

RE: MOTORWAY VARIABLE SPEED LIMITS

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ADVICE

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1. We are asked to advise Road Safety Support Limited ("RSS") on behalf of its member, the Highways Agency, in relation to a number of discrete issues arising in respect of current and proposed systems for signing variable speed limits on motorways. These issues are somewhat technical and involve detailed consideration of a number of statutory provisions. At this stage it may be helpful to identify the particular matters upon which our advice is sought. These are as follows:
  - (i) Are the Advance Motorway Indicators ("AMI") '*traffic signs*' as prescribed by the Traffic Signs Regulations and General Directions 2002 ("TSRGD")?
  - (ii) If they are not prescribed by the TSRGD, is it necessary for the Secretary of State to give authorisation to:
    - (a) any AMI which has the same meaning as the speed restriction sign depicted in diagram 670 within the TSRGD;
    - (b) any AMI which has the same meaning as the national speed limit sign depicted in diagram 671 within the TSRGD?
  - (iii) Do AMI provide "*adequate guidance*" for the purposes of section 85 of the Road Traffic Regulation Act 1984 ("RTRA 1984")?
  - (iv) If an AMI is not a '*traffic sign*' either within the meaning of the TSRGD or because it has been authorised by the Secretary of State, may it still provide the necessary "*adequate guidance*"?
  - (v) Are the definitions of what constitutes "*a speed limit sign*" within various Statutory Instruments issued under the RTRA to cover AMI appropriate?

- (vi) Is it possible to say what proportion of the LED lights on a given AMI sign would need to be in full working order for it to comply with either the TSRGD or any authorisation issued by the Secretary of State?
2. The significance of the advice sought is easy to state. There is concern to ensure that AMI are capable of providing sufficient notification of a temporary speed limit. This will enable prosecution of those who exceed the speed limit for the offence of speeding. The evidence in support of the prosecution will be gathered by means of the HADECS system. Crucial to the success of any prosecution will be the validity of the traffic signs which provide the notification of the speed limit. AMI will be the only way in which the fact of a speed limit (other than the national speed limit) is communicated to drivers.
  3. In these circumstances it is essential that AMI conform to the statutory requirement and accordingly are beyond challenge.
  4. In summary, our conclusions are as follows:
    - (i) It is at least arguable that AMI are not "*traffic signs*" as defined by the RTRA 1984 and prescribed by the TSRGD;
    - (ii) Accordingly it is advisable for the Secretary of State to authorise the use of any AMI which conveys a speed restriction or indication of permissible speed;
    - (iii) If they are lawfully in use (because they have been properly authorised or prescribed), AMI do provide "*adequate guidance*" for the purposes of section 85 of the RTRA 1984 provided, of course, that they are in fully working order or as close to fully working order as possible;
    - (iv) AMI which are not a "*traffic signs*" either because they are not prescribed by the RTRA 1984 or have not been authorised by the Secretary of State do not provide "*adequate guidance*" within the meaning of section 85 of the RTRA 1984;
    - (v) The definitions of a speed limit sign in relation to AMI as appears within a number of the SIs are potentially vulnerable to challenge and consideration should be given to re-wording them;

- (vi) It is impossible to provide a definitive answer to the question of what proportion of LED lights would need to be in full working order before it could comply with either the TSRGD or any authorisation issued by the Secretary of State. We think the question would be likely to be determined as an issue of fact and degree in every case.

5. Our reasoning in relation to each of the points is set out in more detail below.

**1. Are AMI “traffic signs” as prescribed by the TSRGD**

- 6. By way of introduction, in order for any sign to be lawfully placed on a public highway, it must be either prescribed by the TSRGD or authorised by the Secretary of State for Transport. Any other kind of traffic sign is unlawful. So much is apparent from paragraph 1.18 of Traffic Signs Manual which provides:

*“The use on public highways of non-prescribed signs which have not been authorised by, or on behalf of, the Secretary of State is illegal and authorities who so use unauthorised signs act beyond their powers. Additionally an unauthorised sign in the highway is an obstruction. The possible consequences of erecting or permitting the erection of obstructions may be severe and those responsible could lay themselves open to a claim for damages; for example if the obstruction is the cause of accident or of injury in a collision or if the unauthorised sign injuriously affects a fronting property by blocking light or impairing visual amenity.”*

- 7. The prescription or authorisation dichotomy is contained in section 64(1) of the RTRA 1984 which is in the following terms:

*“In this Act, ‘traffic sign’ means any object or device (whether fixed or portable) for conveying to traffic on roads or any specified class of traffic, warnings, information, requirements, restrictions or prohibitions of any description –*

(a) *Specified by regulations made by Ministers acting jointly;*

(b) *Authorised by the Secretary of State”*

8. The TSRGD (as amended in 2005 and 2008) constitute the current regulations for the purposes of section 64(1) of the RTRA 1984. A traffic sign conforming to the requirements of the TSRGD will be lawful.

