



**Northern Ireland
Assembly**

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

11 September 2009

Committee for Agriculture and Rural Development	S.R. 2009 Nos. 251, 298
Committee for Culture, Arts and Leisure	S.R. 2009 Nos. 288, 289, 295
Committee for Employment and Learning	S.R. 2009 Nos. 271, 297
Committee for Enterprise, Trade and Investment	S.R. 2009 Nos. 238, 296
Committee for the Environment	S.R. 2009 Nos. 252, 254, 256, 257
Committee for Finance and Personnel	S.R. 2009 No. 241
Committee for Health, Social Services and Public Safety	S.R. 2009 Nos. 247, 260, 263, 266
Committee for Regional Development	S.R. 2009 Nos. 246, 255, 269, 277, 278, 291, 292, 300, 301
Committee for Social Development	S.R. 2009 Nos. 239, 261, 262, 276, 286, 294

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 ENVIRONMENT LIABILITY (PREVENTION AND REMEDIATION)
REGULATIONS (NORTHERN IRELAND) 2009 (S.R. 2009/252)

GROUNDWATER REGULATIONS (NORTHERN IRELAND) 2009
(S.R. 2009/254)

3. **I draw the attention of the Committee for the Environment and the Assembly to the Environment Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009 (S.R. 2009/252) and to the Ground Water Regulations (Northern Ireland) 2009 (S.R. 2009/254) on the ground that both sets of regulations are defectively drafted in one or more respects, acknowledged by the Department of the Environment.**
4. Both sets of regulations contain provisions for penalties in respect of offences that may be prosecuted either summarily (in a magistrates' court) or on indictment (in the Crown Court); in both cases the penalty on summary conviction is expressed to be a fine not exceeding level 5 on the standard scale or imprisonment for a term not

exceeding three months. As regards the fine, the proper formula in a case such as this is a fine “not exceeding the statutory maximum”, since the standard scale applies to summary-only offences: that the current amount for both the statutory maximum and level 5 on the standard scale happens to be the same (£5,000) is immaterial, since they are two distinct statutory concepts. I have made this point before, as have the Joint Committee on Statutory Instruments at Westminster and the Subordinate Legislation Committee of the Scottish Parliament. I am of the view that the Department cannot argue that it is open to the court to rectify the Department’s mistake as regards the expression of the summary penalty.

5. The recital of powers/preamble to the Environment Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009 (S.R. 2009/252) recites the following:

“These Regulations make provision for a purpose mentioned in section 2(2) of, and paragraph 1A of Schedule 2 to the European Communities Act 1972 and it appears to the Department of the Environment that it is expedient for the Community instruments referred to in these Regulations to be construed as references to those instruments as amended from time to time.”

The established drafting practice in using this “ambulatory reference” formula (inserted as paragraph 1A of Schedule 2 to the European Communities Act 1972 by section 28 of the Legislative and Regulatory Reform Act 2006) is to set out in the body of the Regulations the references to instruments to be construed as being references to those instruments as amended from time to time: this was done in respect of the corresponding regulations for England (contained in S.I. 2009/153) thus:

“References to Community instruments

3. References in Schedule 2 to Community instruments are references to those instruments as amended from time to time.”

S.R. 2009/252 contains no corresponding provision and I take this to be an oversight on the part of the Department.

6. S.R. 2009/252 contains several references in regulation 26 to certain acts being done under authority of a warrant (see regulation 26(7)(b) and (8)). But those provisions are silent as to where the warrant comes from in the first place: who issues it, and on foot of what procedure? I should have thought that the warrant would be *issued by a lay magistrate on being satisfied on sworn complaint in writing* [of whatever – perhaps:] *that there are reasonable grounds for its issue*.
7. The Department has indicated that it intends to bring forward amendments “as soon as practicable” in the case of S.R. 2009/252 and “as soon as there is an opportunity to do so” in the case of S.R. 2009/254. My view is that **early amendment would be advisable in the case of both sets of regulations** – in view of the need to correct the provision in respect of penalty on summary conviction.

