



Law Society
of Scotland

Written evidence

Transport (Scotland) Bill

27 September 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee, and Rural Affairs and Environmental Law sub-committees welcome the opportunity to consider and respond to the call for evidence from the Scottish Parliament's Rural Economy and Connectivity Committee on the *Transport (Scotland) Bill* (the Bill).¹ We have the following comments to put forward for consideration.

General comments

We consider that the Bill contains laudable aims, particularly with regards to protecting the environment and supporting bus transport services. We note however that certain parts of the Bill deal with policy matters rather than enforceable legal provisions, for example provisions on bus services improvement partnerships and on ticketing schemes. Several provisions of the Bill are skeletal in nature with the detail to be set out in regulations. This makes it difficult to understand the full impacts of what is proposed by the Bill.

We generally support the Bill's policy objectives that relate to clarity with regard to:

- consistency of practice across Scotland in relation to the creation of low emission zones,
- responsible parking, and
- enhanced enforcement of road works.

However, when considering the creation of criminal offences, these must be drafted clearly so that the public are aware what of what actions are intended to constitute an offence. Such offences (and penalties

¹ <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/108853.aspx>

that may be imposed) must also be proportionate when seeking to balance the rights of the individual in relation to the needs of the State to regulate.

Additionally, if any new civil fixed penalties or offences are being created, these must be well publicised. It is important that individuals are able to guide their conduct in light of clear understanding of the law.

Paragraph 148 of the Bill's Policy Memorandum indicates that the Scottish Government intends to undertake a nationwide campaign before any changes are implemented across Scotland, especially in relation to the new parking requirements. We would urge that that campaign is disseminated as widely as possible and is inclusive, having due regard to the needs of vulnerable groups as well as those whose first language may not be English. Road users come from all groups and all require to understand parking restrictions, especially where they involve a change. That will avoid frustration and any unfairness.

We comment on the Bill's provisions as follows.

Response

Part 1 – low emission zones

Section 1 of the Bill sets out the restriction on driving a vehicle that fails to meet the specified emission standards that are to be set up under low emission zone schemes. When a breach arises, a penalty charge will be payable unless the vehicle is exempt from compliance with the regulations.

We note that air quality is fundamental to our environment and recognise that it is in the interests of our environment to take steps to protect this. We recognise that the focus for these provisions concerns urban areas. It is important that rural areas are not prejudiced for example, as a result of vehicles being removed from fleets in urban areas due to not meeting LEZ requirements, and being moved to rural routes.

The proposals will require to be considered fully in terms of their potential impacts on those based in or operating within LEZ areas, for example high street businesses, consumers, freight services and transportation services including buses and taxis.

Section 1(4)(a) of the Bill indicates that the specified emission standard is to be set by the Scottish Ministers by means of regulations. What that standard is, will be crucial since this forms the basis on which a penalty will be imposed. Paragraph 12 of the Bill's Explanatory Notes² indicates that:

“[The emission standard is] likely [to be] set by reference to what are known as the Euro standards (for example, the most recent level is known as Euro 6/VI for diesel engines)”.

² [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33ENS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33ENS052018.pdf)

To justify the Bill, we suggest that the emission standard be set out clearly from the start with powers under regulations to change that standard over time, as required. The standard may well need to change once monitoring, evaluation and evidence is available that demonstrates how successful or otherwise the measures implementing the creation of low emission zones have been. This reflects our general observations above regarding the importance of the public being aware of the actual standard so they are aware when they have breached the provisions regarding low emission zones and the need for compliance.

The setting of that standard is the basis of the creation of what constitutes a low emission zone. In accordance with regulations to be made under section 1(4)(b) of the Bill regarding the types of vehicles that are exempt, we consider that any regulations changing the standard should be subject to affirmative rather than the negative parliamentary procedure³.

A limit to the penalty charges to be imposed should be included within the Bill rather than left to negative parliamentary procedures. Like the issue of the standard, for penalty charges to be proportionate, fair and transparent, they should be set out in the Bill. Any changes to the penalty charge should also be subject to affirmative parliamentary proceedings. This would require Section 72(2) of the Bill to be amended to include section 1(4)(a) and (c).

Section 1(3) of the Bill restricts the penalty charge payable where a vehicle is driven within the same low emission zone by the same person on the same day so that only one penalty would be imposed. What about the circumstances where the same person drives the same vehicle through several low emission zones on the same day? That person will be liable for several penalty charges.

We are unsure why the number of low emission zones should matter? The vehicle causing the offence will be the same.

We can understand that there may be issues of enforceability as local authorities will separately seek to levy the penalty charges and will be unaware of another penalty notice being issued in another low emission zone on the same day to the same person. Consideration of the inclusion of a defence to avoid the ratcheting up of penalty charges in these circumstances would be merited.

Section 2(4)(a) of the Bill indicates that the person who is liable to pay the penalty charge will be the vehicle's registered keeper or the person in such circumstances as may be set out in regulations. The Bill's Explanatory Notes refers at paragraph 16⁴ to Ministers making regulations to provide for a penalty charge to be payable by someone else in specified circumstances.

