TRANSPORT AND WORKS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Transport and Works (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE AND SCOPE OF THE BILL

2. The Bill takes forward the Scottish Ministers’ commitment of 4 May 2005, to the Scottish Parliament, to place the Scottish Ministers at the heart of an order-making process and thereby avoid the need for Private Bills for transport–related developments.

3. The Bill also introduces, in response to the wishes of the Parliamentary authorities, provisions to replace special Parliamentary procedure for the determination of unresolved objections for transport-related developments. Aligning with the broad thrust of the Scottish Parliament for a more proportionate approach to the determination and authorisation of transport-related matters, the Bill makes the Scottish Ministers rather than the Scottish Parliament, in such circumstances, the appropriate decision-making body.

4. The Bill is in three parts:

   • Part 1: Orders authorising works etc. (which contains 23 sections and 1 schedule),
   • Part 2: Miscellaneous amendments (containing 4 sections) and
   • Part 3: General (containing 3 sections and 2 schedules).

5. The contents of the Bill are summarised below:

   • Part 1 makes provision to enable the Scottish Ministers, under an order-making power, to authorise transport developments and provide details of the procedure for the making of orders.
   • Part 2 makes modifications to legislation relating to road and harbour developments. It also establishes revised procedures for the making of Pilotage orders. A
This document relates to the Transport and Works (Scotland) Bill (SP Bill 66) as introduced in the Scottish Parliament on 26 June 2006

modification is made to existing legislation to enable the Scottish Ministers to make grants and loans for an additional purpose.

- Part 3 describes how secondary legislation (orders, rules and regulations) will be made. It also deals with modifications and repeals predominantly in respect of special Parliamentary procedure, and with commencement and the short title of the Act.

DELEGATED POWERS

6. The Bill confers powers on the Scottish Ministers to make orders, rules and regulations in relation to a range of matters dealt with in the Bill. 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 character require a flexible approach and thus are more appropriate to be dealt with by subordinate legislation.

7. 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 orders, rules and regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. Affirmative procedure is used for authorising orders relating to developments of national significance (the position for other orders authorising a transport related development is discussed under section 1). Affirmative procedure is also generally applied where the order, rule or regulation making powers allow for the modification of primary legislation or where there is significant interest. In certain circumstances, when for instance establishing the initial regulations or rules, affirmative procedure is used only in the first instance with negative resolution applied for any subsequent modifications. This approach permits appropriate Parliamentary scrutiny of the initial framework for regulations and rules whilst permitting a proportionate response for any subsequent changes to the rules in the light of operational practice. Not all instruments have Parliamentary procedure applied to them – for example, commencement orders will not require procedure in the Scottish Parliament. Some 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.

8. The Bill provides the Scottish Ministers with powers to make incidental, supplemental, consequential, transitional, transitory or saving provisions. That 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. It can only be used to make provisions which are incidental, supplemental, consequential, transitional, transitory or saving in relation to the order, rules or regulations being made. Accordingly it can only arise in the context of the exercise of powers under the Bill and so its exercise will be for the purposes of or in consequence of, those powers in the Bill.

9. It should be noted that a negative procedure that might otherwise apply below will become affirmative in most cases where an instrument amends primary legislation. The exceptions are orders under section 1(1), 12(18) or 29(3). In light of the terms of section 27(6) of the Bill, each of these powers could be used to amend primary legislation. However, it is not
envisaged that the powers under sections 12(18) and 29(3) will ever be used to amend primary legislation to any significant effect and amendments to such legislation under section 1(1) orders are likely to be specific to the transport project involved rather than of general application.

10. All draft rules, regulations and relevant orders will be subject to consultation prior to their making.

11. In addition to the powers outlined below the Bill also contains a number of direction making powers. It is considered that these are of an executive rather than legislative nature and as such they are not detailed in the memorandum.

THE BILL

Section 1: Orders as to transport systems and inland waterways

Relevant provision: Section 1
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Depending on circumstance, either affirmative resolution of the Scottish Parliament or no Parliamentary procedure

12. Section 1 provides the Scottish Ministers with power to make an order relating to the construction or operation of a specified transport system or an inland waterway. Section 2 (with schedule 1) provides a non-exhaustive list of matters which can be covered in such an order. Paragraphs 12 and 13 of schedule 1 provide for criminal offences but any such offence will be subject to the limitations in section 27(9).

