



The Scottish Parliament
Pàrlamaid na h-Alba

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Transport (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 11 September and seeks an explanation of the following matters:

Part 1 – Low emission zones

Section 1(4) – Restriction on driving within a zone

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative for provision made under section 1(4)(a) and (c); affirmative for provision made under section 1(4)(b)

Section 1(4) of the Bill allows the Scottish Ministers by regulations to: (a) make provision for or in connection with the specification of the emission standard; (b) specify vehicles or types of vehicles which are exempt; and (c) make provision for or in connection with the amount that may be imposed as a penalty charge (including any discounts or surcharges).

- (a) Paragraph 11 of the DPM indicates that the Scottish Government considers that the emissions standard should be consistent with the general leading emission standards for low emission zones established across Europe.

Please explain why the emission standard is not set out on the face of the Bill, with a power taken by regulations to amend it, to enable the Parliament to conduct sufficient scrutiny of this choice during the course of the Bill.

- (b) Furthermore, it appears that the level of the emission standard is so fundamental to the policy effect of Part 1 of the Bill as it determines the types of vehicles that can be driven in the low emission zones (subject to any provision exempting particular vehicles).

Given the effect that this could have on individuals owning vehicles that may not comply with the emissions standard, please reconsider whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to regulations made under section 1(4)(a).

- (c) There is no limit on the face of the Bill for the level of the penalty set under the power in section 1(4)(c). The amounts of the penalties will involve a balancing of the interests of ensuring that the penalties have a deterrent effect and the impact of the penalties on individuals.
- (i) **Please consider whether it would be more appropriate that a limit on the level of the penalty that can be set in regulations is contained on the face of the Bill.**
- (ii) **Would it be more appropriate that the affirmative procedure also applied to regulations made under section 1(4)(c)?**

Section 3(1) – Enforcement

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative, except in relation to the creation of criminal offences (section 3(1) and (3)(a)), which are subject to affirmative procedure

Section 3(3) of the Bill provides, among other things, that regulations made under section 3(1) may include provision creating offences.

The creation of criminal offences is a significant matter which has a real effect on individuals. The DPM acknowledges this by reference to the application of the affirmative procedure to this power. However, there is a public interest in having this type of provision set out in primary legislation, which is subjected to greater parliamentary scrutiny and can be easier for people to find and understand.

Please explain what is it about the enforcement of low emission zone schemes in particular that means that it is not foreseeable at this stage what offences will be necessary.

Part 2 – Bus services

Section 29(2) – new section 3L of the 2001 Act – further provision

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Section 29(2) of the Bill inserts new section 3L(1) into the 2001 Act. It provides (among other things) that the Scottish Ministers may by regulations make further provision about bus services improvement partnership plans and schemes. By virtue of new section 3L(2)(c), without limit to the generality of that power, the regulations may make provision about what may constitute a facility or measure.

The power will allow provision to be made setting out the possible obligations of LTAs under bus services improvement partnership schemes. The Committee would usually expect terms used in the Bill to be defined in the Bill or to be subject to enhanced scrutiny.

Please therefore consider whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to regulations made under new section 3L(2)(c).

Section 32(2) – new section 13H of the 2001 Act – modification of proposed franchising framework (guidance)

Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: Neither laid nor subject to parliamentary procedure

New section 13H of the 2001 Act, inserted by section 32(2) of the Bill, applies where, following consultation under new section 13G, a local transport authority (“LTA”) consider it appropriate to modify the proposed franchising framework. If the LTA consider that the modifications materially affect any part of the assessment prepared under new section 13E that relates to the matters specified in new section 13E(2), the LTA must prepare a new assessment of the proposed framework as modified.

