

**Examiner of Statutory Rules**

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

**12 April 2013  
NIA 107/11-15R**

Committee for Agriculture and Rural Development	S.R. 2013 No. 76
Committee for Employment and Learning	S.R. 2013 No. 68
Committee for Enterprise, Trade and Investment	Draft S.R.: The Renewables Obligation (Amendment) Order (Northern Ireland) 2013 S.R. 2013 No. 92
Committee for the Environment	S.R. 2013 No. 71
Committee for Finance and Personnel	S.R. 2013 Nos. 60, 80, 90
Committee for Health, Social Services and Public Safety	S.R. 2013 Nos. 66, 73, 74, 77, 78, 84, 85
Committee for Justice	S.R. 2013 Nos. 81, 82, 89
Committee for Social Development	S.R. 2013 Nos. 61, 62, 63, 65, 67, 69, 70, 72, 79



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 Education (Student Loans) (Repayment) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/68)**

3. **I draw the attention of the Committee for Learning and Employment and the Assembly to the Education (Student Loans) (Repayment) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/68) 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 statutory rule following its making and its coming into operation). The Department for Employment and Learning has offered an explanation for the breach and the explanation seems to be reasonable.** The Regulations were made on 13 March 2013, were laid on 19 March 2013 and came into operation on 6 April 2013, so that they were laid so that they were laid (slightly) in breach of the 21-day rule. The Department has indicated that the Regulations had to come into operation on 6 April 2013 (the beginning of the tax year) and that it only had sight of the final Regulations for England and Wales on 8 March 2013. It seems to me that the Department could perhaps have (just) complied with 21-day rule had it managed to lay them on Friday, 15 March 2013, but the timetable was tight, especially with the weekend followed by the St Patrick's Day holiday, which I take into account: the Regulations for Northern Ireland were in this case laid six days behind those for England and Wales.

**The Health and Personal Social Services (Superannuation), Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2013 (S.R 2013/73)**

4. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Health and Personal Social Services (Superannuation), Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2013 (S.R 2013/73) on the ground that they were laid in breach of the 21-day rule, explained by the Department of Health, Social Services and Public Safety.** The Regulations were made on 15 March 2013 and laid on 22 March 2013; they came into operation on 1 April 2013 in line with other provisions increasing public sector pension contribution rates for the year 2013/2014 across the United Kingdom. The Department had alerted me to the likely breach of the 21-day rule in this case as far back as 28 November 2012. It seems that the Department only had sight of the final contribution rates for England and Wales and Scotland in or around 5 March 2013 and was engaged with the Committee until 13 March 2013. So the timing of the laying seems to be reasonable.

**The Recovery of Health Services Charges (Amounts) (Amendment) Regulations (Northern Ireland) 2013 (S.R 2013/74)**

5. **I draw the attention of the Committee Health, Social Services and Public Safety and the Assembly to the Recovery of Health Services Charges (Amounts) (Amendment) Regulations (Northern Ireland) 2013 (S.R 2013/74) on the ground that they were laid in breach of the 21-day rule, explained by the Department of Health, Social Services and Public Safety.** The Regulations were made on 19 March 2013, were laid on 20 March 2013 and came into operation on 1 April 2013 in line with the corresponding provision for Great Britain. The Regulations were made for England and Wales and Scotland around 20 February 2013. It seems to have been the Department's intention to make the Regulations before 9 March 2013 so as to comply with the 21-day rule, and the Department notified the Committee of its intention on this in its SL1 letter of 28 February 2013. Also on that date, the Department notified me that it was unlikely to be able to comply with the 21-day rule because the Committee was not in a position to consider the SL1 until 13 March 2013. Perhaps, and with the benefit of hindsight to a large extent, it could have gone to the Committee slightly earlier; but in the circumstances my assessment is that the Department's timing was reasonable in this case.

**The Misuse of Drugs (Designation) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/77)**

**The Misuse of Drugs (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/78)**

6. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to The Misuse of Drugs (Designation) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/77) and the Misuse of Drugs (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/78) on the ground that they were laid in breach of the 21-day rule (marginally), explained by the Department of Health, Social Services and Public Safety.** The Department sight of the corresponding instruments for Great Britain (made on 13 March 2013, laid on 18 March 2013) on 11 March 2013, and it had to then settle, and have approved, the provisions for Northern Ireland. These were considered by Committee on 20 March 2013 and were made and laid on 21 March 2013 with a commencement date of 10 April 2013 to match that for Great Britain. The Department has apologised for the breach of the 21-day rule (which was very marginal in this case) and has asked the Home Office to take account of Northern Ireland position when setting its timetable in future. In the circumstances the timing seems to have been very reasonable in this case.

**The New Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/84)**

**The Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/85)**

7. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the New Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/84) and the Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/85) on the ground that they were laid in breach of the 21-day rule, explained by the Department of Health, Social Services and Public Safety.** The Orders (increasing pension contribution bands for the year 2013/2014 as part of the various exercises in public sector pension schemes across the United Kingdom) were made on 26 March 2013, were laid on 27 March 2013 and came into operation on 1 April 2013 in line with England and with Wales. It seems that the consultation exercise in England was more protracted than first envisaged and that the Ministers in the Department for Communities and Local Government published the consultation response on 26 March 2013. The Orders for Northern Ireland were laid on the same day as those for England, and were laid before those for Wales. So the Department's timing appears to be reasonable. The Department has reminded me that there were last minute changes last year, when the Orders had to be revoked and remade accordingly; fortunately, that did not occur this year.