Reason for taking power

13. The purpose of the power is to fulfil the commitment given to the Scottish Parliament to place the Scottish Ministers at the heart of an order-making process for the authorisation of any future transport system. Without taking the power there would be no means of giving effect to the stated aim of the Scottish Parliament. Each application for authority to construct or operate a specified transport system will have particularities that are not common to other such similar systems and therefore the order has to be specific to the circumstance. The section has to be read with section 2 (which, with schedule 1, describes details of what the order may contain), section 4 (the form and manner of an application for an order), section 6 (the means by which the Scottish Ministers can instigate and promote orders), section 11 (which details the process of making, or not making, orders) and section 13 (which details the relationship to the National Planning Framework and the authorisation process for orders that relate to developments of national significance and those which do not).

14. An affirmative procedure will be used for developments of national significance, and this procedure ensures that the substance of the order will be subject to Parliamentary scrutiny and approval. For developments that are not of national significance no Parliamentary procedure is proposed, which ensures conformity of approach with other non-national transport developments such as roads. There is, however, a discretion for the Scottish Ministers to seek an affirmative procedure for orders that are not designated within the National Planning Framework as being of
This document relates to the Transport and Works (Scotland) Bill (SP Bill 66) as introduced in the Scottish Parliament on 26 June 2006

national significance and the Scottish Ministers may use such a procedure, for example, in respect of a novel guided transport system.

Section 4: Applications

Relevant provision: Section 4(2)

Power conferred on: The Scottish Ministers

Power exercisable by: Rules made by Statutory Instrument

Parliamentary procedure: Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter (unless amending an Act, in which case, affirmative)

15. Section 4(2) provides the Scottish Ministers with power to make rules relating to the form of an application, the documentation and information to be submitted in support of the application, the notice and publication arrangements and the conduct, scope and manner of the pre-application consultation. This power extends, by virtue of section 6(4), to allow the Scottish Ministers to make such rules as they consider appropriate in relation to orders that they propose to make under section 6 and to allow prescription of relevant matters under paragraphs (b) and (c) of section 6(3).

16. Subsection (4) provides that the rules under the section can require compliance with directions in relation to matters concerning relevant authorities providing information for a project and pre-application consultation. Subsection (7) provides a non-exhaustive list of those bodies who may be required to provide information.

17. The power for the Scottish Ministers to set fees for the making of applications is contained within subsection (6).

Reason for taking power

18. The Scottish Ministers want to be assured that the rules will ensure the production of all necessary and pertinent information in support of an application. The rules will also set out the conduct and manner of consultation by promoters as well as any fees charged for the making of an application. These are important matters that will have a bearing on the effectiveness of the process and will therefore need to be kept under constant review: the application of rules ensures sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of operational experience without the need for primary legislation. Rules also allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation of the Bill.

19. The details of the information required in support of an application and the manner by which that information is compiled and transmitted are such that the matters ought to be addressed by rules rather than primary legislation. The rules will be subject to affirmative resolution by the Scottish Parliament in the first instance and negative resolution thereafter.
Section 8: Objections

Relevant provision: Section 8(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Rules made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter (unless amending an Act, in which case, affirmative)

20. Section 8(1) provides the Scottish Ministers with power to make rules in relation to objections made in respect of an application for an order (subsection (1)(a)(i)) or when they are making an order without an application being made to them (subsection (1)(a)(ii)).

Reason for taking power

21. The Scottish Ministers are obliged to take into account objections, before deciding whether or not to make an order. Therefore it is important that the process of making objections and representations is clearly specified and as straightforward as possible so as to encourage those who wish to, to make a valid objection, while ensuring that the objection is meaningful and useful. It is also necessary to specify a time period in which objections can be made. These matters are best addressed in secondary legislation so that any changes to, for instance, the manner of, or the time period within which to make objections can be made to reflect operational experience without having recourse to primary legislation. The rules will be subject to affirmative resolution by the Scottish Parliament in the first instance and negative resolution thereafter.

