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

Transport (Scotland) Bill: 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 the following (and any additional matter added under Rule 6.1.5A)—
(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.

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Introduction

1. At its meetings on 11 September, 2 and 23 October and 6 November 2018, the Delegated Powers and Law Reform Committee considered the delegated powers in the Transport (Scotland) Bill ("the Bill").[i] The Committee submits this report to the lead Committee for the Bill (the Rural Economy and Connectivity Committee) under Rule 9.6.2 of Standing Orders.

2. The Bill was introduced by the Cabinet Secretary for Finance and Constitution, Derek Mackay MSP, on 8 June 2018. The Scottish Government has produced a Delegated Powers Memorandum ("DPM") on the delegated powers provisions in the Bill.[ii]

i The Bill as introduced is available here.
ii The Delegated Powers Memorandum is available here.

Bill overview

3. This large Government Bill has 75 sections and one schedule. Significantly, it has over 60 delegated powers, which is a considerable amount for any bill. The Bill is split over six parts, which are summarised as follows:

    a. ***Part 1*** of the Bill ("Low emission zones") enables the creation and civil enforcement of low emission zone schemes by local authorities in Scotland.

    b. ***Part 2*** ("Bus services") makes provision about the powers and duties of local transport authorities ("LTAs") in relation to bus services in their areas.

    c. ***Part 3*** ("Ticketing arrangements and schemes") allows local transport authorities and the Scottish Ministers to develop and implement smart ticketing arrangements and schemes.

    d. ***Part 4*** ("Pavement parking and double parking") introduces prohibitions on parking on pavements and double parking (together, "the parking prohibitions").

    e. ***Part 5*** ("Road works") makes changes to existing legislation to enhance the role of the Scottish Road Works Commissioner and the wider regulation of road works.

    f. ***Part 6*** ("Miscellaneous and general") clarifies that Transport Partnerships can create and carry forward financial reserves across the financial year-end and allows the Scottish Ministers to vary the size of the British Waterways Board, operating as Scottish Canals. It introduces the schedule, which makes minor and consequential amendments and repeals. Part 6 also contains the final provisions of the Bill and follows a similar form to other bills, including provision about regulations made under the Bill as enacted and commencement.

Consideration of the Bill

4. At its meeting on Tuesday 11 September 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to a number of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to them, are included in the **Annex** to this report.

5. The Committee subsequently took evidence on the delegated powers in the Bill from the Cabinet Secretary for Transport, Infrastructure and Connectivity, Michael Matheson MSP, at its meeting on Tuesday 23 October.[iii]

6. The Committee reports as follows on the delegated powers in the Bill. The Committee is content with the remaining powers.

Creating criminal offences in subordinate legislation

7. The creation of criminal offences in legislation is a significant matter. It is one which is typically thought to be more appropriate for primary rather than subordinate legislation. This is because the creation of criminal offences is not a procedural or administrative matter. Instead, offences have a very real effect on individuals. Setting out criminal offences in primary legislation ensures that they are subjected to greater Parliamentary scrutiny. It can also be easier for people to track down and understand criminal offences in primary legislation.

8. It can be acceptable for offences to be created in subordinate legislation where there are special circumstances that mean that the offences that might be necessary are not foreseeable during the passage of the bill.

9. The Committee focused its questioning on three areas within the Bill where provision is made for criminal offences to be set in regulations:

    a. Section 3(1) – enforcement of low emission zones;

    b. Section 49(1) – enforcement of the parking prohibitions; and

    c. Section 67 (inserting new section 130C(4) into the New Roads and Street Works Act 1991 ("the 1991 Act")) – reinstatement quality plans for roadworks.

10. The Scottish Government's responses to the Committee's written questions on each of these provisions each gave the same general justification – that taking a power to set criminal offences in regulations gives "*Scottish Ministers flexibility to frame offences which are appropriate and necessary for securing the effectiveness*" of the relevant enforcement regime. Powers are taken in each of these three areas for the respective enforcement regimes to be set out in regulations.

11. The Cabinet Secretary provided more detailed justification at the Committee's evidence session by setting out specific reasons in relation to the circumstances applying to each individual delegated power. Specifically:

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iii The Official Report of the evidence session is available here.

a. **In relation to the enforcement of low emission zones**, the Cabinet Secretary indicated that "*it is likely that number plate recognition systems would be used for the enforcement of low-emission zones*".[iv] He explained that offences would be required where a person driving in a low emission zone covers up the number plate on their vehicle with a view to evading the registration number recognition cameras.[v] He also indicated that the enforcement regime had yet to be finalised and referred to the potential for enforcement technology to change.[vi]

b. **In relation to the enforcement of parking prohibitions**, the Cabinet Secretary referred to offences which may be required where a person who is parked on a pavement stops an enforcement officer issuing a ticket for breach of the pavement parking prohibition.[vii]

c. **In relation to the enforcement of reinstatement quality plans for roadworks**, the Cabinet Secretary emphasised that the plans are a new provision that has been created.[viii] The offence that is being created under the new enforcement framework provides for the Scottish Road Works Commissioner to have the ultimate power to fine contractors or roads authorities for failure to comply with a notice to carry out further repairs.[ix] He indicated that this framework had not yet been developed with the sector and that this would have to be set out in the regulations.[x]

12. More generally, the Cabinet Secretary argued that the power to prescribe offences is required to adapt to new ways of circumventing the enforcement regimes.[xi] He also pointed to the fact that the affirmative procedure applies to regulations creating criminal offences[xii] and that the maximum penalty for the offences was set on the face of the Bill as level 5 on the standard scale (currently £5,000).[xiii]

13. The Committee welcomes the fact that in each area the maximum level of the penalty for the offences that can be created are set out on the face of the Bill and

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iv *Official Report*, col. 7, 23 October 2018.

v *Official Report*, col. 7, 23 October 2018.

vi *Official Report*, cols. 7-8, 23 October 2018.

vii *Official Report*, col. 7, 23 October 2018.

viii *Official Report*, col. 8, 23 October 2018.

ix *Official Report*, col. 9, 23 October 2018.

x *Official Report*, col. 9, 23 October 2018.

xi *Official Report*, col. 10, 23 October 2018.

xii *Official Report*, col. 9, 23 October 2018.

xiii *Official Report*, col. 7, 23 October 2018.

that the affirmative procedure applies to the powers to set criminal offences in regulations.

