MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE
BY THE SCOTTISH EXECUTIVE – PRE STAGE 3

TRANSPORT (SCOTLAND) BILL

Purpose

This memorandum, revised as a consequence of Stage 2 consideration, has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.7.9 of the Parliament’s Standing Orders, of provisions in the Transport (Scotland) Bill conferring power to make subordinate legislation. It describes the purpose of each such provision, explains why the matter is to be left to subordinate legislation and the reasons for seeking the proposed powers. All revisions are underlined.

Outline and Scope of the Bill

The Bill fulfils the commitments in the 2004 White Paper, Scotland’s transport future, to put in place new delivery structures for transport that will bring a strong regional approach to transport infrastructure and services; to improve the regulation of road works carried out by utility companies; to enable the Scottish Ministers to operate concessionary travel schemes at their own hand; and, to take forward a number of minor provisions in relation to other transport areas.

The Bill is in four parts:

- Part 1 provides a statutory basis for regional Transport Partnerships.
- Part 2 makes provision to improve the co-ordination and quality of road works.
- Part 3 makes provision to enable the Scottish Ministers to run concessionary travel schemes. It also makes a range of miscellaneous provisions.
- Part 4 deals with citation, commencement and interpretation. It also makes general provision about orders and regulations proposed by the Bill including provision about parliamentary procedure.

Delegated Powers

The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. Whilst a number of the powers contained within the Bill are new, such as those relating to regional Transport Partnerships, others, particularly those in respect of road works, emulate or update powers which already exist within the Traffic Management Act 2004, the New Roads and Street Works Act 1991 and the Roads (Scotland) Act 1984. The powers conferred by the Bill are, for the most part, either of a technical and procedural nature or relate to matters which because of their nature require a flexible procedure and thus are more appropriate to be dealt with by subordinate legislation.

In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations or orders, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily. Affirmative procedure is used
where the order or regulation making powers allow for the modification of any enactment or where there is significant public interest. The Commencement Order, which is made by the Scottish Ministers does not require procedure in the Scottish Parliament. All other enabling powers are deemed not unusual or significant enough to justify affirmative procedure and therefore the negative procedure will apply when those powers are exercised. Where a provision amends, or is closely based upon, a provision in the New Roads and Street Works Act 1991 the approach has been to follow the model provided by the existing statute.

The Bill provides the Scottish Ministers with powers to make supplemental, incidental, consequential, transitory, transitional or savings provisions. This allows the Scottish Ministers to make provision for ancillary matters and to enable unforeseen circumstances to be addressed which may arise following the enactment of the Bill without having to have recourse to primary legislation. The scope of the power is restricted in two respects. Firstly, it can only be used to make provisions which are supplemental, incidental, consequential, transitory, transitional or savings in relation to the order or regulations which are being made. In addition those provisions must be for the purposes of or in consequence of the provisions of the Bill. There are also stand alone provisions in sections 2, 10 and 12 that enable orders made under these sections to modify any enactment.

The power has been taken as the Bill is making significant changes to an existing complex body of law namely the law that governs transport and for Transport Partnerships that which governs local authority bodies. It is not possible to predict the precise transitional and other arrangements that will be needed as a result of the proposals made by this Bill.

The Bill

**Section 1: Establishment of Regional Transport Partnerships**

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Section 1(1) provides the Scottish Ministers with the power to make provisions by order about the establishment and constitution of Transport Partnerships.

Section 1(2) expands on what must, and what might, be contained in an order made under section 1(1). The particular matters listed are: councillor and non-councillor membership, manner of appointment, duration and termination of membership, use of voting, the weighting of votes, the offices to be held by certain members, proxies and role of observers.

Section 1(2)(b) and 1(3) provides that non-councillor members are initially appointed by the Scottish Ministers but that after the local authority elections in 2007 the non-councillor members will be appointed by the Transport Partnerships, but subject to the consent of the Scottish Ministers.

**Reason for taking power**

It is acknowledged that though the broad constitution of each Transport Partnership will be similar, the detailed nature of these provisions and in particular the definition of boundaries and voting arrangements for the Transport Partnerships makes it more appropriate for them to be provided for in subordinate rather than primary legislation. The affirmative procedure
however ensures that the substance of the order will be subject to parliamentary scrutiny and approval. The Scottish Ministers believe that it is appropriate for Parliament to approve the establishment and constitution of new statutory bodies.

Section 2: Dissolution of RTPs

Relevant provision: Section 2(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 2(1) provides the Scottish Ministers with power to dissolve Transport Partnerships.

Section 2(2) places a duty on the Scottish Ministers to consult relevant parties prior to making an order.

Section 2(3) provides for the order, as the Scottish Ministers consider necessary, to modify any enactment.

Reason for taking power
The order made under this power will make provision as to the detail of dissolution. The reasons for dissolution may be various but might, for example, be to permit two or more Transport Partnerships merging or a single Transport Partnership being recast as two or more Transport Partnerships. The exact form of the dissolution will depend on decisions taken by the Scottish Ministers in the light of consultation with affected parties. These matters will be particular to those affected and therefore are more appropriately dealt with under secondary rather than primary legislation.

It is necessary for the order to modify any enactment since Transport Partnerships are being created with administrative functions that apply to councils and other public bodies (Section 4 refers). It is not possible to predict the precise incidental and other arrangements that will be needed should dissolution take place. The affirmative procedure however ensures that the substance of the order will be subject to parliamentary scrutiny and approval.

