



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

Eleventh Report of Session 2016-2017

NIA 22/16-21

20 January 2017

Committee for Agriculture, Environment and Rural Affairs	<p>S.R. 2017/2: The Air Quality Standards (Amendment) Regulations (Northern Ireland) 2017</p> <p>S.R. 2017/3: The Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations (Northern Ireland) 2017</p> <p>S.R. 2017/8: The Areas of Natural Constraint Regulations (Northern Ireland) 2017</p> <p>S.R. 2017/13: The Single Common Market Organisation (Exceptional Adjustment Aid) Regulations (Northern Ireland) 2017</p>
Committee for Communities	Draft S.R.: The Welfare Supplementary Payment (Amendment) Regulations (Northern Ireland) 2017

	<p>Draft S.R.: The Housing Benefit (Welfare Supplementary Payment) Regulations (Northern Ireland) 2017</p> <p>S.R. 2017/9: The Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2017</p>
Committee for the Economy	<p>Draft S.R.: The Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017</p> <p>S.R. 2017/7: The Education (Student Support) (No. 2) (Amendment) and Education (Student Loan) (Repayment) (Amendment) Regulations (Northern Ireland) 2017</p>
Committee for Health	S.R. 2017/10: The General Dental Services (Amendment) Regulations (Northern Ireland) 2017
Committee for Justice	S.R. 2016/431: The Victim Statement Regulations (Northern Ireland) 2016

1. Remit of the Examiner of Statutory Rules

- 1.1 Standing Order 43 provides that every statutory rule or draft statutory rule which is laid before the Assembly and is subject to Assembly proceedings shall stand referred to the appropriate Committee of the Assembly for scrutiny. The Standing Orders of the Assembly are published on the Northern Ireland Assembly [website](#).
- 1.2 To assist Committees of the Assembly in the scrutiny of such rules under Standing Order 43, the Examiner of Statutory Rules (the Examiner) shall carry out those functions delegated to the Examiner in relation to technical scrutiny.
- 1.3 The terms of reference of the Examiner, under delegation from the appropriate Committee, are as set out in Standing Order 43(6) as follows:

“In scrutinising an instrument the appropriate committee shall among other things 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.”

2. In accordance with Standing Orders, in this report I draw the attention of the appropriate Committees and the Assembly to the following Rules.

3. The 21 day rule

- 3.1 The 21 day rule is the established rule of parliamentary practice whereby a Department or other rule-making body should, in the case of a statutory rule that is subject to negative resolution, allow a minimum of 21 days between the laying of the statutory rule and its coming into operation.
- 3.2 The 21 day rule operates to ensure that the Assembly may carry out scrutiny of a statutory rule before it comes into operation. A Department or other rule-making body should not breach the 21 day rule unless there exists a compelling need for urgency which it should set out fully at the time of laying of the statutory rule in question.

4. S.R. 2017/9, The Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2017

- 4.1 I draw the attention of the Committee for Communities and the Assembly to S.R. 2017/9, The Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2017, ('the Regulations') on the ground that the Regulations were laid in breach of the 21 day rule. The Regulations, which are subject to negative resolution, were made on 16 January 2017, laid on 16 January 2017, and come into operation on 23 January 2017.
- 4.2 The Department for Communities ('the Department') has expressed regret at the breach of the 21 day rule and has set out the background to and reasons for this breach.
- 4.3 The Department advises:

"...This Statutory Rule will enable the Local Housing Allowance rate for specified categories of dwelling within some areas of Northern Ireland to be uplifted by 3% through a Targeted Affordability Fund, instead of remaining frozen at the 2015 rate.

It is therefore a beneficial measure for some Housing Benefit claimants. The equivalent changes in Great Britain will come into operation on 23 January 2017 by means of The Rent Officers (Housing Benefit and Universal Credit Functions) (Local Housing Allowance Amendments) Order 2016 (S.I. 2016 No. 1179).

