



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

Thirty-fifth Report of Session 2020 - 2021

27 April 2021

<p>Committee for Agriculture, Environment and Rural Affairs</p>	<p>Subject to the confirmatory resolution procedure:</p> <p>S.R. 2021/65: The Sea Fish Industry (Coronavirus) (Fixed Costs) Scheme (Northern Ireland) 2021</p>
<p>Committee for Communities</p>	<p>Subject to the negative resolution procedure:</p> <p>S.R. 2021/66: The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order (Northern Ireland) 2021</p> <p>S.R. 2021/67: The Universal Credit (Extension of Coronavirus Measures) Regulations (Northern Ireland) 2021</p> <p>S.R. 2020/70: The Housing Benefit (Persons who have attained the qualifying age for state pension credit) (Amendment) Regulations (Northern Ireland) 2021</p> <p>S.R. 2021/81: The Licensing (Designation of Outdoor Stadia) Regulations (Northern Ireland) 2021</p>
<p>Committee for Finance</p>	<p>Subject to the negative resolution procedure:</p> <p>S.R. 2021/74: The Business Tenancies (Coronavirus) (Restriction on Forfeiture: Relevant Period) (Northern Ireland) Regulations 2021</p>
<p>Committee for Health</p>	<p>Subject to the confirmatory resolution procedure:</p> <p>S.R. 2021/93: The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021</p> <p>S.R. 2021/97: The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment) Regulations (Northern Ireland) 2021</p> <p>Subject to the negative resolution procedure:</p> <p>S.R. 2021/101: The Mental Health (1986 Order) (Amendment No. 2) Order (Northern Ireland) 2021</p>

1. Remit of the Examiner of Statutory Rules

1.1 Assembly Standing Order 43 provides that every statutory rule or draft statutory rule which is laid before the Assembly and is subject to Assembly proceedings shall stand referred to the appropriate Committee of the Assembly for scrutiny. The appropriate Committee may also scrutinise any statutory rule which deals with a transferred matter, within the meaning of the Northern Ireland Act 1998, which is not subject to Assembly proceedings. The Standing Orders of the Assembly are published on the [Northern Ireland Assembly website](#).

1.2 To assist Committees of the Assembly in the scrutiny of such statutory rules under Standing Order 43, the Examiner of Statutory Rules (the Examiner) shall carry out those functions delegated to the Examiner in relation to technical scrutiny.

1.3 The terms of reference of the Examiner, under delegation from the appropriate Committee, are as set out in Standing Order 43(6) as follows:

“In scrutinising an instrument the appropriate committee shall among other things 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.”

- 1.4 Standing Order 43(7) provides that the Examiner shall, where practicable, report on a statutory rule or draft statutory rule before any resolution or motion relating to that statutory rule or draft statutory rule is moved in the Assembly.

2. Assembly procedure in relation to statutory rules

Statutory rules which are laid before the Assembly may be subject to one of the following Assembly procedures. The procedure to which any statutory rule is subject will be set out in the parent legislation.

Rules Subject to Negative Resolution

A statutory rule that is subject to the negative resolution procedure is made by the rule making body, often a Department, and laid before the Assembly. It has effect when its 'comes into force' date is reached.

It can be annulled by resolution of the Assembly within the 'statutory period'.¹ It is then void from the date of that annulment.

The statutory period is set out in the Interpretation Act (Northern Ireland) 1954. It is 30 calendar days or ten days on which the Assembly has sat after the date on which the statutory rule was laid before the Assembly, whichever is the longer.²

Rules Subject to Confirmatory Resolution

A statutory rule which is subject to confirmatory procedure is made by the rule making body, often a Department, and laid before the Assembly.

It ceases to have effect within a specified period provided for in the parent legislation unless approved by a resolution of the Assembly within that time.

Rules Subject to Affirmative Resolution

A statutory rule which is subject to the affirmative resolution procedure is made by the rule making body, often a Department, and laid before the Assembly.

It shall not come into operation unless and until affirmed by a resolution the Assembly.

Rules Subject to Draft Affirmative Resolution

A statutory rule which is subject to the draft affirmative procedure is laid in draft before the Assembly by the rule making body, often a Department. It may not be made unless and until affirmed by a resolution the Assembly.

¹ Section 41(6) [Interpretation Act \(Northern Ireland\) 1954](#)

² Section 41(2) [Interpretation Act \(Northern Ireland\) 1954](#)

3. Statutory rules to which attention is drawn in this report

3.1 Breach of the 21 day rule

The 21 day rule is the established rule of parliamentary practice whereby a Department or other rule-making body should, in the case of a statutory rule that is subject to negative resolution, allow a minimum of 21 days between the laying of the statutory rule and its coming into operation.

The 21 day rule acts to protect those who may be affected by changes in the law from being subject to those changes before they have had a reasonable opportunity to understand the effect of the changes and what they must do to satisfy any requirements.

