

Cabinet Secretary for Transport, Infrastructure and
Connectivity
Michael Matheson MSP



Scottish Government
Riaghaltas na h-Alba
gov.scot

T: 0300 244 4000
E: scottish.ministers@gov.scot

Graham Simpson MSP
Convener, Delegate Powers and Law Reform
Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

28th March 2019

Dear Graham,

Thank you for the Delegated Powers and Law Reform Committee's Stage 1 Report on the Transport (Scotland) Bill. I would like to offer my thanks to you and Committee members for the diligent way they have approached scrutiny of the legislation.

The report raises a number of points and reflections in regard to specific matters. Attached is the Scottish Government's response to these, taken in the order they appear in the report.

I can confirm that in two of the recommendations, points 38 and 52, the Scottish Government gives a commitment to act on these matters at Stage 2.

Best wishes

MICHAEL MATHESON

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot



INVESTORS
IN PEOPLE

Accredited
Until 2020



Delegated Powers and Law Reform Committee - Stage 1 Report on the
Transport (Scotland) Bill

Creating criminal offences in subordinate legislation

17. The Committee recognises that flexibility will be required in relation to the enforcement regimes set out in paragraph 9 above. Nevertheless, an appropriate balance needs to be struck between the requirement for flexibility and the need for adequate parliamentary scrutiny, particularly in relation to the creation of criminal offences.

18. The Committee asks the Scottish Government to reflect on whether the policy relating to the enforcement regimes for each of the areas outlined at paragraph 9 above might be developed in more detail to allow the initial criminal offences that are required to be set out on the face of the Bill.

19. One possible approach might be that the existing regulation-making powers are amended to permit modification to the initial criminal offences set out on the face of the Bill and to create new criminal offences. This could provide sufficient flexibility where a compelling change in circumstances necessitates this.

Taking these points collectively, the Scottish Government agrees that it's crucial that an appropriate balance is struck between the requirement for flexibility in developing enforcement machinery and the need for adequate Parliamentary scrutiny, particularly in relation to the creation of criminal offences. The Scottish Government's approach to this issue is set out in the previous letter to the Committee of 12 September 2018 as well as the Response to the lead Rural Economy and Connectivity Committee's Stage 1 Report, where similar reflections were raised in relation to submissions by the Law Society for Scotland.

For low emission zones and the parking prohibitions, we are considering the specific detail of those enforcement methods for each and until those are settled, it is not considered possible to foresee precisely what offences may be needed in each case. However, we can be clear that this is not about creating a criminal offence for non-payment of penalty charge notices, which will be dealt with under civil law.

In relation to road works, any criminal offence created here would provide an ultimate enforcement option for non-compliance with requirements in relation to reinstatement quality plans which are themselves to be set out in regulations. Although it is not envisaged that this scenario will arise with any regularity, it was deemed prudent to allow for criminal offences to be created. Again, until work on developing the detailed provision to go into regulations under new section 130C of the 1991 Act is complete, it is not possible to foresee with sufficient certainty what (if any) offences may be required.

The Scottish Government has sought to strike a balance to ensure that the power to create offences is suitably constrained and subject to adequate scrutiny. That is why

the Bill limits the level of any offences that may be created. They will be restricted to summary procedure and fines not exceeding what is known as level 5 on the standard scale for offences in Scotland (currently £5000). In particular, there is no ability to include a custodial sentence in this penalty regime. Any regulations under the Bill creating offences will be subject to the affirmative procedure.

Low emission zones

35. The Committee suggests that the Scottish Government gives further consideration to setting the initial emission standards on the face of the Bill.

The Scottish Government would draw the Committee's attention to its response to point 29 in the Rural Economy and Connectivity Committee Stage 1 Report, which covers this area

36. The Committee welcomes the Scottish Government's commitment to reflect on applying the affirmative procedure to regulations made under section 1(4)(a) of the Bill.

37. The Committee considers that there are reasons to apply the affirmative procedure to regulations specifying the emissions standard. This is particularly where, as noted above, the Government itself recognises that the emission standards are fundamental to the scope and operation of low emission zones.

