

Examiner of Statutory Rules

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

**23 September 2011
NIA 13/11/15R**

Committee for Agriculture and Rural Development	S.R. 2011 No. 295
Committee for the Environment	Draft S.R.: The Local Government (Rates Support Grant) Regulations (Northern Ireland) 2011 S.R. 2011 Nos. 301, 302, 303, 304
Committee for Regional Development	S.R. 2011 Nos. 261, 314
Committee for Social Development	S.R. 2011 No. 305

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 Railways (Safety Management) (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/261)

3. **I draw the attention of the Committee for Regional Development and the Assembly to the Railways (Safety Management) (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/261) on the ground that they contain one provision that seems to be of very doubtful vires, retrospective and impossible of achievement (so that it is also defectively drafted), seemingly acknowledged by the Department for Regional Development.** The Department, I understand, intends to follow my suggestion of omitting the provision, additionally making some further amendments to the Regulations suggested by the Department for Transport in Great Britain. The corresponding regulations in both Great Britain (S.I. 2011/1860) and the Republic of Ireland (S.I. 70/2011) do not contain a provision of this nature.
4. The Regulations were made on 8 July 2011 and come into operation on 10 October 2011. They were made under the Health and Safety at Work (Northern Ireland) Order 1978 so that they are health and safety regulations, breach of which potentially carries with it criminal liability: that is an particularly important consideration to bear in mind in view of what follows. Regulation 2(2) amends the Railways (Safety Management) Regulations (Northern Ireland) 2006 by inserting a new regulation 16A in the following terms:

“Maintenance of vehicles on the railway system

16A.—(1) Subject to paragraph (2), no person may place in service or use a vehicle on the railway system unless that vehicle has an entity in charge of maintenance assigned to it, and that entity is registered as such in the National Vehicle Register.

(2) Where a vehicle in existence before 9th November 2010 is to be placed in service or used—

(a) on the railway system in accordance with paragraph (1); and

(b) only within Northern Ireland;

the entity in charge of maintenance assigned to that vehicle must be registered as such in the National Vehicle Register by 9th November 2010.

(3) Each entity in charge of maintenance must ensure, by means of a system of maintenance, that a vehicle for which it is in charge of maintenance is in a safe state of running.

(4) The requirements for a system of maintenance referred to in paragraph (3) are that a vehicle must be maintained in accordance with—

(a) the maintenance file for the vehicle;

(b) applicable maintenance rules; and

(c) applicable TSIs.

(5) This Regulation does not apply to heritage vehicles.”.

Regulation 16A(2) purportedly imposes a retrospective duty (impossible to comply with when the regulations come into operation on 10 October 2011 since it must, purportedly, be complied with by 9 November 2010): it seems that that date comes from an EC Decision (Decision 2007/756/EC of 9 November 2007). But that does not answer the point of a purportedly retrospective duty in health and safety regulations, for which (not surprisingly) there is no provision under the Health and Safety at Work Order; nor (again, not surprisingly) is there provision for retrospective regulations made under section 2(2) of the European Communities Act 1972, had that power been exercised in this case: see European Communities Act 1972, Schedule 2, paragraph 1(1)(b). And because there is a purported duty under health and safety regulations, breach of which carries potential for criminal liability (or would carry such liability but for the vires question arising under the purported exercise of the statutory powers in question), there is also a potential issue under Article 7 ECHR (on retrospective criminal liability – an issue which again goes to vires). But leaving aside all those potential issues aside (important as they undoubtedly are), the bottom line is that the provision simply does not work in the first place: it (purportedly) imposes an impossible duty on its face and is plainly defectively drafted from that point of view alone. Accordingly, the Department intends (at my suggestion) to bring forward amending regulations which will, among other things, omit new regulation 16A(2) and the qualifying reference to regulation 16A(2) in new regulation 16A(1) (see above).

The Plant Protection Products Regulations (Northern Ireland) 2011(S.R. 2011/295)

5. **I draw the attention of the Committee for Agriculture and Rural Development and the Assembly to the Plant Protection Products Regulations (Northern Ireland) 2011 (S.R. 2011/295) on the ground that they are defectively drafted in one respect, as drawn to my attention by the Department of Agriculture and Rural Development.** The Department drew my attention to a problem with the defence in regulation 24(4) to proceedings for an offence under 8(b) of the Protection of Animals Act 1911, and the Department indicated to me that the defence was worded in the correct terms until the repeal of the 1911 Act

by the Welfare of Animals Act (Northern Ireland) 2011, which repeal was overlooked when the Regulations were made. (The Department was not quite correct in its statement in that the 2011 Act actually repealed a later provision, namely, section 22(2)(b) of the Welfare of Animals Act (Northern Ireland) 1972, which provision in turn had replaced for Northern Ireland the 1911 provision to similar effect.) The Department has indicated that it will amend the Plant Protection Products Regulations at the first available opportunity. It seems to me that that amendment will in fact probably sweep away the regulation 24(4) defence in its entirety since there is now no equivalent provision to either section 8(b) of the Protection of Animals Act 1911 or section 22(2)(b) of the Welfare of Animals Act 1972 — so that the defence no longer has any purpose.

W G Nabney
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23 September 2011

Appendix

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

Draft statutory rule requiring the approval of the Assembly

Draft S.R.: The Local Government (Rates Support Grant) Regulations (Northern Ireland) 2011

Statutory rules subject to negative resolution

The Railways (Safety Management) (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/261)

The Plant Protection Products Regulations (Northern Ireland) 2011 (S.R. 2011/295)

The Public Service Vehicles (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/301)

The Public Service Vehicles (Conditions of Fitness, Conditions and Use) (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/302)

The Motor Vehicles (Construction and Use) (Amendment No.2) Regulations (Northern Ireland) 2011 (S.R. 2011/303)

The Public Service Vehicles (Accessibility) (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/304)

The Occupational Pension Schemes (Contracting Out) (Amendment) Regulations (Northern Ireland) 2011 (S.R. 2011/305)

The Donaghadee Road, Groomsport (Abandonment) Order (Northern Ireland) 2011 (S.R. 2011/314)



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