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

Transport (Scotland) Bill: as amended
at Stage 2



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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.



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



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Introduction

1. At its meeting on 1 October, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Transport (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
2. The Bill was introduced by the Cabinet Secretary for Finance and Constitution, Derek MacKay MSP, on 8 June 2018. The Lead Committee is the Rural Economy and Connectivity Committee.
3. The Delegated Powers and Law Reform Committee published its Stage 1 Report on the Bill on 6 November.ⁱ The Committee made various recommendations on the delegated powers provisions. The Committee welcomes that the following sections of the Bill have been amended in light of its recommendations:
 - Section 1(4)(a) – Restriction on driving within a zone
 - Section 29(2) – new section 3L of the 2001 Act – further provision
 - Section 39 – new section 32A(1) of the 2001 Act – directions about ticketing schemes
 - Section 61(2) – new section 153I of the 1991 Act – compliance notices: power to make supplementary etc. provision
4. Stage 2 was completed on 26 June 2019. Stage 3 is scheduled for Wednesday 9 October 2019.

ⁱ The Stage 1 Report is available [here](#).

Summary of the Bill

5. The Bill is summarised as follows:

- Part 1 of the Bill (“Low Emission Zones”) enables the creation and civil enforcement of Low Emission Zone Schemes (“LEZS”) by local authorities in Scotland.
- Part 2 (“Bus Services”) makes provision about the powers and duties of local transport authorities (“LTAs”) in relation to bus services in their areas.
- Part 3 (“Ticketing Arrangements and Schemes”) allows local authorities and the Scottish Ministers to develop and implement smart ticketing arrangements and schemes.
- Part 3A (“Travel Concession Schemes: Application to Community Transport”) provides that the Scottish Ministers must publish a report assessing the costs and benefits of extending travel concession schemes to community transport services.
- Part 4 (“Pavement Parking and Double Parking”) introduces prohibitions on parking on pavements and double parking (together, “the parking prohibitions”).
- Part 4A (“Workplace Parking”) makes provision about workplace parking licensing schemes including exemptions and enforcement measures.
- Part 4B (“Recovery of Unpaid Parking Charges”) provides a right, in certain circumstances, to recover unpaid parking charges from the keeper of the vehicle.
- 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.
- 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 commenced.

6. The Scottish Government has lodged a Supplementary Delegated Powers Memorandum (“Supplementary DPM”) covering the powers in the Bill as amended at Stage 2.ⁱⁱ According to the Supplementary DPM, 22 new delegated powers have been inserted and nine existing powers have been revised.

ⁱⁱ The Supplementary DPM is available [here](#).

Powers drawn to the attention of the Parliament

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

- Power conferred on: the Scottish Ministers
- Power exercisable by: regulations made by Scottish statutory instrument
- Parliamentary procedure: negative
- New or revised power: revised

Provision

7. 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.

Committee Consideration

8. In its Stage 1 report the Committee encouraged 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.
9. The Committee made this recommendation in the context that 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. It also noted that, 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.
10. At the oral evidence session the Committee held at Stage 1, the Cabinet Secretary stated 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.*”ⁱⁱⁱ

[1] Official Report, col. 14-15, 23 October 2018.

11. In its response to the Committee’s Stage 1 report, the Scottish Government agreed that consultation with representative organisations and stakeholders is key.^{iv} It stated that it would continue to consult widely with various motoring organisations in the development of the Bill on secondary legislation implementing the Bill. It stated that it noted the Committee’s recommendation and would reflect on the best way to ensure a broad range of views are taken into account.

ⁱⁱⁱ [Delegated Powers and Law Reform Committee. Official Report, 23 October 2018, Col 14.](#)

^{iv} The Scottish Government’s response to the Committee’s Stage 1 report is available [here](#).

12. It is not clear why a consultation requirement has not been included as suggested by the Committee in its Stage 1 report. The Supplementary DPM does not provide any explanation in relation to the decision not to include a specific consultation requirement.

Recommendation

13. **The Committee calls on the Scottish Government to lay an amendment to the Bill at Stage 3 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 as enacted.**

Section 58B – Circumstances when workplace parking space provided

- Power conferred on: the Scottish Ministers
- Power exercisable by: regulations made by Scottish statutory instrument
- Parliamentary procedure: affirmative
- New or revised power: new

Provision

14. Section 58B(1) to (4) sets out the circumstances in which a workplace parking space is provided at premises for the purposes of the provisions agreed at Stage 2 in Part 4A of the Bill on workplace parking licensing.
15. Section 58B(5) allows the Scottish Ministers to vary or amend sections 58B(1) to (4) to add, remove or vary the circumstances in which a workplace parking space is provided.