Accordingly, a statutory rule should be laid at least 21 calendar days before it is due to come into force (including the date of laying) and only be brought into force on the twenty-second day at the very earliest.

The 21 day rule also operates to ensure that the Assembly may carry out scrutiny of a statutory rule before it comes into force. A Department or other rule-making body should not breach the 21 day rule unless there exists a compelling need for urgency which it should set out fully at the time of laying of the statutory rule in question.

Only in the most exceptional circumstances should a statutory rule that is subject to negative resolution be laid after it has come into operation and, where it is so laid, a full explanation of the circumstances giving rise to that should be given.

I draw the attention of the Assembly to the following statutory rule on the ground that the Rule was laid in breach of the 21 day rule.

S.R. 2021/74: The Business Tenancies (Coronavirus) (Restriction on Forfeiture: Relevant Period) (Northern Ireland) Regulations 2021

The Regulations were made on 24 March 2021, laid on 25 March 2021, and came into force on 29 March 2021.

The Department has acknowledged in the Explanatory Memorandum to the Regulations that the Regulations were laid in breach of the 21 day rule explaining that the breach occurred in the context of the coronavirus pandemic. I am content that the Department has, on this occasion, provided a satisfactory explanation for the breach.

3.2 Drafting

The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (S.R. 2021/93) (“the Regulations”)

The Regulations are drawn to the special attention of the Assembly in relation to clarifications which the Department confirms will be made to its drafting. The Department confirms that it will make these amendments at the earliest opportunity.

Regulation 3 of the Regulations relates to requirements to close premises, regulation 3(2) providing that *‘listed businesses must close’*. The Department has confirmed that it will amend the Regulations to clarify that a person responsible for listed premises or a listed business must close those premises or that business.

Regulation 4 of the Regulations relates to restrictions on non-essential retail businesses, regulation 4(2)(a) providing that relevant retail businesses *‘must cease’*. The Department has confirmed that it will amend the Regulations to clarify that a person responsible for a relevant retail business must cease to operate that business.

Regulations 9(7)(a) and 12(6) of the Regulations relate to restrictions on gatherings and require compliance with the guidance on funerals issued by the Department of Health. To increase accessibility, the Department confirms that it will amend the Regulations to provide a link to, or specific web address for, this guidance. Such availability details should also make clear how a hard copy of the guidance may be accessed. This information and any links to the guidance may be provided within footnotes to the relevant provisions.

3.4 Drafting and vires

The Sea Fish Industry (Coronavirus) (Fixed Costs) Scheme (Northern Ireland) 2021 (S.R. 2021/65) (“the Scheme”)

The Scheme is drawn to the special attention of the Assembly on the grounds that there appears to be a doubt as to whether it is intra vires and it appears to have a defect in its drafting.

The Scheme makes provision for the payment of grants to the sea-fishing industry to address financial difficulties arising as a result of the coronavirus pandemic.

The introductory text to the Scheme states that the Scheme was made by the Department under section 15(1) and (2) of the Fisheries Act 1981, as read with paragraph 2(1) of Schedule 2 to the Sea Fisheries (Northern Ireland) Order 2002.

The Scheme was made on 12 March 2021. Section 15 of the Fisheries Act 1981 and paragraph 2 of Schedule 2 to the Sea Fisheries (Northern Ireland) Order 2002 were each repealed by paragraph 4 of Schedule 6 to the Fisheries

Act 2020 on 23 November 2020. Accordingly, at the time the Scheme was made, the cited provisions did not provide the Department with an enabling power.

The Department advises that it acknowledges, and will take immediate steps to seek to remedy, its error.

Angela Kelly

Examiner of Statutory Rules

27 April 2021

Appendix:

STATUTORY RULES SUBJECT TO NORTHERN IRELAND ASSEMBLY PROCEDURE

Subject to the confirmatory resolution procedure:

S.R. 2021/65: The Sea Fish Industry (Coronavirus) (Fixed Costs) Scheme (Northern Ireland) 2021

S.R. 2021/93: The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021

S.R. 2021/97: The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment) Regulations (Northern Ireland) 2021

Subject to the negative resolution procedure:

S.R. 2021/66: The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order (Northern Ireland) 2021

S.R. 2021/67: The Universal Credit (Extension of Coronavirus Measures) Regulations (Northern Ireland) 2021

S.R. 2020/70: The Housing Benefit (Persons who have attained the qualifying age for state pension credit) (Amendment) Regulations (Northern Ireland) 2021

S.R. 2021/74: The Business Tenancies (Coronavirus) (Restriction on Forfeiture: Relevant Period) (Northern Ireland) Regulations 2021

S.R. 2021/81: The Licensing (Designation of Outdoor Stadia) Regulations (Northern Ireland) 2021

S.R. 2021/101: The Mental Health (1986 Order) (Amendment No. 2) Order (Northern Ireland) 2021



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