



**Northern Ireland  
Assembly**

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

24 April 2009

Committee for Agriculture and Rural Development	S.R. 2009 Nos. 129, 130, 134
Committee for Employment and Learning	S.R. 2009 No. 128
Committee for Enterprise, Trade and Investment	S.R. 2009 No. 132
Committee for Finance and Personnel	S.R. 2009 No. 150
Committee for Health, Social Services and Public Safety	S.R. 2009 Nos. 93, 95, 97, 98, 121, 145, 151, 152, 153
Committee for Social Development	S.R. 2009 Nos. 113, 115, 133, 135, 139, 140, 141, 149



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 REGIONAL AGENCY FOR PUBLIC HEALTH AND SOCIAL WELL-  
BEING (MEMBERSHIP) REGULATIONS (NORTHERN IRELAND) 2009  
(S.R. 2009/93)

THE REGIONAL HEALTH AND SOCIAL CARE BOARD (MEMBERSHIP)  
REGULATIONS (NORTHERN IRELAND)  
2009 (S.R. 2009/95)

THE REGIONAL BUSINESS SERVICES ORGANISATION  
(MEMBERSHIP AND PROCEDURE) REGULATIONS  
(NORTHERN IRELAND) 2009 (S.R. 2009/97)

3. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to:**

**(a) the Regional Agency for Public Health and Social Well-being (Membership) Regulations (Northern Ireland) 2009 (S.R. 2009/93);**

**(b) the Regional Health and Social and Social Care Board (Membership) Regulations (Northern Ireland) 2009 (S.R. 2009/95); and**

**(c) the Regional Business Services Organisation (Membership and Procedure) Regulations (Northern Ireland) 2009 (S.R. 2009/97),**

**on the ground that one provision of each (on disqualification from appointment as members) is of doubtful vires or is at least an unusual or unexpected use of the power conferred by the primary legislation.**

4. The provisions in question are regulation 4 of each of the Regulations, which are made under similar powers in Schedules 1 to 3 of the Health and Social Care (Reform) Act (Northern Ireland) 2009. Regulation 4 of each of the Regulations sets out circumstances in which persons are disqualified from appointment as members of the various health and social care bodies encompassed in the Regulations. The power relied on in each case is, it seems, paragraph 3(3) of the relevant Schedule to the 2009 Act, which power, closely following an earlier power in paragraph 3(3) of Schedule 1 to the Health and Personal Social Services (Northern Ireland) Order 1972 (as amended in 1991) in respect of the former Health and Social Service Boards, is in the following terms:

“(3) Regulations may provide that all or any of the persons appointed under sub-paragraph (1)(b) must fulfil prescribed conditions or hold posts of a prescribed description.”.

5. The Department of Health, Social Services and Public Safety indicated to me its view that the power in the 2009 Act was broad enough to include a power to disqualify from appointment in particular circumstances, although I understand that it may be looking at that again in light of my comments to it. For my part, I am not convinced that a power of disqualification from appointment in prescribed circumstances (which is what in effect the Department has read into the 2009 Act for regulation 4 of each of the Regulations) is subsumed within a power to provide that a person appointed must fulfil prescribed conditions. It is probably (strictly) beyond my terms of reference, but it seems to me that it would do no harm in the circumstances of these Regulations to suggest that, for the longer term, the Department should review the powers in the primary legislation: what seems to be required, if the Department is to achieve what it has set out to achieve in regulation 4 of each of the Regulations, is a two-pronged proposition, namely, a power for regulations to provide in effect:

- (a) that all or any of the persons mentioned in [sub-paragraph (1)(a) and (b)] are disqualified from appointment under that sub-paragraph in prescribed circumstances (the negative prong – *a person must not be appointed if...*); or
- (b) that all or any of the persons appointed under sub-paragraph (b) must fulfil prescribed conditions or hold posts or a prescribed description (the positive prong – *to be appointed, or subsequent to appointment, a person must...*).

I see no reason why an express disqualification provision should not apply equally to the Chair and other members of the bodies concerned, hence my suggested reference to sub-paragraph (1)(a); the second prong, on conditions to be fulfilled, is perhaps a

different matter, but the Department might wish to review that also as a matter of policy.