9. Section 64(2) of the RTRA provides:

*“Traffic signs shall be of the size, colour and type prescribed by regulations made as mentioned in 1(a) above except where the Secretary of State authorises the erection or retention of a sign of another character; and for the purposes of this subsection, illumination whether by lighting or by the use of reflectors or reflecting material, or the absence of such illumination, shall be part of the type or character of a sign”*

10. For the purposes of this advice, the significance of this definition arises in relation to section 85(1) of the RTRA 1984 which provides:

*(1) For the purposes of securing that adequate guidance is given to drivers of motor vehicles as to whether any, and if so what, limit of speed is to be observed on any road, it shall be the duty of the Secretary of State, in the case of a road for which he is the traffic authority, to erect and maintain traffic signs in such positions as may be requisite for that purpose.*

11. The offence of driving in excess of a speed limit is created by section 89(1) of the RTRA 1984 which is in the following terms:

*(1) A person who drives a motor vehicle on a road at a speed exceeding a limit imposed by or under any enactment to which this section applies shall be guilty of an offence*

12. The offence under section 89(1) is subject to the provisions of section 85(4) which is in the following terms (so far as relevant):

*(4) Where...a limit of speed is to be observed on a road, a person shall not be convicted of driving a motor vehicle on the road at a speed exceeding the limit unless the limit is indicated by means of such traffic signs as are mentioned in subsection (1) above”*

13. In summary, unless adequate guidance is provided by “*traffic signs*”, a person who was driving in excess of the speed limit on a given road may not be convicted of an offence of speeding.
14. We understand that the Secretary of State not authorised any AMI other than those which appear on the M25 and which were authorised prior to the enactment of the TSRGD. Accordingly, if any other AMI are to constitute “*traffic signs*” for the purposes of section 64(1) of the RTRA 1984, they must be prescribed by the TSRGD.
15. The TSRGD came into force on 31<sup>st</sup> January 2003. Regulation 2 revokes the previous regulations governing traffic signs, save that by regulation 3(1) any signs which were prescribed by the Traffic Signs Regulations 1981 and the Traffic Signs Regulations 1994 immediately before the TSRGD came into force, and which remained compliant with those regulations continued to be prescribed as if those regulations had not been revoked. The saving in regulation 3(1) is time limited in respect of certain signs by remaining paragraphs within the regulation. This saving does not include AMI.
16. We have been provided with the Highways Agency diagram MCX 1031 “*NMCS 2 Controlled Motorway AMI Aspects*” apparently created by the Agency on 11<sup>th</sup> July 2006. This diagram shows in schematic form what AMI are capable of displaying. The diagram specifies at point 4 that

*“Aspects dimensions must comply with the [TSRGD]”*

17. It is significant to note that neither this diagram nor the schematics is reproduced within the TSRGD. This may be thought to be a curious omission in light of the fact that there were amendments made to the TSRGD by the Traffic Signs (Amendment) Regulations and General Directions 2008 (SI 2008/2177). These amendments, which post-dated the diagram MCX 1031, would have created an opportunity to insert these schematics within the TSRGD.

18. It may well be that those responsible for the drafting of the amending regulations considered such an insertion to be unnecessary on the basis that what was represented by MCX 1031 was already prescribed by the TSRGD.
19. Whatever the true position, the consequence of this omission is that it is necessary to bring what is shown within this diagram within existing prescriptions (or permissible variations) of the TSRGD in so far as they are relevant to creating a variable speed limit.
20. It is clear that the TSRGD were drafted with AMI in mind. AMI are a “*variable message sign*” for the purposes of the TSRGD. A “*variable message sign*” is defined by Regulation 58(1) which provides (as relevant for these purposes):

*“In these Regulations, a “variable message sign” means a device capable of displaying, at different times, two or more aspects falling within the following descriptions –*

*(a) A sign shown in a diagram in schedule...2...”*

21. There are two signs which are directly relevant to the issue currently under consideration. The first is that which limits or restricts speed on any road below the national speed limit (that is either 70 mph on a dual carriageway or motorway, or 60 mph on a single carriageway). The second is that which indicates that the national speed limit is in force. It is convenient for the purposes of this advice to consider each of the sign types separately.

