



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

Eleventh Report of Session 2020 – 2021*

18 November 2020

Committee for the Economy	<p>Subject to the negative resolution procedure:</p> <p>S.R. 2020/251: The Posted Workers (Agency Workers) Order (Northern Ireland) 2020</p>
Committee for Infrastructure	<p>Subject to the negative resolution procedure:</p> <p>S.R. 2020/218: The Planning Act 2011 (Review) Regulations (Northern Ireland) 2020</p> <p>S.R. 2020/222: The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) Regulations (Northern Ireland) 2020</p>

1. Remit of the Examiner of Statutory Rules

- 1.1 Assembly 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 appropriate Committee may also scrutinise any statutory rule which deals with a transferred matter, within the meaning of the Northern Ireland Act 1998, which is not subject to Assembly proceedings. 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 statutory 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.”

- 1.4 Standing Order 43(7) provides that the Examiner shall, where practicable, report on a statutory rule or draft statutory rule before any resolution or motion relating to that statutory rule or draft statutory rule is moved in the Assembly.

2. Assembly procedure in relation to statutory rules

Statutory rules which are laid before the Assembly may be subject to one of the following Assembly procedures. The procedure to which any statutory rule is subject will be set out in the parent legislation.

Rules Subject to Negative Resolution

A statutory rule that is subject to the negative resolution procedure is made by the rule making body, often a Department, and laid before the Assembly. It is law when its 'comes into force' date is reached.

It can be annulled by resolution of the Assembly within the 'statutory period'.¹ It is then void from the date of that annulment.

The statutory period is set out in the Interpretation Act (Northern Ireland) 1954. It is 30 calendar days or ten days on which the Assembly has sat after the date on which the statutory rule was laid before the Assembly, whichever is the longer.²

Rules Subject to Confirmatory Resolution

A statutory rule which is subject to confirmatory procedure is made by the rule making body, often a Department, and laid before the Assembly.

It ceases to have effect within a specified period provided for in the parent legislation unless approved by a resolution of the Assembly within that time.

Rules Subject to Affirmative Resolution

A statutory rule which is subject to the affirmative resolution procedure is made by the rule making body, often a Department, and laid before the Assembly.

It shall not come into operation unless and until affirmed by a resolution the Assembly.

Rules Subject to Draft Affirmative Resolution

A statutory rule which is subject to the draft affirmative procedure is laid in draft before the Assembly by the rule making body, often a Department. It may not be made unless and until affirmed by a resolution the Assembly.

¹ Section 41(6) [Interpretation Act \(Northern Ireland\) 1954](#)

² Section 41(2) [Interpretation Act \(Northern Ireland\) 1954](#)

3. Statutory rules to which attention is drawn in this report

3.1 Breach of the 21 day rule

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.

The 21 day rule acts to protect those who may be affected by changes in the law from being subject to those changes before they have had a reasonable opportunity to understand the effect of the changes and what they must do to satisfy any requirements.

Accordingly, a statutory rule should be laid at least 21 calendar days before it is due to come into force (including the date of laying) and only be brought into force on the twenty-second day at the very earliest.

The 21 day rule also operates to ensure that the Assembly may carry out scrutiny of a statutory rule before it comes into force. 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.

Only in the most exceptional circumstances should a statutory rule that is subject to negative resolution be laid after it has come into operation and, where it is so laid, a full explanation of the circumstances giving rise to that should be given.

I draw the attention of the Assembly to the following statutory rule on the ground that the Rule was laid in breach of the 21 day rule.

S.R. 2020/251: The Posted Workers (Agency Workers) Order (Northern Ireland) 2020

The Order was made on 12 November 2020, laid on 12 November 2020, and came into operation on 13 November 2020.

In the Explanatory Memorandum to the Order, the Department has acknowledged that the Order was laid in breach of the 21 day rule and has explained the reason for the breach.

The Department advises that it considers that the breach was necessary in order to ensure that the relevant EU Directive which was due to be transposed by 30 July 2020 was not further delayed and to ensure compliance in advance of IP completion day (31 December 2020 at 11.00 pm).

I am content that the Department has, on this occasion, provided a satisfactory reason for the breach.

4. Unusual or unexpected use of the power

4.1 S.R. 2020/218: The Planning Act 2011 (Review) Regulations (Northern Ireland) 2020 (the Regulations) are drawn to the special attention of the Assembly on the ground that an unusual or unexpected use has been made of the power conferred by the parent legislation.

The Regulations are made under section 228(2) of the Planning Act (Northern Ireland) 2011 (the 2011 Act). Section 228 provides:

“228—(1) The Department must—

(a) not later than 3 years after the commencement of Part 3 of this Act, and

(b) at least once in every period of 5 years thereafter,

review and publish a report on the implementation of this Act.

(2) Regulations under this section shall set out the terms of the review.”

Section 228(1) of the 2011 Act requires the Department to review and publish a report on the implementation of the 2011 Act no later than 3 years after the commencement of Part 3 of the Act, and at least once in every 5 year period thereafter. As the relevant commencement date was 1 April 2015, the first review was mandated to take place by 1 April 2018.

The Department is required by section 228(2) to make regulations setting out the terms of the review. While section 228 does not specify the period within which the Regulations are to be made, the Regulations must set out the terms of the review; accordingly, the regulations must necessarily precede the review.

The Department advises that the requirement to review and publish a report on the implementation of the 2011 Act is to ensure the Department monitors and reports on the coming into operation of the provisions within the 2011 Act, to provide a level of assurance that the legislative framework for the delivery of a reformed two-tier planning system has been implemented and in a timely fashion.

The Department advises that the delay in meeting the initial timeframe set out in the Act for making the regulations and publication of the associated report, stems from decisions not to proceed made under the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018. The Department determined that in the absence of a Minister or functioning Assembly, it would not be appropriate to make the regulations, and to publish the subsequent report on the implementation of the 2011 Act. The Department advises that this would have been a significant step for officials to take in the absence of Ministers and that, on balance, the public interest was best served by deferring the decision until it could be taken by a Minister.

The Department acknowledges that section 228(1) of the 2011 Act requires that the review be carried out within a specified time which is now past. The Department advises that it considers that it could not have been the Assembly's intention that, if a review was not carried out within 3 years, then the consequence would be that no review of the 2011 Act should take place.

The Department is of the view that, considering the context and purpose of the 2011 Act, even if the review is delayed, it still should be carried out and therefore the Regulations under section 228(2) may still be made.

It may be considered that the legislative intent behind section 228 of the 2011 Act was timely review of the implementation of the 2011 Act. The requirement to hold this review within 3 years of the commencement of Part 3 of the 2011 Act has not been complied with. However, within the very particular context set out by the Department, an argument may be made that the Regulations may be considered to represent substantial compliance with the requirement to set out the terms of such a review and a timeous exercise of the power conferred under section 228(2) of the 2011 Act.

Angela Kelly

Examiner of Statutory Rules

18 November 2020

Appendix:

STATUTORY RULES SUBJECT TO NORTHERN IRELAND ASSEMBLY PROCEDURE

Subject to the negative resolution procedure:

S.R. 2020/218: The Planning Act 2011 (Review) Regulations (Northern Ireland) 2020

S.R. 2020/222: The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) Regulations (Northern Ireland) 2020

S.R. 2020/251: The Posted Workers (Agency Workers) Order (Northern Ireland) 2020

* The numbering of this Report has been amended to align with the Northern Ireland Assembly's parliamentary calendar.



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