14. The Committee also recognises that the flexibility of subordinate legislation would allow offences to be tailored to changes in technology and to keep pace with new ways of seeking to avoid the enforcement regime.

15. In general the Committee's position has been that delegated powers should not be taken as a substitute for developing policy fully in time for a bill's introduction. The fact that there may be future changes in technology is an argument for flexibility but is not in itself a justification for using delegated powers. One option would be to set out on the face of the Bill the initial offences which it is envisaged would be required in the area of enforcement, possibly with flexibility to change them subsequently.

16. Given the significance of criminal offences to the rights of individuals, the Committee believes that further consideration should be given to setting out sufficient detail in the primary legislation in relation to the enforcement regimes in these three areas to allow the initial criminal offences to be set out on the face of the Bill. A power could then be taken to amend these criminal offences or create new criminal offences where a compelling change in circumstances necessitates this. This would achieve a balance between the requirement for flexibility and parliamentary scrutiny.

Recommendations

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.**

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)**

Provisions

20. Section 1(1) prohibits a person from driving a vehicle on a road within a low emission zone contrary to the terms of a low emission zone scheme unless the vehicle meets a specified emission standard or is exempt by virtue of section 1(4)(b) or section 12. In terms of section 1(2), a penalty charge is payable where a person contravenes section 1(1).

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

22. Regulations under section 1(4)(b) making provision in relation to exempt vehicles are subject to the affirmative procedure. Otherwise, regulations under section 1(4)(a) and (c) are subject to the negative procedure.

Committee consideration

Setting the initial emissions standard on the face of the Bill

23. Paragraph 11 of the DPM states that "*It may be a reasonable assumption that the standard will be consistent with the general leading emission standards for low emission zones established across Europe – presently Euro VI/6 for diesel vehicles and Euro IV/4 for petrol vehicles which are consistent with the standards proposed for the London Ultra Low Emission Zone and the UK Government's Clean Air Zone framework.*"

24. The Committee wrote to the Scottish Government asking it why the emission standard is not set out on the face of the Bill, with a power taken by regulations to amend it. This is particularly where the Government appears to have a particular emission standard in mind. Setting the initial standard on the face of the Bill would assist the Parliament to conduct scrutiny of the policy choice made by the Government as to the particular emission standard chosen.

25. The Scottish Government's position was that: "*although it is likely that the emission standards will be set as Euro6/VI for diesel vehicles and Euro 4 for petrol vehicles, no final decision has yet been taken. The Scottish Ministers consider that the provisions of Part 1 of the Bill are set out in sufficient detail to allow the Parliament to scrutinise both the principle of low emission zones, and how it is intended that a low emission zone scheme will operate in practice*."

26. At the oral evidence session the Cabinet Secretary indicated that setting the initial standard on the face of the Bill with a power through regulations to amend it was one option, but that the standard is not finalised by all the parties that will take part in the implementation of low emission zones.[xiv]

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xiv *Official Report*, col. 10, 23 October 2018

27. The Committee recognises the importance of taking a power through regulations to alter the emissions standard to reflect new vehicle emission technologies and progression in emissions standards around the world in the future.

28. Nevertheless, the Committee considers that it would enhance parliamentary scrutiny if the initial emission standard was set out on the face of the Bill, with a power taken in regulations to amend it. This is particularly in circumstances where, as the Government accepted in its written response to the Committee, the emission standard is fundamental to the scope and operation of low emission zones. The Government has also indicated that the European standards for petrol and diesel vehicles have largely been accepted by stakeholders who responded to the Government's consultation and that it is reasonable to assume that the first and subsequent standards specified in the regulations will be consistent with leading European emission standards.

Choice of parliamentary procedure

29. The DPM argues that the negative procedure is appropriate for the setting of the emission standard on the basis that it is technical in nature and is likely to remain consistent with general leading emission standards across Europe.

30. The Committee asked the Scottish Government in written correspondence whether the affirmative procedure would be more appropriate on the basis that the level of the emission standard is so fundamental to the policy effect of the Bill; i.e. it determines what vehicles can drive in the low emission zones (subject to any applicable vehicle exemptions). The affirmative procedure also appears appropriate where the level of the emission standard has an impact on the rights of individuals owning vehicles that may not comply with the standard that is set.

31. The Scottish Government's written response undertook to reflect on the question of whether the affirmative procedure might be appropriate for regulations setting the emissions standard under section 1(4)(a), taking account of the Committee's views, any evidence given to the Parliament during Stage 1 by stakeholders and the Stage 1 Report.

32. At the oral evidence session, the Cabinet Secretary indicated that he would be happy to give consideration to any view on the matter expressed by the Committee and that he was not unsympathetic to the suggestion.[xv] He also agreed 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.[xvi]

33. 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.

34. However, the Committee considers that there are reasons to apply the affirmative procedure to regulations specifying the emissions standard. This is particularly

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xv *Official Report*, col. 11, 23 October 2018

xvi *Official Report*, col. 11, 23 October 2018

where, as noted above, the Government itself recognises that the emission standards are fundamental to the scope and operation of low emission zones.