As the Northern Ireland Housing Executive is obliged by statute to make Local Housing Allowance rate determinations on the last working day of January, which this year falls on 31 January, these changes need to be in place to ensure that those Local Housing Allowance rates which will benefit from the Targeted Affordability Fund are not frozen without this mitigation and that those claimants who would benefit do not lose out.

...

DWP laid their equivalent regulations on 12 December.

We then had to identify the relevant Broad Rental Market Area and categories of dwelling within those areas which would benefit from the 3% uplift, in conjunction with colleagues in the Northern Ireland

Housing Executive. This exercise was completed on 20 December, by which time the Assembly had gone into recess.

The first available Committee for Communities meeting after this was scheduled to take place on 12 January 2017 and the SL1 for our regulations was listed for consideration on that date. Unfortunately the Committee meeting did not take place.

In the absence of Committee scrutiny we then had to decide to go ahead and lay the Regulations.

A submission detailing the beneficial nature of the Regulations and explaining the ramifications of not laying them was submitted to Minister on 13 January 2017. Ministerial agreement was received on the same date.

The regulations were then laid on 16 January 2017.”

- 4.4 I am content that the Department has provided a satisfactory explanation for the breach in this instance.

5. S.R. 2017/13, The Single Common Market Organisation (Exceptional Adjustment Aid) Regulations (Northern Ireland) 2017

- 5.1 I draw the attention of the Committee for Agriculture, Environment and Rural Affairs and the Assembly to S.R. 2017/13, The Single Common Market Organisation (Exceptional Adjustment Aid) Regulations (Northern Ireland) 2017, ('the Regulations') on the ground that the Regulations were laid in breach of the 21 day rule. The Regulations, which are subject to negative resolution, were made on 16 January 2017, laid on 16 January 2017, and come into operation on 1 February 2017.

- 5.2 The Department for Agriculture, Environment and Rural Affairs ('the Department') has set out its reasons for this breach of the 21 day rule in the Explanatory Memorandum prepared by the Department to accompany the Regulations.

- 5.3 The Department states:

“These Regulations come into operation on 1 February 2017 and therefore breach the 21 Day Rule. The Minister for Agriculture, Environment and Rural Affairs notified the European Commission of the proposed measures for use of EU Exceptional Adjustment Aid in Northern Ireland on 30 November 2016. Since that date work has been progressing on the detailed operation of these measures and drafting of the associated new Regulations. Furthermore, given the current political uncertainty it is not clear on what alternative date these Regulations might have been brought into operation under the normal legislative procedure. The EU Commission deadline for payment of Exceptional Adjustment Aid is 30 September 2017. Any delay to implementation of the BVD and pig competitiveness measures would mean that it would then not be possible to spend in full the EU funding provisionally allocated to these measures. In addition, there is an expectation in the industry that funding will be available for BVD and

there is therefore a risk that farmers would hold onto infected calves pending confirmation of the scheme details. In view of the prevailing circumstances, the Minister has taken the decision, to proceed to make and lay the Regulations and bring them into operation on 1 February 2017.”

- 5.4 I am content that the Department has provided a satisfactory explanation for the breach in this instance.

