Northern Ireland) 2012 (S.R. 2012/456)

The Foyle Area and Carlingford Area (Angling) (Amendment) Regulations 2012 (S.R. 2012/458)

The Foyle Area (Control of Fishing) (Amendment) Regulations 2012 (S.R. 2012/459)

The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012/462)

Statutory rule not subject to laying and not subject to Assembly proceedings

The Magistrates' Courts (Costs in Criminal Cases) (Amendment) Rules (Northern Ireland) 2012 (S.R. 2012/430)



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