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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Railway Policing (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on:

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
John Scott
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Alison Harris
Scottish Conservative
and Unionist Party



Monica Lennon
Scottish Labour



David Torrance
Scottish National Party

Introduction

1. At its meetings on 17 January 2017, 7 February 2017 and 21 February, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Railway Policing (Scotland) Bill ("the Bill") at Stage 1ⁱ. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum ("DPM")ⁱⁱ on the delegated powers provisions in the Bill.

ⁱ <http://www.scottish.parliament.uk/Railway%20Policing%20Scotland%20Bill/SPBill02S052016.pdf>

ⁱⁱ http://www.scottish.parliament.uk/Railway_Policing_Bill_-_DPM.pdf

Overview of the Bill

3. This Bill was introduced by the Cabinet Secretary for Justice on 8 December 2016.
4. The Policy Memorandum explains that the policy objective of the Bill is to pave the way for the integration of railway policing for Scotland into the Police Service of Scotland (“Police Scotland”). The Bill does this by providing Police Scotland and the Scottish Police Authority with new powers in relation to railway policing, and by removing existing powers in relation to railway policing in Scotland from the British Transport Police (“BTP”) and the British Transport Police Authority (“BTPA”).
5. The function of railway policing for Great Britain is currently undertaken by the BTP, with accountability to the BTPA and through them to the UK Parliament. The Scotland Act 2016 gave effect to the recommendation of the Smith Commission that the functions of the BTP in Scotland should be a devolved matter, by transferring legislative competence in the area of railway policing to the Scottish Parliament. Accordingly, the Scottish Parliament now has the power to legislate in this area.
6. The Policy Memorandum explains that the Scottish Government’s ultimate intention is that the officers and staff of BTP currently based in Scotland will transfer into Police Scotland, and that the function of policing Scotland’s railways will be taken forward by a specialist railway policing function within the wider Police Scotland structure, with oversight by the SPA and ultimately the Scottish Parliament. The Policy Memorandum further explains that delivering the policy objective will require a substantial programme of work following the passage of the Bill. This will include UK legislation making provision for the transfer of staff from BTP to Police Scotland and for the transfer of property and liabilities and provision in respect of cross-border policing.
7. The Policy Memorandum for the Bill identifies a target date for completion of the overall programme of integration of 1 April 2019, although the timetable for integration will be kept under review. The Annex to the Policy Memorandum sets out a summary of the Scottish Government’s current plan as to the overall legislative framework needed to deliver integration, of which this Bill represents the first step.

Delegated Powers Provisions

8. At its meeting on 17 January 2017, the Committee considered the three delegated powers in the Bill. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:
 - Section 6 - Ancillary Provision
 - Section 7 - Commencement.
9. At this same meeting, the Committee agreed to write to the Scottish Government to raise three questions on the one remaining delegated power in section 1 of the Bill. A copy of all correspondence with the Scottish Government is reproduced at Annex A.
10. Following consideration of the Scottish Government's responses to these three questions, the Committee is content in relation to the issues raised in its first two questions.
11. In relation to the issue raised in the Committee's third question, however, the Committee is not content with the Scottish Government's response and makes one recommendation as set out in the next section of this report.

Recommendations

12. The Committee's comments and recommendation on the delegated power in section 1 of the Bill are detailed below:

Section 1 - Provision for policing of railways and railway property

New Section 85C(1) of the Police and Fire Reform (Scotland) Act 2012 Power to require railway operators to enter into railway policing agreements

- **Power conferred on: The Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Negative**

13. Provision

Section 1 of the Bill inserts a new Chapter 12A into the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act"), consisting of new sections 85A to 85M. These sections set out the practical arrangements for how railway policing will be delivered in Scotland under the new model introduced by the Bill, following the integration of the British Transport Police ("BTP") in Scotland into Police Scotland.

14. The new model is based on the existing model of railway policing for Great Britain set out in the Railways and Transport Safety Act 2003 ("the 2003 Act"). Under the existing model, Network Rail and the various train and freight operating companies enter into 'Police Services Agreements' with the British Transport Police Authority and pay for the railway policing services which they receive from the BTP.
15. In a similar way, under the new model for Scotland, set out in new section 85A, the Scottish Police Authority ("SPA") will have the power to enter into what will be known as 'Railway Policing Agreements' ("RPAs") with railway operators. These RPAs will require Police Scotland to provide an agreed level of policing services in respect of the railway and railway property, and will require the relevant railway operator to pay for these services.
16. New section 85C gives a power to the Scottish Ministers to make regulations requiring a railway operator (or a specific class of railway operators) to enter into an RPA within such period (if any) as may be specified in the regulations. The SPA must take reasonable steps to enable a railway operator to comply with any such requirement to enter into an RPA. The Scottish Ministers must consult the affected railway operator(s) before making regulations under section 85C.
17. Under section 125 of the 2012 Act, regulations made under new section 85C are subject to the negative Parliamentary procedure.
18. Comment