Relevant provision: Section 2(2A)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 2(2A) provides the Scottish Ministers with a power, on dissolving a Transport Partnership, to return a function of that Transport Partnership to the person who was carrying out that function immediately prior to it having been transferred to the Transport Partnership by an order under section 10. If there have been two or more orders under section 10 transferring that function, then the order-making power at section 2(2A) may be used to return the function to the person who originally exercised it before the first section 10 order.

Reason for taking power
There is a need to ensure that should a Transport Partnership be dissolved its functions can be performed by another party. This is to avoid a situation of a void or hiatus between the
dissolution of a Transport Partnership and the creation of a new Transport Partnership. An hiatus is a possibility in that any newly created Transport Partnership would have up to 12 months from being created to produce its strategy and unless the Scottish Ministers imposed functions on the new Transport Partnership from the outset the transfer of functions would be conditional on the need to await approval of the strategy.

Orders under section 2(2A) will be subject to affirmative resolution procedure and this ensures that the substance of the order will be subject to parliamentary scrutiny and approval. Given that orders under section 10(1) transferring transport functions to Transport Partnerships are subject to affirmative resolution procedure the Scottish Ministers believe it is appropriate to apply the same procedure to orders under section 2(2A), which, on dissolution of a Transport Partnership, transfer functions back to the persons who originally exercised them.

Section 3 – Funding and borrowing

Relevant provisions: Section 3(2)(b)

Power conferred on: The Scottish Ministers

Power exercisable by: Order by Statutory Instrument

Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 3(2)(b) provides the Scottish Ministers with the power to determine, when the Transport Partnership is unable to decide, the share of expenses to be paid by a constituent council to a Transport Partnership.

Reason for taking power

The power will only apply if the Transport Partnership cannot reach a decision. The amount of the contribution will be informed by the needs of the Transport Partnership i.e. the funding that the Transport Partnership requires to execute particular functions in pursuit of its strategy objectives. The Scottish Ministers will not know the Transport Partnership’s requirements until it is established and therefore it is appropriate for this matter to be addressed by secondary legislation. The expectation is that this power, though necessary, will be rarely used. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Relevant provisions: Section 3(3)

Power conferred on: The Scottish Ministers

Power exercisable by: Order by Statutory Instrument

Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 3(3) provides the Scottish Ministers with the power to determine the means by which constituent councils provide funding to their Transport Partnerships and how Transport Partnerships will repay loans.

Reason for taking power

The accounting procedures and administrative arrangements associated with the transfer of funds and repayment of loans are necessarily detailed in order, amongst other matters, to safeguard the use of public funds. These procedures and arrangements are subject to revision and refinement. By using secondary legislation the Scottish Ministers have the flexibility to adjust the administrative arrangements to accord with prevailing accounting and
administrative practices. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 8 – Duty of constituent councils and other public bodies as respects transport strategies
Relevant provisions: Section 8(2)
Power conferred on: The Scottish Ministers
Power exercisable by: Order by Statutory Instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 8(2) places a duty on specified public bodies to act consistently, in the performance of their transport-related functions and activities, with the transport strategy.

Section 8(3) provides the Scottish Ministers with the power to specify which public bodies should act consistently with the transport strategy of a Transport Partnership.

Reason for taking power
This allows the Scottish Ministers to define and place a duty on those public bodies that are affected by transport strategies to ensure that, in respect of transport, they operate in a manner that is consistent with the transport strategy. The order will define the public bodies and the strategies of the relevant Transport Partnerships with which they must act consistently.

It is not appropriate to place a duty in primary legislation on all public bodies since not all will be affected by transport strategies. In addition, strategies are subject to revision and therefore for these reasons it is considered that this matter is more appropriately dealt with under secondary rather than primary legislation. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 10 – Other transport functions of RTPs
Relevant provisions: Section 10(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Order by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 10(1) provides the Scottish Ministers with the power to confer transport functions on a Transport Partnership.

Section 10(1A) places a duty on the Scottish Ministers to have regard to the strategy, once produced, of a Transport Partnership before conferring functions.

Section 10(2A) provides examples of the functions that may be included within an order made under section 10(1).

Section 10(3) provides that the order can be made by Scottish Ministers in response to an application by a Transport Partnership.
Section 10(5) provides that the Scottish Ministers have a duty to consult prior to creating the order.

Section 10(6) provides for the order, as the Scottish Ministers consider necessary, to modify any enactment.

**Reason for taking power**
Transport Partnerships may require transport functions to execute their transport strategies. The order making power at section 10(1) enables the Scottish Ministers to make an order conferring functions on a Transport Partnership at any time. However, once the strategy is in place the Scottish Ministers under section 10(1A) have to have regard to the strategy before conferring any function on the Transport Partnership. The functions will be specific to each Transport Partnership and in addition as the strategy develops in its execution the functions may be subject to review. Section 10(2A) provides an non-exhaustive list of the functions that may be conferred on a Transport Partnership. The Scottish Ministers recognise that the conferment of a function on a Transport Partnership that was previously undertaken by a council will be of interest to Parliament. It is necessary for the order to modify any enactment as the transfer may not make any sense legally unless the legislation containing the transport function is amended to remove any anomalies or difficulties that arise from the transfer. The affirmative procedure ensures that the substance of the order will be subject to parliamentary scrutiny and approval.