### **Speed limit signs**

22. The current prescribed sign indicating a maximum speed limit in miles per hour appears within schedule 2 to the TSRGD, and is described as diagram 670. Regulation 17(1) of the TSRGD states:

*(1) This regulation applies to a sign shown in a diagram in a Schedule other than Schedule 6 and such a sign is in this regulation called an “upright sign”.*

*(2) The form of an upright sign shall, if the circumstances in which it is placed so require, or may, if appropriate in those circumstances, be varied -*

*(a) in the manner (if any) allowed or required in item 4 of the untitled table below or beside the diagram; or*

*(b) in the manner allowed or required in column (3) of an item in Schedule 16, if the diagram is one whose number is given in column (2) of that item.*

23. Diagram 670 specifically states that a variant is permitted to the sign (and indicates that this is in accordance with schedule 16 at item 1). Column 2 provides:

*Numerals may be varied but (with the exception of one decimal place of a metre indicating a height, width or length) no fractions or decimal places shall be used.*

24. We do not think that this permits a variation to the typeface of the numeral; it concerns the number which is shown (Diagram 670 shows the “40” miles per hour speed limit). The permitted variation is accordingly not directly relevant to this issue.

25. By virtue of Regulation 11(1):

*Subject to the provisions of these Regulations, a sign for conveying information or a warning, requirement, restriction or speed limit of the description specified under a diagram in Schedules 1 to 7, Part II of Schedule 10 and Schedule 12 to traffic on roads shall be of the size, colour, and type shown in the diagram*

26. It follows that Regulation 11(1) requires a consideration of ‘size’, ‘colour’ and ‘type’. We shall consider each in turn in relation to AMI.

**Size**

27. So far as the question of size is concerned, the specified diameter of the circle within which the speed limit must appear within diagram 670 was specified as being 300, 450, 600, 750, 900, 1200 or 1500 millimetres in TSRGD as originally enacted. By virtue of the insertion of paragraph 6A to Regulation 58 by the Traffic Signs (Amendment) Regulations and General Direction 2005:

*Where a variable message sign displays the sign shown in Diagram 670 by means of light emitting characters and symbols, the diameter of the sign may be varied to 1,300 millimetres*

28. We understand that there are currently three designs for AMI produced by three separate companies. We further understand that, although it is possible to say that none of the AMI has a diameter of exactly 1,300 millimetres, it is not possible to say exactly what diameter the signs in fact have. However it is clear that they are close to being 1,300 millimetres.
29. In our view a Court considering whether the AMI complied with the 'size' requirement would be likely to consider that the variation – if there is one – would be subject to the *de minimis* rule. That is to say that a Court would be likely to regard very minor non-compliance with the precise requirements as not significant.
30. By way of example, in the case of *Sharples v Blackmore* [1973] R.T.R. 249 the Divisional Court held that the fact that the back of a sign was painted grey not black as required was insignificant. Likewise in *Cotterill v Chapman* [1984] R.T.R. 73, the Court held the fact that the distance between white lines was 3 millimetres shorter than the prescribed length was not sufficiently significant to affect the driver's conviction.

## **Colour**

31. Although diagram 670 prescribes that the inner circle of the sign shall be white and that the numerals shall be black, regulation 58(3) of the TSRGD provides:



*If the construction or method of operation of a variable message sign prevents a sign from being displayed in the colours shown for it in the appropriate diagram in schedule...2..., a black legend or symbol on a white or yellow background may be displayed as a white, off-white or yellow legend or symbol on a dark background, provided that any red triangle or red circle forming part of the sign is included*

32. We have been shown photographs of the design for AMI and consider that way in which the colours appear on it are adequate to meet the requirements of Regulation 11(1) when read together with Regulation 58(3). That is to say they are a white or off-white legend on a dark background and the red circle is shown.

### **Type**

33. For the purposes of enforcement of a speed limit other than the national speed limit, what is displayed on an AMI is a graphical representation of diagram 670 by means of an LED display on a variable message sign. It follows that the representation of diagram 670 on currently designed AMI cannot be said to be the same “type” as that which appears within Schedule 2 since it is rendering by means of an LED display of what would otherwise be a fixed sign.

### **Typeface**

34. Regulation 13 of the TSRGD provides for the proportions of letters, numerals, symbols and other characters. Regulation 13(9) provides:

*All letters, numerals, symbols and other characters incorporated in variable message signs shall have the general proportions and form shown in Part V of Schedule 13 where the construction or method of operation of the sign does not permit the use of letters, numerals and other characters of the proportions and form shown in Part I, II,*

*III or IV of Schedule 13 or of symbols shown in diagrams in Schedules 1 to 5, 10 or 12.*

