



**Northern Ireland
Assembly**

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

11 March 2009

Committee for Agriculture and Rural Development	S.R. 2009 No. 59, 60
Committee for Enterprise, Trade and Investment	S.R. 2009 Nos. 66, 67
Committee for the Environment	S.R. 2009 Nos. 32, 33, 34, 61, 76
Committee for Finance and Personnel	S.R. 2009 No. 71
Committee for Social Development	S.R. 2009 Nos. 68, 70 and 74

1. In accordance with the delegations in respect of the technical scrutiny of statutory rules under Standing Order 41(4)(b) (now renumbered as Standing Order 43(4)(b)) given to the Examiner of Statutory Rules by the appropriate Committees on 11, 16, 17 and 18 May 2007, 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 AGRICULTURE (HARDSHIP PAYMENT) SCHEME (NORTHERN IRELAND) 2009 (S.R. 2009/60)

3. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Agriculture (Hardship Payment) Scheme (Northern Ireland) 2009 (S.R. 2009/60) on the ground that it was laid in breach of the 21-day rule (that is to say, the well-established rule of practice whereby a Department of other rule-making body should, in the case of a statutory rule that is subject to negative resolution, allow at least 21 days between the making of the statutory rule and its coming into operation) as explained by the Department for Agriculture and Rural Development.** The Scheme was made on 20 February 2009 and was laid on 23 February 2009; it came into operation on 5 March 2009. The Department of Agriculture and Rural Development has explained that it was necessary to have the Scheme in place in early March to meet the Executive’s requirement to have payments made under it within the financial year ending 31 March 2009. **The Department’s explanation for the breach of the 21-day rule seems to be reasonable.**

THE HOUSEHOLD FUEL PAYMENT SCHEME REGULATIONS
(NORTHERN IRELAND) 2009 (S.R. 2009/70)

4. **I draw the attention of the Committee for Social Development and the Assembly to the Household Fuel Payments Scheme Regulations (Northern Ireland) 2009 (S.R. 2009/70) on the grounds, first, that they are not in accordance with established legislative practice in not reciting a condition precedent for the exercise of the powers in question in the preamble to the Regulations, and, second, that the Regulations were laid in breach of the 21-day rule as explained by the Department for Social Development.**
5. These Regulations are made by the Department for Social Development under the sections 1(2) and 3 of the Financial Assistance Act (Northern Ireland) 2009, so there are two conditions precedent to the exercise of the powers: first, there must be a determination under section 1(1) of that Act by the First Minister and deputy First Minister, acting jointly; and second, the First Minister and deputy First Minister, acting jointly, must designate the Department for Social Development as **the** relevant department under section 1(3)(a) of that Act if the Department for Social Development is to have power to make the Regulations as the relevant department. The Department for Social Development has, it seems, recited the second condition precedent but not the first:

“The Department for Social Development makes the following Regulations in exercise of the powers conferred by sections 1(2) and 3 of Financial Assistance Act (Northern Ireland) 2009(a).

The Department for Social Development has been designated as a relevant department under section 1(3)(a) of that Act.

The Regulations are made with the approval of the Office of First Minister and deputy First Minister.”.

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 [xxxxxxxxxxxx] as the relevant department under section [1(3)(a)][2(3)(a)] of that Act.

Accordingly, the Department [xxxxxxxxxxxx] [, 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, the exercise of the powers.) **I emphasise that I am fully satisfied that anything that I have said above by way of criticism (minor – and constructive, I hope) of the drafting of the preamble does not affect the validity or operation of the Regulations themselves.**

6. **The Department has briefly explained the breach of the 21-day rule in terms that seem to be reasonable:** there was an urgent need to make the payments as soon as possible. The proposed Regulations were sent to the Committee on 25 February 2009 and were discussed by the Committee on 26 February 2009. They were made on 2 March 2009 and were laid on the same day; they came into operation on 3 March 2009.

W G Nabney

Examiner of Statutory Rules

11 March 2009

APPENDIX

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

Statutory rules subject to affirmative resolution

The Pre-release Access to Official Statistics Order (Northern Ireland) 2009 (Northern Ireland) (S.R. 2009/71)

The Pneumoconiosis, etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/74)

Statutory rules subject to negative resolution

Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 (S.R. 2009/32)

Local Government Pension Scheme (Administration) Regulations (Northern Ireland) 2009 (S.R. 2009/33)

Local Government Pension Scheme (Amendment and Transitional Provisions) Regulations (Northern Ireland) 2009 (S.R. 2009/34)

The Seed Potatoes (Crop Fees) Regulations (Northern Ireland) 2009 (S.R. 2009/59)

The Agriculture (Hardship Payments) Scheme (Northern Ireland) 2009 (S.R. 2009/60)

The Surface Waters (Shellfish) (Classification) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/61)

Weights and Measures (Passing as Fit for Use for Trade and Adjustment Fees) Regulations (Northern Ireland) 2009 (S.R. 2009/66)

Measuring Instruments (EEC Requirements) (Verification Fees) Regulations (Northern Ireland) 2009 (S.R. 2009/67)

The Social Security (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/68)

The Household Fuel Payments Scheme Regulations (Northern Ireland) 2009 (S.R. 2009/70)

The Waste Management (Licensing) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/76)

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