

Examiner of Statutory Rules

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

**21 November 2014
NIA 280/11-16**

Committee for Enterprise, Trade and Investment	S.R. 2014 No. 280
Committee for the Environment	S.R. 2014 No. 276
Committee for Health, Social Services and Public Safety	S.R. 2014 No. 267
Committee for Justice	S.R. 2014 Nos. 265, 274
Committee for Regional Development	S.R. 2014 Nos. 278, 279
Committee for Social Development	S.R. 2014 No. 275

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 rule to which attention is drawn in this report

The Health and Social Care (Disciplinary Procedures) Regulations (Northern Ireland) 2014 (S.R. 2014/267)

3. **I draw the attention of the Committee for Health, Social Services and Public Safety to the Health and Social Care (Disciplinary Procedures) Regulations (Northern Ireland) 2014 (S.R. 2014/267) on the ground that they contain a number of drafting defects, acknowledged by the Department for Health, Social Services and Public Safety (see paragraphs 5 to 8).**
4. **And it seemed to me that the appeals procedure in regulation 6 was in plain need of restructuring after some sixty-six years in much the same form: the fundamental problem is that a panel hears the appeal but the Department actually decides it on the basis of a report from the panel. The Department accepts this and intends to consult the Regional Health Board and the relevant professions (see paragraphs 9 and 10).**
5. The drafting defects mainly concern numbering and layout points.
6. I queried the intended effect provisions relating to time limits in respect of disciplinary action by the Regional Board in regulation 3, particularly regulation 3(2) to (4). Paragraph (2) states that the time limits are those set out in paragraph (3), which is in turn qualified (in part at least) by paragraph (4), but the reference to paragraph (3) in that paragraph is plainly wrong in that it includes a reference to a non-existent paragraph (3)(c) as well as to paragraph (3) (a) and (b). The Department is now reconsidering the provisions relating to time limits to

ensure that they do precisely what was intended. My understanding of the Department's present position is that the qualification of the paragraph (3) general time limit in paragraph (4) should in fact apply only to paragraph (b)(iii). Plainly, the Department needs to consider this carefully to ensure that the numbering is consistent with the intended effect in as clear a manner as possible for all users of the Regulations.

7. In regulation 5(3) (relating to appeals to the Department) there is a reference to a modification of certain provisions "in accordance with paragraph (5)" (whose intended effect is to apply certain provisions with the modification of substituting the Department for the Regional Board where the Department is making the decision on appeal from the Regional Board). Unfortunately, there is a (plainly) wrong cross-reference to paragraph (5): it should be to paragraph (4). And there is also in that paragraph an erroneous qualification ("Subject to paragraph (6)"): there is no paragraph (6). (I return to the matter of appeals at paragraphs 9 and 10 of this report.)
8. In several places the paragraphing has gone awry. In regulation 7, the final words "the Department may" have been wrongly attached to paragraph (7)(b), whereas the intended effect was that those words should apply to both regulation 7(a) and (b), and that they should have been printed full out as a final line of the regulation. The same point applies to regulations 8 and 12.
9. I have identified some problems with the appeals provisions in regulations 5 and 6. But my main concern is more fundamental. The Department goes to some lengths to provide for appeals to be heard by a panel consisting of a legally qualified chair and two other panel members drawn from the relevant health profession (dentists, ophthalmic opticians, ophthalmic medical practitioners or pharmacists, as the case may be) to which the appeal relates. So far so good. The problem I see is that the appeal is heard by the panel but the actual decision is made by the Department on a report from the panel. That surely cannot be right in principle, either from the perspective of Article 6 ECHR (so that its compatibility with Article 6 must at least be in question) or indeed from the perspective of general principles of procedural fairness? Indeed it seems to me that it is not, in juristic terms, an appeal in any true sense. I add that it seems that this appeal structure has evolved in the manner it has over the sixty-six years since the establishment of the Health Service in Northern Ireland in 1948. Prior to these Regulations the appeal structure was last formulated in 1996.
10. I have made some suggestions for the redrafting of regulations 5 and 6 so that the panel would in effect make the actual decision on appeal on behalf of the Department, which seems much more satisfactory all round. I am also of the view that the drafting of the provisions could be streamlined in terms of procedure and expressed more clearly. My understanding is that the Department is generally receptive to my suggestions, but that it needs to consult the Regional Board and bodies representing the relevant professions.
11. **My overall view, in conclusion, is that that it would be better to replace these Regulations (which come into operation on 24 November 2014) as soon as possible, albeit that the Department needs to consult on the appeals provisions. In the short term the Department intends to tidy the errors and infelicities in these Regulations. That should, it seems to me, be followed fairly quickly (allowing for the necessary consultations) by a full set of replacement regulations incorporating the appeals provisions, and the Committee may wish to seek a firm undertaking from the Department to that effect. It is in everyone's interest that there are proper procedures in place.**

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)

Statutory rules subject to negative resolution

The Police Act 1997 (Criminal Records) (Amendment No. 2) Regulations (Northern Ireland) 2014 (S.R. 2014/265)

The Health and Social Care (Disciplinary Procedures) Regulations (Northern Ireland) 2014 (S.R. 2014/267)

The Attorney General's Human Rights Guidance (Northern Ireland Courts and Tribunals Service – Support for Victims and Witnesses) Order (S.R. 2014/274)

The Social Security (Miscellaneous Amendments No. 2) Regulations (Northern Ireland) 2014 (S.R. 2014/275)

The Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/276)

The Penalty Charges (Additional Contraventions) Regulations (Northern Ireland) 2014 (S.R. 2014/278)

The Penalty Charges (Prescribed Devices) Regulations (Northern Ireland) 2014 (S.R. 2014/279)

The Health and Safety (Fees) (Amendment) Regulations (Northern Ireland) 2014 (S.R. 2014/280)



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