

# **TRANSPORT (SCOTLAND) BILL**

---

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Transport (Scotland) Bill, introduced in the Scottish Parliament on 8 June 2018.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 33–FM);
  - a Policy Memorandum (SP Bill 33–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 33—LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.
5. It is worth noting that the freestanding provisions of the Bill are subject to the Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA) which, among other things, provides default definitions for certain expressions (such as 'person') and default rules for common situations (such as when something which is sent by post is deemed to arrive).
6. Where the Bill is amending Acts of the Scottish Parliament passed between the start of devolution in 1999 and 4 June 2010 (when Part 1 of ILRA came into force), the inserted (and amended) text is subject to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999.<sup>1</sup> Where the Bill is amending Acts passed by the UK Parliament, the inserted (and amended) text is subject to the Interpretation Act 1978. These Acts are broadly similar to ILRA, but there are differences which were highlighted in the explanatory notes which accompanied ILRA.

---

<sup>1</sup> SI 1999/1379

## **THE BILL**

7. The Bill is divided into six Parts. They are:
- Part 1: Low emission zones;
  - Part 2: Bus services;
  - Part 3: Ticketing arrangements and schemes;
  - Part 4: Pavement parking and double parking;
  - Part 5: Road works;
  - Part 6: Miscellaneous and general.

## **PART 1 – LOW EMISSION ZONES**

### **Overview**

8. Part 1 of the Bill introduces the concept of low emission zones, which are set up under low emission zone schemes. A low emission zone scheme is a scheme under which individuals driving vehicles which fail to meet specified emission standards will be prohibited from driving those vehicles in contravention of the terms of the scheme within a designated geographical area. Where a person breaches this rule, a penalty charge will be payable unless the vehicle is exempt. Exemptions will be set out in regulations but are likely to include, for example, emergency service vehicles. The scheme itself may also make provision for the local authority operating the scheme to grant exemptions in certain circumstances.

9. It is for local authorities to put in place low emission zone schemes where they consider it appropriate to do so. Typically, the primary goal of a low emission zone scheme is to improve air quality. Local authorities will also be able to work with neighbouring local authorities to create a combined scheme if they wish. A local authority which wishes to put in place a low emission zone scheme will need to carry out local consultation and obtain Ministerial approval before doing so.

10. The Bill also makes provision about a number of other matters relating to the operation of low emission zone schemes: for example, the installation of signs and cameras, the potential creation of offences in connection with the enforcement of schemes, accounting requirements, and the ability to review the effectiveness of a scheme. In addition, it provides for a grace period in relation to a zone so that those wishing to drive within it have an opportunity to upgrade their vehicle to a less polluting model (either by replacing it or having it modified) before penalty charges begin to be applied.

### **Chapter 1 – Effect of a low emission zone scheme**

11. Section 1 of the Bill restricts the driving of vehicles within low emission zones. Where a low emission zone scheme is in place, its terms must be complied with; subject to the terms of the scheme (which will make provision about matters such as hours of operation), only vehicles which are at least at the level of the specified emission standard, or which are covered by an

exemption, may be driven on roads within the zone. Where anyone drives on a road within a zone in contravention of subsection (1), a penalty charge will become payable.

12. The specified emission standard will be set by the Scottish Ministers by regulations under section 1(4)(a). It is likely that this will 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). Section 72 is also relevant here as it allows different provision to be made for different purposes. Accordingly, a different standard could be set for diesel vehicles compared to petrol vehicles.

13. Exemptions will be set by the Scottish Ministers by regulations under section 1(4)(b). This would allow Ministers to provide, for example, that emergency service vehicles are to be exempt.<sup>2</sup> The local authority which operates the low emission scheme will also be able to grant exemptions of a time-limited nature under section 12 if the scheme makes provision to this effect. This would allow for exemptions to be granted in cases where it is not appropriate for the vehicle to benefit from a blanket exemption but there are particular circumstances in which it ought to be exempt for a limited period.

14. The Scottish Ministers will also be able to specify by regulations the amount of the penalty charge (section 1(4)(c)). Again, this power is subject to section 72, which provides that different provision may be made for different purposes, so this power could be exercised so as to specify different levels of penalty charge depending on, for example, the class of vehicle, the emission standard of the non-compliant vehicle, or whether there are repeated contraventions. In addition, the power includes the ability to make provision for discounts for early payment, or surcharges for non-payment.

