Northern Ireland Assembly

Education Service

Assembly control of Delegated/Subordinate Legislation:

1. Primary legislation (eg Acts of the Northern Ireland Assembly, Acts of Parliament) may set the framework of the law on a particular subject, leaving the details and procedures to delegated legislation (sometimes referred to as secondary legislation or subordinate legislation).

2. Powers to make delegated legislation, which are set out in primary legislation, allow for changes to be made in the law quickly and without the need for the more extensive parliamentary procedures involved in primary legislation.

3. Delegated legislation is made by government departments, by Ministers, and by other rule making bodies. Delegated legislation may be contained in a type of legislation called Statutory Rules. This is the type of delegated legislation that is most often laid before, and considered by, the Northern Ireland Assembly. Statutory Rules are defined in the Statutory Rules (Northern Ireland) Order 1979.

4. Delegated legislation may be subject to the parliamentary scrutiny procedures of the Assembly. The particular Assembly procedure to be used in each case is set out in the relevant primary legislation (sometimes called the '*parent legislation'*).

5. It is important to remember that delegated legislation is law.

Assembly parliamentary scrutiny procedures commonly used are:

6. <u>Negative resolution procedure:</u>

   - The delegated legislation is made, laid before the Assembly, and operating as law, BUT

   - section 41(6) Interpretation Act 1954 (IA) provides that it may be annulled by resolution of the Assembly in statutory period – whichever is longest of ten days on which the Assembly has sat or 30 calendar days (IA S.41(2))

7. <u>Affirmative resolution procedure:</u>

   - the delegated legislation is made, laid before the Assembly, BUT
   - has no effect in law until affirmed by resolution of the Assembly (IA s.41(4))

8. <u>Draft affirmative resolution procedure:</u>

   - A draft of the delegated legislation is laid before the Assembly, BUT
   - the legislation may not be made (and can have no effect) until the draft has been affirmed by resolution of the Assembly

9. Confirmatory resolution procedure:

   - the delegated legislation is made, laid before the Assembly, and operating as law, BUT
   - will lapse within a stated period of time unless confirmed by resolution of the Assembly

Scrutiny opportunities:

10. The Assembly has two important opportunities to have an impact upon delegated legislation.

    - Delegated **powers** scrutiny – the Assembly's scrutiny of any delegated powers proposed to be contained in primary legislation (Bills)
    - Delegated **legislation** scrutiny – the Assembly' scrutiny of delegated legislation which has been laid before the Assembly (under powers in primary legislation such as Act of the Assembly)

Unique to the Northern Ireland Assembly – The office of the Examiner of Statutory Rules

11. The office of Examiner of Statutory Rules has its origins in a 1974 resolution of the former Assembly (established under the Northern Ireland Constitution Act 1973). The then Assembly decided to appoint an officer of the Assembly to carry out technical scrutiny rather than to establish a committee for that purpose. (There had previously been a Joint Committee on Statutory Rules, Orders and Regulations under the Parliament of Northern Ireland).

12. The role of the Examiner of Statutory Rules has continued since, appearing in the standing orders of the Assembly which was established under the Northern Ireland Act 1998. The Assembly's Committee on Procedures reconsidered the matter when it considered legislative procedures generally in January 2002 and it recommended that there be no change in the basic structures for scrutiny of subordinate legislation.

13. The role of the Examiner of Statutory Rules in relation to subordinate legislation mirrors that of the Westminster Parliaments' Joint Committee on Statutory Instruments (the JCSI).

14. The Examiner of Statutory Rules has a further role in relation to the scrutiny of delegated powers in Bills. Bills are referred to the Examiner by the relevant Committee asking the Examiner to scrutinise proposals in Bills to delegate legislative power from the Assembly to another body.

15. The Examiner advises the Committee on whether the provisions of the Bill inappropriately delegate legislative power, and whether the exercise of that legislative power provided for in the Bill is subject to an inappropriate degree of scrutiny by the Assembly.

16. This delegated powers scrutiny role is carried out in Westminster by the Delegated Powers and Regulatory Reform Committee, a House of Lords Select Committee.

The role of the Examiner of Statutory Rules in relation to delegated powers in Bills:

17. The role of the Examiner in relation to delegated powers in Bills before the Assembly is to considered those Bills referred to the Examiner by a Committee.

18. On behalf of that Committee, the Examiner carries out scrutiny of provisions in those Bills which will delegate legislative power from the Assembly to another body.

19. The Examiner advises the Committee on:

- whether the provisions of the Bill inappropriately delegate legislative power, and
- whether the exercise of legislative power provided for in the Bill is subject to an inappropriate degree of scrutiny by the Assembly.

20. This function of the Examiner is a key component of effective parliamentary scrutiny.

21. This role is carried out in Westminster by the Delegated Powers and Regulatory Reform Committee, a House of Lords Select Committee.

The Role of the Examiner of Statutory Rules in relation to the scrutiny of delegated legislation:

22. The role of the Examiner of Statutory Rules in relation to delegated legislation (statutory rules) is set out in Assembly Standing Order 43.

23. 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.

24. 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.

25. To assist Committees of the Assembly in the scrutiny of such statutory rules under Standing Order 43, the Examiner carries out those functions delegated to the Examiner in relation to technical scrutiny.

26. This delegation is given by each Committee to the Examiner at the beginning of the mandate, usually at the first meeting of the Committee.

27. 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."*

28. As part of the technical consideration of the Regulations under Standing Order 43, the Examiner is required to consider 'vires'.

29. Standing Order 43(6)(f) requires that the Examiner consider a Statutory Rule, and bring it to the special attention of the Assembly if "*there appears to be a doubt whether it is intra vires".*

30. Intra vires means '*within the powers'*: that is to say, the Examiner is required to consider whether the rule making body had power to make the delegated legislation which is the subject of scrutiny. This requires consideration of the standard common law limitations on the exercise of a delegated power: these are illegality, procedural unfairness, and irrationality.

31. As part of the examination of vires, the Examiner is also required to consider and Report upon whether the statutory rule is in accordance with the requirements of section 24 of the Northern Ireland Act 1998.

32. Section 24 of the Northern Ireland Act 1998 provides:

"(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—

(a) is incompatible with any of the Convention rights;

(aa) is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);…

(c) discriminates against a person or class of person on the ground of religious belief or political opinion;

(d) in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground; or

(e) in the case of legislation, modifies an enactment in breach of section 7."

33. Accordingly, in addition to considering the drafting, structure, and accessibility of delegated legislation, the role of the Examiner is to carry out scrutiny of its impacts on the rule of law and human rights - in particular those rights which are secured under the European Convention on Human Rights (ECHR) and under Art 2(1) of the Protocol/Windsor Framework.

The Reports of the Examiner of Statutory Rules:

34. 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 to inform the decision of the Assembly.

35. The Reports of the Examiner are noted in the Assembly's Minutes of Proceedings and are made publicly available on the Assembly website.

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