**Relevant provisions:** Section 10(7)
**Power conferred on:** The Scottish Ministers
**Power exercisable by:** Order by statutory instrument
**Parliamentary procedure:** Affirmative resolution by the Scottish Parliament

Section 10(7) provides the Scottish Ministers with the power to confer any transport function of Strathclyde Passenger Transport Authority and Strathclyde Passenger Transport Executive on a Transport Partnership.

**Reason for taking power**
The purpose of the power is to enable conferment of functions on a Transport Partnership to occur without the need of the Transport Partnership to produce a transport strategy first. A Transport Partnership has up to a year from its establishment to produce a transport strategy (section 6(1) refers). The Scottish Ministers, however, wish to ensure continuity of service in the west of Scotland and therefore propose conferring the transport functions of Strathclyde Passenger Transport Authority and Strathclyde Passenger Transport Executive on the successor Transport Partnership by April 2006. This date may be in advance of the date of production of the Transport Partnership’s transport strategy. There will be no requirement to exercise the power if the Transport Partnership completes its strategy and it is accepted by the Scottish Ministers before April 2006.

This conditional element means that this matter is more appropriately dealt with by secondary rather than primary legislation. The affirmative procedure, however, ensures that the substance of the order will be subject to parliamentary scrutiny.

**Section 10A – Alteration of RTP’s functions**
Section 10A(1) provides the Scottish Ministers with the power to enable a function of a Transport Partnership to be carried out solely or concurrently by the person who previously carried out that function prior to its transfer to that Transport Partnership.

Reason for taking power
These provisions allow the Scottish Ministers to return, by order, a function or functions of a Transport Partnership to the person that previously undertook the function or functions for reasons, for example, where in the light of operational experience the Transport Partnership is not exercising the function or functions as well as its predecessor. Without these provisions permitting alterations to the execution of functions held by a Transport Partnership the Scottish Ministers would need to invoke the dramatic provisions within section 2 to dissolve a Transport Partnership in order to transfer functions back to a predecessor.

As the transfer of functions occurred under secondary legislation it is appropriate return transfer (either solely or concurrently) is similarly pursued via an order. The affirmative procedure, however, ensures that the substance of the order will be subject to parliamentary scrutiny as there will be considerable public interest in the reasons at to why a function should be returned and it is appropriate that such matters are given a public airing.

Section 12 – Transport functions of Scottish Ministers
Relevant provisions: Section 12(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Order by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 12(1) provides the Scottish Ministers with power to make an order to enable them to carry out the rail transport function of Strathclyde Passenger Transport Authority and Strathclyde Passenger Transport Executive.

Reason for taking power
An order under section 30(2) of the Scotland Act 1998 has been approved by both the Scottish Parliament and Westminster to extend the legislative competence of the Scottish Parliament and enable the transfer of the rail powers presently exercised by Strathclyde Passenger Transport Executive or Strathclyde Passenger Transport Authority (SPTE/A) to the Scottish Ministers. The Scottish Ministers require this power to confer the rail powers on themselves. The detail that will need to be specified lends itself to subordinate legislation. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 13 – Transfer of staff, property and liabilities
Relevant provisions: Section 13(4)
Power conferred on: The Scottish Ministers
Power exercisable by: Order by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 13(4) provides the Scottish Ministers with power to transfer the properties and liabilities of one body to another.

Reason for taking power
The Scottish Ministers want to ensure that when a transfer of functions occurs between two bodies that there is also an associated transfer of properties and liabilities. The transfer of functions will occur by order and it is therefore appropriate that the transfer of properties and liabilities transfers in a similar manner. The Scottish Ministers recognise that the conferment of a function on a Transport Partnership that was previously undertaken by another body will be of interest to Parliament and therefore the affirmative procedure as detailed in section 10 ensures that the substance of the order will be subject to parliamentary scrutiny. As the transfer of properties and liabilities is conditional on the transfer of functions it is believed that a negative resolution by Scottish Parliament is sufficient.

Section 16 – Duty of road works authority and undertakers to provide Commissioner with information
Relevant provisions: Section 16(3)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 16(3) provides the Scottish Ministers with the power to prescribe by regulations the method of settlement of a disagreement, relating to information that the Scottish Road Works Commissioner has requested, between a road works authority or an undertaker and the Scottish Road Works Commissioner.

Reason for taking power
The regulations under this power will provide the Scottish Ministers with the flexibility to determine the appropriate means to seek a solution with respect to the nature of the disagreement. The matter may be settled by arbitration (as per section 158 of the 1991 Act) or by such other means as laid out in regulations. The Scottish Ministers wish to consult with Scottish Road Works Commissioner, on appointment, as to the detail of the regulations. It is appropriate for this matter to be addressed by secondary legislation. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 17 – The Scottish Road Works Register
Relevant provisions: Section 17(1), 112A(2) and 112A(5)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament
Section 17(1) inserting section 112A(2) to the 1991 Act provides the Scottish Ministers with power to prescribe the form and manner of keeping of the Scottish Road Works Register. The inserted section 112A(5) provides the Scottish Ministers with power to apply a restriction to the communication of certain information within the register.

