

**Examiner of Statutory Rules**

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

**30 January 2015  
NIA 228/11-16**

Committee for the Environment	S.R. 2014 Nos. 307, 308, S.R. 2015 No. 14
Committee for Finance and Personnel	Draft S.R.: The Public Service (Civil Servants and Others) Pensions (Northern Ireland) Regulations 2015 S.R. 2015 No. 20
Committee for Health, Social Services and Public Safety	S.R. 2015 Nos. 7, 8, 9, 10, 11
Committee for Justice	Draft S.R.: The Justice (Northern Ireland) Act 2004 (Amendment of section 8(4)) Order (Northern Ireland) 2015 Draft S.R.: The Judicial Pensions Regulations (Northern Ireland) 2015
Committee for Regional Development	S.R. 2015 No. 13, 22
Committee for Social Development	S.R. 2015 No. 2



1. In accordance with the delegations in respect of the technical scrutiny of statutory rules under Standing Order 43(4)(b) given to the Examiner of Statutory Rules by the appropriate Committees on 25, 26 and 31 May and 1 June 2011 for this mandate of the Assembly, 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 Nitrates Action Programme Regulations (Northern Ireland) 2014 (S.R. 2014/307)**

**The Phosphorus (Use in Agriculture) Regulations (Northern Ireland) 2014 (S.R. 2014/308)**

3. **I draw the attention of the Committee for the Environment and the Assembly to the Nitrates Action Programme Regulations (S.R. 2014/307) and the Phosphorus (Use in Agriculture) Regulations (Northern Ireland) 2014 (S.R. 2014/308) on the ground that the Regulations were laid in breach of the 21-day rule, explained by the Department of the Environment.** The revised derogation in respect of the Nitrates Action Programme had to be in place for 1 January 2015 (following the expiration of the previous derogation). But the Regulations could not be finalised until 11 December 2014 after the derogation decision was approved by the EU Nitrates Committee. The Phosphorus (Use in Agriculture) Regulations contain cross-references to the Nitrates Action Programme Regulations and connected. So both sets of regulations were made on 11 December 2014, were laid on 12 December 2014 and came into operation on 1 January 2015. In the circumstances the Department's explanation seems to be reasonable.
4. **I also draw attention a drafting defect in the Nitrates Action Programme Regulations, acknowledged by the Department.**

5. Regulation 31 makes provision for penalties both on conviction summarily and on indictment. In doing so it largely follows Article 32(7) of the Waste and Contaminated Land (Northern Ireland) Order 1997 in the following terms:

**“Penalties**

31. Any person guilty of an offence under regulation 30 shall be liable on summary conviction, to a fine not exceeding level 5 on the standard scale (if not calculated on a daily basis) or, in the case of a continuing offence, not exceeding an amount equal to one-tenth of level 5 on the standard scale; or on conviction on indictment to imprisonment for a term not exceeding 2 years.”.

Article 32(7) of the 1997 Order (to which there is similar provision, generally for England and Wales and Scotland, in section 140(10) of the Environmental Protection Act 1990), for comparison, is as follows:

“(7) No offence under the regulations shall be made punishable with imprisonment for more than 2 years or punishable on summary conviction with a fine exceeding level 5 on the standard scale (if not calculated on a daily basis) or, in the case of a continuing offence, exceeding one-tenth of the level on the standard scale specified as the maximum penalty for the original offence.”.

The two provisions, on their face, look reasonably similar. The problem is that regulation 31 actually prescribes the penalties for an offence punishable either summarily or on indictment: in that case, the summary penalty by way of a fine should (in the absence of a specified higher fine) be expressed in terms of the statutory maximum rather than level 5 on the standard scale: see Article 4 of the Fines and Penalties (Northern Ireland) Order 1984. There is no actual conflict between the proposition in respect of the statutory maximum and what is in Article 32(7) of the 1997 Order because the purpose of Article 32(7) is not to set out penalties but, rather, merely to restrict the Department’s power to prescribe penalties where it creates offences in regulations. (The penalty in regulation 12 of the Phosphorus (Use in Agriculture) Regulations — also made under Article 32(7) of the 1997 Order — is, by contrast, correctly stated in terms of the level 5 on the standard scale formula, since the offence in question is summary-only.)

6. I have suggested to the Department that it should replace regulation 31 with provision similar to what was in the previous Nitrates Action Programme Regulations (contained in S.R. 2010/411) in respect of penalties. I also suggested to the Department that it might perhaps give consideration to a future amendment of Article 32(7) of the 1997 Order in primary legislation to make the limits on penalties clearer. On the other hand, I reflect that there is a similar limiting provision on penalties in paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972, and that seems to work reasonably well, both for offences punishable either way and summary-only offences. Particular care must of course be taken in the drafting offences and the penalties attaching to them, and that is a point worth emphasising again and again.

