



**Northern Ireland
Assembly**

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

12 September 2008

Committee for Agriculture and Rural Development	S.R. 2008 Nos. 263, 275, 277, 295, 296, 297, 298, 299, 300, 301, 302, 304, 323, 340, 359
Committee for Culture, Arts and Leisure	S.R. 2008 Nos. 318, 319
Committee for Employment and Learning	S.R. 2008 Nos. 250, 254, 255, 294, 324, 326
Committee for Enterprise, Trade and Investment	S.R. 2008 Nos. 261, 287
Committee for the Environment	S.R. 2008 Nos. 282, 310
Committee for Health, Social Services and Public Safety	S.R. 2008 Nos. 238, 249, 256, 260, 271, 292, 346, 350
Committee for Regional Development	S.R. 2008 Nos. 270, 279, 281, 315, 328, 341, 344, 349
Committee for Social Development	S.R. 2008 Nos. 258, 262, 280, 283, 285, 286, 289, 290, 303, 342, 343, 352, 353, 354, 357

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 FIREFIGHTERS’ COMPENSATION SCHEME (AMENDMENT) ORDER (NORTHERN IRELAND) 2008 (S.R. 2008/238)

3. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Firefighters’ Compensation Scheme (Amendment) Order (Northern Ireland) 2008 (S.R. 2008/238) on the ground that it is defectively drafted in one respect, as acknowledged by the Department of Health, Social Services and Public Safety.**
4. Article 3(2) (general transitional provision) contains a reference to “protection benefit” whereas it is plain from the first paragraph of Article 3 that this was intended to refer to “protected benefit”. (The numbering of the paragraphs in Article 3 has gone slightly awry: the first paragraph is not numbered, the second paragraph is numbered “(1)” and the third paragraph is numbered “(2)”. The Department has indicated that there may be an opportunity to correct these small points in the next year as and when there are further amendments to the Compensation Scheme.

THE HEALTH AND SOCIAL CARE (PENSION SCHEME) REGULATIONS
(NORTHERN IRELAND) 2008 (S.R. 2008/256)

THE HEALTH AND PERSONAL SOCIAL SERVICES (SUPERANNUATION)
(ADDITIONAL VOLUNTARY CONTRIBUTIONS, INJURY BENEFITS AND
COMPENSATION FOR PREMATURE RETIREMENT (AMENDMENT)
REGULATIONS (NORTHERN IRELAND) 2008 (S.R. 2008/350)

5. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Health and Social Care (Pension Schemes) Regulations (Northern Ireland) 2008 (S.R. 2008/256) and the Health and Personal Social Services (Superannuation) (Additional Voluntary Contributions, Injury Benefits and Compensation for Premature Retirement) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/350) 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 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). But they are part of a series of Regulations, already explained by the Department of Health, Social Services and Public Safety, that has effect from 1 April 2008 as authorised by the Superannuation (Northern Ireland) 1972.**

THE PENALTY FARES (INCREASE) ORDER (NORTHERN IRELAND) 2008
(S.R. 2008/281)

6. **I draw the attention of the Committee for Regional Development and the Assembly to the Penalty Fares (Increase) Order (Northern Ireland) 2008 (S.R. 2008/281) on the ground that it is defectively drafted in one respect.**
7. The Order increases the penalty fare on bus and train services from £10 to £20, and that is explained in the Explanatory Note, indicating that the penalty fare was last increased in 1991 from £5 to £10. But on the face of the Order itself there is no mention of the 1991 increase: it simply provides that in paragraph 4(1)(a) of Schedule 1B to the Transport Act (Northern Ireland) 1967 “for “£5” substitute “£20””; whereas paragraph 4(1)(a) was in fact directly amended by S.R. 1991/297 (substituting £10 for £5). In other words, the actual increase effected by the Order is from £10 to £20 rather than from £5 to £20. I would add that in my view the defect is not fatal to the working of the Order: it brings about the increase to £20.

THE FOYLE AREA AND CARLINGFORD AREA (PROHIBITION OF SALE
OF SALMON AND SEA TROUT CAUGHT BY ROD AND LINE)
REGULATIONS 2008 (S.R. 2008/302)

8. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Foyle Area and Carlingford Area (Prohibition of Sale of Salmon and Sea Trout Caught by Rod or Line) Regulations (Northern Ireland) 2008 (S.R. 2008/302) on the ground that their drafting raises a question as to the scope of the prohibition in regulation 3.**

9. The operative provision of the Regulations, made by the Foyle Carlingford and Irish Lights Commission, with the approval of the North/South Ministerial Council under section 13(1) of the Foyle Fisheries Act (Northern Ireland) 1952, is as follows:

“Prohibition of sale

3. A person shall not sell or offer for sale within the Foyle Area or the Carlingford Area salmon or sea trout caught by rod or line.”.