6. In passing, I note that the legislation providing for the regulation of various health professions (for example, medical, optical and nursing and midwifery) contains express provision for the Privy Council to provide in subordinate legislation for disqualification from appointment to membership (including the chair, it seems) of the various regulatory bodies: see for example, the General Optical Council (Constitution) Order 2009 (S.I. 2009/442), made under section 1(4) of, and paragraph 1B (inserted by S.I. 2008/1774) of Schedule 1 to, the Opticians Act 1989.
7. **I report accordingly.**

THE RECOVERY OF HEALTH SERVICES CHARGES (GENERAL) AND  
AMOUNTS) (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2009  
(S.R. 2009/121)

8. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Recovery of Health Services Charges (General) and Amounts) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/121) on the grounds 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 a statutory rule that is subject to negative resolution, allow at least 21-days between its laying and its coming into operation) and that they are defectively drafted in one respect.**
9. The Regulations were made on 18 March 2009 and laid the next day; they came into operation on 1 April 2009. The Department of Health, Social Services and Public Safety has explained that it needed to take legal advice on one aspect of the Regulations, namely, that relating to the matter of dual recovery of charges. **It seems to me that in this case the Department's explanation for the breach of the 21-day rule is reasonable.**
10. The drafting defect follows a similar drafting defect in the corresponding regulations for England and Wales contained in S.I. 2009/316, acknowledged by the Department of Health on 12 March 2009 and reported by the Joint Committee on Statutory Instruments in its Tenth Report of Session 2008 – 09, dated 25 March 2009: the Department of Health intends to make a correcting instrument at the earliest opportunity, and I take it that the Department of Health, Social Services and Public Safety will do likewise. In essence, the saving in regulation 4 (of both the regulations for England and Wales and these Regulations) should have been limited to subparagraphs (b) to (e) of Schedule 1 (rather than to the whole of paragraph 1 of that Schedule). I am grateful to the Joint Committee for drawing attention to this.

THE EDUCATION (STUDENT LOANS) (REPAYMENT) (AMENDMENT)  
REGULATIONS (NORTHERN IRELAND) 2009 (S.R. 2009/128)

11. **I draw the attention of the Committee for Employment and Learning and the Assembly to the Education (Student Loans) (Repayment) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/128) on the ground that they were laid in breach of the 21-day rule.** The Regulations, which consolidate earlier

Regulations with amendments, were made on 20 March 2009 and were laid the same day; for the most part, they came into operation on 6 April 2009. **The Department for Employment and Learning has explained the breach in terms that seem to be reasonable.** The Regulations were made in parity for the start of the tax year with the corresponding regulations for England and Wales (contained in S.I. 2009/470), made on 1 March 2009, laid before Parliament and the National Assembly for Wales on 12 March 2009 and coming into force (for the most part) on 6 April 2009. It seems that the Department for Employment and Learning was not aware of intention of the Department for Innovation, Universities and Skills and the Welsh Ministers to consolidate the Regulations for England and Wales until a late stage, resulting in an extremely short time-frame for the preparation of these Regulations. The Department regrets the breach of the 21-day rule, which it found unavoidable on this occasion.

THE AQUATIC ANIMAL HEALTH REGULATIONS (NORTHERN IRELAND)  
2009 (S.R. 2009/129)

12. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Aquatic Animal Health Regulations (Northern Ireland) 2009 (S.R. 2009/129) on the ground that they were laid in breach of the 21-day rule, explained by the Department of Agriculture and Rural Development in terms that seem to be reasonable.** The Regulations were made on 19 March 2009 and laid the next day; they came into operation (for the most part) on 27 March 2009. Member States were required to transpose the provisions on Council Directive 2006/88/EC by 1 August 2008 but it seems that transposition in the United Kingdom was delayed because of internal problems in the European Commission regarding the translation of certain EU legislation required for full implementation, with the result that the United Kingdom administrations were aiming for implementation on 1 May 2009. The Commission, however, threatened infraction proceedings by issuing an Article 226 Reasoned Opinion letter, giving the United Kingdom a deadline of 27 March for implementation of the legislation transposing the Directive.

THE SOCIAL SECURITY (STEPS TO WORK) REGULATIONS (NORTHERN  
IRELAND) 2009 (S.R. 2009/141)

13. **I draw the attention of the Committee for Social Development and the Assembly to the Social Security (Steps to Work) Regulations (Northern Ireland) 2009 (S.R. 2009/141) on the ground that they were laid in breach of the 21-day rule, explained by the Department for Development in terms that seem to be reasonable.** The Regulations were made on 27 March 2009 and were laid on the same day; they came into operation (partially) on 6 April 2009 in parity with the regulations for Great Britain (contained in S.I. 2009/480). The regulations for Great Britain were only finalised and made on 3 March 2009 and laid on 11 March 2009. These Regulations went in proposed form to the Committee for Social Development and the Committee for Employment and Learning and were referred to the Executive Committee in accordance with 2.4 of the Ministerial Code and were approved on 27 March 2009.