15. Section 1(3) deals with the possibility of a non-compliant vehicle passing a number of different enforcement cameras on one journey through a low emission zone. This provides that these infractions are to be dealt with together. Provided that the contraventions occur on the same day, in the same zone, using the same vehicle, and provided that the person who is liable to pay the penalty in respect of the vehicle is also the same in respect of the infractions, only one penalty per day will be payable.

16. In most instances, the person who is liable to pay the penalty will be the vehicle’s registered keeper (see section 2(4)). However, Ministers may by regulations provide for it to be payable by someone else in specified circumstances: for example, by stipulating that a penalty incurred in respect of a hire car (including a ‘car club’ car) is to be paid by the person who hired the car. If such provision is made, the final limb of the single penalty rule in section 1(3) would ensure that a subsequent hire car or car club driver does not benefit from a penalty paid by someone else who hired the same car earlier in the day.

17. The restriction in section 1 relates to driving on a road within a zone. Accordingly, a vehicle which is parked would not be issued with a penalty. In addition, section 2 requires a record to be produced from an approved device (such as automatic number-plate recognition

---

<sup>2</sup> For examples of possible exemptions, see the “Building Scotland’s Low Emission Zones” consultation at [https://consult.gov.scot/transport-scotland/building-scotland-low-emission-zones/user\\_uploads/low-emission-zones-consultation-2.pdf](https://consult.gov.scot/transport-scotland/building-scotland-low-emission-zones/user_uploads/low-emission-zones-consultation-2.pdf).

cameras) and a record of the vehicle's emission standard issued by the Secretary of State (in the guise of the DVLA). Accordingly, a penalty could not be issued to a parked car by an attendant on the basis of a deduction that a parked car within the zone which breaches the emission standard must have been driven within the zone prior to parking. Rather, penalties will need to be sent out by post on the basis of camera records in a similar fashion to speeding tickets.

18. In addition, as the rule is about driving on a road within a zone, movement of vehicles which occurs within a zone but not on a road (for example, moving from one space within a car park to another one) would not incur a penalty. Section 1 should be read in conjunction with, in particular, sections 9(1) and (3) which relate to the requirement for a zone to specify the roads forming part of it. There is a prohibition on the inclusion of what are known as "special roads" (usually motorways) or private roads.

19. Section 2 also provides that the record obtained from the DVLA as to the vehicle's emission standard is to be treated as determinative. This means that there will not be disputes between different experts as to what a car's emission standard is. Instead, the database being compiled by the DVLA will be authoritative.

20. Penalty charges are to be paid, in accordance with section 2(4), to the local authority which issued the penalty charge notice. What the local authority then does with those proceeds is subject to sections 9(2) and 21. Essentially, joint schemes must provide for the proceeds to be shared between the local authorities concerned. Proceeds must also be ring-fenced for specified purposes.

21. Section 3 allows the Scottish Ministers to make further provision about the enforcement of low emission zone schemes to ensure that they operate effectively. In particular, this power can be used to set out the rules which will apply to penalty charge notices (such as the form they take, the time allowed for payment, what happens when a person requests an internal review of a ticket or appeals it to an external adjudicator, etc.).

22. This section also allows offences to be created in relation to enforcement. The maximum penalty that any such offences may provide for is level 5 on the standard scale (currently £5,000). In addition, a number of existing offences may be relevant to the enforcement of low emission zone schemes. For example, under sections 42 and 43 of the Vehicle Excise and Registration Act 1994, it is an offence to fail to affix a registration plate, to obscure it, or to render it not easily distinguishable. Under section 44 of that Act, it is an offence to forge a registration document or mark, or to fraudulently alter, use, lend or allow the use of it. Vandalism of enforcement cameras would also already constitute an offence.

## **Chapter 2 – Creation and modification of a low emission zone scheme**

### Process

23. Sections 4 to 8 deal with the process involved in making, amending or revoking a low emission zone scheme.

24. Under section 4, a low emission zone scheme can relate to all or just part of a local authority's area. Two or more local authorities can also join together to create a joint scheme. Where a scheme is made jointly, the local authorities concerned must act jointly in relation to it in all respects. This would not preclude them from agreeing upon a division of labour in terms of how the scheme is run, but they would need to reach agreement about, for example, any proposal to amend or revoke the scheme. In the unlikely event that they were to reach a stalemate, this could be resolved by means of the procedure set out in sections 24 and 25.

25. Section 5 provides that the making, amendment or revocation of a low emission zone is ineffective unless it has first been approved by the Scottish Ministers. Ministers are also able to make adjustments to a proposed scheme when granting their approval rather than only being able to approve or reject it in its entirety. It will then be for the local authority to decide whether to proceed with making, amending or revoking the scheme in line with the approval that they receive. There is also provision allowing consultation to take place as part of the approval process.