New section 13H(5) provides that the Scottish Ministers must issue guidance in relation to the circumstances in which a LTA must prepare a new assessment of a proposed framework. It appears that such guidance will be prescriptive in nature insofar as it relates to the circumstances when a LTA “must” prepare a new assessment of a proposed framework. There is no clarification in the Bill that the LTA must “have regard to the guidance” issued under new section 13H(5) of the 2001 Act, which would mean that the LTA would be required to consider the guidance but could decide not to follow it.

Please therefore consider whether it would be more appropriate that such provision is set out in regulations rather than in guidance. If the Scottish Government does not consider that to be appropriate, please consider whether the guidance should be subject to parliamentary scrutiny.

Section 33(1) (inserting new section 6ZB(2)(c) of the 1985 Act) – Provision of service information: extent of permissible disclosure

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

New section 6ZB(2) of the 1985 Act, inserted by section 33(1) of the Bill, allows the Scottish Ministers by regulations to prescribe other persons to whom an affected authority may disclose patronage information received from an operator under new section 6ZA.

The requirement to provide potentially commercially sensitive information will affect the rights of local service operators leaving the market. The exercise of a power to prescribe other persons who are entitled to receive information about an operator's patronage information may impact on the rights of those operators under both the European Convention on Human Rights and under EU procurement law.

Accordingly, please consider whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to allow the Parliament to be satisfied that the rights of operators will be respected.

Part 3 – Ticketing arrangements and schemes

Section 35 - new section 27A of the 2001 Act – additional classes of service participating in ticketing arrangements

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Section 35(2) of the Bill inserts new section 27A into the 2001 Act. New section 27A(1) defines “ticketing arrangements” and new section 27A(5) provides that the Scottish Ministers may by regulations amend that definition.

New section 27A(6) provides that the regulations made under subsection(5) may also amend sections 28 to 31 of the Bill as enacted in their application to services specified in the regulations as the Scottish Ministers consider appropriate.

The DPM does not explain why the power in new section 27A(6) is considered necessary. **Please provide examples of the sort of provision that may need to be made under the power in new section 27A(6).**

In addition, please explain why the power in new section 27A(5) is not considered sufficient when read in light of the ancillary power in existing section 81(2) of the 2001 Act.

Section 36 – new section 27B of the 2001 Act – National technological standard for smart ticketing

Power conferred on: Scottish Ministers
Power exercisable by: Administratively
Parliamentary procedure: None

Section 36(2) of the Bill inserts new section 27B into the 2001 Act. It provides that the Scottish Ministers may specify a technical standard for the implementation and operation of smart ticketing arrangements.

This power is not considered in the DPM. The Bill does not require the standard to be set to be laid before the Parliament or subject to any parliamentary procedure.

Please explain why it is considered appropriate to confer an administrative power on the Scottish Ministers to set the technical standard, rather than that standard being set in regulations which would be subject to scrutiny by the Parliament.

Section 39 - new section 32A(1) of the 2001 Act – directions about ticketing schemes

Power conferred on: Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: Neither laid nor subject to parliamentary procedure

Section 39(2) of the Bill inserts new section 32A into the 2001 Act. It provides that the Scottish Ministers may direct a LTA, or two or more LTAs, to exercise their power under section 29(1) of the 2001 Act to make a ticketing scheme or under section 31(5) of the 2001 Act to vary a ticketing scheme.

The power to direct a LTA to make a ticketing scheme appears to be a significant power. Paragraph 127 of the DPM states that the reasons for issuing the direction will be clearly set out in the direction itself. However, there is no requirement in the Bill to do so.

Please consider whether, to put the position beyond doubt, it would be more appropriate to require on the face of the Bill that reasons are given in the published direction for making the direction.

Part 4 – Pavement parking and double parking

Section 48(5) – Setting the level of the penalty charge

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Section 48(5) of the Bill provides that the Scottish Ministers may by regulations make provision for or in connection with the amount that maybe imposed as a penalty charge, which may include provision for discounts and surcharges. Regulations under section 48(5) are subject to the negative procedure.

