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Transport (Scotland) Bill: Road Works

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This briefing provides an overview of the road works related provisions set out in the Transport (Scotland) Bill.



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Introduction

The Transport (Scotland) Bill ("the Bill") was introduced to the Scottish Parliament by Derek Mackay MSP, Cabinet Secretary for Finance and the Constitution, on 8 June 2018. Part 5 of the Bill deals with road works.

This briefing summarises:

- How road works are currently regulated
- The proposals set out in "Part 5: Road Works" of the Bill
- Financial implications of the Bill
- Consultation on the road works proposals undertaken by the Scottish Government prior to the introduction of the Bill

The proposed changes to the regulation of road works set out in the Bill are largely based on the recommendations of the [Review of the Office and Functions of the Scottish Road Works Commissioner](#)¹, carried out by former senior Transport Scotland official Jim Barton.

How road works are currently regulated

The term "road works" covers two different categories of work:

1. Works by electricity, gas, water and telecommunications companies (collectively known as utility companies) that are necessary for placing, inspecting, maintaining, adjusting, repairing, altering, renewing, removing or changing the position of apparatus associated with their networks. This includes incidental works, such as breaking open the road
2. Works by roads authorities for road purposes, e.g. filling pot-holes or installing signage. There is also a separate category of "major works for roads purposes" which includes larger scale works, such as reconstruction or widening a road

Road works are regulated under the provisions of the:

- New Roads and Street Works Act 1991 (NRSWA)
- Roads (Scotland) Act 1984 ("RSA")

Under the NRSWA, roads authorities are deemed to be "road works authorities" and have an obligation to coordinate their own works and those of utility companies (referred to in legislation as "undertakers"). Under the provisions of the NRSWA, undertakers are required to ensure:

- roads works are adequately guarded, lit, and signposted
- road works are completed as quickly as reasonably practicable
- road works are carried out by suitably qualified operatives and supervisors
- roads authorities are afforded reasonable facilities to establish whether the company is complying with its duties
- that any works affecting another organisation's apparatus are notified to that organisation and that the undertaker meets any reasonable requirement to protect that apparatus
- that the road is reinstated as soon as reasonably practicable after the completion of work, if it is an interim reinstatement then the final reinstatement must be completed within six months
- that any reinstatement complies with materials and performance standards
- that they co-operate with the roads works authority and other undertakers in the interests of safety, minimising inconvenience and to protect the structure of the road

Additional procedures apply to protected roads (principally trunk roads), roads with special engineering difficulties and traffic sensitive roads.

The Scottish Road Works Commissioner: The role of Scottish Road Works Commissioner was established under the provisions of the Transport (Scotland) Act 2005.

The Commissioner is an independent public official, appointed by Scottish Ministers. The Commissioner can:

- monitor the carrying out of works in roads in Scotland. Monitoring is at a strategic level, considering the overall performance of roads authorities and utility companies rather than individual work sites
- promote compliance with the requirements of the New Roads and Street Works Act 1991 and obligations imposed under it
- promote the pursuit of good practice by organisations involved in roads works
- impose civil penalties on either roads authorities or undertakers in terms of their duties under S118 and S119 of the New Roads and Street Works Act 1991 – Duty to Coordinate and Duty to Cooperate, respectively

The Scottish Road Works Register: The Scottish Road Works Commissioner maintains the [Scottish Road Works Register](#) (SRWR). The SRWR is an online tool, accessible to the public, which is used by utility companies and road works authorities to record details of intended road works across Scotland for co-ordination purposes. Once notified, the road works authority or utility company must allow a set notification period to elapse before beginning works. The periods vary depending on the categorisation of the works - these are Emergency, Urgent, Minor (without excavation), Minor (mobile and short duration), Remedial works (non-dangerous), Standard, Major and Substantial works for road purposes.

The proposals set out in "Part 5: Road Works" of the Bill

The Bill proposes a number of changes to the legislation governing the regulation of road works in Scotland, which are summarised below:

Status of the Scottish Road Works Commissioner: The Bill would clarify the status of the Scottish Road Works Commissioner as a "Juristic person distinct from the individual for the time being holding the office". This change has been made following concerns about a lack of clarity regarding the Commissioner's role raised by previous post holders.

Inspections: The Bill would grant the Commissioner, or a person authorised by the Commissioner, powers to carry out inspections to establish whether an offence or breach of road works related duties has been committed under the New Roads and Street Works Act 1991. An inspection could involve:

- entering the premises of an undertaker, road works authority or roads authority
- requiring the production of documents
- taking copies or possession of information
- carrying out an examination of, or tests on, equipment used by an undertaker, road works authority or roads authority
- requiring any person to provide necessary assistance or facilities to carry out such work

Where entry to premises is refused, such a refusal is expected, the premises are unoccupied or the occupier temporarily absent, the Commissioner may apply to a sheriff for a warrant to enter the premises to carry out an inspection. Reasonable force can be used in making an entry authorised by a warrant.