**Reason for taking power**
In section 163 of the 1991 Act “prescribed” means prescribed by the Scottish Ministers by regulations. In section 17 et seq. of this Bill “prescribed” has that meaning.

Section 17 imposes a duty on the Scottish Road Works Commissioner to keep a register. The form and the manner of keeping the register are matters of detail that are appropriate to subordinate legislation. Section 112(2) of the 1991 Act, which is now deleted by the provisions in this Bill, had a similar provision. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

**Relevant provisions:** Section 17(1), 112A(3A)

**Power conferred on:** The Scottish Ministers

**Power exercisable by:** Regulations by statutory instrument

**Parliamentary procedure:** Negative resolution by the Scottish Parliament

Section 17(1) inserting section 112A(3A) to the 1991 Act provides the Scottish Ministers with power to make regulations regarding the payment of fees, as a condition of access to the register.

**Reason for taking power**
The provision ensures that the cost of operating the register is met by contributions from those who are required to place information on the register, which is the case currently. There is no intention of charging for those who merely wish to inspect the details on the register. The regulations will set the schedule of fees that parties will need to contribute to fund the operation of the register. It is appropriate for the matter to be addressed through regulations so that any changes in the operating costs of register as a consequence, for instance, of technological improvement can be reflected in the contribution that parties have to make. It is however expected that parties, as is the case currently, will agree to the fee levels set for access to the register however having the ability to lodge regulations will enable any potential non-statutory difficulties to be overcome. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

**Relevant provisions:** Section 17(1), 112B(1) to (4)

**Power conferred on:** The Scottish Ministers

**Power exercisable by:** Regulations by statutory instrument

**Parliamentary procedure:** Negative resolution by the Scottish Parliament

Section 17(1) inserting section 112B(1) to the 1991 Act provides the Scottish Ministers with power to prescribe the road details that a road works authority shall enter in the Scottish Road Works Register.
Section 17(1) inserting section 112B(2) to the 1991 Act provides the Scottish Ministers with power to prescribe the information that a road works authority shall enter in the Scottish Road Works Register relating to permissions and directions issued by the road works authority in certain circumstances.

Section 17(1) inserting section 112B(3) to the 1991 Act provides the Scottish Ministers with power to prescribe the information that a road authority shall enter in the Scottish Road Works Register relating to permissions, notices and consents issued by the roads authority in certain circumstances.

Section 17(1) inserting section 112B(4) to the 1991 Act provides the Scottish Ministers with power to prescribe how information will be entered in the register.

**Reason for taking power**
The regulations impose a duty on a road works authority to enter information as may be required to ensure that the register operates effectively. The information set is a matter of detail that is appropriate to subordinate legislation. Similar provisions within the original section 112 of the 1991 Act were also subject to regulations. It is appropriate that these regulations are subject to a similar level of parliamentary scrutiny.

**Relevant provisions:**  
Section 17(2)(b), 113(3A)  
**Power conferred on:**  
The Scottish Ministers  
**Power exercisable by:**  
Regulations by statutory instrument  
**Parliamentary procedure:**  
Negative resolution by the Scottish Parliament

Section 17(2)(b) inserting section 113(3A) to the 1991 Act provides the Scottish Ministers with power to prescribe the notice period for works to be entered in the Scottish Road Works Register.

**Reason for taking power**
The Scottish Ministers accept that different notice periods will be required in different circumstances. The detail of the information required will be informed by discussions with the Scottish Road Works Commissioner. The use of regulations is appropriate to ensure that the information required and the timeliness of its input remains relevant. This power amends the existing power to make regulations conferred by section 113(2) of the 1991 Act. This is a matter of detail that is appropriate to secondary legislation and subject to parliamentary scrutiny by negative resolution.

**Relevant provisions:**  
Section 17(3)(b), 114(3A)(a)(ii)  
**Power conferred on:**  
The Scottish Ministers  
**Power exercisable by:**  
Regulations by statutory instrument  
**Parliamentary procedure:**  
Negative resolution by the Scottish Parliament

Section 17(3)(b) inserting section 114(3A)(a)(ii) to the 1991 Act provides the Scottish Ministers with power to prescribe the information that an undertaker has to contain within a notice advising any bodies with apparatus in the road that road works are to commence.

**Reason for taking power**
The regulations under this power will provide the detail of any additional information that ought to be provided by the undertaker within the notice. This power amends the existing power to make regulations conferred by section 114(1) of the 1991 Act. It is not a new set of regulations. It is not appropriate for primary legislation to contain such detail. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Relevant provisions: Section 17(4)(b), 116(3A)(a)(ii)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 17(4)(b) inserting section 116(3A)(a)(ii) to the 1991 Act provides the Scottish Ministers with power to prescribe the information that an undertaker has to contain within a notice advising the body specified in section 114 that road works for emergency purposes are to commence.

Reason for taking power
The regulations under this power will provide the detail of any additional information that ought to be provided by the undertaker within the notice. It is not appropriate for primary legislation to contain such detail. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 18 - Directions as to timing of road works
Relevant provisions: Section 18(3A), 115(2A)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 18(3A) inserting section 115(2A) to the 1991 Act provides the Scottish Ministers with power by regulations to make provision for appeals against the directions of road works authorities regarding the timing of works.