Section 10: Procedure at inquiries and hearings

Relevant provision: Section 10(1)
Power conferred on: The Scottish Ministers
Power exercisable by: Rules made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter (unless amending an Act, in which case, affirmative)

22. This section provides the Scottish Ministers with power to make rules to regulate the proceedings of an examination.

23. Subsections (1) and (2) describe the matters which the rules may regulate. Subsections (3) and (4) ensure that for consistency of approach particular matters which apply under the Local Government (Scotland) Act 1973 in respect of an inquiry or hearing will apply in similar circumstances to an examination carried out under the provisions of the Bill. Subsection (5) requires the Council on Tribunals to be consulted on the making of any rules under this section.

Reason for taking power

24. Though there are existing procedures for the conduct of an examination in relation to a planning appeal, a roads inquiry and a public local inquiry there are no rules that specifically
relate to the conduct of an examination of matters relating to developments that are to be authorised under this proposed process. The intention is to establish a clear set of rules that address these specific needs ensuring that there is an appropriate level of flexibility afforded to reporters in the conduct of the examination. These are detailed matters that will require extensive consultation with practitioners, particularly the Council on Tribunals, and are therefore more suited to being set out in subordinate legislation rather than in the Bill itself. The rules will be subject to affirmative resolution by the Scottish Parliament in the first instance and negative resolution thereafter.

Section 12: Publicity for making or refusal of order

Relevant provision: Section 12(18)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter

25. This section provides the Scottish Ministers with power, by order, to designate that certain persons should receive a notice informing them of the determination of the Scottish Ministers in respect of the making or not making of an order authorising a development.

Reason for taking power

26. The intention is to ensure that all appropriate parties are informed of the determination of the Scottish Ministers. Under the Bill the applicant and any relevant objectors will receive a notice. A notice will also be placed in the Edinburgh Gazette and a local newspaper. The power provides the flexibility to inform other interested parties in particular circumstances (for example, other persons who may have appeared or been represented at an inquiry or hearing but who were not statutory objectors). The order will be subject to affirmative resolution by the Scottish Parliament in the first instance and negative resolution thereafter.

Section 14: Consents etc. under other enactment

Relevant provision: Section 14(3)
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter (unless amending an Act, in which case, affirmative)

27. This section enables other consents, permissions or licences relevant to applications or proposals for orders under section 1 to be appropriately dealt with as a result of the new authorisation procedure. Subsection (3) provides for the Scottish Ministers to make regulations in relation to appropriate consents which would not otherwise be dealt with through an order under section 1. Subsections (4) and (5) set out what the Scottish Ministers may cover in the regulations.
Reason for taking power

28. This power will, for example, avoid duplication of procedures under different consent regimes by allowing other matters to be dispensed with, where appropriate, in view of the authorisation by an order under section 1 or for the matter to be deemed to be granted as part of the process, or for procedures to be assimilated. The intention is that any specific public scrutiny regarding pertinent permissions, licences or consents can take place as part of the general scrutiny by the independent reporter of the application as a whole rather than separately (e.g. through the local authority). The section provides that the Scottish Ministers may make regulations which specify particular permissions, licences and consents which may be dealt with through the new authorisation process, and/or which may be granted through a particular procedure that assimilates otherwise disparate procedures.

29. The Scottish Ministers will wish to consult with the persons who are responsible for the granting of permissions, licences and consents as to the detail of the regulations and to have sufficient flexibility to make changes to the regulations, in the light of operational experience, to extend or contract the permissions, licences and consents that may be covered. For these reasons, these matters are more appropriately set out in subordinate legislation. The expectation is that the initial regulations will be comprehensive, setting and establishing the framework for any subsequent modifications and therefore it is proposed that the regulations will be subject to affirmative resolution by the Scottish Parliament in the first instance and negative resolution thereafter.

Section 18: Access to land

Relevant provision: Section 18(1)(a)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter (unless amending an Act, in which case, affirmative)

30. Subsection (1)(a) permits the Scottish Ministers to set up a regime by order to authorise prospective applicants to access land for the purposes of informing an application for an order.