35. In the ordinary course of events, the numerals which would be used on a speed restriction sign are those which appear within Part II of Schedule 13 (albeit that they would be inverted in accordance with Regulation 58(3)). The numerals in Parts I, III and IV are not relevant since they relate to signs with background colours which are not white.
36. An examination of the numerals which an AMI would display reveals that they are certainly not exactly those which appear within diagram 670. At the very least, the "0" is different as are the "2", "5" and "6".
37. The numerals are not those those within Part II of Schedule 13. We think it is at least arguable that they are not of the same "*general proportions and form*" as them either. Accordingly, it would be necessary for them to be compliant with those in Part V of the Schedule.
38. We note that there are no prescribed sizes for the numerals within Part V of Schedule 13. However, having examined the numerals contained within Part V of Schedule 13, it is apparent that they cannot be said to match exactly the numerals in MCX 1031. For example the "0", "3", "5" and "6" are different. In addition, there may be said to be a more subtle difference in the "4" and "2". We also think that it is also at least arguable that they are not of the same "*general proportions and form*" either.
39. We understand that this is a result of the way in which the device is set up by the manufacturer. We have been told that the reason for this difference is not entirely clear, and it is also not clear whether the manufacturers of AMI have had their attention drawn to the relevant parts of the TSRGD. It may be prudent to make enquiries of the manufacturers to see if they are able exactly to replicate the font which is prescribed by the TSRGD since if this were possible it would remove a potential obstacle to AMI being within the requirements. In passing it appears as though the typeface which has been used is based upon that which is used in diagram 6001 to 6022 (Schedule 11 part 1) for Matrix signs on the potentially erroneous assumption that this was typeface was the prescribed form.
40. In our view it would be arguable (and open to a court to find) that the numerals incorporated in variable message signs are not those of diagram 670, and do not have the "*general proportions and form*" as either those numerals or those shown in Part V of Schedule 13. The consequence of this would be that the numerals which AMI will display would not conform to the requirements of TSRGD. The effect of this, in the absence of approval by the Secretary of

State, would be that section 84(4) of the RTRA 1984 would be engaged and enforcement of a variable speed limit would be impossible.

41. The requirement that the numerals are displayed in a way which matches the “general” proportions and form of the way in which they appear within the TSRGD may appear to allow a degree of latitude. However it is important to recognise that in relation to displays of this type, a Court will be likely to take the view that it is important that there is as little deviation from the prescribed form as it appears as possible. The view we have taken in relation to the question of compliance with the TSRGD in this respect is undoubtedly based on a very strict view of the requirements imposed by them. However we feel that it is likely a Court would adopt a similarly strict approach to the issue.
42. We have given consideration to whether (if a Court were to conclude that the numerals did not comply with the requirements) such deviations could be argued to be *de minimis*.
43. The Divisional Court in *Davies v Heatley* [1971] R.T.R. 145 held that strict and complete compliance with the regulations regarding the form of road signs is required. While this requirement is not totally inflexible (see the cases of *Sharples*, and *Cotterill* (ante)), it will only be disregarded where the deviation is minor.
44. The Administrative Court recently considered *de minimis* variations from the strict requirements of the TSRGD in *Canadine v DPP* [2007] EWHC 383 (Admin). On appeal by way of case stated, the Court (Sir Igor Judge P. and Lloyd-Jones J.) held that the black casing in which a speed limit sign was housed was held not to form a part of the sign and thus did not breach the requirements of the TSRGD. However, the Court went on to consider the position were the appellant’s submission that the housing did form a part of the sign itself were correct and concluded it would make no difference to the result. Lloyd-Jones J. held (at paragraph 28):

*“In the present case there was no question of any road user being misled or misinformed. The district judge has found that except on very close examination the casing around the sign is effectively invisible. In the light of that finding I consider that even if, contrary to my conclusion, the sign is to be regarded as not complying with the regulations, the deviation is so minor that on the authority of *Sharp v Blackmoor* and *Cotterill v Chapman* it should be disregarded”*

45. In our view the deviation from the requirements of diagram 670 or the typeface required by Part V of Schedule 13 are such that there may be difficulties in persuading a Court that the strict requirements of the TSRGD should not be applied.
46. The consequence of the matter not being beyond doubt is that there will be challenges taken on the point. Since there is a comparatively easy way to ensure that, on this narrow point at least, a challenge can be avoided, it would seem sensible to take that course.

### **National speed limit sign**

47. The sign indicating that the national speed limit is to apply appears within the same schedule as diagram 671. No variation is permitted to this diagram. The sign is a single black line on a diagonal across a white background. By virtue of Regulation 58(3) this may be displayed as a white line across a black background.
48. An examination of MCX 1031 reveals that the current way in which diagram 671 is to be rendered on AMI is by means of a white circle cut in half by a diagonal white line. Although it is no doubt recognisable as being an attempt to render diagram 671, it also undoubtedly not the same type of sign and is undoubtedly not prescribed by the TSRGD.

### **Summary of conclusions on the first issue**

49. In summary, our conclusion is that the way in which AMI will display diagram 670 would meet the requirements within the TSRGD in relation to size and colour. It is at least arguable that the requirements so far as type, and more significantly the numerals to be used do not.
50. So far as the display of diagram 671 is concerned, we do not see how it could ever meet the requirements of the TSRGD.

## 2. Authorisations

**Is it necessary for the Secretary of State to authorise any AMI/speed limit sign meaning the same as TSRGD diagram 670?**

51. By virtue of section 64(1) and (2) of the RTRA 1984, the Secretary of State is given a power to authorise the erection of “*a sign of another character*” to those which are prescribed by the TSRGD.