26. However, before a local authority takes the step of submitting a proposal to the Scottish Ministers, section 6 requires them to consult with a number of specified bodies or representatives of particular interest groups. A local authority may also consult anyone else whom it considers appropriate to consult, and the Scottish Ministers may also extend the mandatory consultees by way of regulations.

27. Section 7 allows for the holding of local inquiries into proposals to make, amend or revoke a low emission zone scheme. Both the local authority concerned and the Scottish Ministers may organise an inquiry where they consider it appropriate to do so.

28. Where a local inquiry is held, sections 210(3) to (8) of the Local Government (Scotland) Act 1973 will apply to it. These provisions relate to the duty of the person holding the inquiry to give notice of when and where it will be held, the person's ability to compel the giving of evidence and the person's ability to allow the payment of expenses.

29. The Scottish Ministers have the power, under section 8, to make regulations setting out additional rules about the procedures to be followed in relation to the making, amendment or revocation of low emission zone schemes. This might include, for example, setting down rules about how consultation is to take place, and how decisions to make, alter or revoke a scheme must be publicised. The form of the scheme itself may also be prescribed.

### Content

30. Sections 9 to 14 relate to the content of a low emission zone scheme.

31. Section 9 sets out what a low emission zone scheme must contain. It must specify the zone to which it relates. This must be specified as both a geographical area and by reference to the roads which comprise part of the zone. While a penalty notice is only payable in respect of driving on the roads within the zone, it is important that the zone itself includes more than just the roads, as certain provisions (such as section 10) depend on whether a person lives within the zone. The specification of roads is subject to section 9(3) which provides that a special road or a

private road cannot be included within the zone. Special roads are usually motorways but also include, for example, the Edinburgh bypass. However, a trunk road for which the Scottish Ministers are the traffic authority may be included as part of a zone (provided Scottish Ministers grant their approval to the proposed scheme).

32. A low emission zone scheme must also specify the date on which it comes into effect (which need not be the same day as the day the scheme is made). The objectives of the scheme must be specified too and, under subsection (4), a mandatory objective is contributing towards meeting air quality objectives. The scheme must also make provision about the grace periods which will apply under it (as to which, see sections 10 and 11). Where it is a scheme made jointly between more than one local authority, it must also make provision about the apportionment of the proceeds of penalty charges.

33. Much as regulations can do, schemes may make different provision for different purposes or areas. This would allow, for example, the scheme to be brought into force in relation to particular types of vehicle on a different date.

34. Sections 10 and 11 deal with grace periods. A grace period is a period during which breach of section 1(1) will not result in a penalty charge becoming payable.

35. A grace period will last for a different length of time depending on the individual concerned: a longer period is allowed for residents of the zone. To be eligible for the residents' grace period, the vehicle in question must be registered to an individual (not a company, etc.) and the address which appears on the DVLA's records for the vehicle must be a residential property (not business premises) within the zone.

36. For non-residents, the grace period must be between one and four years, running from the date of the scheme coming into effect. The grace period for residents will continue to run at the end of the standard grace period for a further period of between one and two years.

37. Section 11 deals with the more unusual cases which might arise in relation to grace periods. Ordinarily, a scheme will be set up from scratch in an area which has not had a zone before, and the position will be straightforward. However, there may be times where a road has already been the subject of a low emission zone scheme. For example, two neighbouring local authorities might have their own schemes but decide to revoke those individual schemes and replace them with one combined scheme. Alternatively, a road may have recently formed part of a zone, only to have been amended out of it and then subsequently included in a different zone soon after. In each of those cases, the road has already benefitted from a grace period in the recent past. Section 11(1) therefore provides for such cases.

38. The section is framed so as to cover cases where the previously-zoned roads are no longer zoned but were zoned in the recent past. It also covers cases where, at the point of the proposed scheme being put forward, the roads continue to form part of a zone – but with the expectation being that they will soon cease to form part of that particular zone. This would most likely apply in the example of two local authorities replacing individual zones with one joint one, as it is likely that the applications for revocation and for the new zone would be proceeding in tandem so as to avoid any gap in operation.

39. Under section 11(1), a recently-zoned road will not be subject to the normal grace period rules: it has already had the benefit of those. For these purposes, “recently-zoned” means that the road formed part of a zone within 12 months of the proposed new zone coming into effect.

40. A recently-zoned road which had already exhausted its grace period and had become chargeable will become subject to the penalty regime immediately. This rule is applied separately in relation to residents and non-residents, so the determining factor is whether it was chargeable for that category of people.