Committee Consideration

16. Paragraph 70 of the Supplementary DPM indicates that regulations made under section 58B(5) are subject to the affirmative procedure. However, it appears that they are in fact subject to the negative procedure, as they are not specified as being subject to the affirmative procedure in section 72 of the Bill.
17. The Committee considers this power to be wide in its scope and that it should therefore be subject to the affirmative procedure as appears to have been the intention.

Recommendation

18. **The Committee calls on the Scottish Government to lay an amendment to section 72 of the Bill at Stage 3 to apply the affirmative procedure to regulations made under section 58B(5) in line with the position set out at paragraph 70 of the Supplementary DPM.**

Section 58N(1) – Penalty charges in relation to workplace licensing schemes

- Power conferred on: the Scottish Ministers
- Power exercisable by: regulations made by Scottish statutory instrument
- Parliamentary procedure: negative
- New or revised power: new

Provision

19. Section 58N(1) provides the Scottish Ministers with the power to make provision about the imposition of penalty charges in respect of acts, omissions, events or circumstances relating to, or connected with, workplace licensing schemes, and the notification, payment, adjudication and enforcement of penalty charges.

Committee Consideration

20. The Scottish Government argues that this power is procedural and technical in nature and therefore that the negative procedure is appropriate.
21. However, the Committee consider that the scope of the power extends beyond merely procedural and technical provision. In particular, it includes the power to define the acts, omissions, events or circumstances in which a penalty charge may be imposed.
22. The Committee consider that this particular power, which concerns the important issue of when a penalty will be imposed, is substantive in nature and that it would be more appropriate for the affirmative procedure to apply. This would allow the Parliament to conduct enhanced scrutiny of the choice of when a penalty will apply.

Recommendation

23. **The Committee calls on the Scottish Government to lay an amendment at Stage 3 to apply the affirmative procedure to regulations that make provision for or in connection with the acts, omissions, events or circumstances in which a penalty charge maybe imposed under section 58N.**

Section 58Z12(1) – Power to modify aspects of Part 4B on recovery of unpaid parking charges

- Power conferred on: the Scottish Ministers
- Power exercisable by: regulations made by Scottish statutory instrument
- Parliamentary procedure: affirmative
- New or revised power: new

Provision

24. Section 58Z12(1) confers power on the Scottish Ministers to amend the definition of “relevant land” in section 58. It also confers power on the Scottish Ministers to add,

remove or amend any of the conditions to which the right conferred by section 58Z is for the time being subject. Included within this part of the power, is the power to add to, remove, or amend any provisions that are applicable for the purposes of a condition and any powers of the Scottish Ministers to prescribe anything for the purposes of a condition by regulations (section 58Z(2)(b)).

Committee Consideration

25. The Committee considered that the provision made in section 58Z12(2)(b), which would permit regulations to modify any powers of the Scottish Ministers to prescribe anything for the purposes of a condition by regulations, is wide in its scope.
26. It is unusual for legislation to make provision permitting subordinate legislation to add or remove, or amend the scope of, a power to make regulations. It is usually considered appropriate for Parliament to confer and set the scope of delegated powers in primary legislation. The Supplementary DPM does not specifically explain why this particular aspect of the power is considered necessary.

27. The Committee agreed at its meeting on 1 October to write to the Scottish Government seeking further information on why this power is considered to be necessary. It will reconsider this power in light of any response from the Scottish Government at its meeting on 8 October.

Section 68B(5) – Health boards: duty to work with community transport bodies

- Power conferred on: the Scottish Ministers
- Power exercisable by: not set
- Parliamentary procedure: none
- New or revised power: new

Provision

28. Section 68B requires each health board (or health and social care partnership), in providing non-emergency patient transport services, to work with bodies which provide community transport services in its area.
29. Section 68B(5) provides that in section 68B “community transport services” is to be construed in accordance with section 22(1) of the Transport Act 1985, with such modifications as the Scottish Ministers may specify for community transport services that are not bus services.

Committee Consideration

30. It is not clear how the Scottish Ministers are to make this specification. The specification is not to be contained in regulations made by Scottish statutory instrument. No parliamentary procedure applies to any such specification.
31. The Committee consider that it is to be expected that provision defining terms used in primary legislation should be defined sufficiently on the face of the Bill or, in

exceptional cases, in subordinate legislation such as regulations made by Scottish statutory instrument, which is subject to some form of parliamentary procedure.

32. The Committee received a letter from the Scottish Government on 30 September 2019 stating that an amendment has been lodged requiring the Scottish Ministers to set out in regulations any additional transport services (other than community bus services) in respect of which the duty in section 68B will apply and that the negative procedure will apply to these regulations.

Recommendation

33. **The Committee welcomes the Scottish Government's proposed amendment of the power in section 68B(5) to provide that the specification of additional transport services is to be done by regulations which will be subject to the negative procedure.**
34. **The Committee draws the Scottish Government's attention to the same issue which appears in section 41A(2) of the Bill, inserting section 93(7D) into the Transport Act 1985.**