52. Regulation 8 of the TSRGD provides:

*“Nothing in these Regulations shall be taken to limit the powers of the Secretary of State, the Scottish Ministers and the National Assembly for Wales under section 64(1) and (2) of the 1984 Act to authorise the erection or retention of traffic signs of a character not prescribed by these Regulations.”*

53. In the light of the answer to the first issue, in order to avoid challenge on the point in our view it is advisable for the Secretary of State to authorise AMI to display the version of diagram 670 which appears within MCX 1031.

54. We understand that it is the view of the Department for Transport that the Secretary of State should not purport to authorise something which is prescribed by the TSRGD. Since it appears arguable that AMI are not prescribed by the TSRGD, we cannot see what harm can be caused by the Secretary of State issuing an authorisation. In the event that a Court were to find that the AMI version of diagram 670 was prescribed, the authorisation would be of no effect. In the event that they are not, the authorisation would prevail.

55. We understand that there is a degree of resistance to advising the Secretary of State to authorise AMI in any event. We have been helpfully provided with a summary of the position which has been advanced to suggest that it is neither necessary nor desirable.

56. The position advanced is as follows. Section 65 of the RTRA is in the following terms:

*(1) The traffic authority may cause or permit traffic signs to be placed on or near a road, subject to and in conformity with such general directions as may be given by the Ministers acting jointly or such other directions as may be given by the Secretary of State.*

*(1A) The power to give general directions under subsection (1) above includes power to require equipment used in connection with traffic signs to be of a type approved in accordance with the directions.*

*(2) The Secretary of State may give directions to a local traffic authority—*

*(a) for the placing of a traffic sign of any prescribed type or authorised character specified in the directions, or*

*(b) for replacing a sign so specified by, or converting it into, a sign of another prescribed type or authorised character so specified.*

*(3) The power to give general directions under subsection (1) above shall be exercisable by statutory instrument.*

*(3A) No charge may be made—*

*(a) in England and Wales, by a highway authority which is the council of a country, metropolitan district or London borough or the Common Council of the City of London, or*

*(b) in Scotland, by a local roads authority,*

*with respect to the exercise of their power under subsection (1) above to permit a traffic sign to be placed on or near any road in their area if—*

*(i) the sign conveys information of a temporary nature or is otherwise intended to be placed only temporarily; and*

*(ii) the sign is to be placed by a body which is prescribed for the purposes of this subsection as being a body appearing to the Secretary of State to be representative of the interests of road users or any class of road users.*

*(4) In this section—*

*“authorised character” means a character authorised by the Secretary of State, and*

*“prescribed type” means a type prescribed by regulations made under section 64(1)(a) of this Act.*

57. The provisions of section 65 of the RTRA 1984 are subject to section 77 of the RTRA 1984 where the Secretary of State is the authority (which includes Motorways):

*In relation to a road for which the Secretary of State is the traffic authority —*

*(a) section 65(1) of this Act shall have effect with the omission of references to directions, and*

*(b) the provisions of this Act relating to directions for the placing, replacing, conversion and removal of traffic signs, notices, objects or devices shall not apply except in relation to a bridge repairable by a person other than the Secretary of State.*

58. The effect of the modification is that section 65(1) is intended to read (where the Secretary of State is the Traffic Authority)

*“The traffic authority may cause or permit traffic signs to be placed on or near a road”*

That is to say there is no reference to such traffic signs being subject to and in conformity with the general directions given by Ministers acting jointly, or other directions given by the Secretary of State.

59. It is suggested that this modification means that traffic signs which are erected by the Secretary of State as a traffic authority do not have to conform to the requirements of Regulation 11 of TSRGD.
60. We believe that this suggestion overlooks the fact that the words “*traffic signs*” in section 65(1) must be read in the light of the way in which the term is defined in sections 64(1) and (2). In other words, the section grants the Secretary of State the power to place signs on or near a road, but in order for what is placed there to be considered a ‘*traffic sign*’ it must conform to section 64(1).
61. Furthermore, so far as this issue is concerned, we believe that it is important to focus on the fact that for the speed limit to be enforceable with a criminal sanction it must provide adequate guidance within the meaning of section 85(1) and (4) which would require the AMI to be prescribed or authorised by the Secretary of State. Section 85 does not provide an exemption so far as roads where the Secretary of State is the traffic authority.

**Is it necessary for the Secretary of State to authorise any AMI/speed limit sign meaning the same as TSRGD diagram 671?**

62. The addition of a significant feature to the sign, namely a white border to the sign would be very unlikely to be considered to fall within the *de minimis* rule. In our view it would be essential to obtain the Secretary of State's authorisation for this to be considered a traffic sign within the meaning of the RTRA 1984. We understand that the Department for Transport are aware of this necessity and intend that an authorisation is to be obtained.
63. We note in passing that there appears to be an inconsistency between the fact that it is suggested that authorisation is not required so far as the AMI representation of diagram 670 is concerned, but accepted that it is required in respect of the AMI representation of diagram 671. We suggest the acceptance of the latter proposition indicates acceptance that there is a requirement to comply with Regulation 11 of the TSRGD on the motorway network.