**Superannuation (Maze/Long Kesh Development Corporation) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/90)**

8. **I draw the attention of the Committee for Finance and Personnel and the Assembly to Superannuation (Maze/Long Kesh Development Corporation) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/90) on the ground that it was laid in breach of the 21-day rule, explained by the Department Finance and Personnel.** The Order was made on 28 March 2013 so as to come into operation on 22 April 2013 (with retrospective effect as authorised by the parent primary legislation from 10 September 2012). It was laid on 9 April 2013. The Department drew my attention to this on 9 April 2013, indicating that it could (and perhaps should) have laid the Order in typescript rather than wait for the printed copies (as it did); alternatively, it has suggested that it could have allowed a later commencement date, particularly since it has retrospective effect. The Department's observations are of course very fair in this case. But, in the event, the timing of the laying makes very little practical difference in this case, given the nature of the Order and its retrospective effect as authorised.

**The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013 (S.R. 2013/92)**

9. **I draw the attention of the Committee for Finance and Personnel and the Assembly to the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013 (S.R. 2013/92) on the grounds that they were defectively drafted in one respect, acknowledged by the Department of Enterprise, Trade and Investment, and were laid in breach of the 21-day rule, explained by the Department.**
10. The drafting defect, acknowledged by the Department, is that the preamble or recital of powers contains a statement intended to make references to particular EC Regulations ambulatory so that they are to be construed as references to those Regulations as amended from time to time: the framework for doing this is set out in paragraph 1A of Schedule 2 to the European Communities Act 1972. The particular passage of the preamble identifies the Regulations by number and by description, and the ambulatory amendments are made in regulation 3(a) (amendment of the definition of "the Electricity Regulation" and "the Gas

Regulation” in Article 2(2) of the Energy (Northern Ireland) Order 2003). So far so good, but the problem is that, while the description of the Regulations in the preamble is correct, the Regulation numbers are wrong on their faces: “Regulation (EC) 174/2009” read “Regulation (EC) 714/2009”; and similarly “Regulation (EC) 175/2009” should read “Regulation 715/2009”; of the Explanatory Note, which uses the correct numbers. Often an error in a preamble/recital of powers would necessitate the revocation and remaking of the whole statutory rule, since it would be difficult, if not impossible to textually amend the preamble in an amending instrument. But, on consideration, my view is that such drastic action is not required in this case, unfortunate as the drafting slip is: the intention is clear both from the description of the EC Regulations in question and from the effect of the amendments inserted in the Energy Order (where the Regulations are correctly numbered and correctly described in the text of that legislation). I am accordingly satisfied that the preamble can be appropriately corrected in this case by use of a correction slip rather than by legislative action requiring the revocation and remaking of the whole of the Regulations. The Department has acknowledged the defect and has agreed to produce the correction slip.

11. As regards breach of the 21-day rule, the Regulations were made on 28 March 2013, were laid on 29 March 2013 and came into operation on 12 April 2013 (today). There is intense pressure on the Department (with infraction proceedings at a far advanced state) to fully transpose a package of EU legislation compendiously referred to, I understand, as IME3. These Regulations form part of that overall exercise, and it seems that they must be operative by 12 April 2013 so as to extend a deadline for making licence modifications to 30 April 2014. Accordingly, the Department’s explanation seems to be reasonable as regards the timing of the laying.

**W G Nabney**

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12 April 2013

## 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 Renewables Obligation (Amendment) Order (Northern Ireland) 2013

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

The Social Security Benefits Up-rating Order (Northern Ireland) 2013 (S.R. 2013/69)

### Statutory rules subject to negative resolution

Building (Prescribed Fees (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/60)

The Social Security Pensions (Flat Rate Accrual Amount) Order (Northern Ireland) 2013 (S.R. 2013/61)

The Social Security Revaluation of Earnings Factors Order (Northern Ireland) 2013 (S.R. 2013/62)

The Social Security Pensions (Low Earning Threshold) Order (Northern Ireland) 2013 (S.R. 2013/63)

The Guaranteed Minimum Pensions Increase Order (Northern Ireland) 2013 (S.R. 2013/65)

The Food Safety (Sampling and Qualifications) Regulations (Northern Ireland) 2013 (S.R. 2013/66)

The Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2013 (S.R. 2013/67)

### **The Education (Student Loans) (Repayment) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/68)**

The Social Security Benefits Up-rating Regulations (Northern Ireland) 2013 (S.R. 2013/70)

Local Government Pension Scheme (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/71)

The Occupation and Stakeholders Pension Schemes (Miscellaneous Amendments) Regulations (Northern Ireland) 2013 (S.R. 2013/72)

### **The Health and Personal Social Services (Superannuation), Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/73)**

### **The Recovery of Health Services Charges (Amounts) (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/74)**

The Zoonoses (Fees) Regulations (Northern Ireland) 2013 (S.R. 2013/76)

The Misuse of Drugs (Designation) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/77)

### **The Misuse of Drugs (Amendment) Regulations (Northern Ireland) 2013 (S.R. 2013/78)**

The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order (Northern Ireland) 2013 (S.R. 2013/79)

The Rates (Unoccupied Hereditaments) (Amendment No. 2) Regulations (Northern Ireland) 2013 (S.R. 2013/80)

The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (S.R. 2013/81)

The Crown Court (Amendment) Rules (Northern Ireland) 2013 (S.R. 2013/82)

**The New Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/84)**

**The Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/85)**

**Superannuation (Maze/Long Kesh Development Corporation) (Amendment) Order (Northern Ireland) 2013 (S.R. 2013/90)**

**The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013 (S.R. 2013/92)**

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

The Magistrates' Courts (Amendment) Rules (Northern Ireland) 2013 (S.R. 2013/89)

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