

Examiner of Statutory Rules

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

**11 June 2010
NIA 64/09/10R**

Committee for Enterprise, Trade and Investment	S.R. 2010 Nos. 169, 170, 180, 184, 187
Committee for the Environment	S.R. 2010 Nos. 165, 179, 181, 188,
Committee for Health, Social Services and Public Safety	Draft S.R.: The Medical Profession (Responsible Officers) Regulations (Northern Ireland) 2010
Committee for Regional Development	S.R. 2009 Nos. 132, 183
Committee for Social Development	S.R. 2009 Nos. 185, 186

1. In accordance with the delegations in respect of the technical scrutiny of statutory rules under Standing Order 41(4)(b) (now renumbered as Standing Order 43(4)(b)) given to the Examiner of Statutory Rules by the appropriate Committees on 11, 16, 17 and 18 May 2007, 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 Train Driving Licences and Certificates Regulations (Northern Ireland) 2010 (S.R. 2010/132)

3. **I draw the attention of the Committee for Regional Development and the Assembly to Train Driving Licences and Certificates Regulations (Northern Ireland) 2010 (S.R. 2010/132) on the ground that many of the offences set out in regulation 40 and Schedule 8 have inappropriate penalties either because they exceed the powers in paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972 (and are ultra vires to that extent) or because offences triable either summarily or on indictment (as distinct from a summary-only offence) are wrongly expressed in terms of a (summary) fine not exceeding level 5 on the standard scale rather than a (summary) fine not exceeding the statutory maximum.** The Department for Regional Development acknowledges the substance of these points (although I think, contrary to the Department’s view that it is merely the expansion of an existing offence in relation to the activities for which a prohibition notice or improvement notice can be served, I would categorise the provision for the offence under Article 35(1) (g) of the Health and Safety at Work (Northern Ireland) Order 1978 (as applied and modified by these Regulations) as the creation of a new offence for the purposes of paragraph 1(1) (d) of Schedule 2 to the 1972 Act in that it has an altogether different statutory base (or normative structure perhaps) from the offence under the 1978 Order as it exists without the modifications and applications).

4. Essentially, paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972 restricts summary penalties for new offences in regulations made under section 2(2) of that Act to imprisonment for a term not exceeding 3 months and a fine not exceeding level 5 on the standard scale (summary-only offence) or not exceeding the statutory maximum (summary penalty for offence triable summarily or on indictment); so that provision for a summary penalty of imprisonment for a term not exceeding 12 months or a fine not exceeding £20,000 (or both), as set out in Schedule 8 to the Regulations, would seem to be *ultra vires* the provisions of the 1972 Act — at least in the case of the creation of a new offence .
5. The Department intends to mirror the effect of the regulations for Great Britain (which regulations sought to limit the penalties within the restrictions of paragraph 1(1)(d) of the 1972 Act) for consistent treatment of offences: in passing, I observe two apparent sets of errors in the offences in the regulations for Great Britain in S.I. 2010/724 (which alas complicates matters); they seem to have been drafted, unlike the regulations for Northern Ireland, despite my criticisms, without reference to the amendments in the Health and Safety (Offences) Act 2008; and they seem to have fallen into the error of expressing summary penalties in relation to offences triable either way in terms of a fine not exceeding level 5 on the standard scale (rather than a fine not exceeding the statutory maximum, the appropriate formula in this case). **So it seems that there will need to be amending regulations (sooner rather than later) for Northern Ireland (and for Great Britain). Especial care must of course be taken in the drafting of offences and penalties.**
6. **I also draw attention to the appeals provisions in section regulation 11 (and the lack of an appeal provision in regulation 10, albeit that the latter is subject to review provisions in regulations 18 and 19).** There is under regulation 11(3) an appeal to the Department from a railway undertaking in respect of decision regarding the issuing of a train driving certificate. But regulation 11(5) merely places a duty to publish the appeals procedure on its website and appeals must be made in accordance with that procedure. It seems to me that that seems to be a very weak and uncertain form of appeal and one that can be changed entirely at the Department's will without any form of scrutiny; one hesitates that to say that it might even be changed inadvertently, but that is perhaps a possibility. I have suggested to the Department that it might consider applying some existing appeal provisions with adaptations (for example those under the Deregulation (Model Appeals Provisions) Order 1997 (S.R. 1997/269); cf the Control of Asbestos (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/187)).
7. There appears to be no appeal in respect of the Department's decision on a train driving licence under regulation 10, but there is provision for a review procedure under regulations 18 and 19; and similarly with the Department's decision to suspend or withdraw a train driving certificate under regulation 36 or a train driving licence under regulation 37. The review procedure is to be published on the Department's website.
8. The Department is looking again at the review and appeals procedures and I am not in a position to take this any further at this stage. All I will say is that the guiding principle for the Department might well be an independent and impartial appeal to a tribunal established by law as in Article 6 ECHR.
9. Finally, I mention in passing that the Department at the grammatical consistency of the drafting in regulation 17(2), a small point arising out of an attempt at gender neutral drafting (which is a developing issue). I observed to the Department that the corresponding provision for Great Britain is not entirely consistent in its approach. I will have a further opportunity to look at appeals and reviews when the further regulations arrive.

