



Law Society
of Scotland



Stage 1 briefing

Transport (Scotland) Bill

March 2019



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.

We previously responded¹ to the Rural Economy and Connectivity Committee's (the Committee) call for evidence on the Transport (Scotland) Bill (the Bill). The Committee published its stage 1 report² on the Bill on 7 March 2019. We now have the following comments to put forward for consideration at Stage 1.

If you would like to discuss this paper, or if you would like more information on the points we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General comments

The Bill contains many laudable aims which we support, particularly with regards to protecting the environment and supporting bus transport services.

However, the Bill needs much more detail with regard to a number of aspects including emissions standards, penalty charges, offences and appeals³ as the Committee highlighted. This lack of detail can be illustrated:

- Where the Bill deals with policy matters rather than setting out clearly what provisions are to be legally enforceable. How should the provisions relating to bus services improvement partnerships and ticketing schemes be enforced?
- Where the imposition of criminal offences is contemplated, drafting of such offences must be clear and detailed in the Bill. The public must be aware what actions will amount to an offence. Any offences (and penalties) must be proportionate and seek to balance the rights of the individual in relation to the regulatory needs of the state. The point applies equally to any new civil fixed penalties.

¹ <https://www.lawscot.org.uk/media/361094/27-09-18-env-crim-transport-scotland-bill-stage-1.pdf>

² <https://digitalpublications.parliament.scot/Committees/Report/REC/2019/3/7/Stage-1-Report-on-the-Transport--Scotland--Bill>

³ Paragraph 21 of the Committee Stage 1 Report

The Scottish Government has expressed an intention to undertake a nationwide campaign before any changes are implemented. That campaign needs to be disseminated as widely as possible. Road users come from all groups of society so such a campaign must be inclusive, having due regard to the needs of vulnerable groups as well as those whose first language may not be English. Avoiding inequalities, frustration and unfairness is essential.

Bill

Part 1 – low emission zones (LEZ)

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

Environment: Air quality is fundamental to our environment and we recognise the need for protection. The Bill's focus tends to be on urban rather than rural areas. Rural areas should not be prejudiced where vehicles are removed from fleets in urban areas due to not meeting LEZ requirements but moved to rural routes. The Committee's recommendations⁴ in relation to LEZ's proposed implementation and the possible unintended consequences should be considered carefully.

Potential impacts on those based in or operating within LEZ areas, such as high street businesses, consumers, freight services and transportation services including buses and taxis must also be considered.

Emission standard: 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 Notes⁵ 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)”.

The emission standard should be set out clearly in the Bill with powers under regulations to change that standard over time, as required. Monitoring and evaluation will be required as to how successful or otherwise the creation of LEZs have been.

The public must be aware of the actual standard, so they know what a breach of the LEZ is.

Regulatory: Where regulations are made under section 1(4)(b) of the Bill regarding the types of vehicles that are exempt, regulations changing the standard should also be subject to affirmative rather than the negative parliamentary procedure⁶.

⁴ Rural Economy and Connectivity Committee, Stage 1 Report, Paragraph 42.

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

A limit to the penalty charges to be imposed should be included within the Bill and not left to negative parliamentary procedures. Penalty charges require to be proportionate, fair and transparent and changes should be subject to affirmative parliamentary proceedings. This requires section 72(2) of the Bill to be amended to include sections 1(4)(a) and (c).

Penalty charges: Section 1(3) of the Bill restricts the penalty charge payable where a vehicle is driven within the same LEZ by the same person on the same day to allow only one penalty to be imposed.

We note some queries:

- What about the circumstances where the same person drives the same vehicle through several LEZs zones on the same day? That person could be liable for several penalty charges but in the same offending vehicle. Would providing a defence to avoid the ratcheting up of penalty charges on an offence being committed be merited?
- Who is to pay the penalty charge?⁷ Is it always the vehicle's registered keeper? Responsibility for compliance with the Bill's provisions should be clear. If anyone other than the registered keeper is to be responsible for compliance, the Bill should set this out and not in Regulations
- If the intention is for contravention of LEZs to be a criminal offence⁸, this needs to be specified in the Bill.
- 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, the Bill makes no reference to the forum where such appeals or review would require to be held⁹. In the interests of fairness, we would consider that these should be set out in the Bill. 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 LEZs for facilitating them. Independence and transparency is required in the case of adjudication on disputes.
- Guidance¹⁰ on how the LEZs are to operate should be provided. Transparency requires such guidance to be published once issued.