There is a suggestion that any penalty charge incurred in respect of a hire car (including a car club car) would require to be paid by the person who hired the car. Responsibility for compliance with the Bill's

³ Delegated Powers and Law Reform Committee letter of 12 September 2018 sets out a similar view.

⁴ [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33ENS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33ENS052018.pdf)

provisions should be clear at the outset. If there is anyone other than the registered keeper to be responsible for compliance, that should be set out in the Bill so that the circumstances and safeguards are clear.

Section 3(3) of the Bill includes power to create offences. If the intention is for contravention of low emission zones to be a criminal offence, that should be included in the Bill. We note that section 3(4) of the Bill does not restrict any offence to summary prosecution.

Section 3(3)(c) of the Bill includes provision to make regulations regarding any review and appeals. Not only has the means of appeal not been specified in the Bill, this makes no reference to the forum where such appeals or review would require to be held. Paragraph 44 of the Explanatory Notes states that:

“Provision is also to be made in regulations for an appeal and adjudication process for vehicle owners to challenge a penalty charge notice”.

In the interests of fairness, we would consider that these should be set out on the face of the Bill since there must be access to justice in an open and transparent manner. This is especially relevant when the Bill allows the penalty monies to be retained by the local authority operating the low emission zone primarily for facilitating the low emission zone objectives, including funding the back-office administration costs. There needs to be independence in the case of adjudication on disputes.

Section 26(1) of the Bill requires local authorities to have regard to any guidance issued by Scottish Ministers about the exercise of its functions in relation to low emission zones. For transparency purposes, any such guidance should be published once it is issued for it to be effective so that those affected by guidance may clearly see it.

Part 2 – bus services

We welcome the introduction of provisions to permit councils to provide local bus services in areas where there is an unmet public transport need.

As referred to above, the provisions relating to bus services improvement partnerships deal primarily with policy matters. We note the provisions of section 29(2) which amends the Transport (Scotland) Act 2001, by providing that “a local transport authority may, if they consider it appropriate to do so, make a bus services improvement partnership plan (a “partnership plan”) in relation to the whole or part of their area.”

This test leaves discretion to take action in this field to local transport authorities. We note that the explanatory notes state:

“This is a broad test which gives the local transport authority discretion as to when they wish to make a partnership plan. In practice this will be informed by discussions with the operators of local services in the area and those in the community using those services.”⁵

While discretion in this field may be merited, we note that there are no provisions on the face of the Bill requiring local transport authorities to undertake consultation with relevant parties. We welcome the provision requiring partnership schemes to specify how their operation is to be reviewed and the dates by which reviews are to be completed. This ensures some degree of accountability.

With regards to local services franchises, we welcome the requirements of assessment, audit, consultation and approval which provide safeguards for the establishment of such franchises.

Part 3 – ticketing arrangements

We have no comment on this Part.

Part 4 – parking

We support the principles of the Bill regarding prohibiting double parking and parking on pavements. However, where powers are provided to local authorities for enforcement, there are concerns about the level of the unrestricted nature of the penalty charges that may be imposed.

We have similar concerns as reflected on in relation to the regulatory making provisions. These include:

- Limiting the penalty: Section 48(5) of the Bill permits Scottish Ministers to specify the amount to be levied as a penalty charge in respect of pavement parking or double parking. We refer to our comments above that a limit to the level of such penalty charges should be specified at the outset. The penalty charge that should be imposed requires to be proportionate and represent a balance.
- Appeals process: Section 49(2)(c) of the Bill refers to appeals and reviews. These procedures should be set out clearly on the face of the Bill.
- Creation of criminal offences: Section 49(4) of the Bill includes the potential for the creation of criminal offences. Again, if it is intended that pavement parking or double parking should amount to a criminal offence then this should be included within the Bill and not be created by way of regulations.

⁵ [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33ENS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33ENS052018.pdf) at Paragraph 109.

If the policy intention is not to include specific provisions in the Bill in relation to the creation of criminal offences and an appropriate appeal procedure being included, we would propose that any regulatory provisions should be subject to the affirmative parliamentary proceedings (though that is intended for the creation of offences).

Part 5 – road works

Paragraph 28 of the Bill's Policy Memorandum⁶ sets out a number of changes following the Barton Review⁷ of the office and functions of the Scottish Roads Works Commissioner (SRWC) and the regulation of utility road works in Scotland. The measures contained in the Bill are aimed at improving the quality of road works by encouraging a more effective regime to ensure that works are carried out properly, to make information about road works better and to ensure that the SRWC can deal more effectively with poor performance. We include several observations with regard to these new provisions.

Inspection Powers

Section 60 of the Bill includes the provision of detailed inspection powers for the SRWC as currently, the SRWC does not have any general inspection functions which hinders its means of establishing compliance with road works. It amends the Transport (Scotland) Act 2005 (2005 Act) to include these powers.