41. If the grace period had been only partly used up for a recently-zoned road, the maximum amount of the grace period which may now be allocated in respect of it is to be reduced accordingly. These rules apply to residents’ grace periods as they apply to standard grace periods.

42. There may also be times where a scheme is amended so as to include new roads. In such cases, a grace period is needed for the newly adopted roads which have not been in a zone in the recent past. That period will need to run from the date those roads were included in the scheme though, rather than the date on which the scheme came into effect. Section 11(6) provides for such cases. The roads already within the zone prior to its amendment continue to be dealt with under section 10.

43. Section 12 allows a local authority to make provision in a low emission zone scheme for the granting or renewing of time-limited exemptions for particular vehicles or types of vehicle. Where a local authority wishes to take advantage of the ability to grant such exemptions, it must specify in its scheme how it intends to operate the granting of such exemptions. This involves, at minimum, specifying the broad circumstances in which it must, may, or must not grant or renew exemptions, as well as the maximum period for which such exemptions will be granted (which cannot exceed one year). While the broad proposals as to the granting of time-limited exemptions must be set out in the scheme, the precise detail of the exemption will be set out by the local authority when an exemption is granted in respect of a particular vehicle.

44. This power would allow, for example, a local authority to put in place conditions in a scheme which allowed it to grant a time-limited exemption to someone who requires their vehicle to be able to work a night-shift when public transport is not available but who has a low income and cannot afford to replace or improve their vehicle yet. The granting of a time-limited exemption may be appropriate in such a situation as it is not that the person will never be in a position to afford to upgrade to a less polluting vehicle; simply that it is not possible immediately. It would also allow for the possibility of the person’s circumstances suddenly changing, as conditions could be attached as to when the right granted under the time-limited exemption must be relinquished.

45. Section 13 specifies that the default position is that a low emission zone operates 24 hours a day, every day of the year – from the moment of coming into effect until the moment of its revocation. However, a local authority may propose different rules as to the hours of operation and, if this included within the proposed scheme, is approved and is then incorporated in the resulting scheme, those will supplant the default position. For example, a scheme might specify that it will not operate during certain months due to a recurring event which takes place

then. It may not be thought necessary for schemes to include provision along those lines though, as section 18 does offer a separate mechanism allowing a scheme to be suspended for events of national importance.

46. Section 14 allows the Scottish Ministers to make further provision, by regulations, about information that may or must be included in a low emission zone scheme.

### **Chapter 3 – Operation of a low emission zone scheme**

#### *Equipment and signs*

47. Sections 15 to 17 deal with the infrastructure necessary within a zone.

48. Section 15 is about the use of equipment: primarily approved devices but also other structures (such as posts on which to mount the devices). Where a low emission zone scheme exists, the traffic authority for the roads concerned may install devices and construct other structures for use in connection with the scheme. This includes the ability to maintain these items once they are in place, and the ability to remove them too. The traffic authority may also subcontract and authorise someone else to do this on its behalf. The equipment and buildings concerned must be on a road, but the definition of “road” is such that this includes the verges too.

49. This power is granted to the traffic authority: the traffic authority for most roads within a zone will be the local authority operating the zone. However, the traffic authority for trunk roads is the Scottish Ministers. Accordingly, if any trunk roads are included within a zone, it will be Scottish Ministers who are entitled to install any necessary equipment in connection with those roads.

50. Section 16 allows the Scottish Ministers to make regulations about the approval of devices used in connection with low emission zone schemes. This would allow, for example, rules to be made about the equipment that can be used or the process a local authority has to go through to satisfy itself about the suitability of the equipment before using it. The types of devices approved under this power could include automatic number-plate recognition cameras. If regulations make rules about a particular type of device then a device of that type cannot be used unless it has been approved under, or in accordance with a process set out in, the regulations.

51. Section 17 relates to traffic signs but has a number of features in common with section 15. However, it places a duty on the traffic authority to maintain signs, rather than simply the ability to do so. It does not deal with the placing of the signs though. The authority for the placing of signs will be found in section 65(1) of the Road Traffic Regulation Act 1984.

52. In addition, section 64 of the Road Traffic Regulation Act 1984 requires traffic signs of a type specified by the relevant authority to be of the size, colour and type prescribed by regulations. Under changes made by section 41 of the Scotland Act 2016, the relevant authority is, in relation to a function within devolved competence, the Scottish Ministers. Accordingly, it will be possible to lay down requirements as to the detail of the signs used in connection with low emission zone schemes by using the existing power in relation to traffic signs.