(The same provision is made in parallel Regulations for the Republic of Ireland laid before the Oireachtas by the Minister for Communications, Energy and Natural Resources.)

10. The Regulations were laid by the Department of Agriculture and Rural Development. I asked the Department whether, given the terms of section 13(1) of the Foyle Fisheries Act, the prohibition should have been expressly restricted to salmon or sea trout caught within the Foyle Area or the Carlingford Area: it seemed to me that under that provision Regulations were about “*the management, conservation, protection and improvement of the fisheries of the Foyle Area and the Carlingford Area*” and that one interpretation of that was that the power restricted in section 13(1) restricted the prohibition to salmon or sea trout caught within the Foyle Area and the Carlingford Area. I mention in passing that there is a parallel prohibition the Republic for all fishery areas *other than the Moville Area and the Louth Area* (that is to say, the parts of the Foyle Area and the Carlingford Area located within the Republic): see the Salmon and Sea Trout Caught by Line (Prohibition on Sale) Order 2001 (S.I. No 353 of 2001). I understand also that parallel prohibition is being considered for Northern Ireland (other than the Londonderry Area and Newry Area, that is to say, the parts of the Foyle Area and the Carlingford Area located within Northern Ireland) under the Fisheries Act (Northern Ireland) 1966.
11. The Department has suggested to me that the power under section 13(1) of the Foyle Fisheries Act is sufficiently wide to prohibit the sale of rod-caught salmon and sea trout in the Foyle Area and Carlingford Area regardless of where the fish were caught. But I have my doubts, reinforced by the parallel prohibition (cited at paragraph 10) and also by the proposed parallel prohibition under the Fisheries Act (Northern Ireland) 1966. It seems to me that, if someone were prosecuted under the prohibition, the prosecutor would at least have to prove that the salmon or sea trout in question were caught by rod or line and sold or offered for sale in the Foyle Area or the Carlingford Area; and that the defendant could arguably raise a defence as an (implied) exception, proof of which would perhaps lie on him on the balance of probabilities, to the effect that the fish in question were caught outside the Foyle Area or the Carlingford Area: see Article 124 of the Magistrates’ Courts (Northern Ireland) Order 1981.
12. Accordingly, it seems to me that **the terms of the prohibition should be reviewed by the Foyle, Carlingford and Irish Lights Commission, and I so recommend**. It would surely be more a satisfactory exercise of the power under section 13(1) of the Foyle Fisheries Act if the prohibition were confined to salmon and sea trout caught by rod and line in the Foyle Area or the Carlingford Area, complemented by a parallel prohibition by the Fisheries Conservancy Board or the Department of Culture, Arts and Leisure under the Fisheries Act (Northern Ireland) 1966 for salmon or sea trout so caught elsewhere in Northern Ireland (just as there is parallel provision in respect of

elsewhere in the Republic of Ireland under the 2001 Order, cited at paragraph 10). In those circumstances it may be that the onus of proof should rest upon the various prosecuting authorities to establish where the fish in question were caught: it would be incumbent on those authorities (as prosecution authorities must do generally) to review the available evidence in a particular case so as to ensure as far as possible that the appropriate offence was prosecuted: that is a matter for consideration in reviewing the terms of the prohibition; but it seems to me that it be more consistent with the power under section 13(1) of the Foyle Fisheries Act, and more satisfactory drafting generally, to frame the provision thus:

“Prohibition of sale

3. A person shall neither sell nor offer for sale salmon or sea trout caught within the Foyle Area or the Carlingford Area by rod or line.”.

Consider it another way: it must surely be more material to the exercise of the power under section 13(1) of the Foyle Fisheries Act to have the references to the Foyle Area and the Carlingford Area related to the *place of catching* rather than to the *place of sale*. The former, it seems, is *directly* related to the conservation, and so on, of fisheries in those Areas; the latter is more remote from that purpose, if within it at all.

I report accordingly.

THE INSHORE FISHING (PROHIBITION OF FISHING AND FISHING METHODS) (AMENDMENT) REGULATIONS
(NORTHERN IRELAND) 2008 (S.R. 2008/304)

13. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly and the Assembly to the Inshore Fishing (Prohibition of Fishing and Fishing Methods) Regulations (Northern Ireland) 2008 (S.R. 2008/304) on the ground that they were laid in breach of the 21-day rule and laid after they came into operation, explained by the Department of Agriculture and Rural Development. The explanation appears to be reasonable in the circumstances.**
14. The Department had consulted on the Regulations in 2007 and it had been intended to make them in 2009, banning the use of suction dredgers in Belfast Lough. But matters were brought to a head, it seems, when there was intelligence that suction dredgers might be used the over the July holiday weekend, coupled with other circumstances including a favourable Food Standards Agency health classification in respect of fish from Belfast Lough. Without the Regulations the Department had no powers to prevent suction dredging in the area, and that posed a serious threat to the cockle resource, to licensed aquaculture sites and to the environment in terms of the Habitats Directive. In the circumstances the Department felt compelled to make the Regulations as a matter of urgency, having discussed the matter with representatives of the local fishing industry and with the Chairperson of the Committee for Agriculture and Rural Development. The Regulations were made on 11 July 2008 and came into operation on the same day, but as it happened it was not possible to register them until 15 July 2008, so that they could be laid until the Business Office reopened on that day.

