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## RAILWAY POLICING (SCOTLAND) BILL AT STAGE 1

Dear Euan,

Thank you for your letter of 17 January to James Hynd, setting out specific points on which the Delegated Powers and Law Reform Committee is seeking further explanation of the powers contained in Section 1 of the Railway Policing (Scotland) Bill ("the Bill"). It has been passed to me to reply, as my Division has policy responsibility for the Bill.

Responses to each of the three areas on which the Committee is seeking further explanation, all within new Section 85C of the Police and Fire Reform (Scotland) Act 2012 ("PFRA"), are as follows.

***1. The Committee has requested an explanation of why it is considered necessary to impose a time period within which a Railway Policing Agreement (RPA) must be entered into by a railway operator specified in the regulations.***

The power in section 85C(1) creates an obligation on various parties to enter into a Railway Policing Agreement. Unlike section 34 of the Railways and Transport Safety Act 2003, this power expressly enables the Scottish Ministers to set a time period for the parties to enter into the RPA, if they consider it appropriate.

It was considered desirable to adopt this approach in the Bill for 2 reasons.

Firstly, having the ability to set a timeframe provides greater transparency regarding the process. Parties may find it beneficial to have a clear understanding as to the date by which RPAs must be in place and the power therefore allows for that. Section 85C(3) specifies that before making the regulations, Scottish Ministers must consult the railway operator or operators who are to be subject to them, which would provide an opportunity to express views on the timescale, if one is to be specified.



Secondly, by virtue of section 85D(2)(a)(ii), the new dispute resolution mechanism is engaged where parties are in breach of the requirement to enter into an RPA. Without a timeframe being specified, it could be a matter of dispute whether a rail operator is in fact in breach of the requirement. This could therefore frustrate the dispute resolution mechanism and lead to unnecessary litigation and delays.

**2. The Committee has requested an explanation of why a different approach has been taken from the Railways and Transport Safety Act 2003 (“the 2003 Act”) to ensuring the compliance of a railway operator with a requirement to enter into an RPA.**

As noted by the Committee, the 2003 Act provides that a railway service provider who provides railway services without entering into a Police Services Agreement (PSA) commits a criminal offence, and is liable to sanctions in the form of a fine if found guilty. The policy objective of that approach is to ensure that railway service providers enter into PSAs when required to do so. To our knowledge these sanctions have never been applied in practice, and the Scottish Government is not convinced that the threat of criminal sanctions is the most effective way of securing the policy objective. Even if sanctions might have the desired effect, the Scottish Government considers that this approach would be disproportionate. The Bill therefore takes an alternative approach to ensuring that RPAs are in place for operators who are required to enter into them.

Section 1 of the Bill inserts sections 85D to 85I of the PFRA, creating a dispute resolution mechanism in relation to RPAs. Paragraphs 17 to 24 of the Explanatory Notes to the Bill describe the dispute resolution mechanism in more detail, though it may be helpful to draw attention here to the fact that this mechanism allows disputes to be referred to the Scottish Ministers where the parties have failed to agree the terms to be included in an RPA and that failure to agree is likely to cause (or has caused) a breach of a requirement to enter into an RPA imposed by regulations under section 85C (section 85D(2)(a)). Section 85F(4) requires a person determining that dispute to specify the terms to be included in an RPA and those terms are to be treated as if they had been agreed between the parties. In other words, where there is a requirement to enter into an RPA and that requirement is not met, powers exist under sections 85D and 85F enabling the Scottish Ministers (or a person appointed by them) to put an RPA in place. It is considered that this is more a proportionate, direct and effective means of addressing failure to comply than imposing a criminal sanction.

**3. The Committee has asked the Government to consider providing for the affirmative rather than the negative procedure for the subordinate legislation requiring a railway services provider to enter into an RPA.**

The Committee has expressed the view that it would be open to the Scottish Government to exercise the power to require a railway services provider to enter into an RPA in order to, for example, introduce a modified railway policing model in Scotland.

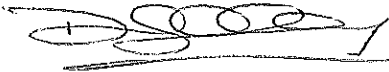
The Scottish Government’s policy intention here is that the subordinate legislation will identify the operators or classes of operator who are required to enter into an RPA. The power is narrowly drawn and could be used only for that purpose. The Scottish Government does not accept that the railway policing model itself, i.e. matters like the priorities, services and costs of railway policing, could be affected by a power to impose on specified railway operators a requirement to enter into RPAs. Indeed a separate means through which the approach to railway policing is to be agreed between the SPA, Chief Constable, and relevant

railway operators is set out in provisions in added section 85K of the PFRA ('Agreement of railway policing priorities, objectives etc.').

It may also be worth noting that the requirement under the 2003 Act for railway services providers to enter into a PSA for railway policing is already well understood as a condition linked to the operation of railway services. It is therefore envisaged that the similar requirement to be established by the Bill for operators and classes of operators as specified in the subordinate legislation to enter into an RPA will ensure continuity for these key stakeholders, while providing a means of responding to changes over time in the identity and/or type of operators engaged in the provision of railway services. As noted above, Section 85C(3) specifies that the railway operator or operators concerned must be consulted before the regulations are made, while the Railway Policing Management Forum established separately by the Bill is intended to ensure that the railway operators subject to the requirement are closely involved on an ongoing basis in decisions affecting the railway policing model.

In sum, our view is that the negative procedure remains appropriate to the scope and intended purpose of the power, and we hope that the information above will be helpful to the Committee by way of further explanation of the reasoning behind this view.

Yours sincerely,



**D McGillivray**  
**Deputy Director**