GENERAL DENTAL SERVICES (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2009 (S.R. 2009/263)

8. **I draw the attention of the Committee for Health, Social Services and Public Safety and the Assembly to the General Dental Services (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/263 on the ground they are defectively drafted in one respect, acknowledged by the Department of Health, Social Services and Public Safety.** The Regulations were made in conjunction with the Department of Finance and Personnel, in accordance with Article 107(6) of the Health and Personal Social Services (Northern Ireland) 1972, but the recital of powers/preamble did not recite that they were so made (although it recited Article 107(6) among the enabling powers). The Department has acknowledged the error, and I am of the view that it does not affect the validity of the Regulations.

W G Nabney
Examiner of Statutory Rules
11 September 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 Child Support (Miscellaneous Amendments) Regulations (Northern Ireland) 2009 (S.R. 2009/286)

Statutory rules subject to negative resolution

The Chemicals (Hazard Information and Packaging for Supply) Regulations (Northern Ireland) 2009 (S.R. 2009/238)

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

Valuation for Rates (Decapitalisation Rate) Regulations (Northern Ireland) 2009 (S.R. 2009/241)

Water Supply (Water Quality) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/246)

The Meat (Official Controls Charges) Regulations (Northern Ireland) 2009 (S.R. 2009/247)

The Horses (Zootechnical Standards) Regulations (Northern Ireland) 2009 (S.R. 2009/251)

The Environment Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009 (S.R. 2009/252)

Groundwater Regulations (Northern Ireland) 2009 (S.R. 2009/254)

The Water Supply (Water Fittings) Regulations (Northern Ireland) 2009 (S.R. 2009/255)

The Planning Fees (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/256)

The Smoke Control Areas (Exempted Fireplaces) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/257)

The Natural Mineral Water, Spring Water and Bottled Drinking Water (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/260)

The Social Security (Students and Miscellaneous Amendments) Regulations (Northern Ireland) 2009 (S.R. 2009/261)

The Social Security (Deemed Income from Capital) Regulations (Northern Ireland) 2009 (S.R. 2009/262)

General Dental Services (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/263)

Working Time (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/266)

The Tullynacross Road, Lisburn (Footway) (Abandonment) Order (Northern Ireland) 2009 (S.R. 2009/269)

The Industrial Training Levy (Construction Industry) Order (Northern Ireland) 2009 (S.R. 2009/271)

The Hosing Benefit (Child Benefit Disregard and Child Care Charges) Regulations (Northern Ireland) 2009 (S.R. 2009/276)

The Main Street, Castledawson (Footpath) (Abandonment) Order (Northern Ireland) 2009 (S.R. 2009/277)

The Clifton Street and Glenravel Street, Belfast (Footpath) (Abandonment) Order (Northern Ireland) 2009 (S.R. 2009/278)

The Safety of Sports Grounds (Designation) Order (Northern Ireland) 2009 (S.R. 2009/288)

The Safety of Sports Grounds (Fees and Appeals) Regulations (Northern Ireland) 2009 (S.R. 2009/289)

The Glencam Road, Omagh (Abandonment) Order (Northern Ireland) 2009 (S.R. 2009/291)

The Street Works (Inspection Fees) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/292)

The Pensions Regulator (Delegation of Powers) Regulations (Northern Ireland) 2009 (S.R. 2009/294)

The Safety of Sports Grounds (Designation) (No.2) Order (Northern Ireland) 2009 (S.R. 2009/295)

The Health and Safety at Work (Application to Environmentally hazardous Substances) Regulations (Northern Ireland) 2009 (S.R. 2009/296)

The Steps to Work (Miscellaneous Provisions) Order (Northern Ireland) 2009 (S.R. 2009/297)

Animals and Animal Products (Examination for Residues and Maximum Residue Levels) (Amendment) Regulations (Northern Ireland) 2009 (S.R. 2009/298)

The Barbour Gardens and Kingsway, Dunmurry (Abandonment) Order (Northern Ireland) 2009 (S.R. 2009/300)

The T6-Land Frontier-Aughnacloy-Ballygawley-Enniskillen-Belcoo-Land Frontier Order (Northern Ireland) 2009 (S.R. 2009/301)

Published by Authority of the Northern Ireland Assembly,
Belfast: 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@Blackwell and other Accredited Agents

Customers can also order publications from:

TSO Ireland

16 Arthur Street, Belfast BT1 4GD

Telephone: 028 9023 8451

Fax: 028 9023 5401