Finally, we welcome the Committee's recommendations regarding consistency across Scotland in relation to which vehicles can enter a LEZ and which are exempt, and the suggestion "that standardised signage should be developed for LEZs to encourage familiarisation and reduce confusion amongst road users who might visit several different zones across Scotland."¹¹

⁶ Delegated Powers and Law Reform Committee letter of 12 September 2018 sets out a similar view.

⁷ Section 2(4)(a) of the Bill

⁸ Section 3(3) of the Bill includes power to create offences.

⁹ 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".

¹⁰ Section 26(1) of the Bill requires local authorities to have regard to any guidance issued by Scottish Ministers

¹¹ Rural Economy and Connectivity Committee, Stage 1 Report, Paragraphs 29 and 30.

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.

The provisions relating to bus services improvement partnerships deal primarily with policy matters. Section 29(2) 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 act to local transport authorities. 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.”¹²

Consultation provisions should be included in the Bill.

Partnership schemes should specify how their operation is to be reviewed and the dates by which reviews are to be completed. This will ensure some degree of accountability.

We welcome the requirements of assessment, audit, consultation and approval which provide safeguards for the establishment of local services 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. With enforcement powers being for local authorities, the level of the unrestricted nature of the penalty charges to be imposed is a concern. These refer to:

- The level of penalty charges require to be specified and be proportionate and balanced;
- The appeals process needs to be set out; and
- If pavement parking and/or double parking are criminal offences, these should be in the Bill and not set by regulations.

Such regulatory provisions should be subject to the affirmative parliamentary proceedings.

¹² [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33ENS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33ENS052018.pdf) at Paragraph 109.

Part 5 – road works

Paragraph 28 of the Bill's Policy Memorandum¹³ sets out a number of changes following the Barton Review¹⁴ of the office and functions of the Scottish Roads Works Commissioner (SRWC) and the regulation of utility road works in Scotland. The Bill is aimed at improving the quality of road works by:

- encouraging a more effective regime to ensure that works are carried out properly;
- making information about road works better; and
- ensuring 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 provides detailed inspection powers for the SRWC. Currently, the SRWC does not have any general inspection functions which hinders its means of establishing compliance with road works.

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 as to the authorised person.

18B Inspection: warrants: This provides for a warrant to be granted in relation to section 18A of the Bill. Warrants should only be obtained after attempts have been made to obtain entry and been refused. The circumstances in which a refusal would reasonably be expected is unclear when entry has not been attempted. This is 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. A period of twenty-eight days might seem reasonable as warrants should not be granted for an indefinite period.

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 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. Including a right of appeal to the courts in relation to such compliance notices seems proportionate¹⁵.

Section 61 of the Bill (section 153G (3) of the 1991 Act) provides where there is any failure to comply with any compliance notice, without a reasonable excuse, that failure will comprise a criminal offence. The

¹³ [http://www.parliament.scot/Transport%20\(Scotland\)%20Bill/SPBill33PMS052018.pdf](http://www.parliament.scot/Transport%20(Scotland)%20Bill/SPBill33PMS052018.pdf)

¹⁴ <https://www.transport.gov.scot/media/10269/srwc-review-consultants-report>

¹⁵ 1991 Act, section 153F, appeal against a compliance notice.

maximum penalty on conviction in summary proceedings is to be a fine of £50,000¹⁶. Section 61(2) of the Bill (section 153I of the 1991 Act) provides for regulations to be made to modify section 153G.

The Delegated Powers and Law Reform Committee¹⁷ queries if the reference to section 153G should be instead to section 153H. 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 made by 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.

Exactly when a fixed penalty charge would be issued rather than a report made for prosecution to the Crown Office and Procurator Fiscal Office (COPFS) is unclear. Is guidance to be issued?

The fixed penalty charge (civil) would in many cases be greater than the penalty imposed by way of a criminal fine. Reference is made to the test of 'sufficient public interest in doing so'¹⁸ when referring this to COPFS. COPFS decide if prosecution is justified in the public interest and in which forum that any prosecution should take place subject to sufficient admissible evidence being available.

We consider the Bill should reflect this.

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. We consider codes of practice should be subject to some form of parliamentary scrutiny and 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 this is to be a criminal offence, this should be achieved by primary legislation.

Part 6 – Regional Transport Partnerships and Scotland's canals

We have no comment on this Part.

¹⁶ This does not equate to the civil fixed penalty under section 62(3)(d) which amends schedule 10 paragraph 4(1) of the 1991 Act

¹⁷ http://www.parliament.scot/S5_Delegated_Powers/20180912TransportBill.pdf

¹⁸ 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)



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