<p><b>The Housing Benefit (Executive Determinations) Regulations (Northern Ireland) 2015 (S.R. 2015/2)</b></p>
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7. **I draw the attention of the Committee for Social Development and the Assembly to the Housing Benefit (Executive Determinations) Regulations (Northern Ireland) 2015 (S.R. 2015/2) on the ground that the Regulations were laid in breach of the 21-day rule, explained by the Department for Social Development.** The Department for Work and Pensions advised DSD on 4 December 2014. Since then the Department worked closely with the Northern Ireland Housing Executive. Final checks were carried out on the Housing Executive’s proposed local housing allowance (LHA) rates for 2015 (identification of dwellings within particular broad market rental areas that would attract an LHA Targeted Affordability Fund increase on LHA rates). Agreement on this was reached on 12 January 2015, whereupon the Regulations were made and laid on 13 January 2015. Under the formula in

existing regime when the Regulations were made, the date for the determination of this was 21 January 2015, so the Regulations were made so as to come into operation on 20 January 2015. (Changes for the future, contained in these Regulations, make the determination date the last working day of January, so that may ease the timing of this in future years, taking account of holiday and recess periods around Christmas.) In the circumstances, the Department's explanation seems to be reasonable.

**The Rates (Making and Levying of Different Rates) Regulations (Northern Ireland) 2015 (S.R. 2015/20)**

8. **I draw the attention of the Committee for Finance and Personnel and the Assembly to the Rates (Making and Levying of Different Rates) Regulations (Northern Ireland) 2015 (S.R. 2015/20) on the ground that the Regulations were laid in breach of the 21-day rule, explained by the Department for Finance and Personnel.** The explanation (given to me in advance on 22 January 2015) seems to be reasonable in the circumstances. It is in the following terms:

“[The reorganisation of local government on 1 April 2015 from 26 district councils to 11] will take effect on the same date as the non-domestic revaluation exercise. The changes to the number of councils, and the non-domestic tax base as a result of both those changes means that conversion factors currently prescribed within the Rates (Making and Levying of Different Rates) Regulations (Northern Ireland) 2006 (S.R. 2006 No.498) need to be adjusted.

Conversion factors are employed within the rating system to enable different district rates to be made and levied on the rateable net annual values of properties and on the rateable capital values of properties. A formula is applied by district councils to allow them to make one decision in striking a district rate by treating their domestic tax base and their new non-domestic tax base as a unified tax base.

The new conversion factors have been determined by DFP. In addition each of the new 11 councils have been given advance notification of their applicable conversion factor formally through the estimated penny product process undertaken by the Department, and the Department has been working closely with councils in relation to how the factors will be employed.

There are a lot of complex changes occurring within the rating system in April due to local government reorganisation, reductions in DOE grants to councils and the non-domestic Revaluation. DFP wants to ensure, therefore, that it strikes the right balance in terms of the timing and accuracy of setting the conversion factors in subordinate legislation. We need to use the most up to date valuation and boundary information available to us, while also allowing the new shadow councils to trial the conversion factors for their rate striking procedures in advance of the Department codifying them.

This process has to be undertaken and finalised before the legislation can be made. However legal advice from DSO has indicated that the legislation should ideally be operative before the Councils formally strike their rates. The Department considers it necessary on this one occasion to wait until the last possible moment, before formally codifying the conversion factors. This will however entail a breach of the 21 day convention.”

Against that background, the Regulations were made and laid on 27 January 2015 and came into operation on 28 January 2015.

**W G Nabney**  
Examiner of Statutory Rules  
30 January 2015

## Appendix

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

### Draft statutory rules requiring the approval of the Assembly

Draft S.R.: The Justice (Northern Ireland) Act 2004 (Amendment of section 8(4)) Order (Northern Ireland) 2015

Draft S.R.: The Judicial Pensions Regulations (Northern Ireland) 2015

Draft S.R.: The Public Service (Civil Servants and Others) Pensions (Northern Ireland) Regulations 2015 This draft statutory rule replaces S.R. 2015/15, which is to be revoked.

### Statutory rules subject to affirmative resolution

The Donaghadee Harbour (Transfer of Harbour Undertaking) Order (Northern Ireland) 2015 (S.R. 2015/22)

### Statutory rules subject to negative resolution

**The Nitrates Action Programme Regulations (Northern Ireland) 2014 (S.R. 2014/307)**

**The Phosphorus (Use in Agriculture) Regulations (Northern Ireland) 2014 (S.R. 2014/308)**

The Housing Benefit (Executive Determinations) Regulations (Northern Ireland) 2015 (S.R. 2015/2)

The Firefighters' Compensation Scheme (Amendment) Order (Northern Ireland) 2015 (S.R. 2015/7)

The Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2015 (S.R. 2015/8)

The New Firefighters' Pension Scheme (Amendment) Order (Northern Ireland) 2015 (S.R. 2015/9)

The New Firefighters' Pension Scheme (Amendment No. 2) Order (Northern Ireland) 2015 (S.R. 2015/10)

The Firefighters' Compensation Scheme (Amendment No. 2) Order (Northern Ireland) 2015 (S.R. 2015/11)

The Level Crossing (Cullybackey South) Order (Northern Ireland) 2015 (S.R. 2015/13)

The Food Waste Regulations (Northern Ireland) 2015 (S.R. 2015/14)

**The Rates (Making and Levying of Different Rates) Regulations (Northern Ireland) 2015 (S.R. 2015/20)**





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