



**Northern Ireland
Assembly**

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

26 June 2009

Committee for Agriculture and Rural Development	S.R. 2009 Nos. 223, 226, 229
Committee for Education	S.R. 2009 No. 231
Committee for Enterprise, Trade and Investment	S.R. 2009 No. 227
Committee for Health, Social Services and Public Safety	S.R. 2009 Nos. 188, 220
Committee for Regional Development	S.R. 2009 Nos. 221, 222
Committee for Social Development	S.R. 2009 No. 228, 233, 239, 240

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 HEALTH AND PERSONAL SOCIAL SERVICES (SUPPANNUATION
SCHEME AND INJURY BENEFITS) AND HEALTH AND SOCIAL CARE
(PENSION SCHEME) (AMENDMENT) REGULATIONS
(NORTHERN IRELAND 2009 (S.R. 2009/188))

3. **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 Scheme and Injury Benefits) and Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/188) on the ground several provisions appear to be of doubtful vires on the basis of unauthorised sub-delegation. The Regulations closely follow Regulations for England contained in S.I. 2009/381, reported to both Houses of Parliament by the Joint Committee on Statutory Instruments in its Twelfth Report of Session 2008 – 09 (29th April 2009). I am happy to follow the Joint Committee’s approach, and acknowledge it accordingly.**
4. Regulation 4 amends regulation 10 of the Health and Personal Social Services (Superannuation) Regulations (Northern Ireland) 1995. Paragraph (1A) of regulation

10 as amended provides that a member of the superannuation (pension) scheme must contribute a percentage of superannuable (pensionable) pay according to the pay band there specified into which the member's superannuable (pensionable) pay falls. Paragraph (2) provides that the Department of Health, Social Services and Public Safety may, with the consent of the Department of Finance and Personnel, make a determination substituting all or any of the pay bands or contribution rates specified in paragraph (1A) with effect from a date specified in the determination. There are similar amending provisions in regulations 11(2) and 52.

5. The Department of Health (England) was unable to satisfy the Joint Committee as to the enabling powers for this sub-delegation of powers. The Joint Committee, rightly in my view, took the view that the variations set out in the amended paragraph (2) (mentioned in paragraph 4 of this report) required a further amending statutory instrument, subject to Parliamentary scrutiny, because there was no statutory power either expressly or by necessary implication allowing a sub-delegation of powers by way of determination. The Joint Committee further expressed its view that a power to make incidental and supplementary provisions did not appear to be sufficient authority for the sub-delegation of powers by way of a determination.
6. The same considerations apply equally to this statutory rule (made under parallel statutory provisions for Northern Ireland): to achieve what is set out in paragraph (2) of the amended regulation 10 of the 1995 Regulations (and in the similar amendments introduced by regulations 11(2) and 52), further amending regulations would need to be made by statutory rule, which statutory rule would be subject to Assembly scrutiny (as being subject to negative resolution). The Department has, in response to my query in light of the Joint Committee's report, adopted the position adopted by the Department of Health in its memorandum to the Joint Committee, a position which the Joint Committee did not accept. **I will simply observe that in light of all this it seems inconceivable that either the Secretary of State (for Health) in England or the Department in Northern Ireland would seek to make a determination under the purported powers rather than make amending regulations as envisaged by the primary legislation.** It is one thing to provide for the making of contributions as may be prescribed by regulations (Superannuation (Northern Ireland) Order 1972, Schedule 3, paragraph 1); it is quite another thing for regulations to introduce a further *quasi-legislative* mechanism to vary (or, in effect, amend) regulations by way of determinations in the absence of statutory authority to do so; and, as referred to in paragraph 5 of this report, the power in paragraph 13 of Schedule 3 to make such incidental or supplementary provisions as appear to the Department to be expedient does not assist the Department in its aim in this regard.

W G Nabney
Examiner of Statutory Rules
26 June 2009

APPENDIX

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

Statutory rules subject to negative resolution

The Health and Personal Social Services (Superannuation Scheme and Injury Benefits) and Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/188)

The Contaminants in Food (Northern Ireland) 2009 (S.R. 2009/220)

The Traffic Signs (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/221)

The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/222)

The Swine Vesicular Disease Regulations (Northern Ireland) 2009 (S.R. 2009/223)

The Foyle Area and Carlingford Area (Licensing of Fishing Engines) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/226)

The Health and Safety (Miscellaneous Amendments and Revocation) Regulations (Northern Ireland) 2009 (S.R. 2009/227)

The Social Security (Industrial Injuries) (Prescribed Diseases) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/228)

The Products of Animal Origin (Disease Control) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/229)

The Education (Pupil Reporting) Regulations (Northern Ireland) 2009 (S.R. 2009/231)

The Social Fund Winter Fuel Payment (Temporary Increase) Regulations (Northern Ireland) 2009 (S.R. 2009/233)

The Social Security (Recovery of Benefits) (Lump Sum Payments) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/239)

The Social Security (Miscellaneous Amendments No. 2) Regulations (Northern Ireland) 2009 (S.R. 2009/240)

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