*Temporary suspension for events*

53. Section 18 allows a local authority to temporarily suspend a low emission zone scheme to accommodate an event, held in or near the zone, which it considers to be of national importance. It is for a local authority to decide both whether an event meets these criteria and also whether it wishes to exercise its power to suspend the zone in cases where it is open to it to do so. A local authority might, for example, choose to exercise this power in connection with an event such as the Commonwealth Games or the Ryder Cup being held in Scotland, or a festival which has become of national significance to Scotland, such as the Edinburgh festivals.

54. This power is in addition to the ability of the scheme itself (as made or amended) to set different hours of operation from the default position under section 13. So it would be open to a local authority which plays host to a recurring event of this nature to deal with it instead by seeking approval for a zone which, instead of operating 52 weeks a year, operates with a gap during the known period of the event. However, this power will allow a local authority to accommodate an event which is less predictable in its timing or location. It may also be relied upon by a local authority which does not wish to create a scheme with an automatic suspension in the period of operation built into it.

*Finances and reporting, etc.*

55. Section 19 provides that the Scottish Ministers may make grants to a person (which covers organisations as well as individuals) or a local authority. The purposes for which grants may be made are: to help with the cost of retrofitting vehicle exhaust systems in order to reduce their emissions, and to help with a local authority's costs in deciding whether to make a low emission zone scheme, making a scheme, or operating a scheme. Grants (including grants from Scottish Ministers to local authorities) can be unconditional or can be subject to specific conditions as to repayment.

56. Section 20 confirms that a local authority has power to incur expenditure in connection with low emission zone schemes, and that they may enter into arrangements such as sub-contracting in relation to matters such as the installation of cameras.

57. Under section 21, the proceeds of a low emission zone scheme may be applied by the local authority only for specified purposes. The first of these is facilitating the achievement of the scheme's objectives. This would cover things like the back-office administration costs of operating the scheme and implementing air quality mitigation measures. The other purpose for which the proceeds can be applied is the repayment of any conditional grant funding received from the Scottish Ministers under section 19. Under section 9(2), a scheme which is made by more than one local authority must set out in the scheme how the proceeds will be apportioned between or among them.

58. Section 22 allows the Scottish Ministers to make regulations about the accounts that local authorities must keep in connection with their functions in relation to low emission zone schemes.

59. Section 23 requires each local authority which is operating a low emission zone scheme to prepare and publish a report on the scheme, and to send a copy of it to the Scottish Ministers.

This must be done as soon as reasonably practicable after the end of the financial year (i.e. 31 March).

Performance of a scheme

60. Sections 24 and 25 allow the performance of a low emission zone scheme to be kept under review by the Scottish Ministers as and when necessary. This could be used if, for example, it appears that a particular scheme is failing to operate as it should or is not achieving very much, or if two local authorities entered into a scheme jointly but have then reached an impasse in terms of agreement on its operation.

61. Section 24 allows the Scottish Ministers to require a local authority to carry out its own review of a low emission scheme being operated by it. This review must consider how successful the scheme is being in meeting its objectives, any ways in which it is not succeeding, and any areas in particular within the zone where the scheme is not being successful in meeting its objectives. A review must also include any other assessments or provide any other information which is set out in the direction from Ministers. A direction must be published by the Scottish Ministers, as must any amendment or revocation of it. Once the review has been completed, the local authority must prepare a report of its findings and give this to the Scottish Ministers.

62. Following receipt of a report under section 24, section 25 allows the Scottish Ministers to direct a local authority to take such steps as the Ministers specify. Again, the direction must be published by the Scottish Ministers, as must any amendment or revocation of it. However, a direction may only be given by Ministers under this section if they consider that one or more of the criteria set out in paragraphs (a) to (d) of section 25(1) are met.

**Chapter 4 – General**

63. Section 26 requires local authorities to have regard to any guidance issued by the Scottish Ministers about the exercise of functions conferred by Part 1 of the Bill or any regulations made under it.

64. Section 27 sets out definitions for a number of terms used within Part 1.

**PART 2 – BUS SERVICES**

**Introduction**

65. Part 2 of the Bill deals with local bus services. This breaks down into four sub-topics:

- Provision of local services by local authorities;
- Bus services improvement partnerships;
- Local services franchising;
- Information relating to services.

## **General background**

66. The majority of bus services in Scotland are provided by bus operators on a commercial basis, though they are subject to regulation to ensure that vehicles meet safety and environmental standards, that operators and drivers are suitably qualified and comply with their legal obligations, that services are operated punctually and reliably and that accurate passenger information is made available in good time.