Reason for taking power
The regulations under this power will provide the detail of the procedure that ought to be followed by the undertaker and the road works authority. These are new regulations. The Scottish Ministers do not believe that it is appropriate for primary legislation to contain such detail. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 19 - Directions as to placing of apparatus in roads
Relevant provisions: Section 19(1), 115A(4)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament
Section 19(1) inserting section 115A(4) to the 1991 Act provides the Scottish Ministers with power to prescribe the procedure for the giving of directions by the road works authority to the undertaker on the placing of apparatus.

**Reason for taking power**
The regulations under this power will provide additional information to road works authorities to assist them with procedures to be followed when giving directions to undertakers. In essence, it will establish the manner by which the road works authority will exercise its power. These are new regulations. It is not appropriate for primary legislation to contain such detail and Scottish Ministers will be seeking to work with road works authorities to design appropriate procedures. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

**Relevant provisions:** Section 19(1), 115A(5)
**Power conferred on:** The Scottish Ministers
**Power exercisable by:** Regulations by statutory instrument
**Parliamentary procedure:** Negative resolution by the Scottish Parliament

Section 19(1) inserting section 115A(5) to the 1991 Act places a duty on the Scottish Ministers to make provision by regulations for appeals by undertakers against directions given by road works authorities regarding the placement of apparatus in the road.

**Reason for taking power**
The regulations under this duty will provide the detail of the procedure that ought to be followed by the undertaker and the road works authority. These are new regulations. The Scottish Ministers do not believe that it is appropriate for primary legislation to contain such detail. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

**Section 23 – Enforcement of section 119 of 1991 Act**
**Relevant provisions:** Section 23(2), 119A(1)
**Power conferred on:** The Scottish Ministers
**Power exercisable by:** Regulations by statutory instrument
**Parliamentary procedure:** Negative resolution by the Scottish Parliament

Section 23(2) inserts section 119A(1) to the 1991 Act to enable the Scottish Ministers to make regulations about the notification, enforcement, level and payment of penalties as well as the appeals process against the imposition of penalties by the Scottish Road Works Commissioner.

**Reason for taking power**
The Scottish Minister may make regulations to give the Scottish Road Works Commissioner the power to impose financial penalties on undertakers who are failing in their duty under section 119. These are new regulations rather than amendments to existing regulations within the 1991 Act. The details are such that the matter ought to be addressed via regulation rather
than primary legislation. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 24 – Qualifications of supervisors and operatives
Relevant provisions: Section 24(2), 126(1A)(b)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 24(2) inserts section 126(1A)(b) to the 1991 Act to provide the Scottish Ministers with the power to prescribe the evidence to be supplied by undertakers to a road works authority to substantiate the qualifications held by the undertakers’ supervisors.

Reason for taking power
The Scottish Ministers want to be assured that those persons supervising road works on behalf of undertakers are suitably qualified. Section 126 of the 1991 Act contains the power to prescribe circumstances i.e. create regulations. The new powers amend those regulations and are therefore not new regulations. The details of the information required and the manner by which it is transmitted to the road works authority are such that the matter ought to continue to be addressed via regulation rather than primary legislation.

Relevant provisions: Section 24(3), 126(2A)(b), (2B) and (2C)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 24(3) inserts section 126(2A)(b), (2B) and (2C) to the 1991 Act to provide the Scottish Ministers with power to prescribe the evidence to be supplied by undertakers to a road works authority to substantiate the qualifications held by the undertakers’ operatives.

Reason for taking power
The Scottish Ministers want to be assured that those persons (operatives) engaged in road works activities on behalf of undertakers are suitably qualified and that their presence on site is notified. This power amends the existing power to make regulations as conferred under section 126 of the 1991 Act. The details of the information required and the manner by which it is transmitted to the road works authority are such that the matter ought to continue to be addressed via regulation rather than primary legislation.

Section 26 – Duty of undertaker to notify completion of road works: form and procedure
Relevant provisions: Section 26(c), 129(5A)(a)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 26(c) inserts section 129(5A)(a) to the 1991 Act to provide the Scottish Ministers with power to prescribe the information that ought to be contained within the notice, supplied
by the undertaker to the Scottish Road Works commissioner, stating that reinstatement has been completed.

**Reason for taking power**
The Scottish Ministers want to ensure that the Scottish Road Works Commissioner has up to date records within the Scottish Road Works Register. The Scottish Road Works Commissioner needs to know whether the re-instatement performed by the undertaker is permanent or temporary and if the latter the date by which permanent re-instatement will take place. The manner in which information is recorded and supplied to the Commissioner is a matter of detail and therefore appropriate to secondary legislation. The use of regulations permits the commissioner to vary requirements in accordance with any future enhancements to the Scottish Road Works Register. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

**Section 27 – Notices requiring remedial works relating to reinstatements**

**Relevant provisions:** Section 27(1), 131(3)

**Power conferred on:** The Scottish Ministers

**Power exercisable by:** Regulations by statutory instrument

**Parliamentary procedure:** Negative resolution by the Scottish Parliament

Section 27(1) amends section 131(3) and inserts section 131(3A) to the 1991 Act to give power to the Scottish Ministers to prescribe the periods within which undertakers must perform remedial work as a consequence of a re-instatement.