The Delegated Powers Memorandum ("DPM") explains that the Scottish Government considers that the negative Parliamentary procedure provides an appropriate level of scrutiny for the exercise of this power for two main reasons. Firstly, the Scottish Government considers that the power may need to be exercised

relatively quickly in response to changing circumstances. For example, where a railway operator changes its name, a new operator takes on the business of another operator or a new operating licence is granted.

19. Secondly, the Scottish Government considers that the power is likely to be exercised in response to changing circumstances which may be largely administrative in nature. The DPM explains that the power is likely to be initially exercised in a way which broadly maintains the current arrangements for mandatory policing agreements so far as those railway operators operating in Scotland are concerned. Any subsequent exercise of the power is likely to reflect changes of an administrative or factual nature in relation to the railway operator (such as a change of name, structure or licence) and which require to be reflected in the RPA model.
20. In correspondence, the Committee set out its concerns to the Scottish Government with regard to the choice of the negative Parliamentary procedure for the scrutiny of this power. The Committee noted that it did not consider the power to be purely administrative in nature, but rather considered the power to be both integral to the delivery of the policy intention and to have the potential to fundamentally affect stakeholder interests under the new model.
21. While noting the Scottish Government's intention to exercise the power in a way which maintains current arrangements, the Committee considered that it would be open to the Scottish Government to exercise the power differently, so as (for example) to introduce a modified railway policing model north of the border. The Committee further noted that a requirement for the power to be exercised quickly does not of itself justify the choice of the negative procedure for a power which is not of a purely administrative nature.
22. In light of these concerns, the Committee invited the Scottish Government to consider providing for the affirmative procedure instead.
23. The Scottish Government response addresses the Committee's concern that the power in new section 85C(1) could be used to introduce a modified railway policing model in Scotland. The Scottish Government comments that the power in the Bill is narrowly drawn, so as to allow the Scottish Ministers only to require railway operators (or a particular class of railway operators) to enter into RPAs. The Scottish Government therefore does not accept that the railway policing model itself – matters like the priorities, services and costs of railway policing – could be affected by a power to impose on specific railway operators a requirement to enter into RPAs.
24. The Committee accepts that the power in section 85C(1) could not be used to change the priorities, services or costs of railway policing. It is clear that the power can only be used to specify which railway operators are (and, by extension, are not) required to enter into railway policing agreements with the Scottish Police Authority. In this sense it is true that the power is narrowly drawn. However, this does not mean that the power is narrow in its effect. The power will be exercised to specify which operators are caught by the new railway policing model introduced by the Bill. Its exercise is therefore fundamental to the scope of the new model, since it will dictate which operators do, or do not, fall within its ambit.
25. Notwithstanding the Scottish Government's intention that the power will be used to establish a similar requirement on railway operators as that already in place under

the 2003 Act, the Committee considers that it would be possible – however unlikely that may be – for this or subsequent administrations to exercise the power differently; so as, for example, to include operators who are not currently caught by the existing model, or to exclude operators who are currently caught. In this sense, the power in section 85C(1) could be used to modify the model of railway policing in Scotland. The Committee considers that any change of this nature is a matter of substance in respect of which Parliament would require an opportunity for detailed scrutiny.

26. More fundamentally, the Scottish Government's response does not address the Committee's concern, set out in correspondence, that the power in section 85C(1) is not purely administrative in nature, and therefore that the negative procedure is not appropriate. The Committee's letter to the Scottish Government noted that the exercise of the power is integral to the delivery of the policy intention and has the potential to fundamentally affect stakeholder interests under the new model. Nothing in the Scottish Government response dissuades the Committee from this view.
27. The Committee considers that while the power in section 85C(1) is narrowly drawn its effect is not narrow. It is correct that the power could be used to make administrative changes, but this is not the only use to which it may be put. Indeed, the duty on railway operators to enter into RPAs pursuant to section 85C(1), together with the power for the SPA to enter into such agreements, are, in the Committee's view, the two central pillars on which the railway policing model rests. The Committee therefore considers that the power cannot be properly characterised as purely administrative in nature.
28. **The Committee therefore recommends that the power in new section 85C(1) of the Police and Fire Reform (Scotland) Act 2012 (inserted by section 1 of the Bill) be amended at Stage 2 so that it is subject to the affirmative procedure.**