67. These requirements are enforced by the Traffic Commissioner for Scotland, an independent statutory regulator, with the support of the Driver and Vehicle Standards Agency, an agency of the UK Department for Transport. In addition, Bus Users Scotland, a not-for-profit membership organisation, works to promote the interests of bus users, monitors services to see if they are reliable and punctual and works with bus operators to ensure effective mechanisms for dealing with customer complaints.

68. Transport Scotland subsidises a proportion of the overall costs of the bus network (including scheduled and demand responsive services) through Bus Service Operators Grant (BSOG) which is provided under section 38 of the Transport (Scotland) Act 2001.

69. Beyond this, the majority of services are funded by passenger fares and by reimbursement payments from Transport Scotland for carrying passengers under the national concessionary bus travel schemes, which account for around a third of all bus journeys.

70. A significant minority of services that would not otherwise be viable receive additional financial support from local transport authorities in order to meet social needs in line with their local transport strategies and plans.

71. In some instances, especially where patronage would be too low to justify conventional scheduled bus services, authorities provide demand responsive or dial ride services using a mix of providers using bus and taxi firms and community transport groups.

## Regulatory framework

72. The regulation of the provision and funding of bus services in Scotland is largely devolved to the Scottish Parliament. The regulatory framework is similar to that in England (outside London) and Wales and is based on a commercial market with some government subsidy for bus services (via BSOG) and funding for concessionary travel and with a range of transport authority powers including the ability to subsidise otherwise non-commercial services where necessary.

73. The legal framework for bus services is primarily contained in the following Acts:

- Transport Act 1968;
- Public Passenger Vehicles Act 1981;
- Transport Act 1985;
- Transport (Scotland) Act 2001 (“the 2001 Act”);

- Transport (Scotland) Act 2005.

74. There are also numerous statutory instruments that sit below these pieces of legislation setting out the detail of the various regimes.

75. The Scottish Government's agency, Transport Scotland, sets the national policy framework and provides funding to support bus services.

76. The traffic commissioner for the Scottish Traffic Area is the independent licensing and regulatory authority. The Commissioner is a 'cross border public authority' with reserved and devolved responsibilities. Licensing of bus operators (Public Service Vehicles (PSVs)) and disciplinary action against PSV drivers are reserved to the UK. Registration of services is devolved and subject to the Public Service Vehicles (Registration of Local Services) (Scotland) Regulations 2001. The regulatory regime is designed to ensure that bus service operators are of good repute and that services are introduced, varied or cancelled in an orderly fashion and operated safely and reliably as registered.

77. Provided that an operator registers a service with the Office of the Traffic Commissioner they can operate any route they wish to any timetable (subject to certain limitations where a quality partnership or contract scheme is in place or where the traffic commissioner has imposed a traffic regulation condition at the local transport authority's request). Bus operators use their commercial judgement to determine service routes and frequencies. This market based approach encourages innovation and entrepreneurship and provides incentives for operators to bear down on costs, provide new services and develop new types of service. The statutory process for registration of bus services was changed in January 2016 to extend the time period for pre-registration engagement with local transport authorities.

78. Local transport authorities (local authorities, or so-called 'model III' regional Transport Partnerships for their regions) are responsible for ensuring that bus services in their area meet local needs. Under the Transport Act 1985, they have a duty to secure the provision of services that they deem to be socially necessary and that would otherwise not be provided commercially and a power to provide subsidy to operators to provide those services.

79. Local transport authorities are also responsible for infrastructure – including bus stations and stops, bus lanes and other priority measures – and ensuring the provision of passenger information. Through the planning system and management of roads and parking, local authorities also have a significant influence on the context in which services have to operate.

80. The 2001 Act gave local transport authorities wide ranging powers to work with operators in improving bus services, including quality partnerships and Quality Contracts (a kind of franchising).

#### *Glossary of existing legislative expressions*

81. There are several expressions used in these Notes which are drawn from existing legislation. This paragraph sets out and explains the most common:

“*local service*” is defined by section 2 of the Transport Act 1985. While there are some exceptions, it generally refers to a service using one or more public service vehicles for the carriage of passengers by roads at separate fares.

“*local transport authorities*” (LTAs) are typically local authorities: see section 82(1) of the 2001 Act. The Strathclyde Passenger Transport Authority is also defined as a local transport authority. Further, a number of Transport Partnerships have had some of the functions of a local transport authority conferred upon them by virtue of orders under section 10 of the Transport (Scotland) Act 2005.