31. There are a number of matters described in a non-exhaustive list at subsection (2)(a) that the Scottish Ministers may cover in an order providing the access regime. These matters might include establishing criteria as to whether the prospective applicant is a fit and proper person that is acting in good faith and has a genuine reason for wishing to seek access to the land; the manner and notification of application; and permitting the person who wishes to enter the land and the person whose land may be entered an opportunity to make representations.

32. The Scottish Ministers may consider under subsection (2)(a)(vi) attaching conditions and limitations to any authorisation. That is so as to ensure that the person entering land conducts their business in a safe and secure manner and that entry is planned in a manner that takes full cognisance of the interests that prevail on that land, for example, on agricultural land cropping and lambing times would need to be factored into the times and duration of entry, similarly entry to land on which rail or other operations are conducted might mean that particular conditions of
entry will apply. The Scottish Ministers may make provision within the order for statutory undertakers with apparatus in land who are considered worthy of special protection against the prospective promoter taking access to land in which they have apparatus.

33. Under subsection (2)(a)(x) if the person whose land is affected refuses entry a prospective promoter may apply to a sheriff for a warrant to enter the land. Under subsection 2(a)(xi) a criminal offence may also be created for wilfully obstructing entry. Such an offence is subject to the limitations in section 27(9).

Reason for taking power

34. The order under this power will provide the detail to what is a complex matter addressing the operational needs of the promoter and the interests of the land owner. It is not considered appropriate for primary legislation to contain such detail. It is for those reasons that that an affirmative procedure in the first instance and a negative thereafter will apply.

<table>
<thead>
<tr>
<th>Relevant provision:</th>
<th>Section 18(1)(b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power conferred on:</td>
<td>The Scottish Ministers</td>
</tr>
<tr>
<td>Power exercisable by:</td>
<td>Order made by Statutory Instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative resolution by the Scottish Parliament in the first instance, negative thereafter (unless amending an Act, in which case, affirmative)</td>
</tr>
</tbody>
</table>

35. Subsection (1)(b) permits also the Scottish Ministers by order to enter land and subsection (2)(b) describes in a non-exhaustive list matters that the Scottish Ministers may consider in connection with, or contain within, an order providing access.

Reason for taking power

36. A similar consideration to that given previously for section 18(1)(a) applies.

Section 27: Further provision as regards rules, regulations and orders

<table>
<thead>
<tr>
<th>Relevant provision:</th>
<th>Section 27(7)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power conferred on:</td>
<td>The Scottish Ministers</td>
</tr>
<tr>
<td>Power exercisable by:</td>
<td>Order made by Statutory Instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution by the Scottish Parliament (unless amending an Act, in which case, affirmative)</td>
</tr>
</tbody>
</table>

37. Section 27(7) gives the Scottish Ministers powers to make any incidental, supplementary, consequential, transitory, transitional or saving provision required in connexion with the coming into force of any provision of the Bill. This includes provisions amending or repealing any other enactment. An order under this section is subject to negative resolution except where it adds to, replaces or omits any part of an Act, in which case the order is subject to affirmative procedure. It is considered appropriate that where the order changes primary legislation it should be subject to formal Parliamentary approval.
Reason for taking power

38. 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. The transitional powers will be required when moving from one regime (such as an application for a light railway order ongoing when Part 1 is commenced) to the new regime under Part 1. It is also 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 Scottish Ministers also consider that it will be useful to have the power to make consequential modifications to other legislation to reflect the creation of the new regime to authorise transport developments by the order power.

Section 29 – Short title and commencement

Relevant provision: Section 29(3)
Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: No Parliamentary procedure

39. Section 29 provides for the short title and commencement arrangements for the Bill.

Reason for taking power

40. Section 29(3) provides for the Scottish Ministers to determine when the provisions of the Bill are to come into force. This power recognises the need to stage or control commencement. 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. The power in section 27(6)(b) to include provision which is of a transitional nature, etc. applies to commencement orders under section 29(3) but, if such provision is of any substance, Scottish Ministers would envisage it being contained within a separate order under section 27(7) (which would be subject to procedure before the Parliament).
TRANSPORT AND WORKS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM