

**Examiner of Statutory Rules**

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

**26 February 2010  
Report: NIA 44/09/10R**

Committee for Agriculture and Rural Development	S.R. 2010 Nos. 24, 28
Committee for the Environment	S.R. 2010 No. 23
Committee for Enterprise, Trade and Investment	S.R. 2010 No. 27
Committee for Finance and Personnel	Draft S.R.: The Rates (Deferment) Regulations (Northern Ireland) 2010; S.R. 2010 Nos. 21, 37, 38
Committee for Health, Social Services and Public Safety	S.R. 2010 Nos. 22, 29, 33
Committee for Regional Development	S.R. 2010 Nos. 25, 35
Committee for Social Development	S.R. 2010 Nos. 20, 32



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 (Superannuation Scheme, Compensation for Premature Retirement and Additional Voluntary Contributions), and Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/22)

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, Compensation for Premature Retirement and Additional Voluntary Contributions), and Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/22) 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.** The Regulations were made on 28 January 2010, were laid on 9 February 2010 and came into operation on 26 February 2010. The Department has apologised for the breach, has informed me of difficulties encountered in the printing of the Regulations and has indicated that the production of future Regulations will be more streamlined by using the S.R. template. I am satisfied that the explanation was reasonable.

The Passenger and Goods Vehicles  
(Recording Equipment) (Downloading and Retention of Data)  
Regulations (Northern Ireland)  
2010 (S.R. 2010/23)

4. **I draw the attention of the Committee for the Environment and the Assembly to the Passenger and Goods Vehicles (Recording Equipment) (Downloading and Retention of Data) Regulations (Northern Ireland) 2010 (S.R. 2010/23) on the ground that their drafting could have been clearer in one respect, acknowledged by the Department of the Environment. I report the Regulations by way of an attempt to provide guidance to Departments for future reference.**

5. The Regulations (made under section 2(2) of the European Communities Act 1972) also invoke the powers under paragraph 1A of Schedule 2 to the European Communities Act (as inserted by section 28 of the Legislative and Regulatory Reform Act 2006) to make “ambulatory” references to specified Community instruments so that references to those instruments are treated as references to the instruments as amended from time to time. Accordingly, the third paragraph of the recital of powers or preamble is in the following terms:

*“It appears to the Department of the Environment that it is necessary or expedient that **references to Community instruments in these Regulations** [my emphasis added] be construed as references to those instruments as amended from time to time.”.*

The intention was that this paragraph of the recital or preamble was to refer to a *textual amendment* (contained in regulation 3) of *other subordinate legislation*, namely, the Passenger and Goods Vehicles (Recording Equipment) Regulations (Northern Ireland) 1996 so as to insert in those Regulations a definition of “the Community Drivers’ Hours Regulation” – Regulation No, (EC) 561/2006 as amended from time to time. (A similar approach had been taken in S.R. 2009/91, it seems, where there was a *textual amendment of primary legislation*, inserting into the Road Traffic (Northern Ireland) Order 1981 a similar ambulatory definition of the Community Drivers’ Hours Regulation.)

6. It seems to me that particular care needs to be taken in cases such as this when invoking paragraph 1A of Schedule 2 to the European Communities Act 1972 *with a view to inserting ambulatory references to Community instruments by way of textual amendment to other legislation*. That is because the orthodox and generally accepted view is that a *textual amendment* contained in amending legislation is in effect *part of the legislation being amended rather than part of the amending legislation*. It would also be better practice in a case such as this to *indentify the Community instrument as clearly as possible* especially where there may be more than one Community instrument on the face of the regulations. By way of illustration I would suggest something along the following lines as being appropriate (my emphasis added):

*“It appears to the Department of the Environment that it is necessary or expedient that **references to Regulation No (EC) 561/2006 of the European Parliament and of the Council(x) in the Passenger and Goods Vehicles (Recording Equipment) Regulations (Northern Ireland) 1996(y)** be construed as references to that Community instrument as amended from time to time.”.*

Plainly, there are variations in that, and I commend the form adopted in recent Regulations drafted by the Food Standards Agency Northern Ireland (S.R. 2010/33, listed in the Appendix to this report) for the case where the intention is to invoke paragraph 1A of Schedule 2 to the European Communities Act 1972 so as to introduce textual amendments containing ambulatory references a Community instrument into several sets of subordinate legislation:

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*“... it appears to the Department of Health, Social Services and Public Safety that it is expedient for **references to Directive 2009/39/EC of the European Parliament and of the Council** on foodstuffs intended for particular nutritional uses(x) **in specified statutory rules** to be construed as references to that Directive as amended from time to time.”. (My emphasis added)*

(Where the intention was to apply the ambulatory reference formula to textual amendments in respect of a mixture of primary and subordinate legislation, “in specified statutory provisions” could be substituted for “in specified statutory rules”.)

### Lough Neagh (Levels) Scheme (Confirmation) Order (Northern Ireland) 2010 (S.R. 2010/28)

7. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Lough Neagh (Levels) Scheme (Confirmation) Order(Northern Ireland) 2010 (S.R. 2010/28) on the ground that they were laid in breach of the 21-day rule, explained by the Department of Agriculture and Rural Development.** The Order was made on 8 February 2010, was laid on 15 February 2010 and comes into operation on 1 March 2010. The Order was not laid within the 21-day rule because of an administrative oversight for which the Department of Agriculture and Rural Development apologises to the Assembly.

**W G Nabney**

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## Appendix

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

### **Draft statutory rule requiring the approval of the Assembly**

The Rates (Deferment) Regulations (Northern Ireland) 2010

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

The Pensions (Supplementary Provision) Order (Northern Ireland) 2010 (S.R. 2010/20)

The Rates (Social Sector Value) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/21)

**The Health and Personal Social Services (Superannuation Scheme, Compensation for Premature Retirement and Additional Voluntary Contributions), and Health and Social Care (Pension Scheme) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/22)**

**The Passenger and Goods Vehicles (Recording Equipment) (Downloading and Retention of Data) Regulations (Northern Ireland) 2010 (S.R. 2010/23)**

The Specified Animal Pathogens (Amendment) Order (Northern Ireland) 2010 (S.R. 2010/24)

The Airports (Sale of Aircraft) Regulations (Northern Ireland) 2010 (S.R. 2010/25)

Electricity and Gas (Billing) (No. 2) Regulations (Northern Ireland) 2010 (S.R. 2010/27)

**Lough Neagh (Levels) Scheme (Confirmation) Order (Northern Ireland) 2010 (S.R. 2010/28)**

The Ionising Radiation (Medical Exposure) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/29)

The Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations (Northern Ireland) 2010 (S.R. 2010/32)

The Food for Particular Nutritional Uses (Miscellaneous Amendments) Regulations (Northern Ireland) 2010 (S.R. 2010/33)

The Dill Road, Castlereagh (Abandonment) Order (Northern Ireland) 2010 (S.R. 2010/35)

Non-Domestic Rating (Unoccupied Hereditaments) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/37)

The Rates (Payment of Interest) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/38)





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