**Summary of conclusions on the second issue**

64. It is advisable for authorisation to be obtained from the Secretary of State in respect of both the sign shown in diagram 670 and the sign in diagram 671 when it is displayed on AMI in order for them to constitute "traffic signs" within the meaning of the RTRA 1984.
65. In our view the Secretary of State is bound by the requirements of the TSRGD. We see no bar to the Secretary of State issuing an authorisation in respect of roads for which he is the authority.
66. We are told that there is an alternative to obtaining authorisation, namely amending the TSRGD. This is a time consuming process which may take up to 18 months. In the light of the fact that there is an alternative, we do not suggest that this is necessary.



**3. Do AMI provide ‘adequate guidance’?**

67. There is no statutory definition as to what is meant by the words ‘adequate guidance’ within section 85(1). It is a question of fact and degree in every case. In *Peake v DPP* [2010] EWHC 286 (Admin), the Administrative Court considered questions of adequate guidance in relation to speed limit signs. The appellant submitted that it was necessary for all speed limit signs within a given area (described by him as an “envelope”) and not just those on the stretch of road on which the motorist had driven to comply with the requirements of the TSRGD. The Administrative Court (Elias L.J. and Calvert-Smith J.) rejected the argument. In giving judgment, Calvert-Smith J. held at paragraphs 26-27 that what constitutes “adequate guidance” should be left to a tribunal of fact in a disputed case. Elias L.J. adopted the submission on behalf of the respondent as to the requirements for “adequate guidance” (at paragraph 39):

*“All that need be asked is whether there is compliant signing so that anyone who is caught speeding at the point of enforcement will have been given adequate guidance by compliant signs of the appropriate limit and will therefore be culpable for transgressing it. If there are such signs and if they will have provided adequate guidance whichever route may have been adopted by a driver up to that point of enforcement, then section 85(4) is satisfied. In other words the reference in subsection (4) to the limit being indicated by means of traffic signs is merely a reference to the limit at the point of enforcement on the particular road. Section 85(4) refers to the ...road; it makes no reference to zones or envelopes or such similar terms.”*

68. In our view, if AMI are ‘traffic signs’ within the meaning of section 64(1) of the RTRA 1984, based upon the size and visibility of the signs which will appear at very frequent intervals on the motorway it is difficult to imagine any circumstances in which a Court would conclude that, of themselves, they do not constitute adequate guidance.

69. However our answer to this question must be read together with our answer to the fifth issue set out below.

**4. If any AMI is deemed not to be a traffic sign, either because it is not prescribed or because it is not authorised, may it still provide ‘adequate guidance’?**

70. The short answer to this question is 'no'. If AMI are not "traffic signs" within the meaning of 64 of the RTRA 1984 we cannot see how they could satisfy the requirements of section 85 of that Act.

71. We are asked to consider the effect of an amendment to sections 85(1) and (2)(a) of the RTRA 1984. Prior to July 1, 1992, the words "traffic signs" in sections 85(1) and (2)(a) were preceded by the word "prescribed". The word was removed from both subsections by Paragraph 30 of Schedule 4 to the Road Traffic Act 1991.

72. Schedule 4 to the 1991 Act was brought into force by section 48 of the Act which is to be found in Part One of the Act and is in the following terms:

*"Schedule 4 to this Act, which makes minor amendments and amendments consequential on the preceding provisions of this Act, shall have effect."*

73. The preceding provision to which paragraph 30 relates is section 45 which inserted the new section 84 into the RTRA 1984 (dealing with variable speed limits).

74. Paragraph 30 was inserted as amendment number 68 into the Road Traffic Act 1991 when the Bill was before the House of Lords on the 7<sup>th</sup> May 1991. When dealing with this and a number of other amendments relating to putting variable speed limits on a statutory footing, the sponsoring minister (Lord Brabazon of Tara) said [HL Deb Col 1014-15]:

*"With leave of the Committee, in moving this amendment I should like to speak also to Amendments Nos. 57 to 60, 62 to 65, 67, 68, 71, 72, 162, 172, 173 and 176. These amendments are largely of a technical nature. They are designed to improve Clause 41 [now section 45] which provides for variable speed limits to be imposed by highway authorities in certain circumstances.*

*They are designed to put beyond doubt the power to impose variable speed limits on motorways and to enable the Secretary of State to require the ancillary equipment associated with speed limit and other traffic signs to be of an approved type. That will enable the department to set standards of accuracy and reliability for those devices. In order to assist the development of new and improved speed limit signs, there is provision for the use of non-prescribed speed limit traffic signs. I can assure Members of the Committee that those signs will usually be variations of existing signs, which the department must be able to test in the field before approving them for wider use.*