THE FIXED-TERM EMPLOYEES (PREVENTION OF LESS FAVOURABLE
TREATMENT) (AMENDMENT) REGULATIONS
(NORTHERN IRELAND) 2008 (S.R. 2008/326)

15. **I draw the attention of the Committee for Employment and Learning and the Assembly to the Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/326) on the ground that they were (purportedly) made and laid as being subject to affirmative resolution (that is to say, subject to affirmative resolution within the meaning of section 41(4) of the Interpretation Act (Northern Ireland) 1954), whereas that were in fact subject to a requirement that they be laid in draft for approval by resolution of the Assembly.** The Department for Employment and Learning has subsequently laid draft Regulations in accordance with the correct procedure, replacing these Regulations; these Regulations can have no legal effect but the draft Regulations tidy the matter by expressly revoking these Regulations.
16. This illustrates the need to distinguish between two procedures. If a statutory rule is subject to a requirement that it be laid in draft for approval by a resolution of the Assembly, then it cannot be made until the Assembly has given that approval. If, on the other hand, it is “subject to affirmative resolution”, then it is made and laid but cannot come it operation until it has been affirmed by resolution of the Assembly.

THE ESTABLISHMENTS AND AGENCIES (FITNESS
OF WORKERS) REGULATIONS (NORTHERN IRELAND)
2008 (S.R. 2008/346)

17. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the Establishments and Agencies (Fitness of Workers) Regulations (Northern Ireland) 2008 (S.R. 2008/346) 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.**
18. The Regulations were made and laid on 12 August 2008 and came into operation on 13 August 2008. The Department has explained that these Regulations were made in an emergency situation. Delays in the processing of enhanced disclosure certificates in relation to criminal record checks “are impacting significantly on continuity and quality of service provision in certain areas of health and social care.”. The Department has indicated that these Regulations are a temporary measure and that they will be revoked “at the earliest opportunity”. In terms of technical scrutiny, **the explanation of the breach of the 21-day rule seems to be reasonable in the circumstances.**

W G Nabney
Examiner of Statutory Rules
12 September 2008

APPENDIX

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

Statutory rule required to be laid in draft for approval by resolution of the Assembly

The Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) (No. 2) Regulations (Northern Ireland) 2008 (replacing S.R. 2008/326)

Statutory rules subject to affirmative resolution

The Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/326) (purportedly – see above)

The Road Traffic (Traffic Wardens) (Revocation) Order (Northern Ireland) 2008 (S.R.2008/341)

The Motor Vehicles (Speed Limits) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/344)

The Pneumoconiosis, etc., (Workers' Compensation) (Payment of Claims) (Amendment No. 2) Regulations (Northern Ireland) 2008 (S.R. 2008/352)

Statutory rule subject to approval by resolution of the Assembly (confirmatory procedure)

The Social Security (Students Responsible for Children or Young Persons (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/290)

The Mesothelioma Lump Sum Payments (Conditions and Amounts) Regulations (Northern Ireland) 2008 (S.R. 2008/354)

Statutory rules subject to negative resolution

The Firefighters' Compensation Scheme (Amendment) Order (Northern Ireland) 2008 (S.R. 2008/238)

The Care Tribunal (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/249)

The Education (Student Support) Regulations (Northern Ireland) 2008 (S.R. 2008/250)

Student Awards (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/254)

The Education (Student Loans) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/255)

The Health and Social Care (Pension Schemes) Regulations (Northern Ireland) 2008 (S.R. 2008/256)

The Social Security (Industrial Injuries) (Prescribed Diseases) (Amendment No. 2) Regulations (Northern Ireland) 2008 (S.R. 2008/258)

The Feeding Stuffs (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/260)

The Insolvency (Voluntary Winding Up) (Forms) Regulations (Northern Ireland) 2008 (SR 2008/261)

The Social Security (Students and Miscellaneous Amendments) Regulations (Northern Ireland) 2008 (S.R. 2008/262)

The Control of Salmonella Poultry Scheme Order (Northern Ireland) 2008 (S.R. 2008/263)

The Little King Street, Belfast (Abandonment) Order (Northern Ireland) 2008 (S.R. 2008/270)

The Plastic Materials and Articles in Contact with Food (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/271)