Annex A

Correspondence with the Scottish Government

On 17 January 2017, the Committee wrote to the Scottish Government as follows:

The Delegated Powers and Law Reform Committee considered the above Bill on 17 January 2017 and seeks an explanation of the following matters:

Section 1 - Provision for policing of railways and railway property New Section 85C(1) of the Police and Fire Reform (Scotland) Act 2012 Power to require railway operators to enter into railway policing agreements

- **Power conferred on: The Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Negative**

New section 85C gives a power to the Scottish Ministers to make regulations requiring a railway operator (or a specific class of railway operators) to enter into a Railway Policing Agreement (“RPA”) within such period (if any) as may be specified in the regulations. The Scottish Police Authority must take reasonable steps to enable a railway operator to comply with any such requirement to enter into an RPA. The Scottish Ministers must consult the affected railway operator(s) before making regulations under section 85C.

Under section 125 of the 2012 Act, regulations made under new section 85C are subject to the negative Parliamentary procedure.

The Committee asks Scottish Government to explain the following, in connection with new section 85C:

- **The power in new section 85C of the Police and Fire Reform (Scotland) Act 2012, inserted by section 1 of the Bill, allows the Scottish Ministers to impose a time period within which an RPA must be entered into by a railway operator specified in the regulations. The equivalent power in section 34 of the Railways and Transport Safety Act 2003 (“the 2003 Act”) does not allow the Secretary of State to impose such a time period. Given that the general approach in the Bill appears to be to reflect the existing model, set out in the 2003 Act, in terms of Police Services Agreements, please explain why it is considered necessary to enhance the existing power in this way and what problem this is intended to address.**
- **Section 34(2) of the 2003 Act provides that a railway services provider who is required by subordinate legislation to enter into a Police Services Agreement and who provides railway services without doing so commits an offence and, if guilty, is liable to a fine. This provision is not reflected in the power set out in section 1 the Bill. It appears that the lack of any sanctions in the Bill renders the power in section 1 effectively without ‘teeth’, since there is no incentive for a specific railway operator to comply with any requirement set out in regulations. Please explain why this different approach has been taken and, in the absence**

of sanctions, how it is intended to procure the cooperation of specific railway operators in complying with the requirement to enter into an RPA.

- The Delegated Powers Memorandum suggests that the choice of the negative Parliamentary procedure is appropriate for this power, since the initial exercise of the power is likely to broadly maintain the current arrangements for mandatory policing agreements for railway operators in Scotland, and any subsequent exercise of the power is likely to be to reflect changes of an administrative nature.

The Committee accepts that there may be circumstances in which the power is exercised in response to purely administrative changes relating to specific railway operators. However, the Committee does not consider that the power itself is purely administrative in nature.

The Committee notes that the requirement for specific railway operators to enter into Railway Policing Agreements with the Scottish Police Authority is fundamental to the operation of the new model for Scotland and therefore to the delivery of the policy intention for the Bill. Similarly, the requirement for operators to enter into RPAs will impose on those operators an ongoing contractual obligation which in turn will have an impact on how their business is managed and financed.

Further, while the Committee notes the Scottish Government's intention to exercise the power initially in a way which broadly maintains the current arrangements, the Committee considers that it would in fact be open to the Scottish Government to exercise the power differently, so as (for example) to introduce a modified railway policing model north of the border.

For these reasons, it appears to the Committee that the exercise of this power is both integral to the delivery of the policy intention and has the potential to fundamentally affect stakeholder interests under the new model.

The DPM also suggests that the negative procedure is appropriate since the power may require to be exercised relatively expeditiously to respond to changing circumstances. While the Committee accepts that certain administrative changes in relation to specific operators might require to be addressed relatively quickly by exercise of this power, the Committee does not consider that this alone justifies the choice of the negative procedure for a power which is not of a purely administrative nature. Other bespoke procedures exist for this type of power, which requires to be exercised expeditiously but which also merits an enhanced level of Parliamentary scrutiny.

In light of the above, the Committee considers that the negative procedure would not provide a sufficient level of parliamentary scrutiny and invites the Government to consider providing for affirmative procedure instead.

On 31 January 2017, the Scottish Government, responded as follows:

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.

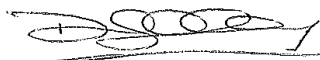
The Scottish Government's policy intention here is that the subordinate legislation will identify the operators or classes of operator who are required to enter into an RPA. The power is narrowly drawn and could be used only for that purpose. The Scottish Government does not accept that the railway policing 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