*The amendments also deal with a number of consequential changes, and are designed to clarify that certain references in the existing legislation to speed limits are to be treated as references to fixed speed limits, not to variable speed limits.”*

75. Lord Brabazon’s words obviously contemplate the Secretary of State authorising signs for use in relation to temporary speed restrictions which were different from prescribed signs.
76. It seems clear that the intention of the amendment to section 85(1) of the RTRA 1984 was to broaden the Secretary of State’s duty to erect (and maintain) traffic signs within the areas for which he is the designated authority beyond signs which are prescribed by the TSRGD to include not only prescribed signs, but also signs for variable speed limits which were authorised by him. It seems clear that by extension and by implication the amendment also gave him the power to do grant authorisation where appropriate.
77. In our view this does not affect the position in relation to section 85(4) of the RTRA 1984. No amendment was made to section 85(4) of the RTRA 1984 by the 1991 Act, nor was there any apparent intention to deal with its meaning. The effect of the amendment on section 85(4) is that adequate guidance may now be provided either by prescribed or authorised signs. This is because the words “*traffic signs*” in section 85(4) are governed by the definition in section 64(1). Accordingly in order to be capable of providing “*adequate guidance*” the signs must either be prescribed by the TSDGD or authorised by the Secretary of State (whereas previously it could only be by prescribed signs) and in the absence of either, the signs will not constitute adequate guidance.
78. We note in passing that had section 85(1) not been amended in this way, it would not have been possible to prosecute a potential offender in relation to traffic signs which were only authorised and did not appear within TSRGD.

#### **Summary of conclusions on the third and fourth issue**

79. In our view AMI do provide “*adequate guidance*”.
80. However a “*traffic sign*” which is not prescribed or authorised cannot provide “*adequate guidance*”. It follows that a motorist who successfully argued the points considered in relation

to the first issue above would, notwithstanding proof that he drove in excess of the temporary speed limit, be entitled to rely on section 85(4) and thereby avoid conviction.

**5. Are the definitions of “a speed limit sign” in the Statutory Instruments appropriate?**

81. A total of eight Statutory Instruments (“SI”) made under section 17 of the RTRA 1984 to cover variable speed limit signs on motorways within the England are currently in force. These are as follows:

- (a) The M25 Motorway (Junctions 10 to 16)(Variable Speed Limits) Regulations 2001 [SI 2001/3763];
- (b) The M42 (Junctions 3A to 7)(Actively Managed Hard Shoulder and Variable Speed Limits) Regulations 2005 [SI 2005/1671];
- (c) The M42 (Junctions 3A to 7)(Actively Managed Hard Shoulder and Variable Speed Limits)(Amendment) Regulations 2009 [SI 2009/1568];
- (d) The M40 Motorway (M40 Junction 16 to M42 Junction 3A)(Northbound)(Variable Speed Limits) Regulations 2009 [2009/1569];
- (e) The M42 (Junctions 7 to 9)(Variable Speed Limits) Regulations 2009 [SI 2009/1570];
- (f) The M6 Motorway (Junctions 4 to 5)(Actively Managed Hard Shoulder and Variable Speed Limits) Regulations 2009 [SI 2009/1571];
- (g) The M6 Motorway (Junctions 8 to 10A)(Actively Managed Hard Shoulder and Variable Speed Limits) Regulations 2010 [SI 2010/284]
- (h) The M20 Motorway (Junctions 4 to 7)(Variable Speed Limits) Regulations 2010 [SI 2010/775]

82. Only the SI referred to at (a) above was made prior to the enactment of the TSRGD;
83. There are three different definition of what constitutes “*a speed limit sign*” to indicate that a variable speed limit is in force within the SIs. The latter two definitions are subtle variations of each other.
84. If the definitions were intended to refer to speed limit signs of the usual type prescribed by the TSRGD then it appears that no particular difficulties would arise. However it appears to us that problems arise if the SIs are to be used to encompass what is displayed on AMI.
85. In the SI referred to at (a) above it is defined in Regulation 2(1) as “*a traffic sign for indicating that a specified maximum speed limit other than the national speed limit is in force*”. This is an attractively simple definition. The SI does not define what is meant by a “*traffic sign*”. It is presumably to be construed by reference to section 64(1) of the RTRA 1984 which gives rise to potential problems in the event that the AMI is neither prescribed nor authorised and is therefore not a ‘*traffic sign*’ within the meaning of the Act or the SI. In the event that the issues discussed in (i) above are resolved, the definition within this SI appears to be the simplest way to define the term
86. In the SI referred to at (b) (as amended by (c)) above, “speed limit sign” is defined by Regulation 4(4) respectively as:

*“a traffic sign of the type shown in diagram 670 to Schedule 2 of the 2002 Regulations [further defined as the TSRGD] which indicates that a specified maximum speed limit other than the national speed limit is in force”.*

87. We think this definition may cause considerable difficulties, since what would be displayed by AMI may not constitute a ‘*traffic sign*’ and in any event is not “*of the type shown in diagram 670 to Schedule 2 of the [TSRGD]*”. At best it is a rendering by means of an LED display of diagram 670. It may be that a Court would conclude that what is shown on AMI is a different sign entirely. We consider this definition would be vulnerable if it were to be challenged.

