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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 (supplementary report)



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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. On 1 October the Committee published its report on the Transport (Scotland) Bill: as amended at Stage 2.ⁱ The Committee also wrote to the Cabinet Secretary for Transport, Infrastructure and Connectivity, Michael Matheson MSP, to ask whether the Scottish Government intended to lay amendments in line with the Committee's recommendations (Annex A). In this letter the Committee also requested further information on the power in section 58Z12(2)(b) of the Bill.
2. The Convener received two responses from the Cabinet Secretary: one dated 1 October responding to the Committee's recommendations (Annex B) and the other dated 2 October responding to its request for information on the power in section 58Z12(2)(b) (Annex C).
3. The Committee is grateful for the responses received from the Cabinet Secretary and is content with the explanation provided in relation to the power in section 58Z12(2)(b) of the Bill.
4. The Committee also welcomes the amendment laid by the Cabinet Secretary to apply the affirmative procedure to regulations made under section 58B(5) in line with the Committee's recommendation.

Outstanding Issues

5. Four amendments have been laid by the Convener on behalf of the Committee in order to address the two outstanding issues that it raised in its Stage 2 report. These are considered further below.

ⁱ Delegated Powers and Law Reform Committee, 44th Report 2019 (Session 5): Transport (Scotland) Bill: as amended at Stage 2.

Outstanding Issues

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

6. 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 pavement parking, double parking and dropped footway parking prohibitions and for the disposal of removed vehicles.
7. The Committee considered that the delegated powers in these sections should include a requirement to consult organisations representative of drivers and other applicable road users on the face of the Bill. The Committee called on the Scottish Government to lay an amendment to this effect both in its Stage 1 and Stage 2 reports.
8. The Cabinet Secretary's response to the Committee's Stage 2 report confirms that the Scottish Government does not plan to lay an amendment to this effect for the reasons it has provided previously. The Scottish Government considers that consultation with representative organisations and stakeholders is key and seeks to reassure the Committee that it has consulted widely with various motoring organisations in the development of the Bill and would continue to do so when developing secondary legislation.
9. The Committee remains of the view that a consultation requirement is appropriate for the reasons set out in its reports at Stages 1 and 2. In particular, regulations made under the power would engage the right guaranteed under article 1 of protocol 1 of the European Convention on Human Rights to peaceful enjoyment of property. Furthermore, 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 such representative organisations as they think fit.

Conclusion

10. The Committee remains of the view that a requirement to consult organisations representative of drivers and other applicable road users before making regulations under sections 51 to 53 should be set out on the face of the Bill. The Convener has laid amendments 157, 158 and 159 on behalf of the Committee to seek to address this issue.

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

11. 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.
12. In its Stage 2 report, the Committee called 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 may be imposed under section 58N(1). The Committee considered that this aspect of the power, in section 58N(1)(a), was substantive in nature rather than merely procedural and technical.

13. In his response to the Committee's Stage 2 report the Cabinet Secretary maintains the view set out in the Supplementary DPM that the negative procedure is appropriate for regulations made under this power, including, in particular, the part that allows regulations to set the circumstances when penalties will apply.
14. The Cabinet Secretary argues that the approach in this provision is consistent with the approach taken to similar powers elsewhere in the Bill, including in relation to the enforcement of low emission zone schemes ("LEZS") and the parking prohibitions, which are subject to the negative procedure.
15. The Committee considers that the position for penalty charges due in relation to workplace parking licensing schemes is different from the examples provided by the Scottish Government as the circumstances when a penalty is payable are not set out on the face of the Bill.
16. In relation to low emissions zones, section 1(2) of the Bill sets the circumstances when a penalty charge is payable (where a person drives a vehicle on a road within a low emission zone contrary to the terms of a LEZS). Likewise, section 48(1) provides that a penalty charge is payable where a person parks a motor vehicle in contravention of the pavement parking, double parking or dropped footway parking prohibitions. Regulations under section 3(1) can make provision for or in connection with the enforcement of LEZS and regulations under section 49(1) can make provision for or in connection with the enforcement of the parking prohibitions. However, in neither of these provisions do the powers specifically refer to regulations making provision about the circumstances in which a penalty is due.
17. The Committee therefore considers that the position for penalty charges due in relation to workplace parking licensing schemes is different from the examples provided by the Scottish Government as the circumstances when a penalty is payable are not set out on the face of the Bill.

Conclusion

18. The Committee remains of the view that this power should be subject to the affirmative procedure to the extent that it is used to make provision for or in connection with the acts, omissions, events or circumstances in which a penalty charge may be imposed under section 58N(1)(a). The Convener has laid amendment 177 on behalf of the Committee to seek to address this issue.

Annex A: Correspondence to the Cabinet Secretary of 1 October

The Delegated Powers and Law Reform Committee today considered the delegated powers provisions in the Transport (Scotland) Bill as amended at Stage 2. The Committee has subsequently published its report on these new and revised powers.

I am writing to highlight a number of recommendations the Committee has made on these powers in its report and ask whether you intend to lodge Stage 3 amendments in light of the issues raised. Further information is also sought in relation to the power in section 58Z12(1). This will help to inform its consideration of this provision at its meeting on Tuesday 8 October.

Summary of recommendations

You will see in the report that the Committee has called on the Scottish Government lodge amendments to the Bill on the following powers:

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

Committee recommendation

“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

Committee recommendation

“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

Committee recommendation

“The Committee calls on the Scottish Government to lay an amendment to the Bill 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 may be imposed under section 58N.”