“*passenger transport authorities*” (PTA) were established under the Transport Act 1968. These authorities have a duty to secure the provision of public passenger transport services in their area (see section 9A of the Transport Act 1968). They also have powers to provide subsidies in support of that duty. There is only one PTA in Scotland – Strathclyde Passenger Transport Authority. However, most of their functions (including their function under section 9A) have now been transferred to the Strathclyde Partnership for Transport (SPT) (a regional Transport Partnership – see below). The rest of Scotland is served by local transport authorities or regional Transport Partnerships.

“*public service vehicle*” (PSV) is defined by section 1 of the Public Passenger Vehicles Act 1981 and means a motor vehicle which is either (i) a vehicle adapted to carry more than 8 passengers that is used for carrying passengers for hire or reward, or (ii) a vehicle that isn’t adapted that is used for carrying passengers for hire or reward at separate fares in the course of a business of carrying passengers.

“*regional Transport Partnership*” refers to any of the Transport Partnerships which were established by an order made under section 1 of the Transport (Scotland) Act 2005 in respect of a particular region of Scotland. Each Transport Partnership is required to create a regional transport strategy for its area. The Transport (Scotland) Act 2005 also allows for certain local transport functions to be transferred to these Partnerships and 3 such orders have been made, transferring functions to SPT (covering the West of Scotland region), SWestrans (covering the South-west region) and ZEstans (covering Shetland).

The order made in 2005<sup>3</sup> which created the regional Transport Partnerships originally named the region covered by SPT as the “West of Scotland” region and provided that the regional Transport Partnership for that area would be known as the “West of Scotland Transport Partnership”. However, a Transport Partnership may decide to change the name of its region by notifying the Scottish Ministers and its constituent councils and the West of Scotland Transport Partnership notified Ministers of its change of name to “Strathclyde Partnership for Transport” in early 2006.

“*traffic areas*” are areas established under section 3 of the Public Passenger Vehicles Act 1981. The whole of Scotland is classed as a single traffic area for the purposes of that Act.

“*traffic commissioner*”: this is an office established under section 4 of the Public Passenger Vehicles Act 1981. The Scottish traffic commissioner is a designated cross border public

---

<sup>3</sup> The Regional Transport Partnerships (Establishment, Constitution and Membership) (Scotland) Order 2005 SSI 2005/622

authority and is appointed by the Secretary of State. The commissioner has a variety of statutory enforcement functions relating to:

- PSV operator licences;
- registration of local services;
- ticketing schemes;
- the provision of information.

## **Provision of local services by local authorities**

### **Introduction**

82. The 1985 Act deregulated bus services in the UK, moving from council-run buses to an open commercial market via a transitional period. In that transitional period, the bus services that councils provided were moved over to companies owned by them, which were then largely sold off. In Scotland, only one of those companies remains in existence today: Lothian Buses Limited. Otherwise, section 66 of the 1985 Act prevents a council from providing local services themselves<sup>4</sup>.

83. As noted in the general background section, however, under section 63 of the 1985 Act councils<sup>5</sup> are under a duty to secure the provision of such public transport services as they consider appropriate in order to meet any public transport requirements which they don't think would otherwise be met by the open commercial market. Councils have a variety of tools to try to achieve this, but subsection (5) of section 63 is significant in that it enables councils to enter into agreements to provide subsidies to operators in order to secure a service.

### *Provision of local services by local authorities – section 28*

84. Section 28 of the Bill introduces a new exemption into the 1985 Act, which enables councils to decide to run local services themselves (or by means of a company formed by them) in those situations where they think action needs to be taken to meet a local services requirement. This is delivered by amending section 66 of the 1985 Act (see subsection (3) of the Bill) and inserting a new section 71A into the 1985 Act (see subsection (4) of the Bill). Sections 63(5), (6) and (8) of the 1985 Act are also adjusted to take account of the provision of services under the new exemption.

85. Subsection (1) of inserted section 71A sets out when the new exemption will apply. It becomes available where, under section 63(2), the council consider it appropriate take action to secure the provision of local services in order to meet a public transport requirement.

---

<sup>4</sup> There is an existing exemption to this prohibition under section 71 of the 1985 Act for small undertakings and there are a number of other provisions, such as community bus permits, under which a council can provide bus services in certain circumstances. In addition, the councils for the Orkney Islands, Shetland Islands and Western Isles are specifically exempted from the restriction in section 66 of the 1985 Act.

<sup>5</sup> In addition, this could apply to a regional Transport Partnership which has had the functions of a council under this section conferred upon it by an order made under section 10 of the 2005 Act.