Recommendations

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

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.**

Part 2 – Bus services

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

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

Provisions

39. Section 29(2) of the Bill inserts new section 3L(1) into the Transport (Scotland) Act 2001 ("the 2001 Act"). It provides that the Scottish Ministers may by regulations make further provision about bus service improvement partnership plans and schemes; the procedures to be followed to prepare and make, postpone, vary and revoke a plan or scheme and reviewing and reporting on the operation of a plan and scheme.

40. New section 3L(2)(e) of the 2001 Act provides that such regulations may (without limit to the generality of the power in subsection (1)) make provision about what may constitute a facility or measure.

41. Regulations made under new section 3L of the 2001 Act are subject to the negative procedure.

Committee consideration

42. Paragraph 55 of the DPM argues that detailed technical work is required with LTAs and operators to determine what constitutes a facility or measure to ensure that they are both realistic and appropriate to adopt.

43. The Committee asked the Government whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to regulations setting out the possible obligations of LTAs under bus services improvement partnership schemes.

44. In its written response, the Scottish Government explained that new section 3L(2)(e) will not allow Scottish Ministers to define the relevant terms or restrict their scope by way of a general definition. Rather, it is to allow them to make provision of an illustrative nature as to what may constitute a facility or measure. This, say the Scottish Government, will "*provide practical illustrations for local transport authorities to consider when developing partnerships, and it is envisaged that the regulations will be updated over time to reflect best practice*". Accordingly, the Scottish Government does not consider that the enhanced parliamentary scrutiny afforded by affirmative procedure is necessary in this case.

45. At the oral evidence session, the Cabinet Secretary explained that setting out illustrative examples in regulations was designed to be helpful to local transport authorities.[xvii] He stated that the

> *bus service improvement partnership model does not impose a particular obligation on local transport authorities as regards what facilities or measures must be part of the scheme. Instead, it seeks to assist local transport authorities to choose whether to include particular facilities or measures in the circumstances to which they are looking to apply a bus service improvement partnership*.[xviii]

46. The Cabinet Secretary indicated that a "facility" would primarily be infrastructure, such as bus stops or bus lanes and that "*a measure might be the provision of additional parking facilities*".[xix] Brendan Rooney, the Bill Team Manager, further explained that a measure "*could include traffic management or congestion policies or schemes that incentivise bus use and disincentivise car use"*.[xx] He explained that as

> *the partnership arrangements bed in or are taken up across the country, there is flexibility to look at how much direction will be needed in regulations to give the parties involved in the partnerships more of a framework for coming to an agreement.* [xxi]

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xvii *Official Report*, col. 12, 23 October 2018

xviii *Official Report*, col. 12, 23 October 2018

xix *Official Report*, col. 12, 23 October 2018

xx *Official Report*, cols. 12, 23 October 2018

47. The Cabinet Secretary also reiterated that the application of the affirmative procedure was "*a step too far*" given that the provision made in regulations was not prescriptive.[xxii]

48. The Committee notes that new section 3C of the 2001 Act, inserted by section 29 of the Bill, provides considerable detail on the possible obligations of operators of local services to comply with "service standards" under a bus service improvement scheme. This term is sub-divided into a "route service standard", in relation to the frequency or timing of a service, or an "operational service standard", which may impose requirements about the matters listed in new section 3C(3) of the 2001 Act.

49. By way of contrast, the Bill does not set out any clear parameters as to the scope of the terms "facility" and "measure", which are, as the Scottish Government itself recognises in its written response to the Committee, "potentially wide-ranging". The Committee considers that there should be clarity over what these terms mean. That is because the meaning of the terms "facility" and "measure" are important insofar as they set out the possible obligations of LTAs under bus services improvement partnership schemes.

50. The terms "facility" and "measure" could be further defined on the face of the Bill; for example, by reference to the facilities and measures referred to at the Committee's evidence session narrated at paragraph 46 above. The Committee notes that defining the meaning of these terms does not require local transport authorities to impose a particular "facility" or "measure" (as defined) under the partnership scheme.

51. Alternatively, these terms could be defined in regulations subject to the affirmative procedure. The Committee also notes that a power taken to make regulations includes the power to amend those regulations if required to take account of new facilities or measures that may be sought under bus service improvement partnership schemes.

Recommendation

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.**

Part 3 – Ticketing arrangements and schemes

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

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xxi *Official Report*, col. 12-13, 23 October 2018

xxii *Official Report*, col. 13, 23 October 2018

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

Provisions

53. 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.

54. Such a direction may specify ticketing arrangements or kinds of ticketing arrangements that operators of local services must be required to make and implement under the ticketing scheme and the class of local services to which the scheme is to apply.

55. Before making such a direction, the Scottish Ministers must consult the Smart Ticketing Advisory Board to be established under new section 27C(1) of the 2001 Act.

56. A direction given by the Scottish Ministers under new section 32A of the 2001 Act is neither laid before the Parliament nor subject to any parliamentary procedure. However, the direction must be in writing and published in such manner as the Scottish Ministers consider appropriate as soon as reasonably practicable after it is communicated to the LTA or LTAs.

Committee Consideration

57. 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.

58. The Committee asked the Scottish Government 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.

59. In its written response, the Scottish Government stated that the Scottish Ministers are required to provide reasons for issuing a direction as a matter of administrative law and as such it was considered superfluous to include an express requirement on the face of the Bill to set out reasons in the direction.

60. However, at the oral evidence session the Cabinet Secretary agreed to put the matter beyond doubt and make it clear in the Bill that there will be a requirement on the Minister to set out their reasoning in the direction.[xxiii]

Recommendation

[xxiii] *Official Report*, col. 14, 23 October 2018

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.**

Part 4 – Pavement parking and double parking

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**

Provisions

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

63. Regulations made under sections 51 to 53 are subject to the negative procedure.

Committee Consideration

64. The DPM states 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. Conversely, by virtue of section 134(8) of the Road Traffic Regulation Act 1984, before making similar regulations under sections 99 to 101 of that Act the Scottish Ministers are required to consult with such representative organisations as they think fit.