88. In the SIs referred to at (d) - (g) above it is defined (“*in relation to a vehicle*”) as:

*“a traffic sign of the type shown in diagram 670 in Schedule 2 to the 2002 Regulations which is—*

*(a) situated on or near any part of a road specified in the Schedule; and*

*(b) directed at traffic on the carriageway on which the vehicle is being driven.*

89. We think that this definition suffers from the same weakness as that identified in relation to the SI referred to at (b) above.

#### **Summary of conclusions on the fifth issue**

90. In our view all three definitions may be vulnerable to challenge. In order to avoid challenges being made to the definition, we suggest that consideration be given to ensuring that relevant SIs are defined by reference to a traffic sign authorised by the Secretary of State for the purposes of imposing a speed limit on the motorway.

**Is it possible to say what proportion of the LED lights on a given AMI sign would need to be in full working order for it to comply with either the TSRGD or any authorisation issued by the Secretary of State?**

91. Some assistance on the issue may be found in the case of *Coombes v DPP* [2006] EWHC 3263 Admin. On appeal by way of case stated the appellant submitted that section 85(4) of the RTRA applied where a speed limit sign had been obscured by overgrown vegetation such that it was only possible to see them at after he had driven past it.

92. The Administrative Court (Keene L.J. and Walker J.) allowed the appeal on the facts of the case. Walker J. in giving judgment stated (at paragraph 23-4):

*“The ordinary meaning of the words used in s 85(4) is that two tests must be met before the appellant can be convicted. The first is that at the time when the offence is said to have been committed there were such signs as are mentioned in s 85(1) or (2) . The second is that those signs indicated the relevant speed limit. At the very least it seems to me that this second test involves a requirement that, at the geographical point where the motorist exceeded the limit, the signs could reasonably be expected to have conveyed the limit to an approaching motorist in sufficient time for the motorist to reduce from a previous lawful speed to a speed within the new limit. This court observed in *Wawrzynczyk* that the purpose of section 85 is that “adequate guidance*

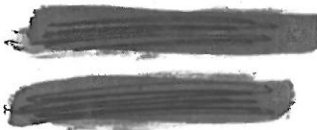
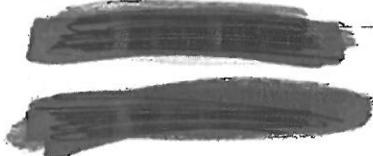
*be given to motorists". The objective of s 85(4) is plainly that motorists should not be convicted in the absence of adequate guidance. In my view the requirement I have described is necessarily implicit in order to ensure this objective.*

*24 In the present case the Crown Court found, in effect, that had the appellant been travelling at 40 m.p.h. as he approached the signs at the start of the relevant stretch, then if he had not had local knowledge he would not have had time to reduce his speed below 30 m.p.h. when he entered the relevant stretch. This seems to me to be an assessment by the court of the cumulative effect of the roadside signs and roundels. The court made no explicit finding as to the precise location where the appellant had been recorded as travelling over the speed limit. Nor is there a finding that this location was any substantial distance from the start of the relevant stretch. In these unusual circumstances it seems to me impossible to do anything other than to conclude that in the appellant's case the requirement I have described was not met".*

93. Walker J. declined to decide another point which the appeal raised which related to the question of whether the local authority could be said to have "maintained" a sign which had become overgrown on the grounds that the TSRGD imposed no obligation as to visibility.
94. In our view, a Court faced with a situation in which it was alleged that a number of LEDs were not functioning on an AMI would have to decide the case on the evidence before it as to whether the number LEDs which were not working meant that, taken as a whole, the AMI did not provide "adequate guidance" within the meaning of section 85(1) of the RTRA 1984. We think that this would have to be considered as it would be in relation to any alleged defects to a fixed speed limit sign.
95. We have considered whether it might be possible for any authorisation which the Secretary of State issued for AMI to cover the issue of non-functioning LEDs. We think that seeking to define an acceptable number of non-functioning LEDs would be fraught with difficulty and would be unlikely to overcome potential challenges in any event.

## **6. Conclusion**

96. We hope what we have written is clear. In the event that we can be of further assistance, or that any matter requires further explanation or clarification, please do not hesitate to contact us.

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20<sup>th</sup> August 2010