6. Draft S.R.: The Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017

- 6.1 I draw the attention of the Committee for the Economy and the Assembly to the draft Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017, ('the Regulations') in relation to Standing Order 43(6)(f).
- 6.2 The Regulations are subject to the draft affirmative procure and were laid by the Department for the Economy ('the Department') on 13 January 2017. If approved and made, the Regulations shall come into operation on whichever is the later of 1 April 2017 or the day after the European Commission gives approval that the provisions of the Regulations are compatible with the internal market, within the meaning of Article 107 of the Treaty on the Functioning of the European Union. The Regulations will amend the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 ('the 2012 Regulations') to introduce a tiered tariff and an annual cap for eligible payments for installations accredited before 18 November 2015 which fall within the small or medium commercial biomass installations set out in new Schedule 3A. The Regulations, and accordingly the changes which they make to the Renewable Heat Incentive Scheme (the RHI scheme), will cease to have effect on 31 March 2018.
- 6.3 Standing Order 43(6)(f) provides that in scrutinising an instrument the appropriate Committee, or the Examiner having been so delegated, shall 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 the ground that there appears to be a doubt whether it is intra vires.
- 6.4 Consideration under Standing Orders of whether an instrument is intra vires requires consideration of the application of section 24 of the Northern Ireland Act 1998 ('the 1998 Act'). Section 24 of the 1998 Act provides that a Minister or Northern Ireland Department has no power to make, confirm or approve any subordinate legislation in so far as the legislation is incompatible with any of the rights secured under the European Convention on Human Rights ('the Convention').
- 6.5 Accordingly, the attention of the Committee and the Assembly is drawn to the Regulations in relation to the impact of the Regulations on rights secured under Article 1, Protocol 1 of the Convention.
- 6.6 Article 1 of Protocol 1 to the Convention states:

“Every natural or legal person is entitled to the peaceful enjoyment of his or her possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

- 6.7 It is noted that the rights secured by Article 1, Protocol 1 are not absolute and that the state may interfere with these rights in so far as that interference is proportionate to the legitimate public interest objective. The Committee and the Assembly must consider whether and how the Regulations interfere with such rights: whether any person will be deprived of their possessions, whether any such interference is according to law, whether there is a justification in the public interest for any such interference, and whether the Regulations maintain a reasonable relationship of proportionality, that is, a fair balance, between the means employed and the aim sought to be realised.
- 6.8 ‘Possessions’ within the meaning of Article 1, Protocol 1 can be either existing possessions or assets or claims in respect of which there is a ‘legitimate expectation’ that they will be realised. This may include situations where there exists a ‘legitimate expectation’ that a certain state of affairs will apply or on a reasonably justified reliance on a legal act which had a sound legal basis and which bore on property rights.
- 6.9 A monetary loss, or loss of future livelihood, unless based on loss of some professional or business goodwill or other present legal entitlement, will not constitute a possession. While an expectation of future income is not a possession, legislation which provides for a payment to be received in the future may nevertheless be regarded as creating a present legal entitlement and a proprietary interest falling within the ambit of Article 1, Protocol 1. The question of whether any person has in fact established such an interest may ultimately be a matter for the Court.
- 6.10 Any interference with rights secured under Article 1, Protocol 1 must be subject to the conditions provided for by law. Section 113 of the Energy Act 2011 (‘the 2011 Act’) provides the Department with the statutory authority to make the Regulations. It is noted that while the 2011 Act places duties to consult on the Secretary of State in relation to certain matters under the 2011 Act, there is no statutory duty to consult placed upon the Department by the 2011 Act in relation to its powers under section 113.
- 6.11 While there is no general common law duty to consult persons who may be affected by a change in policy, a duty to consult may exist in circumstances where there is a legitimate expectation that such a consultation will take place. Adherence to the rule of law and principles of natural justice is a requirement inherent in the Articles of the Convention. It requires consideration not just of the statutory authority under which a Department may make regulations, but also consideration of the common law requirement of fairness, which can

require consultation. A benefit ought not to be withdrawn before the reason for its withdrawal has been communicated to that person enjoying it and that person has been given an opportunity for comment, unless there is an overriding reason to deny the opportunity for that consultation.