65. The Committee asked the Government whether it would be more appropriate for the requirement to consult, which could include a requirement to consult representative organisations, to be set out on the face of the Bill.

66. The Government's written response was that it was a matter of standard practice when promoting any transport related secondary legislation to consult with a wide range of representative bodies including organisations representative of drivers. It did however state that as the Bill progresses it will consider whether "*a requirement to consult organisations representative of drivers and perhaps other road users, including non-motorised users, should be included within the Bill provisions*."

67. At the oral evidence session, the Cabinet Secretary reiterated that the Scottish Government would routinely consult on subordinate legislation. He was, however, "*very open*" to the Committee's views and was happy to give further consideration to having a requirement to consult on the face of the Bill to "*put the matter beyond doubt*".[xxiv]

68. The Committee welcomes the Scottish Government's commitment to reflect on the inclusion of a requirement to consult to be set out on the face of the Bill.

69. However, the Committee considers that there should be a consultation requirement included on the face of the Bill. This is particularly where the powers to remove, move and dispose of vehicles engage the right guaranteed under article 1 of protocol 1 of the European Convention on Human Rights to peaceful enjoyment of property.

Recommendation

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.**

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**

Provisions

71. 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 issued in respect of road works. Such provision may also be made in relation to the carrying out of the functions of the Scottish Road Works Commissioner under new sections 153A to 153H of the 1991 Act.

72. 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* […]".

73. Regulations under new section 153I which modify section 153G or paragraph 6 of schedule 6B of the 1991 Act are subject to the affirmative procedure. Otherwise, the regulations are subject to the negative procedure.

Committee Consideration

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xxiv *Official Report*, col. 14-15, 23 October 2018

74. The Committee drew the Scottish Government's attention to an apparent drafting error in section 61(3) of the Bill. It inserts a new subsection (2A) into section 163 of the 1991 Act, which provides that regulations under new section 153I(1) of the 1991 Act which modify new section 153G [emphasis added] or paragraph 6 of schedule 6B of the 1991 Act are subject to the affirmative procedure. However, the reference to new "section 153G" should be to new "section 153H" of the 1991 Act, in accordance with the power to modify that latter section contained in new section 153I(3) of the 1991 Act.

75. The Scottish Government conceded in their written response to the Committee that there is a drafting error and has committed to bringing forward an amendment to correct section 61(3) of the Bill at Stage 2.

Recommendation

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.**

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**

Provisions

77. Section 67(2) of the Bill inserts new section 130C into the 1991 Act. This allows the Scottish Ministers to issue or approve codes of practice giving practical guidance about reinstatement quality plans under new sections 130A or 130B of the 1991 Act. They may also make regulations containing further provision about reinstatement quality plans to be entered in the Scottish Road Works Register.

78. New section 130C(3)(f) of the 1991 Act provides that the regulations may make provision about the consequences of complying, and of failing to comply, with a code of practice issued or approved by the Scottish Ministers. Such regulations may also create offences for failure to comply with requirements imposed under the regulations (new section 130C(4)).

79. Regulations which create an offence are subject to the affirmative procedure. Otherwise, the regulations are subject to the negative procedure.

Committee Consideration

80. New section 130C(3)(f) 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. That provision

provides that a person is to be taken to comply with the requirements imposed on them by section 60 of the Roads (Scotland) Act 1984 if (and in so far as) a person complies with the code of practice (and vice versa in relation to a failure to comply).

81. 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, it may be more appropriate that codes of practice issued under new section 130C(1) are subject to some form of parliamentary scrutiny.

82. The Committee's written question to the Scottish Government therefore focused on whether, if the regulations were in effect to require compliance with the code of practice, the code of practice itself should be subject to some form of parliamentary scrutiny.

83. The Scottish Government's written response indicated that in its "view" the Bill did not authorise the regulations to contain provision making it an offence, or imposing any other penalty, for failing to comply with the code of practice.

84. It also explained that the consequences of failing to comply with the quality plan code of practice will not necessarily be that such a failure is to be taken as evidence of a failure to comply with the duties in relation to such a plan. It can, according to the Scottish Government, therefore be distinguished from the safety code under section 64 of the Bill, where failure to comply with the code is taken to amount to a failure to discharge the underlying duties.

85. By way of example, the Scottish Government indicated that provision could be made in regulations under section 130C(3)(f) about the circumstances in which failure to comply with the code might lead to a refusal by the Scottish Road Works Commissioner to approve a plan. It could also be made to require mandatory training in the use of the Scottish Road Works Register in which notices and plans under section 130A of the 1991 Act must be entered.

86. At the oral evidence session, Kevin Gibson, Solicitor from the Scottish Government Legal Directorate, explained that

> *a code of practice by its very nature is an advisory document. Our view is that, unless we specifically allowed for the regulations to create an offence of failing to comply with that document and adjusted its nature in that way, the powers as they stand do not allow us to create such an offence. We take the view that, by remaining silent on the point, we cannot create that mandatory element to the code of practice.* [xxv]

87. However, Mr Gibson stated that the Scottish Government could think about whether it could do anything to make this clearer in the Bill.[xxvi] The Cabinet Secretary indicated that he would be interested in any views expressed by the Committee on this matter.[xxvii]

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xxv *Official Report*, col. 16, 23 October 2018
xxvi *Official Report*, col. 16, 23 October 2018

xxvii *Official Report*, col. 16, 23 October 2018

88. The Committee considers that there could be doubt about whether the regulations made under new section 130C(2) of the 1991 Act are capable of requiring compliance with the code of practice issued or approved under new section 130C(1) and of creating a criminal offence under new section 130C(4) for a failure to comply with such a requirement.