The amounts of the penalties will involve a balancing of the interests of ensuring that the penalties have a deterrent effect and the impact on individuals. No limit is set on the face of the Bill on the amount of the penalty that can be imposed under section 48(5).

Accordingly, would it not be more appropriate that such a limit is set or that the affirmative procedure applies to the scrutiny of regulations setting the amount of the penalty charge?

Section 49(1) – Enforcement of parking prohibitions

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative except in relation to the creation of criminal offences (section 49(1) and (4)(a)), which are subject to affirmative procedure

Section 49(1) of the Bill provides that the Scottish Ministers may by regulations make provision for or in connection with the enforcement of the pavement parking prohibition and the double parking prohibition (together, the “parking prohibitions”). Section 49(4)(a) provides, among other things, that regulations made under section 49(1) may include provision creating criminal offences.

As noted in the question relating to the power in section 3(3)(a) of the Bill, the creation of criminal offences is a significant matter which has a real effect on individuals. There is a public interest in having this type of provision set out in primary legislation, which is subjected to greater parliamentary scrutiny and can be easier for people to find and understand.

Please explain what is it about the enforcement of the parking prohibitions in particular that means that it is not foreseeable at this stage what offences will be necessary.

Sections 51(1), 52(1) and 53(1) – Removal of vehicles, moving vehicles parked contrary to parking prohibitions and disposal of removed vehicles

Powers conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Sections 51(1), 52(1) and 53(1) of the Bill create regulation-making powers in relation (respectively) to the removal and moving of motor vehicles parked contrary to the parking prohibitions and for the disposal of removed vehicles.

Similar powers are contained in section 99 to 101 of the Road Traffic Regulation Act 1984. These powers allow the Secretary of State (or the Scottish Ministers in Scotland) to make regulations providing for the removal of vehicles which have been permitted to remain at rest on a road and for the disposal of vehicles.

The powers to remove, move and dispose of vehicles engage the right guaranteed under article 1 protocol 1 ECHR to peaceful enjoyment of property.

The DPM states (at paragraphs 160, 163 and 166) that the use of secondary legislation will allow proposals to be developed and then a consultation to be conducted. However, there is no express requirement in sections 51 to 53 of the Bill to consult. By way of contrast, section 134(8) of the Road Traffic Regulation Act 1984 provides that before making regulations under sections 99 to 101 of that Act the Scottish Ministers are required to consult with such representative organisations as they think fit.

Please consider whether it would be appropriate for the Bill to contain an express requirement to consult organisations representative of the drivers of motor vehicles.

Part 5 – Road works

Section 61(2) – new section 153I of the 1991 Act – compliance notices: power to make supplementary etc. provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative if amending section 153G or paragraph 6 of schedule 6B of the 1991 Act, otherwise negative

New section 153I(1) of the 1991 Act, inserted by section 61(2) of the Bill, confers power on the Scottish Ministers by regulations to make such supplementary, incidental or consequential provision as they consider appropriate in connection with compliance notices and the carrying out of the SRWC's functions under new sections 153A to 153H of the 1991 Act.

New section 153I(3) provides that "*regulations under subsection (1) may make such modifications of section 153H and paragraph 6 of schedule 6B as the Scottish Ministers consider appropriate [...]*". Section 61(3) of the Bill inserts new subsection (2A) into section 163 of the 1991 Act, which provides that "*Regulations under section 153I which modify section 153G or paragraph 6 of schedule 6B are subject to the affirmative procedure.*"

Please confirm whether the reference to section 153G in section 163(2A) of the 1991 Act as inserted by section 61(3) of the Bill should be to section 153H.

Section 62(3)(d)(ii) – new paragraph 1A of schedule 6B of the New Roads and Street Works Act 1991 – fixed penalty notices

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Section 62(3)(d)(ii) of the Bill inserts new sub-paragraph (1A) into paragraph 4 of schedule 6B of the New Roads and Street Works Act 1991 (the “1991 Act”). It provides that the penalty for a fixed penalty offence in relation to an offence under section 153G(1) is such amount, not exceeding £100,000, as is prescribed in regulations made by the Scottish Ministers.