THE TRAVELLING EXPENSES AND REMISSION OF CHARGES  
(AMENDMENT NO. 2) REGULATIONS (NORTHERN IRELAND) 2009  
(S.R. 2009/140)

14. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Travelling Expenses and Remission of Charges (Amendment No. 2) Regulations (Northern Ireland) 2009 (S.R. 2009/151) on the grounds that they were laid in breach of the 21-day and were laid after they came into operation.** The Regulations were made on 3 April 2009 and came into operation on 6 and 7 April 2009; they were laid on 7 April 2009. As I understand the explanation from the Department of Health, Social Services and Public Safety (which apologises for the breach), it was originally intended that the proposed Regulations were to go before the Committee on 26 March 2009 but this did not happen, and presumably they went to the Committee on 2 April 2009, thus affecting the timetable for their making and laying. The Department was further constrained by following the operational date for the corresponding regulations for England. **In all the circumstances that occurred the Department's explanation seems reasonable.**

THE GENERAL OPHTHALMIC SERVICES (AMENDMENT NO. 2)  
REGULATIONS (NORTHERN IRELAND) 2009 (S.R. 2009/152)

THE CHARGES AND PAYMENTS (AMENDMENT) REGULATIONS  
(NORTHERN IRELAND) 2009 (S.R. 2009/153)

15. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the General Ophthalmic Services (Amendment No. 2) Regulations (Northern Ireland) 2009 (S.R. 2009/152) and the Charges and Payments (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/153) on the ground that there seems to be a doubt as to their vires in that they purport to have come into operation before they were made without any express power for such retrospective effect. They were laid after they were made so that there is also a breach of the 21-day rule on that basis (for which the Department of Health, Social Services and Public Safety apologises).**
16. The Regulations were made on 3 April 2009 and came into operation on 1 April 2009. Again, unfortunately, they were due to go before the Committee on 26 March 2009, but in the events that happened, they went before the Committee on 2 April 2009. Again, it seems that the Department was constrained by the operational date for England. They were laid on 7 April 2009.
17. The Department is of the view that there is no doubt as to the validity of the Regulations from 3 April 2009. I would not put it as high as that: there is plainly a doubt as to their vires but it is perhaps arguable that they are valid from 3 April 2009. The Department points to the benefits of the Regulations are the disadvantage to Northern Ireland citizens as compared with their English counterparts. That is of course compelling in policy terms (and I accept that revoking and remaking the Regulations might well cause more problems) but I am not sure that it completely answers the vires point. Having said that, it is clear that the Department seems content to live with the vires point, and the risk is probably fairly small in practice. Nevertheless, it is a far from ideal situation and one to be avoided for the future.

Clearly, the Department should liaise particularly closely with the Committee in the timetabling of business where it foresees such problems arising in the future. There are plainly lessons to be learnt from this.

18. **I report accordingly.**

*W G Nabney*

**Examiner of Statutory Rules**

24 April 2009



## APPENDIX

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

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

The Social Security (Incapacity Benefit) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/135)

The Occupational Pension Schemes (Contacting -out) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/149)

### **Statutory rules subject to negative resolution**

**The Regional Agency for Public Health and Social Well-being (Membership) Regulations (Northern Ireland) 2009 (S.R. 2009/93)**

**The Regional Health and Social Care Board (Membership) Regulations (Northern Ireland) 2009 (S.R. 2009/95)**

**The Regional Business Services Organisation (Membership and Procedure) Regulations (Northern Ireland) 2009 (S.R. 2009/97)**

The Patient and Client Council (Membership and Procedure) Regulations (Northern Ireland) 2009 (S.R. 2009/98)

The Pensions (2008 Acts) (Consequential Provisions) Order (Northern Ireland) 2009 (S.R. 2009/113)

The Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations (Northern Ireland) 2009 (S.R. 2009/115)

**The Recovery of Health Services Charges (General) and (Amounts) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/121)**

**The Education (Student Loans) (Repayment) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/128)**

**The Aquatic Animal Health Regulations (Northern Ireland) 2009 (S.R. 2009/129)**

The Products of Animal Origin (Third Country Import) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/130)

The Health and Safety (Fees) Regulations (Northern Ireland) 2009 (S.R. 2009/132)

The Child Support and Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2009 (S.R. 2009/133)

The Plant Health (Import Inspection Fees) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/134)

The Occupational Pension Schemes (Levy Ceiling) Order (Northern Ireland) 2009 (S.R. 2009/139)

The Pension Protection Fund (Pension Compensation Cap) Order (Northern Ireland) 2009 (S.R. 2009/140)

**The Social Security (Steps to Work) Regulations (Northern Ireland) 2009 (S.R. 2009/141)**

The Establishments and Agencies (Fitness of Workers) (Amendment No. 2) Regulations (Northern Ireland) 2009 (S.R. 2009/145)

Superannuation (Health and Social Care Bodies) Order (Northern Ireland) 2009 (S.R. 2009/150)

**The Travelling Expenses and Remission of Charges (Amendment No. 2) Regulations (Northern Ireland) 2009 (S.R. 2009/151)**

**The General Ophthalmic Services (Amendment No. 2) Regulations (Northern Ireland) 2009 (S.R. 2009/152)**

**The Optical Charges and Payments (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/153)**





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