89. In the Committee's view, rather than relying on silence on this point, it would be preferable to amend the Bill to provide that, for the avoidance of doubt, the regulations cannot include provision making it an offence, or imposing any other penalty, for failing to comply with the code of practice.

90. On that basis, the Committee would be content that the code of practice issued under new section 130C(1) of the 1991 Act does not need to be made subject to parliamentary procedure.

Recommendations

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.**

Annex : Written correspondence with the Scottish Government

LETTER TO THE SCOTTISH GOVERNMENT OF 12 SEPTEMBER 2018

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 section1(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.

RESPONSE FROM THE SCOTTISH GOVERNMENT OF 25 SEPTEMBER 2018

Thank you for your letter of 12 September 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 Parts 1-5 of the Transport (Scotland) Bill ("the Bill"). It has been passed to me to reply, as my division has policy responsibility for the Bill. Thank you also for extending the deadline to 5pm 25 September.

Responses to the areas on which the Committee is seeking further explanation are as follows.

Part 1 - Low emission zones

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

1. The Committee has requested an explanation of 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.

The consultation, Building Scotland's Low Emission Zones, outlined proposals for emission standards (predominantly Euro6/VI for diesel vehicles and Euro 4 for petrol vehicles). These standards were largely accepted by stakeholders who responded to the consultation. It is likely that the Scottish Ministers will set Euro6/VI for diesel vehicles and Euro 4 for petrol vehicles as the initial emission standards in regulations made under the power in section 1(4)(a). However, continuing improvements in technology mean that vehicle emissions should decrease over time. As such, it is possible that the Scottish Ministers will wish to make the emission standards in the regulations progressively more stringent in future.

It is considered that having the emission standard set out in regulations allows for sufficient Parliamentary scrutiny during the course of the Bill as, although it is likely that the emission standards will be set at Euro6/VI for diesel vehicles and Euro 4 for petrol vehicles, no final decision on this has yet been taken. The Scottish Ministers consider that the provisions of Part 1 of the Bill are set out in sufficient detail to allow the Parliament to scrutinise both the principle of low emission zones, and how it is intended that a low emission zone scheme will operate in practice.

2. **The Committee has requested reconsideration of whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to regulations made under section 1(4)(a) given the effect that this could have on individuals owning vehicles that may not comply with the emissions standard.**

As noted in response to the previous question, it is reasonable to assume that the first standards specified in regulations under section 1(4)(a) will be consistent with the leading Euro emission standards. It is also reasonable to assume that subsequent changes in the specified standards will track changes in those Euro standards. It is therefore envisaged that the specification of standards will be to some extent led by technological developments. The Scottish Government's current view is that the negative procedure allows for an appropriate balance between the need to respond to and reflect such developments and the need for Parliament to scrutinise Ministers' policy choices. However, it is also accepted that the emission standards are fundamental to the scope and operation of low emission zones. The Committee's concern about the Bill's silence on the first emission standards is relevant in that regard. The Scottish Government will therefore reflect on the question of whether the affirmative procedure might be appropriate for

regulations under section 1(4)(a), taking account of the Committee's views, any evidence given to Parliament during Stage 1 by stakeholders, and the Stage 1 Report.

3. The Committee has requested consideration of 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.

The Scottish Government does not consider it to be either necessary or practicable to set a limit on the penalty which may be set in regulations under section 1(4)(c). A maximum is not necessary because a penalty may amount to a deprivation of property for the purposes of Article 1 of Protocol 1 to the ECHR and must therefore be set at a level which is necessary and proportionate to the achievement of the policy aims of low emission zones. Irrespective of whether a limit is set in the Bill, the Scottish Ministers' discretion is therefore constrained by those factors.

It is not considered practicable to set a maximum penalty limit because flexibility in the setting of penalties is required to deal with a range of circumstances in which penalties may be levied (including the setting of different penalties in respect of different types of vehicle). Likewise, the question of what constitutes a proportionate and effective penalty will not be fixed at the point the Bill is passed; the assessment of this issue will evolve over time through experience of operating schemes and as the value of money changes.

4. The Committee has requested whether it would be more appropriate that the affirmative procedure also applied to regulations made under section 1(4)(c).

In determining its approach to the procedure attaching to regulations under section 1(4)(c), the Scottish Government considered the civil penalty regimes for decriminalised parking (explained further below in response to question 13), and for road user charging under Part 5 of the Transport (Scotland) Act 2001, neither of which require penalties to be set in regulations subject to the affirmative procedure. It is also proposed that the parking provisions in the Bill are subject to the negative procedure. In the case of the parking provisions in this Bill and the road user charging provisions in the 2001 Act, negative procedure is considered to strike an appropriate balance between the need to set out the technical detail of civil enforcement regimes and the need for Parliament to scrutinise the exercise of Scottish Ministers' discretion in setting out that detail.

Given that the principles underpinning low emission zones will be subject to significant scrutiny through the Bill process, it is considered that in this case too, the negative procedure affords the Parliament sufficient opportunities for scrutiny of the technical detail as to penalties.

Section 3(1) – Enforcement

5. The Committee has requested an explanation of 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.

Section 3 generally sets out that the provisions for enforcement of low emission zone schemes will be through provision made by regulations. The power in section 3(3) to create offences in connection with enforcement gives the Scottish Ministers flexibility to frame offences which are appropriate and necessary for securing the effectiveness of the primary enforcement methods set out in regulations under section 3(1) and (2). Until the specific detail of those enforcement methods is settled, it is not considered possible to foresee precisely what offences may be needed in that regard. The power in section 3(1)

also allows for flexibility to develop and adjust the approach to enforcement of low emission zones through experience. For example, particular enforcement methods, such as the method of issue of a penalty charge or the manner of enforcement of a penalty charge, may change over time. As the method of enforcement evolves, new ways and means of interfering with enforcement functions or equipment, or otherwise seeking to evade enforcement, may likewise be identified. A power to create offences in connection with enforcement is therefore also needed to complement changes to the overall enforcement mechanisms.