As paragraph 180 of the Policy Memorandum recognises, the limit of £100,000 is a significant amount for a maximum fixed penalty notice. The imposition of a fine will in principle engage the right guaranteed by the first paragraph of article 1 of protocol 1 ECHR (the right to property) as it deprives the person concerned of an item of property, namely the sum that has to be paid.

Given the significance of the maximum penalty that may be imposed, would it not be more appropriate that the enhanced parliamentary scrutiny afforded by the affirmative procedure applies to regulations made under new paragraph 4(1A) of schedule 6B of the 1991 Act?

Section 64(3) – new section 60A(1) of the Roads (Scotland) Act 1984 – Safety measures: code of practice

Power conferred on: Scottish Ministers
Power exercisable by: Code of practice
Parliamentary procedure: None

Section 64 of the Bill inserts new section 60A into the Roads (Scotland) Act 1984. It allows the Scottish Ministers to issue or approve codes of practice giving practical guidance as to the duties imposed by section 60 of the Roads (Scotland) Act 1984 in relation to the fencing and lighting of obstructions and excavations in the road.

With reference to new section 60A(2) and (3), the codes of practice issued or approved under new section 60A will be significant insofar as compliance with them is to be taken as compliance with the requirements of section 60 (and a failure to comply with the code is evidence of a failure to comply with section 60). In effect, therefore, persons conducting road works are required to comply with a code of practice issued under section 60, even if this requirement is not provided for expressly.

(a) Would it not be more appropriate that codes of practice issued under new section 60A of the Roads (Scotland) Act 1984 are subject to some form of parliamentary scrutiny?

- (b) **If the Scottish Government does not consider that this is appropriate, should there at least be requirements for a code of practice issued under section 60A to be published and consulted on?**

Section 67 – new section 130C(2) of the 1991 Act – reinstatement quality plans: regulations

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative except in relation to the creation of criminal offences (by virtue of section 130C(4) and 130C(5)), which are subject to affirmative procedure

Section 67(2) of the Bill inserts new section 130C into the 1991 Act. New section 130C(2) confers a regulation-making power on the Scottish Ministers to make further provision about plans to be entered in the SRWR under new sections 130A or 130B.

- (a) **In the absence of any explanation in the DPM, please explain why the list of powers contained in new section 130C(3) is stated to be without limit to the generality of the regulation-making power in new section 130C(2).**

What other provision is it envisaged may need to be made about plans to be entered in the SRWR under new sections 130A or 130B beyond the examples provided in new section 130C(3)?

- (b) New section 130C(3)(f) provides that the regulations may prescribe the consequences of complying or otherwise with the code of practice (new section 130C(3)(f)). This is a different approach to that taken in section 64 of the Bill, which inserts new section 60A(2) of the Roads (Scotland) Act 1984, and which sets out the consequences of complying and failing to comply with a code of practice on the face of the Bill.

If regulations made under the power in new section 130C of the 1991 Act were, in effect, to require compliance with a code of practice, the Committee may wish to insist that codes of practice issued under new section 130C(1) of the 1991 Act are subject to some form of parliamentary scrutiny.

Please therefore explain why new section 130C(3)(f) is considered necessary and appropriate.

- (c) As noted in a previous question, the creation of criminal offences is a significant matter and one which is typically thought to be more appropriate for primary legislation rather than subordinate legislation. It can be acceptable for offences to be created in subordinate legislation where there are special circumstances that mean that the offences that are necessary are not foreseeable during the passage of the bill.

Please explain why the enforcement of reinstatement quality plans in particular requires the creation of criminal offences in subordinate legislation.

I would be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Thursday 20 September 2018.

Thank you.

Andrew Proudfoot
Clerk to the Delegated Powers and Law Reform Committee