**The Solvents Emissions (Amendment) Regulations (Northern Ireland) 2010
(S.R. 2010/165)**

10. **I draw the attention of the Committee for the Environment and the Assembly to the Solvents Emissions (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/165) on the ground that they are drafted in a unconventional manner using inconsistent drafting techniques; and that they could have been drafted more clearly. The Department of the Environment acknowledges the substance of the point** and I am not sure that I can take this much further to unravel the Regulations: I admit to have struggled with them because of the way they are drafted — most unconventionally, to put it at its mildest. All I will say is this. The Regulations amend two sets of Regulations (the Solvent Emissions Regulations (Northern Ireland) 2004 and the Pollution Prevention and Control Regulations (Northern Ireland) 2003) using a not altogether consistent combination of techniques: there are direct textual amendments with indirect referential elements (a contradiction on the face of it); there are indirect referential amendments; and there are parallel amendments (both direct textual and indirect referential) with different commencement dates (to reflect the EU regime under Directive 2008/112/EC of the European Parliament and of the Council), not internally signposted (say, by a heading or something indicating the effective date in the text) but only gleaned from the general commencement provision in regulation 1. The Department (as it admits) drafted the Regulations in a rush, and it shows. I recommend that the Department should take a further look at this to consider how the amendments of the Regulations in question could be set out more clearly: they are fast becoming unreadable and incomprehensible, and that will undoubtedly have serious consequences when it comes to application and enforcement. This is not an easy task but it is one that the Department needs to tackle with sufficient and proper drafting resources at its disposal.

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)

Draft statutory rule requiring the approval of the Assembly

The Medical Profession (Responsible Officers) Regulations (Northern Ireland) 2010

Statutory rules subject to negative resolution

The Train Driving Licences and Certificates Regulations (Northern Ireland) 2010 (S.R. 2010/132)

The Solvent Emissions (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/165)

The Petroleum Production (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/169)

The Hydrocarbons Licensing Directive Regulations (Northern Ireland) 2010 (S.R. 2010/170)

The Motor Vehicles (Construction and Use) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/179)

The Control of Artificial Optical Radiation at Work Regulations (Northern Ireland) 2010 (S.R. 2010/180)

The Motor Vehicles (Construction and Use) (Amendment No. 2) Regulations (Northern Ireland) 2010 (S.R. 2010/181)

The Penalty Charges (Exemptions from Criminal Proceedings) (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/183)

The Companies (Disqualification) Regulations (Northern Ireland) 2010 (S.R. 2010/184)

The Social Fund Winter Fuel Payment (Temporary Increase) Regulations (Northern Ireland) 2010 (S.R. 2010/185)

The Employers' Duties (Registration and Compliance) Regulations (Northern Ireland) 2010 (S.R. 2010/186)

The Control of Asbestos (Amendment) Regulations (Northern Ireland) 2010 (S.R. 2010/187)

The Air Quality Standards Regulations (Northern Ireland) 2010 (S.R. 2010/188)



Published by Authority of the Northern Ireland Assembly,
Belfast: The Stationery Office

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Printed in Northern Ireland by The Stationery Office Limited
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ISBN 978-0-339-40341-3



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