It would be an offence to, without reasonable excuse, fail to comply with a requirement issued by the Commissioner or authorised person or to obstruct them in the exercise of their duty. Anyone committing such an offence would be liable to a fine.

Scottish Ministers would have power to make regulations about the use of these powers by the Commissioner, who would also be required to submit an annual report on the use of these powers to Scottish Ministers. The Commissioner would also be able to report on anyone failing to comply with statutory road works obligations or to follow good practice.

Compliance notices: The Commissioner would have the power to issue a compliance notice to a person they consider to have breached one, or more, of the following duties under the Roads (Scotland) Act 1984 and New Roads and Street Works Act 1991.

- fencing and lighting of obstructions and excavations
- requirement for qualified supervisors and operatives
- duty to enter certain information in the Scottish Road Works Register

- advance notice of certain works
- notice confirming start date of works
- notice of emergency works
- general duty of road works authority to co-ordinate works
- general duty of undertakers to co-operate
- safety measures
- qualifications of supervisors and operatives
- duty of undertaker to reinstate road
- materials, workmanship and standards of reinstatements
- duty to inform undertakers of locations of apparatus
- duty to maintain apparatus

A compliance notice will set out the steps the person must take in order to address any breach of these duties. It is an offence to fail to comply with a compliance notice. Anyone receiving a compliance notice can appeal, within 21 days from the date of issue, to a Sheriff. In addition, the Commissioner can vary or withdraw a compliance notice at any time. Scottish Ministers would have the power to make regulations creating supplementary, incidental and consequential provisions relating to compliance notices.

Fixed penalty notices: The ability to issue fixed penalty notices, as an alternative to prosecution, is extended to include the Scottish Road Works Commissioner, and members of their staff. Failure to comply with a compliance notice is added to the list of offences enforceable by fixed penalty notice.

Permission to execute works in a road: There are currently two, broadly similar, consenting mechanisms for organisations wishing to undertake work in a road involving apparatus. The Bill would remove one of these by repealing section 61 of the Roads (Scotland) Act 1984 and making consequential amendments to Section 109 of the New Roads and Street Works Act 1991.

Safety measures for carrying out works in roads: The current requirement for undertakers to ensure that road works are fenced and lit would be extended to include works undertaken by roads authorities. Scottish Ministers would also gain powers to issue or approve codes of practice covering safety at road works sites, e.g. fencing or lighting requirements. The maximum penalty for failing to comply with a requirement set out in such a code would be increased.

Qualifications for supervisors and operatives: Currently, operatives and supervisors carrying out road works on behalf of an undertaker are required to hold appropriate qualifications. This requirement would be extended to cover staff undertaking works for roads authorities that are not covered by the current requirement.

The Bill would give roads authorities a new power to require an undertaker, or anyone carrying out works on their behalf, to supply the names of any supervisors or trained operatives currently (or previously) working on a site, along with details of their

qualifications. It would be an offence to fail to comply with such a request. The Bill would also give the Scottish Road Works Commissioner the power to request these details, plus details of supervisors and trained operatives working on behalf of a roads authority, from any roads authority.

Scottish Ministers would be given powers to make regulations setting out required qualifications for supervisors and trained operatives and other related matters.

The law would be clarified to confirm that road works must be supervised until the point that the road is reinstated and that a trained operative must be on-site at all times works are ongoing. Scottish Ministers would also have the power to make regulations setting out when more than one trained operative is on-site.

Commencement and completion notices: The Bill would require undertakers, roads authorities, road works authorities and Scottish Ministers to enter the exact date that road works commence into the Scottish Road Works Register within a time period established in regulations, which the explanatory notes that accompany the Bill indicate would be the day that works commence. A similar duty would apply to the completion of road works.

A new duty would be imposed on undertakers to notify the owners of apparatus in a road that they intend to undertake works on, details of which would also have to be entered in the Scottish Road Works register. Failure to do so would be an offence.

Reinstatement of roads following works: Undertakers carrying out road works that involve breaking open and reinstating or tunnelling/boring under a road would be required to enter a reinstatement quality plan in the Scottish Road Works Register. These plans can take two forms:

1. a specific reinstatement quality plan, specific to particular road works
2. a general reinstatement quality plan, covering the approach to reinstatement for certain categories of road works

Both types of plan must be approved by the Scottish Road Works Commissioner. The Commissioner would only approve a plan where it demonstrates that the person submitting the plan:

- is competent to execute the works
- has quality control procedures in place to ensure the reinstatement meets required standards

It would be an offence to fail to enter a reinstatement quality plan, approved by the Commissioner, in the Scottish Road Works Register before undertaking road works where this was a requirement.

A roads authority carrying out road works that involve breaking open and reinstating or tunnelling/boring under a road must, following a request by the Commissioner, enter a reinstatement quality plan in the Scottish Road Works Register. The plan must show that the authority has:

1. appropriate procedures in place to safely and effectively reinstate the road

2. has quality control procedures in place to ensure the reinstatement meets required standards

Scottish Ministers would also have powers to issue codes of practice and make regulations about reinstatement quality plans.