Part 2 – Bus services

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

6. The Committee has requested consideration of whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to regulations made under new section 3L(2)(c).

The power in section 3L(2)(c) is not intended to be used to define a term in the Bill in the usual sense.

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. Against that background, section 3L(2)(c) will not allow the Scottish Ministers to define the relevant terms or restrict their scope by way of a general definition. Rather, it will allow them to make provision of an illustrative nature as to what may constitute a facility or measure. This will provide practical illustrations for local transport authorities to consider when developing partnerships, and it is envisaged that the regulations will be updated over time to reflect best practice. It is not considered that the additional levels of parliamentary scrutiny afforded affirmative procedure are necessary for regulations made under new section 3L(2)(c).

More generally, it is not accepted, as a matter of principle, that regulations defining terms used in a Bill should necessarily be subject to the affirmative procedure. With few exceptions, the choice of procedure is considered on a case by case basis and decided on in merits taking into account a range of factors.

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

7. The Committee has requested consideration of 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.

It is not considered that anything in the way that section 13H(5) is framed changes the advisory nature of the guidance under that power.

The requirement imposed on LTAs under the Bill (new section 13H(3)) is to prepare a new assessment of a franchising framework where they consider that the modifications materially affect the existing framework. Those are, in the language of section 13H(5), the circumstances in which a LTA must prepare a new assessment. The guidance therefore cannot, and is not intended to, prescribe or mandate the circumstances in which a new assessment is to be carried out, that being a matter already dealt with under subsection

(3). Instead the guidance will help inform a local authority's consideration of whether a further assessment is required. On this basis the use of regulations is not considered appropriate as it is not regulating when a new assessment must be undertaken. Further, given the advisory nature of the guidance, it does not appear to the Scottish Government to merit taking up valuable parliamentary time.

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

8. The Committee has requested consideration of 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.

The powers to prescribe additional prospective recipients of information relates only to patronage information which is unlikely to be commercially sensitive and therefore to affect the rights of operators. In addition new section 6ZB(7)(b) of the Bill prevents an affected authority from disclosing information to any person if they consider it likely to be commercially damaging, providing a safeguard for operators if it is required. As such it is not considered that the additional levels of parliamentary scrutiny afforded affirmative procedure are necessary for regulations made under new section 3ZB(2)(c). In addition, in their 2011 investigation of the local bus market[xxviii], which informed the development of this policy, the Competition Commission stated: "We did not consider that monthly information relating to patronage would be sensitive, especially as all operators told us that the market was transparent."

Part 3 – Ticketing arrangements and schemes

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

9. The Committee has requested examples of the sort of provision that may need to be made under the power in new section 27A(6).

The provision made in section 27A(6) makes clear that when regulations made under section 27A(5) amend the definition of "ticketing arrangement", those regulations can also make any necessary changes to the provision made in sections 28 to 31 of the 2001 Act (which set out the steps to be taken in making ticketing arrangements and schemes). For example, it may be necessary to add new bodies to the list of bodies with whom local transport authorities must consult with before making a scheme (in terms of section 30(3)) or to change/add to the information which is to be set out in the notice of making a ticketing scheme (in terms of section 31(4)).

10. The Committee has requested an explanation of 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.

General powers such as those in section 81(2) of the 2001 Act are intended to deal with any unforeseen or tangential consequences or circumstances which may emerge in the

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xxviii Local Bus Services Market Investigation: http://webarchive.nationalarchives.gov.uk/+/http:/www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/00_sections_1_15.pdf

course of making regulations and so ensure that the purpose of an Act may be given full effect.

By contrast, the provision made in section 27A(6) relates to a known and foreseeable requirement to deal with consequential matters and it is therefore appropriate to make clear that the power in section 27A(5) includes the power to make the types of changes outlined above as a result of any changes to the definition of "ticketing arrangements."

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

11. The Committee has requested an explanation of 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.

The standard will be very technical and will be reviewed and updated on a reactive (and potentially regular) basis. In addition, it may be that Ministers do not prescribe the content of the standard – they may refer to a standard developed by third party. On that basis it was considered appropriate for the standard to be published, reviewed and updated by Ministers as and when required.

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

12. The Committee has requested consideration of 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.

The Scottish Ministers are required to provide reasons for issuing a direction as a matter of administrative law and as such it was considered that any express requirement to set out reasons in the direction would be superfluous.

Part 4 – Pavement parking and double parking

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

13. The Committee has requested consideration of whether it would 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.

The current biggest regime for "civil penalties" in relation to parking contraventions is the decriminalised parking regime provided for under the Road Traffic Act 1991. In order for criminal offences for parking contraventions to be de-criminalised in a local authority area, a designation order requires to be made under schedule 3 of that Act. Such an order is subject to the negative procedure in Parliament. A designation order decriminalises the offences listed in paragraphs (2) and (3) of schedule 3 to the 1991 Act and also applies with modifications various sections of the Road Traffic Act 1991 and the Road Traffic Regulation Act 1984, in so far as they apply, in the designated area of the relevant local authority. One of the modifications which is made by a designation order is to substitute section 74 of the Road Traffic Act 1991 to enable the fixing of parking charges in the designated area of the relevant local authority. The modified section 74 provides that parking charges in the designated area are to be set by the local authority in accordance with any guidance issued by the Scottish Ministers. This accords with the approach taken

by the Traffic Management Act 2004 in relation to civil enforcement areas, which are established under that Act (see schedule 9, part 3, paragraphs 7 and 8).