**Reason for taking power**
The Scottish Ministers recognise that different types of work require a different time period to remedy. It is not appropriate to state that all works must be remedied within, say, 7 days. It may be that certain works are of such extent or complexity that the remedial action will take longer to complete. These are new regulations rather than amendments to existing regulations within the 1991 Act. The Scottish Ministers believe that by having regulations more circumstances can be addressed and that more specific time periods can be provided for particular circumstances taking in to account, for instance, the road materials. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

**Relevant provisions:** Section 27(2)(a), 149(2)

**Power conferred on:** The Scottish Ministers

**Power exercisable by:** Regulations by statutory instrument

**Parliamentary procedure:** Negative resolution by the Scottish Parliament

Section 27(2)(a) amends section 149(2) of the 1991 Act to give power to the Scottish Ministers to prescribe the periods within which undertakers must perform remedial work in the case of road works which necessarily involved the breaking up or opening of a sewer, drain or tunnel under the road.

**Reason for taking power**
The Scottish Ministers recognise that different types of work require a different time period to remedy. It is not appropriate to state that all works must be remedied within, say, 7 days. It may be that certain works are of such extent or complexity that the remedial action will take longer to complete. This is a new regulation. The Scottish Ministers believe that by having regulations more circumstances can be addressed and that more specific time periods can be provided for particular circumstances. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.

Section 28 – Power of road works authority to require undertaker to resurface road
Relevant provisions: Section 28(1), 132A(1), (2)(c), (3), (4) and (5)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 28(1) inserts section 132A to the 1991 Act to give power to the Scottish Ministers to prescribe circumstances in which a road works authority may require an undertaker to resurface the road.

Reason for taking power
Undertakers affected by this power are those who have given notice under section 113 or section 114 of the 1991 Act, are carrying out road works at the same time the road works authority issues the requirement, or are still within the notice period for the completion of road works.

The circumstances in which a road works authority issues the requirement will be set out in regulations, and will enable the road works authority to require a part of a road to be resurfaced which has not directly been broken up by the undertaker. Equally, the regulations may restrict the extent of the resurfacing works which undertakers are required to carry out.

It is inappropriate to provide in primary legislation for all the circumstances that might apply, Scottish Ministers will therefore engage in consultation with undertakers, road works authorities and the Scottish Road Works Commissioner to determine the appropriateness and content of regulations. This matter, therefore, is more appropriately dealt with by secondary rather than primary legislation, however, in recognition of the importance of the provisions and consequences for all parties the first regulations under this section will be by affirmative resolution. Subsequent regulations will be subject to a negative resolution of the Scottish Parliament.

Relevant provisions: Section 28(1), 132B(2)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 28(1) inserts section 132B(2) to the 1991 Act giving power to the Scottish Ministers to require a road works authority to consult an undertaker before the making of a notice and
provide a date no earlier than the date of issuing a notice for the beginning, execution or completion of works.

Reason for taking power
The time taken to resurface roads will be influenced by the type of materials used in the original surface. It is therefore proposed that extensive consultation will be undertaken with undertakers and road works authorities on the content prior to the making of the regulation.

This matter is more appropriately dealt with by secondary rather than primary legislation however in recognition of the importance of the provisions and the consequence of the regulations for undertakers and road works authorities the first regulation under this section will be by affirmative resolution. Subsequent regulations will be subject to a negative resolution of the Scottish Parliament.

Relevant provisions: Section 28(1), 132C(1) and (2)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 28(1) inserts section 132C(1) and (2) to the 1991 Act imposing a duty on an undertaker to comply with material and workmanship requirements as specified in regulations.

Reason for taking power
Undertakers and road works authorities will be consulted prior to drafting regulations. The regulations will contain considerable detail in respect of the use of materials and the standard of workmanship to be deployed in completing resurfacing work. This matter therefore is more appropriately dealt with by secondary rather than primary legislation however in recognition of the importance of the provisions and the operational consequences for undertakers the first regulation under this section will be by affirmative resolution. Subsequent regulations will be subject to a negative resolution of the Scottish Parliament.

Section 29- Resurfacing: regulations and guidance
Relevant provisions: Section 29, 132D(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 29 inserts section 132D to the 1991 Act and provides the Scottish Ministers with power to make regulations which in particular supplement sections 132A, 132B and 132C. These provide the powers to require an undertaker to resurface a road and the time by which that resurfacing should be executed as well as the materials to be used and standard of workmanship to be observed in performing the resurfacing. The regulations may also create offences punishable on summary conviction with a fine. Prior to making the regulations the Scottish Ministers are placed under a duty to consult any relevant association of undertakers as well as any other body they consider appropriate.

Reason for taking power
Undertakers and road works authorities will be consulted prior to drafting regulations regarding the information to be contained in a resurfacing notice and in particular the prescribed circumstances in which an undertaking is entitled to pay a sum (and the calculation of that sum) to the roads works authority instead of executing the works specified in a resurfacing notice. The provisions as listed at section 132D(2)(a)-(g) refer to matters of detail that are more appropriate to secondary legislation. The provisions (a) to (d) refer to operational matters. The provisions (e) and (f) refer to right of appeal and the manner and persons engaged in appeals or dispute resolution. The Scottish Ministers require the flexibility afforded by regulations to create and set the level of fine for offences in respect of resurfacing. There is public interest, particularly in respect of offences and fines, and therefore it is proposed that any initial regulations created by these provisions must be subject to an affirmative resolution by the Scottish Parliament. Subsequent regulations should be by negative resolution.