- 6.12 No consultation on the Regulations has taken place; however, it is noted that the Department has stated its intention to consult on changes to the RHI scheme. The Regulations propose a change in the payments regime under the RHI scheme for a period ending on 31 March 2018. While it may be asserted that urgency has precluded consultation in this case, and that the change in the rights of participants in the RHI scheme is limited in its duration, it is unlikely that such an approach could be justified in the case of further or continuing changes to the scheme.
- 6.13 Where the interference with the rights secured under Article 1, Protocol 1 is subject to the conditions provided for by law, that interference must be in pursuance of a legitimate public interest objective.
- 6.14 The Department has advised that it considers that the present RHI Scheme strikes a poor balance between the public interest and private interests. The Department considers that the terms of the RHI Scheme do not presently serve the objectives of the 2011 Act, encourage poor use of energy, have severe implications for public spending and do not reflect the requirements of the European Commission's State aid approval.
- 6.15 The state has a wide margin of appreciation in the implementation of social and economic policy and the judgement of the state as to what is in the general interest is likely to be accepted by the European Court of Human Rights (ECtHR) unless manifestly without reasonable foundation. A deprivation of property affected in pursuance of legitimate social, economic or other policies may be in the public interest even if the community at large derives no direct benefit from the deprivation.
- 6.16 The remaining question is whether the Regulations maintain a reasonable relationship of proportionality between the means employed to meet the Department's legitimate aims and the aims to be realised. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protections of the individual's fundamental rights. The individual must not be required to bear an individual and excessive burden. The state is not required to seek out the least burdensome policy approach; the fact that there may be other means by which the state may achieve its legitimate public interest objective does not of itself render the chosen approach disproportionate.
- 6.17 The availability of compensation may have relevance in assessing whether a fair balance has been struck between the public interest objective and the rights of the individual. It is noted that Article 1, Protocol 1 does not guarantee a right of compensation in all circumstances; legitimate public interest objectives may call for less than reimbursement of the full market value of the deprivation or make no provision for compensation for any such deprivation.

- 6.18 It is important to note that statutory rules, particularly those with significant human rights implications, should be laid before the Assembly, or otherwise made available to the appropriate Committee of the Assembly, so as to allow sufficient time for effective scrutiny to take place.
- 6.19 Given the limited opportunity for scrutiny of the Regulations, the Assembly and Committee may not be able to reach a definitive view as to whether these Regulations will in fact interfere with the Article 1, Protocol 1 rights of any person. It may be considered that the public interest objectives of the Department fall within the wide margin of appreciation afforded to the state and that the stated objectives of the Department in making these Regulations may be considered to be a legitimate public interest objective. Further, if a legitimate expectation to the continuation of the payments at the original 2012 tariff were to be established by any person, or indeed all affected participants, it may be argued that these Regulations, limited in their period of application, are nonetheless a proportionate means of achieving that legitimate public interest objective.

Angela Kelly

Examiner of Statutory Rules

20 January 2017

Appendix:

The attention of the appropriate Committees and the Assembly is drawn to those statutory rules which are set out in bold.

STATUTORY RULES SUBJECT TO NEGATIVE RESOLUTION

S.R. 2016/431: The Victim Statement Regulations (Northern Ireland) 2016

S.R. 2017/2: The Air Quality Standards (Amendment) Regulations (Northern Ireland) 2017

S.R. 2017/3: The Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations (Northern Ireland) 2017

S.R. 2017/7: The Education (Student Support) (No. 2) (Amendment) and Education (Student Loan) (Repayment) (Amendment) Regulations (Northern Ireland) 2017

S.R. 2017/8: The Areas of Natural Constraint Regulations (Northern Ireland) 2017

S.R. 2017/9: The Housing Benefit (Executive Determinations) (Amendment) Regulations (Northern Ireland) 2017

S.R. 2017/10: The General Dental Services (Amendment) Regulations (Northern Ireland) 2017

S.R. 2017/13: The Single Common Market Organisation (Exceptional Adjustment Aid) Regulations (Northern Ireland) 2017

STATUTORY RULES SUBJECT TO DRAFT AFFIRMATIVE RESOLUTION

Draft S.R.: The Housing Benefit (Welfare Supplementary Payment) Regulations (Northern Ireland) 2017

Draft S.R.: The Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017

Draft S.R.: The Welfare Supplementary Payment (Amendment) Regulations (Northern Ireland) 2017



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ISBN: 978-1-78619-284-4