Neither of those regimes set out the maximum level on the face of the primary legislation and the Scottish Government does not consider it to be either necessary or practicable to set a limit on the penalty which may be set in regulations under section 48(5). A maximum is not necessary because, as explained above in relation to low emission zones, the Scottish Ministers may only set penalties under section 48(5) which are necessary and proportionate to the achievement of the policy aims of the parking prohibitions. Irrespective of whether a limit is set in the Bill, the Scottish Ministers' discretion is therefore constrained by those factors. It is not considered practicable to set a maximum penalty limit because the question of what constitutes a proportionate and effective penalty will not be fixed at the point the Bill is passed; the assessment of this issue will evolve over time through experience of operating schemes and as the value of money changes.

So far as procedure is concerned, it is the Scottish Government's view that, despite the current approach in similar regimes being to not provide any parliamentary scrutiny in relation to the setting of parking charges in decriminalised parking areas that such scrutiny is warranted in the setting of a national penalty charge level. As such in contrast to the approach taken in relation to the current decriminalised parking regimes the Bill provides for parliamentary scrutiny for the setting of penalty charges under the Bill. Given the existing approach and experience of setting penalty charge levels under the decriminalised parking regimes it is considered that the negative procedure provides an appropriate level of scrutiny.

Section 49(1) – Enforcement of parking prohibitions

14. The Committee has requested an explanation of what it is about the enforcement of the parking prohibitions in particular that means that it is not foreseeable at this stage what offences will be necessary.

Section 49 generally sets out that the provisions for enforcement of the parking prohibitions will be through regulations. The power in section 49(4) to create offences in connection with enforcement gives the Scottish Ministers flexibility to frame offences which are appropriate and necessary for securing the effectiveness of the primary enforcement methods set out in regulations under section 49(1) and (2). Until the specific detail of those enforcement methods is settled, it is not considered possible to foresee precisely what offences may be needed in that regard. The power in section 49(1) also allows for flexibility to develop and adjust the approach to enforcement of the parking prohibitions through experience. For example, particular enforcement methods, such as the method of issue of a penalty charge or the manner of enforcement of a penalty charge, may change over time. As the method of enforcement evolves, new ways and means of interfering with enforcement functions or equipment, or otherwise seeking to evade enforcement, may likewise be identified. A power to create offences in connection with enforcement is therefore also needed to complement changes to the overall enforcement mechanisms.

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

15. The Committee has requested consideration of whether it would be appropriate for the Bill to contain an express requirement to consult organisations representative of the drivers of motor vehicles.

Throughout the development of the Bill provisions the Scottish Government has consulted widely with various motoring organisations and others. The Scottish Government is also currently working closely with representative bodies of various transport and road related interests in the development of the guidance and directions to be issued under the Bill. It is also a matter of standard practice when promoting any transport related secondary legislation to consult with a wide range of representative bodies including organisations representative of drivers. The Scottish Government will, however, consider as the Bill progresses whether a requirement to consult organisations representative of drivers and perhaps other road users, including non-motorised users, should be included within the Bill provisions.

Part 5 – Road works

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

16. The Committee has requested confirmation of 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.

The Scottish Government is grateful to the Committee for drawing its attention to this point. The reference in section 163(2A) should be to section 153H, rather than to section 153G. The Scottish Government will bring forward an amendment to correct that reference at Stage 2.

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

17. The Committee has requested reconsideration of whether the enhanced scrutiny afforded by the affirmative procedure would be more appropriate to regulations made under new paragraph 4(1A) of schedule 6B of the 1991 Act given the significance of the maximum penalty that may be imposed.

It is considered that the proper starting point in determining the appropriate procedure in this case is the procedure attaching to regulations made under the existing power in 4(1) of the 1991 Act to set fixed penalties. Those regulations are subject to the negative procedure by virtue of section 163 of the 1991 Act and it is considered that this procedure strikes the appropriate balance between the need to set out the technical detail of the fixed penalty regime in relation to the section 153G(1) offence and effective Parliamentary scrutiny of that detail. It is not considered that the maximum potential fixed penalty in relation to the section 153G(1) offence alters that assessment. Indeed, in Scottish Government's view the existence of such a maximum bolsters the proposition that the negative procedure is sufficient. The maximum will itself have been subject to significant Parliamentary scrutiny and to Parliamentary agreement through the Bill process. That maximum is set to ensure that that a fixed penalty is set at a level sufficiently below the level of the maximum fine on prosecution to create an incentive to accept that penalty as an alternative to prosecution, rather than to create an additional safeguard. But the prior Parliamentary scrutiny given to it is a further reason why, in the Scottish Government's view, it is not necessary to subject regulations setting penalties within the pre-determined parameters to the affirmative procedure.

It is also important to note that those to whom the penalty would apply – both undertakers and roads authorities – have been very supportive of increasing the maximum penalty to

that level. That being the case, the negative procedure is also considered appropriate as the maximum penalty is being set in primary legislation at a level accepted by those potentially affected.

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

18. The Committee has requested consideration of whether it would 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.

The intention is not to create a new code, but to make the existing code followed by undertakers under section 124 of the 1991 Act (known as "Safety at Street Works: A Code of Practice 2013") legally applicable to the functions of Scottish roads authorities.

That code is the standard to which roads authorities already work and practitioners from the wider Scottish road works community were directly involved in its creation and in its maintenance. It is an operator level guide which is informed by nationally applicable standards from another highly technical document, Chapter 8 of the traffic signs manual ("Part 1, Design of traffic safety measures and signs for road works and temporary situations"). It is concerned with the practical application of safety standards to live carriageways and footways, and if deviated from poses an immediate risk to health. Every aspect of the code and how it is applied is the product of decades of very sector specific engineering knowledge. It has been cited in a number of Health and Safety Executive prosecutions elsewhere in the UK (where it is legally binding). One example is HSE case number 4436300, where a £12000 fine was imposed on a telecommunications company for failing to protect its workforce as a result of incorrectly applied safety zones. The standard safety zones, maximum speed limits and limits on working areas make up the bulk of this over 100 page manual, based on the content of the over 300 page long Chapter 8 of the traffic signs manual ("Part 1, Design of traffic safety measures an signs for road works and temporary situations"). The content of the document directly impacts on the safety of both those working within the work zone, and the public travelling around it, all of which means that separate scrutiny of the code is considered inappropriate and would be problematic in many ways.