Section 30 - Contributions to costs of resurfacing by undertaker

Relevant provisions: Section 30(1), 137A(1)(a) and (b), (3), (4) and (5)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 30(1) inserts section 137A to the 1991 Act and provides the Scottish Ministers with the power to make regulations to determine how much road works authorities should contribute when they have issued a resurfacing notice or how much another undertaking should contribute if they carry out work on the same stretch of road. The section also provides the Scottish Ministers with the power to make regulations for the resolution of prescribed disputes.

Reason for taking power
The section addresses detailed issues pertaining to the manner, contribution and apportionment of costs between an undertaking and a road works authority and indeed, if appropriate, between undertakers in resurfacing a road. These are detailed issues that are best addressed by regulations. These are new regulations, they will need to be detailed in respect of how costs will be apportioned and the manner of payment and will require extensive consultation prior to drafting.

The section also makes provision to establish a dispute resolution mechanism for prescribed disputes. The appeal and dispute resolution mechanism will necessarily be detailed and may involve the Scottish Road Works Commissioner. This matter is more appropriately dealt with by secondary rather than primary legislation however in recognition of the importance of the provisions and the consequences for undertakers in particular the first regulations under this section will be by affirmative resolution, subsequent regulations will be subject to a negative resolution of the Scottish Parliament.

Section 32- Fixed penalty offences:

Relevant provision: Section 32(1), 154A(3), 154A(4)
Power conferred on: The Scottish Ministers
Power exercisable by: Order by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament
Section 32(1) inserts section 154A to the 1991 Act and provides the Scottish Ministers with the power to modify by order Schedule 6A of the 1991 Act (as inserted by this section) and details that any order made is to be by statutory instrument.

Reason for taking power
It is appropriate that certain offences should be fixed penalty offences. This means that a person receiving a fixed penalty notice has an opportunity of discharging any liability to conviction by payment of a penalty. Any alteration to that schedule is of such importance that it should be subject to affirmative resolution by the Scottish Parliament.

Section 33 -Civil penalties for certain offences under 1991 Act
Relevant provision: Section 33, 154B(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament

Section 33 inserts section 154B to the 1991 Act and provides the Scottish Ministers with the power to make regulations in respect of the imposition and payment of charges for certain offences that will be subject to civil penalties.

Reason for taking power
The detail of the provision is such that it is more appropriate for secondary rather than primary legislation. The Bill sets out the framework and the issues that will be addressed by the secondary legislation: the offences subject to a penalty charge; payment of the charge; proof that an offence has taken place; level of charge; and appeals. The regulations will necessarily be detailed and may vary over time if and when various offences are decriminalised. The approach for decriminalised offences will be similar to the decriminalised regime in operation in respect of parking offences.

The use of an affirmative resolution recognises that there will be considerable public interest in decriminalising offences and permits Parliament to conduct an open scrutiny of all the issues.

Section 34 – Method of settlement of certain disputes under the 1991 Act
Relevant provision: Section 34, 117(7),120(6),121(5),133(2),143(3),155(3) and 157A and paragraphs 2(1) and 12(2) of Schedule 6
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 34 amends sections 117(7), 120(6), 121(5), 133(2), 143(3), 155(3) of, and paragraphs 2(1) and 12(2) of Schedule 6 to, the 1991 Act by substituting “by arbitration” with “in the prescribed manner” and inserts section 157A. The effect is to confer power on the Scottish Ministers to prescribe the manner in which certain disputes under the 1991 Act are to be settled.
Section 34 also inserts section 157A to the 1991 Act. This section provides that in prescribing the manner in which disputes are to be settled under any of the powers, the Scottish Ministers may provide for settlement by way of arbitration or the Commissioner.

Reason for taking power
Taking power to prescribe the manner of dispute resolution allows that matter to be done flexibly and in a way which is tailored to the particular circumstances of the type of dispute under consideration. Regulations will allow emendation to occur in the light of experience if it proves that certain matters, for example, are better addressed by the Scottish Road Works Commissioner rather than through arbitration, or vice versa. Section 158 of the 1991 Act specifies the method of arbitration.

Section 35 - Fixed penalty offences under the Roads (Scotland) Act 1984

Relevant provision: Section 35(1), 130A(1)(b)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 35(1) inserts section 130A(1)(b) to the Roads (Scotland) Act 1984 to provide powers for regulations to be made by the Scottish Ministers to create fixed penalties for certain offences as prescribed in schedules 8A and 8B of the Roads (Scotland) Act 1984 (or in this Bill schedules 6 and 7).

Reason for taking power
It is appropriate that certain offences should be fixed penalty offences. This means that a person receiving a fixed penalty notice has an opportunity of discharging any liability to conviction by payment of a penalty. By utilising regulations changes to the list of fixed penalty offences, if necessary, can be made expeditiously.

Section 36 – Civil penalties for certain offences under the Roads (Scotland) Act 1984

Relevant provision: Section 36, 130B(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations by statutory instrument
Parliamentary procedure: Negative resolution by the Scottish Parliament

Section 36 inserts section 130B(1) to the Roads (Scotland) Act 1984 to provide powers for regulations to be made by the Scottish Ministers in respect of the imposition and payment of charges for certain offences that will be subject to civil penalties.