Financial implications of the Bill

The Financial Memorandum which accompanies the Bill provides the following cost estimates for its road works related proposals, as they fall on different organisations:

Scottish Road Works Commissioner: The new inspection powers that would be awarded to the Commissioner would require the employment and equipment of up to five additional technical staff. The financial memorandum estimates that this would lead to additional costs of £411,000 in the first year and recurring annual costs of £301,000 thereafter.

Local authorities: The Bill would bring local authority road works within existing codes of practice that currently apply to utility companies road works and require their operatives and supervisors to hold appropriate qualifications. The financial memorandum indicates that local authorities already voluntarily apply the codes of practice, so this should have no cost implications.

There may be cost implications from the requirement to ensure all road operatives and supervisors hold appropriate qualifications. However, some authorities already require their staff to hold such qualifications. The financial memorandum indicates that this may result in an initial one-off cost somewhere between £136,000 and £264,000 for a large local authority and £56,00 and £132,000 for a small authority.

Businesses and utility companies: The financial memorandum highlights a number of proposals in the Bill that might have implications for utility companies - both potential costs and savings. However, given the uncertainties involved with the quality of road reinstatements and the application of penalties there are no firm estimates of what these may be.

Consultation on the road works proposals undertaken by the Scottish Government prior to the introduction of the Bill

Transport Scotland launched a consultation Raising Standards and Improving the Quality of Road Works in Scotland ² on 20 July 2017, which was open for comment until 12 October 2017. The consultation posed 24 questions on proposals aimed at:

- Improving the quality of road works, including the introduction of quality plans and reinstatement guarantee periods
- Improving the availability of road works information
- Improving consistency between requirements for local authority and utility company road works
- Extending enforcement powers available to the Scottish Road Works Commissioner and extending the use of fixed penalty notices by road works authorities
- Clarifying the status of the Scottish Road Works Commissioner and awarding them new inspection powers
- Solving more minor problems raised by stakeholders during earlier consultations

Transport Scotland published an analysis of responses ³ in March 2018. A total of 88 responses were received, 26 from roads authorities, 15 from utility companies, 10 from contractors, 8 from special interest groups, 16 from individuals and 13 classed as "others". Transport Scotland summarised the key themes emerging from the responses as follows:

Improving Quality: there was overall support for the introduction of quality plans, and the review of their effectiveness over time, potentially removing the need for the latent defect process. Although most considered that there should also be a single guarantee period offered on utility reinstatements of six years, (regardless of the depth of excavation), there were some concerns that this may be overly bureaucratic and might be unfairly influenced by existing 'failing surfaces' in some cases. Additional clarity on the scope for a code of practice on reinstatement, including all activity relating to the execution of road works was also welcomed by most.

Improving the availability of road works information: while some felt that making information more accessible and available in a shorter time would assist with the planning and co-ordination of works and traffic movement, others felt that the proposals were too demanding and would be administratively challenging to implement. While this theme attracted the most difference in opinion overall, the majority of respondents still agreed with the different proposals to improve the availability of road works information.

Improving consistency: there was clear support for introducing consistency into Codes of Conduct for those working at sites, as well as for making the requirements Road Works Consultation - Analysis of Responses Transport Scotland 2 for safety related qualifications more stringent across the board (providing that there was flexibility to accommodate minor works, and staff on apprenticeships).

Enforcement: there was reasonable support for both strengthening the role of the SRWC in respect of enforcement powers and changes to the fixed penalty notices scheme, with a widespread recognition that both would potentially lead to better compliance with existing road works rules and regulations. The costs of implementing these proposals, as well as concerns that more consultation was needed before changes were introduced were the main reasons given in opposition.

The Scottish Road Works Commissioner - new functions: proposals to enhance the role of the SRWC attracted the most support, overall. Almost all who responded agreed that the creation of new inspection functions and clarifying the juristic status of the Commissioner would build on progress already achieved in Scotland to date.

Miscellaneous provisions: there was strong support to allow greater flexibility on the 'restriction period' following substantial works and also for noticing requirements to be made the same for all those undertaking works. Absolute agreement was noted, however, with both the need to clarify that a roads authority is included within those to be notified under Section 114 of NRSWA, and roads authorities being one of the parties that must be notified under statute to help formalise the use of early and late start consents. Almost all who gave a response also agreed that Section 61 of the Roads (Scotland) Act 1984 should be revoked. There was less support for Section 132 of NRSWA to be repealed, mostly on the basis that it lacked clear rationale.

Bibliography

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- 3 Transport Scotland. (2018, March). Raising Standards and Improving the Quality of Road Works in Scotland Analysis of Responses from the Consultation. Retrieved from <https://www.transport.gov.scot/media/41833/analysis-of-responses-march-2018-road-works-consultation.pdf> [accessed 31 August 2018]

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