The Committee would be grateful if you could indicate whether or not you intend to lodge such amendments by **9 am on Tuesday 2 October**.

Further information requested

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

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)).

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, appears to be wide in its scope.

It is usually considered appropriate for Parliament to confer and set the scope of delegated powers in primary legislation, rather than for legislation to make provision permitting subordinate legislation to add or remove, or amend the scope of, a power to make regulations.

The Committee would therefore appreciate further information on why it is considered necessary to have a power in the Bill at section 58Z12(2)(b) that is capable of amending other delegated powers in the Bill?

The Committee would be grateful for a response on this issue, by **5 pm on Wednesday 2 October**.

Finally, the Committee would also like to thank you for the changes the Scottish Government made to the Bill at Stage 2 following its recommendations at Stage 1. This was very much welcomed.

Yours sincerely,

Convener of the Delegated Powers and Law Reform Committee

Annex B: Correspondence from the Cabinet Secretary of 1 October

Thank you for your letter dated 1 October 2019 regarding the Committee's recommendations on the Transport (Scotland) Bill. This letter will address the issues raised on Sections 51 to 58N of the Bill and I will take these issues in turn.

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

The Scottish Government does not plan to lay an amendment to the Bill that includes a requirement to consult organisations representing drivers and other applicable road users when making regulations under sections 41 to 53 of the Bill as enacted.

As outlined in its response to the Committee's Stage 1 report, the Scottish Government agrees that consultation with representative organisations and stakeholders is key. It would reassure the Committee that it has consulted widely with various motoring organisations in the development of the Bill and will continue to do so (including in the development of secondary legislation implementing the Bill).

Section 58B - Circumstances when workplace parking space provided

You will note the Government amendment on this that was lodged on 1 October 2019.

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

The Scottish Government does not plan to lay an amendment at Stage 3 to make regulations under section 58N subject to the affirmative procedure. As stated in the Scottish Government's supplementary delegated powers memorandum, these regulations are intended to deal with the technical and procedural mechanics of the enforcement of workplace parking licensing schemes. Given likely technical nature of any regulations made under this power it is considered that the negative procedure affords the appropriate level of Parliamentary scrutiny. This is consistent with the approach taken to similar powers elsewhere, including provisions in this Bill in relation to the enforcement of low emission zones and parking prohibitions.

The remaining issues contained within your letter dated 1 October 2019 will be addressed in a separate response.

MICHAEL MATHESON

Annex C: Correspondence from the Cabinet Secretary of 2 October

Thank you for your letter dated 1 October 2019. We addressed your recommendations regarding sections 51 to 58N of the Bill in our letter to you dated 1 October 2019. This letter will consider the remaining request for further information.

Section 58Z12(1) - Power to modify aspects of Part 48 on recovery of unpaid parking charges

Section 58Z12(1)(b) provides Scottish Ministers with the power to modify this Part for the purpose of adding, removing or amendment "any of the" conditions in that Part. The conditions referred to are specified in sections 58Z1, 58Z2, 58Z7 and 58Z8. The use of the term "any of the conditions" as opposed to "the conditions" or "any conditions" shows that the power is to be used to amend particular conditions (or remove them). It is not a power that is to be used to add brand new and wholly distinct conditions to the set. It is necessary to take a power to amend all of the conditions as an amendment to one could have a knock-on effect to other conditions.

The power is considered necessary as maximum flexibility is required to enable the new keeper liability regime to be able to respond as industry practices for ticketing on private land rapidly develop. There is an equivalent power in the Protection of Freedoms Act 2012 ("the 2012 Act") and, as a large part of the industry operates car parks across the United Kingdom, there is a need for our legislation to be flexible enough to keep pace with changes in England and Wales and we therefore require the same flexibility that exists in the 2012 Act.

Subsection (2)(a) confers what is essentially a consequential power to make changes to sections 58Z3, 58Z4, 58Z5 and 58Z6 (including by removing them entirely if any of the corresponding conditions are left out) and any other provisions from time to time applicable for the purposes of a condition. Subsection (2)(b) is also, essentially, a consequential power as it is an aspect of the power in subsection (1)(b) as conditions cannot be added to, removed or amended in the abstract. It is expressly said to be capable of use only for the purposes of any power to prescribe anything for the purposes of a condition. It could be used narrowly - for example to remove a power if the corresponding condition were removed - or more widely - for example to add a new limb to a power where the condition is added to. An example might be to adjust the powers around the detail of the notice to be given to the keeper, and the manner in which it is given.

Further, the Scottish Government is of the view that the power in section 58Z12(2)(b) is necessary, as it would be problematic for the Scottish Ministers to have the power to amend the conditions if any associated changes that would otherwise be contained in regulations made under the amended powers had to be contained in the primary legislation. For example, if a new notice was required in respect of any of the conditions, without the power in subsection (2)(b), the detailed specification of the form and content would be required to be set out in the Act. This could make the Act, and those regulations that could still be made under it, less accessible and could result in Parliamentary time being expended on scrutinising the kind of technical detail that is more usually done under the negative procedure.

The Scottish Government believes that the affirmative resolution procedure for this power provides sufficient protection whilst affording a degree of necessary flexibility to respond to changes in England and Wales and in industry practice.

MICHAEL MATHESON