Reason for taking power
The detail of the provision is such that it is more appropriate for secondary rather than primary legislation. The Bill sets out the framework and the issues that will be addressed by the secondary legislation: the offences subject to a penalty charge; payment of the charge; proof that an offence has taken place; level of charge; and appeals. The regulations will necessarily be detailed and may vary over time if and when various offences are decriminalised. The Scottish Ministers do not believe that the issue will be contentious and therefore a negative resolution by the Scottish Parliament is appropriate.
Section 37 – National travel concession schemes
Relevant provision: Section 37(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by Scottish Parliament

Section 37 provides the Scottish Ministers with the power to make national concessionary schemes by order. The schemes may be new or may modify or revoke existing local authority concessionary schemes established under section 93 of the Transport Act 1985.

Reason for taking power
The powers for the Scottish Ministers to make concessionary travel schemes are discretionary. If the Scottish Ministers decide to use the powers to make national concessionary travel schemes then a range of issues in relation to the scheme will need to be set out in detail. These will include provisions in respect of the administration of the scheme, the reimbursement of operators, the rate of travel concession and to whom it will apply, the right of operators to participate, the right of the Scottish Ministers to require participation and provisions on appeal by operators about compulsory participation. These are all matters of operational detail which are appropriate to secondary legislation. However, the affirmative procedure ensures that the substance of the order is subject to parliamentary scrutiny and approval.

Relevant provision: Section 37(7)
Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by Statutory Instrument
Parliamentary procedure: Negative resolution by Scottish Parliament

Section 37(7) provides the Scottish Ministers with the power to define further or to expand, by order, the definition of eligible person and eligible service contained in the Bill.

Reason for taking power
The Scottish Ministers believe that it is appropriate to further define eligibility for concessionary travel by means of secondary legislation. This includes provision of a definition of disability for the purposes of concessionary travel, provision to make additional classes of person eligible for concessions and provision to specify the types of service on which concessions are offered. These are matters of operational detail which, in the case of local authority travel concession schemes, are either specified in secondary legislation subject to negative resolution or left to the discretion of local authorities themselves. Therefore, the Scottish Ministers believe that orders made under this section should be subject to negative procedure.

Section 43 – Minor amendments of Transport (Scotland) Act 2001
Relevant provision: Section 43(4)(b)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution by Scottish Parliament
Section 43(4) inserts section 64(1A) and (1B) into section 64 of the Transport (Scotland) Act 2001 to provide the Scottish Ministers with powers to make regulations in respect of the appointment of persons to determine disputes and appeals and the payment arrangements in respect of the expenditure incurred in consequence of the appointment.

Reason for taking power
The detailed arrangements lend themselves to secondary legislation rather than primary legislation. The regulations will set out the appointment process of the persons to determine disputes and hear and determine appeals as well as the arrangements by which charging authorities will make payment for the expenditure incurred by those persons appointed to determine disputes and those persons appointed to hear and determine appeals.

Section 46 – Short title and commencement
Relevant provision: Section 46(2)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: No parliamentary procedure

Section 46 provides for the short title and commencement arrangements for the Bill.

Reason for taking power
Section 46(2) provides for the Scottish Ministers to determine when the provisions of the Bill are to come into force on a specified date. This decision is due to a need to stage or control commencement. This order making power is required for commencement of the Bill. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation. Whilst the order is not subject to any parliamentary procedure as such, the Subordinate Legislation Committee will have the opportunity to consider the instrument in terms of its remit.

Schedule 5 – Schedule 6B to the New Roads and Street Works Act 1991
Relevant provision: Paragraphs 2, 4(1), 5(2), 11 and 12
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution by Scottish Parliament

Paragraph 2 provides the Scottish Ministers with the power to make regulations specifying the time limits within which the road works authority has to apply a fixed penalty notice for an offence.

Paragraph 4(1) provides the Scottish Ministers with the power to make regulations specifying the amount of the penalty for a fixed penalty offence.

Paragraph 5(2) provides the Scottish Ministers with the power to make regulations specifying the discounted amount of the penalty for a fixed penalty offence.

Paragraph 11(2) provides the Scottish Ministers with power to make regulations specifying the amounts of monies that should be retained by road works authorities to meet the administrative costs associated with managing fixed penalty notices.
Paragraph 11(3) provides the Scottish Ministers with the power to make regulations specifying the accounting process to be used by road works authorities in respect of fixed penalties.

Paragraph 12 provides the Scottish Ministers with the power to make regulations specifying circumstances when fixed penalties may not be issued, the ability to vary the period within which the penalty should be paid and the method or methods by which penalties should be paid.

Reason for taking power
The Scottish Ministers wish to consult with the Scottish Road Works Commissioner, road work authorities and undertakers prior to the creation of the regulations to ensure that the regulations are workable and achieve the desired output. The detail that is required to address particular circumstances and define procedures in respect of the accounting provisions lends itself much more to secondary legislation.

Schedule 7 – Schedule 8B to the Roads (Scotland) Act 1984
Relevant provision: Paragraphs 2, 4(1), 5(2), 11 and 12
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution by Scottish Parliament

These provisions duplicate those made for the New Roads and Street Works Act 1991 and relate then to the Roads (Scotland) Act 1984.

Reason for taking power
The reasoning for these powers is the same as that explained above in respect of schedule 5.

The Scottish Executive
18 May 2005