19. The Committee has requested that if the Scottish Government does not consider that this is appropriate, whether there should at least be requirements for a code of practice issued under section 60A to be published and consulted on.

The existing code was developed by industry engineers with specific traffic management backgrounds. It is based on tested industry standards and principles with regards to stopping distances and visibility and is supported by the Health and Safety Executive as being the correct and required standard for safeguarding the workforce in terms of the Health and Safety at Work Act 1974. Given the limited flexibility to alter the code in response to general comment from the public, a wider consultation on content would not be practicable. The code has been developed by industry and issued for approval by Ministers rather than Ministers developing it themselves. Through that process, industry concerns and interests are more than adequately catered for rendering a separate consultation redundant. The roads and utilities community designate Scottish industry experts to sit on a UK wide working group based on technical expertise. Additionally the office of the Scottish Road Works Commissioner has significant influence on the document and the group that maintains it, and sits as a technical expert on the group's moderation panels.

A narrower, specialist consultation would be normal practice if the code is reviewed. Should there be a future requirement to have a unique code for Scotland, a full consultation process would be appropriate and would be undertaken, albeit still heavily informed by industry experts. But given that any code or adjustments to the code, would be led and developed by the industry itself, it is not considered necessary to impose a requirement on Scottish Ministers to consult on such a code prior to approving it.

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

20. The Committee has requested that in the absence of any explanation in the DPM, for an explanation of 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); and has requested an explanation of what other provision it is 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).

The list in section 130C(3) is said to be without limit to the generality of the power in section 130C(2) to avoid any impression that the list in the former is intended to be prescriptive.

That said, it is anticipated that the list of matters specified in section 130(3) will be a reasonably comprehensive reflection of what regulations under section 130(2) will require to cover. But these are untested waters for the Scottish road works community, and indeed for the wider UK. There is currently no frame of reference for how quality plans in this sector operate in practice, and there was an industry-wide concern that they could, if not properly developed, become a ‘box ticking exercise’ which would not result in changes in working practices on site. In order to achieve the policy aim, and in particular to ensure that reinstatement quality plans are effective, the regulatory framework in relation to those plans must be robust and requires to be developed in partnership with the road works industry. Given the relatively early stage of work on that issue, it is not possible to foresee with absolute certainty the likely content of any underpinning regulations and it is therefore considered prudent to retain some flexibility in the enabling powers to allow for currently unforeseen matters to be addressed. These are matters of which, by their very nature, it is not possible to provide examples. Looking to the future, the Scottish Government considers that the basic framework of the plans should come from the road works industry itself and the community was given a year to identify a way forward. That work was done but it identified that, until the primary legislation was finalised, and associated regulations set, a full working code of practice could not be developed beyond the broad principles that were agreed.

21. The Committee has requested an explanation of why new section 130C(3)(f) is considered necessary and appropriate.

The consequence of failing to comply with the quality plan code of practice won’t necessarily be that such a failure is to be taken as evidence of a failure to comply with the duties in relation to such a plan. It is considered that the reinstatement quality plan code can be distinguished from the safety code, where failure to comply with the code is taken to amount to a failure to discharge the underlying duties. In particular, the nature of the duties under sections 130A and 130B means that there may not be to any great extent an element of subjectivity as to how they should be discharged. The requirement for prior Commissioner approval of a plan, in particular, should avoid defective plans being submitted in purported discharge of the relevant duties. This may be contrasted with safety

duties under the 1984 and 1991 Acts and the relevant code of practice which provides guidance as to how those duties are to be discharged.

However, this is a new area to Scottish road works and the quality plans working group have discussed only very broad themes. The consequences of failure to comply with the quality plan code will be dictated to some extent by the content of the code itself but there is a likelihood that provision about those consequences will be needed. It is envisaged, for example, that provision could be made about the circumstances in which failure to comply with the code might lead to a refusal by the Commissioner to approve a plan or could be made to require mandatory training in the use of the Scottish Road Works Register on which notices and plans under section 130A must be entered.

Whatever consequences of non-compliance may be considered appropriate in due course, the power will not be capable of being used to require compliance in a strict sense. For that, it is considered that some form of penalty for non-compliance with the code – as opposed to non-compliance with the underlying duties – would be required. While the regulations under section 130C(2) may create offences, those offences may relate only to requirements under the regulations. Section 130C(2)(f) does not permit requirements to be imposed, but rather permits provision to be made about a failure to comply with the code of practice. This would not, in the Scottish Government's view, include provision making it an offence – or imposing any other penalty – for failure to comply. Express provision for that would be required.

22. The Committee has requested an explanation of why the enforcement of reinstatement quality plans in particular requires the creation of criminal offences in subordinate legislation.

Section 130C of the 1991 Act generally sets out that the detailed regulatory framework in relation to reinstatement quality plans will be set out in regulations. The power in section 130C(4) to create offences gives the Scottish Ministers flexibility to frame offences which are appropriate and necessary for securing the effectiveness of that framework. Until the specific detail of that framework is settled, it is not considered possible to foresee precisely what offences may be needed in that regard. The power in section 130C(2) also allows for flexibility to develop and adjust the approach to enforcement through experience. A power to create offences in connection with enforcement is therefore also needed to complement any changes which may be made to the overall regulatory regime.