18A Power to carry out inspections: Section 18A(1)(e) concerns the facilities and assistance to be provided to the authorised person. This should be restricted to 'reasonably considers necessary' rather than give complete discretion to the authorised person.

18B Inspection: warrants: This deals with provisions to allow a warrant to be granted for the exercise of the powers conferred by section 18A of the Bill. A warrant can be granted if there are reasonable grounds for entering the premises. Section 18B(3)(b)(ii) of the Bill refers to "a refusal being reasonably expected." Warrants should only be obtained when attempts have been made to obtain entry and they have been refused. The circumstances in which a refusal would reasonably be expected is unclear without entry having been attempted. This seems too wide and difficult evidentially to establish.

Section 18(4)(a) of the Bill deals with the expiry of the warrant. Warrants should only be obtained when matters are urgent. A time-period would normally be expected for its expiry, and we suggest that a period of twenty-eight days would seem reasonable (see the Misuse of Drugs Act 1971). Warrants should not be granted for an indefinite period.

⁶ [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33PMS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33PMS052018.pdf)

⁷ <https://www.transport.gov.scot/media/10269/srwc-review-consultants-report>

18E Liability of authorised persons: Sections 18E(3) and (4) of the Bill should be deleted. We do not consider that it is proportionate to include a blanket immunity to anyone exercising any of the powers under section 18A(1) of the Bill. They should be subject to law as relevant and appropriate.

Compliance notices

The SRWC may currently give directions in relation to the duties of roads authorities and undertakers to co-ordinate road works under sections 118 and 119 of the New Roads and Street Works Act 1991 (1991 Act). The Bill now provides the SRWC with power to issue ‘compliance notices’ where the SRWC considers that a person is failing, or has failed, to comply with certain duties under the relevant legislation. Including a right of appeal to the courts in relation to compliance notices seems proportionate⁸.

Section 61 of the Bill (paragraph 153G (3)) sets out where there is any failure to comply with any compliance notice, without a reasonable excuse, that failure will comprise a criminal offence. The maximum penalty on conviction in summary proceedings is to be a fine of £50,000 (which does not equate to the civil fixed penalty under section 62(3)(d) which amends schedule 10 paragraph 4(1) of the 1991 Act).

Section 61(2) of the Bill (section 153I of the 1991 Act) provides power for regulations to be made ‘*to modify section 153G.....*’ We refer to the letter from the Delegated Powers and Law Reform Committee⁹ which queries if the reference to section 153G should be instead to section 153H. Otherwise, provision has been retained to amend the offence by means of affirmative regulations which would not seem to be appropriate. Amendments to criminal offences should be by way of primary legislation.

Section 62 of the Bill provides powers to issue fixed penalty notices to allow a non-court disposal in relation to any alleged offence. In respect of non-compliance with a compliance notice, the level of any fixed penalty is envisaged to be set at a maximum of £100,000. This is a significant amount for a maximum fixed penalty notice and does not equate as drafted to the maximum criminal penalty on summary complaint. We note that ministers intend to consult on regulations to increase the level of the Commissioner’s existing civil penalty from £50,000 also up to £100,000 to ensure that the civil penalty and the fixed penalty notice introduced under the Bill have the same maximum at £100,000.

Exactly when a fixed penalty charge would be issued rather than a report for prosecution to the Crown Office and Procurator Fiscal Office (COPFS) is unclear. We would question whether there is any intention to issue guidance. There are concerns too that the fixed penalty charge would in many cases be greater than the penalty imposed by way of a fine. We also note the reference to the test of ‘sufficient public interest in doing so’¹⁰ in referring a matter to COPFS. It is a matter for COPFS to decide if prosecution is

⁸ Section 153F Appeal against a compliance notice.

⁹ http://www.parliament.scot/S5_Delegated_Powers/20180912TransportBill.pdf

¹⁰ Paragraph 181 of the Policy Memorandum [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33PMS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33PMS052018.pdf)

justified in the public interest and in which forum that any prosecution should take place subject to sufficient admissible evidence being available.

Permission to execute works in a road

Section 64 of the Bill inserts new section 60A into the Roads (Scotland) Act 1984 (1984 Act). Scottish Ministers can issue or approve codes of practice giving practical guidance as to the duties imposed by section 60 of the 1984 Act in relation to the fencing and lighting of obstructions and excavations in the road. These codes of practice will be significant insofar as compliance is concerned. Should codes of practice not be subject to some form of parliamentary scrutiny? Should these codes not be published and subject to consultation?

Reinstatement of roads following works

Section 67 of the Bill inserts a new section 30C (4) which allows criminal offences to be created by regulations where there is failure to comply with the enforcement of reinstatement quality plans. If it is intended for criminal offences to be created, this should be done by means of primary legislation.

Part 6– Regional Transport Partnerships and Scotland’s canals

We have no comment on this Part.

For further information, please contact:

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