The Bluetongue Regulations (Northern Ireland) 2008 (S.R. 2008/275)

The Welfare of Animals (Slaughter or Killing) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/277)

The Upper Galliagh Road, Londonderry (Stopping-Up) Order (Northern Ireland) 2008 (S.R. 2008/279)

The Employment and Support Allowance Regulations (Northern Ireland) 2008 (S.R. 2008/280)

The Penalty Fares (Increase) Order (Northern Ireland) 2008 (S.R. 2008/281)

The Smoke Control Areas (Exempted Fireplaces) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/282)

The Employment and Support Allowance (Transitional Provisions) Regulations (Northern Ireland) 2008 (S.R. 2008/283)

The Housing Benefit (Extended Payments) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/285)

The Employment and Support Allowance (Consequential Provisions) Regulations (Northern Ireland) 2008 (S.R. 2008/286)

Guarantees of Origin of Electricity Produced from High-efficiency Cogeneration Regulations (Northern Ireland) 2008 (S.R. 2008/287)

The Social Fund Winter Fuel Payment (Temporary Increase) Regulations (Northern Ireland) 2008 (S.R. 2008/289)

The Travelling Expenses and Remission of Charges (Amendment No. 2) Regulations (Northern Ireland) 2008 (S.R. 2008/292)

The Industrial Training Levy (Construction Industry) Order (Northern Ireland) 2008 (S.R. 2008/294)

Farm Modernisation Programme Regulations 2008 (S.R. 2008/295)

Supply Chain Development Programme Grant Regulations 2008 (S.R. 2008/296)

Vocational Training and Information Actions Grant Regulations 2008 (S.R. 2008/297)

The Foyle Area (Control of Oyster Fishing) Regulations 2008 (S.R. 2008/298)

The Foyle Area (Landing Areas for Oysters) Regulations 2008 (S.R. 2008/299)

The Foyle Area (Licensing of Oyster Fishing) Regulations 2008 (S.R. 2008/300)

The Foyle Area (Oyster Logbook and Identification Tagging) Regulations 2008 (S.R. 2008/301)

The Foyle Area and Carlingford Area (Prohibition of Sale of Salmon and Sea Trout caught by Rod and Line) Regulations 2008 (S.R. 2008/302)

The Pension Protection Fund (Entry Rules) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/303)

The Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/304)

The Local Government (Constituting a Joint Committee as a Body Corporate) Order (Northern Ireland) 2008 (S.R. 2008/310)

Cross-border Railway Services (Working Time) Regulations (Northern Ireland) 2008 (S.R. 2008/315)

Fisheries (Amendment) Byelaws (Northern Ireland) 2008 (S.R. 2008/318)

Fisheries (Conservation of Coarse Fish) Byelaws (Northern Ireland) 2008 (S.R. 2008/319)

Milk and Milk Products (Pupils in Education) Regulations (Northern Ireland) 2008 (S.R. 2008/323)

The Further Education (Student Support) (Eligibility) Regulations (Northern Ireland) 2008 (S.R. 2008/324)

Westlink (Busway) Regulations (Northern Ireland) 2008 (S.R. 2008/328)

The Zoonoses (Monitoring) Regulations (Northern Ireland) 2008 (S.R. 2008/340)

The Welfare Reform Act (Relevant Statutory Provision) Order (Northern Ireland) 2008 (S.R. 2008/342)

The Social Security (Use of Information for Housing Benefits and Welfare Services Purposes) Regulations (Northern Ireland) 2008 (S.R. 2008/343)

The Establishments and Agencies (Fitness of Workers) Regulations (Northern Ireland) 2008 (S.R. 2008/346)

The T7 (Broadbridge) Order (Northern Ireland) 2008 (S.R. 2008/349)

The Health and Personal Social Services (Superannuation) (Additional Voluntary Contributions, Injury Benefits and Compensation for Premature Retirement) (Amendment) Regulations (Northern Ireland) 2008 (S.R. 2008/350)

The Mesothelioma Lump Sum Payments (Claims and Reconsiderations) Regulations (Northern Ireland) 2008 (S.R. 2008/353)

The Social Fund (Applications and Miscellaneous Provisions) Regulations (Northern Ireland) 2008 (S.R. 2008/357)

The Zoonoses Animal By-Products (Fees) Regulations (Northern Ireland) 2008 (S.R. 2008/359)

Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich, NR3 1GN

Telephone orders/General enquiries: 0870 600 5522

Fax orders: 0870 600 5533

E-mail: customer.services@tso.co.uk

Textphone 0870 240 3701

TSO Shops

16 Arthur Street, Belfast BT1 4GD

028 9023 8451 Fax 028 9023 5401

71 Lothian Road, Edinburgh EH3 9AZ

0870 606 5566 Fax 0870 606 5588

TSO@Blackwell and other Accredited Agents