38. The Committee also welcomes the Cabinet Secretary's commitment to write to the Committee informing it of the reasons either for lodging an amendment to the Bill to apply the affirmative procedure to the power in section 1(4)(a) or otherwise explaining why that amendment will not be lodged.

As committed to in evidence before the Committee, the Scottish Government has given this careful consideration. It can now be confirmed that an amendment will be lodged at Stage 2 to apply the affirmative procedure.

Bus Services

52. The Committee therefore asks the Scottish Government to reflect further on defining the terms "facility" and "measure" on the face of the Bill, or consider instead amending the power in new section 3L of the 2001 Act to provide for the regulations to define those terms and to make the regulations subject to the affirmative procedure.

The Scottish Government will reflect on the Committee's thoughts, but refers back to the position it set out in its letter to the Committee of 12 September 2018.

It should be noted that this power has been designed to be helpful to local transport authorities (LTAs) in the setting up of a Bus Service Improvement Partnership (BSIP) and allowing best practice to influence the national approach over time.

The concepts of “facilities” and “measures” in the context of a partnership scheme are potentially wide-ranging. It is intended that these concepts should be construed widely to allow LTAs to take a flexible and expansive approach to the action they may take under such a scheme.

Entering into a BSIP will not be mandatory. It will be an LTA’s choice and it will not have to commit to a facility or measure where it does not feel it can or should. However, the Scottish Government has given careful consideration and can confirm that the affirmative procedure will be applied to these regulations.

Ticketing Arrangements and Schemes

61. The Committee welcomes the Scottish Government’s commitment to lodge an amendment to the Bill to require reasons to be provided with a direction issued under new section 32A of the 2001 Act.

Pavement and Double Parking

70. The Committee therefore encourages the Scottish Government to include a requirement to consult organisations representative of drivers and other applicable road users when making regulations under sections 51 to 53 of the Bill.

The Scottish Government agrees that consultation with representative organisations and stakeholders is key. It would reassure the Committee that, as set out in the Scottish Government’s previous letter of response, it has consulted widely with various motoring organisations in the development of the Bill and will continue to do so (including in development of secondary legislation implementing the Bill). However, the Scottish Government notes the Committee’s recommendation and will reflect on the best way to ensure a broad range of views are taken into account.

Road Works

76. The Committee welcomes the Scottish Government’s commitment to lodge an amendment to the Bill at Stage 2 to correct the current reference in section 61(3) of the Bill to new “section 153G” of the 1991 Act to refer instead to new “section 153H” of the 1991 Act.

91. The Committee therefore recommends that the Scottish Government considers whether the Bill might be amended at Stage 2 to clarify the scope of the power to make regulations in new section 130C(2) (read with new section 130C(4)) of the 1991 Act (inserted by section 67(2) of the Bill).

92. In particular, any amendment could clarify that, for the avoidance of doubt, such regulations cannot include provision making it an offence, or imposing any other penalty, for failing to comply with the code of practice made under new section 130C(1) of the 1991 Act.

The Scottish Government takes seriously the Committee’s concerns in this regard, particularly given the link between the approach taken to new section 130C(2) of the

1991 Act and the question of whether a code of practice under section 130C should be subject to Parliamentary procedure.

The Scottish Government does not consider that the power under new section 130C(2) of the 1991 Act permits the creation of criminal offences. The creation of criminal offences in subordinate legislation requires an express enabling power in the Act under which that subordinate legislation is made. Section 130C(3)(f) of the 1991 Act enables regulations made under section 130C(2) to contain provision about “the consequences of complying, and of failing to comply” with a code of practice. This provision does not mention specifically the creation of offences and so in the Scottish Government’s view falls short of expressly enabling their creation.

While the Scottish Government will reflect prior to Stage 2 on whether additional clarity could appropriately be offered here, it would of course be a reasonably significant shift in approach if a new standard were set on the basis that it is necessary to be expressly clear that an enabling provision of the sort described in section 130C(3)(f) does not permit the creation of offences, rather than relying on the fact that it contains no express indication that offences can be created to settle the question.