86. It is worth noting that this is narrower than section 63(2) as it is restricted to local services rather than all public passenger transport services. This therefore limits the situations where the new power might be used to the provision of local services.

87. Where the exemption applies, subsection (2) enables the council to provide local services themselves to meet the unmet requirements. It is important to note that the exemption does not enable the council to operate local services where there is no such unmet requirement: if commercially operated services are operating without subsidy, the council cannot compete with them.

88. As noted above, the provision does not impose any obligation on the council to have tried to enter into a subsidised service before deciding to provide local services themselves. It is, instead, an alternative approach that is open to the council in order to secure provision of services in satisfaction of its duty under section 63(2). However, the council must comply with the other requirements of 1985 Act in connection with the provision of local services, most notably those under section 6 (registration of local services).

89. It is worth noting that new section 71A is limited to cases where the duty under section 63(2)(a) of the 1985 Act is being exercised. That section only applies to councils insofar as their area is not a passenger transport area. As a result, Scotland's sole passenger transport area, (which is now the SPT area), is not covered by this new provision. However, it already benefits from a power to offer its own transport services under section 10 of the Transport Act 1968.

## **Bus services improvement partnerships**

### **Introduction**

90. Sections 29 and 30 of the Bill introduce a number of new provisions on Bus Services Improvement Partnerships (BSIPs) into the 2001 Act (inserted sections 3A to 3L and a new schedule A1). These provisions replace the material on quality partnerships in Part 2 of the 2001 Act and provide an updated and revised model for how local transport authorities can work with operators to improve the quality and efficiency of local services.

91. Section 31 provides for the changes necessary to the Transport Act 1985 to deal with the registration of local services where a BSIP is in place. These mainly relate to the enforcement of the service standards imposed by the schemes which implement the arrangements. Some further amendments which are consequential on these changes are in Part 1 of the schedule of the Bill.

92. BSIPs involve local transport authorities formulating a plan (called a partnership plan in the Bill) with the operators in their area and then deciding on how best to implement it through supporting schemes (partnership schemes). BSIPs contain several distinguishing features from quality partnerships, namely:

- there is a requirement for the local transport authority to invest in some way (whether through new facilities or taking certain measures to assist the operators);
- the range of available 'service standards' is more extensive;

- operators are to be involved in the preparation of the partnership plans and schemes and have a say in whether the plans or schemes are to proceed;
- reflecting that involvement, operators in the area of a scheme must provide a service which meets the operational service standards or risk losing the right to operate the service through deregistration;
- the traffic commissioner can refuse an application for registration by an operator who, in the commissioner's opinion, cannot meet the operational service standards that are applicable in an area.

*Bus services improvement partnerships*

*Partnership plans and schemes – inserted sections 3A and 3B*

93. Inserted section 3A(2) sets out the core requirements of what a partnership plan is and what it must contain.

94. Partnership plans operate at the strategic level and are to have three core elements, namely:

- providing an analysis of the local services operating in an area;
- determining policies relating to those services; and
- setting objectives to be achieved within the life of the plan.

95. Partnership plans must also make provision for obtaining the views of those in the community using the local services about how well those services are working and make provision for when it is to be reviewed.

96. Section 3B(1) provides that a partnership plan must be underpinned by one or more implementation schemes (referred to in the Bill as partnership schemes) which set out in detail how the desired improvements to services or standards required are to be achieved. Section 3B(2) confirms that further schemes may be made in relation to existing plans.

97. A partnership scheme may relate to the whole of the area of a partnership plan or any part of it. It will contain the standards of service that are expected of the operators of local services which have stopping places in the area of the scheme. It must also contain a requirement for at least one facility or measure to be provided by the local transport authority. Facilities will typically take the form of an investment in infrastructure, such as providing improved bus stops, whereas measures will relate to taking actions, such as restricting the number of times in a year that local authority roadworks occur on key bus corridors. It is also possible for a scheme to contain a requirement on a local transport authority or operator to take some other action designed to facilitate the operation of the scheme. This might include publicising the scheme or committing to meet on a regular basis to discuss matters.

98. Once a partnership scheme is in place, section 3F(1) confirms it will apply to all operators of local services within the area of the scheme. Failure to comply with the operational service standards of the scheme can lead to an operator being deregistered as an operator of a

local service and therefore unable to provide services in that area (see sections 6(7ZA) and 6L of the 1985 Act, as added by section 31 of the Bill). It is also open to the traffic commissioner to issue penalties under section 39 of the 2001 Act (as amended by paragraph 3(4) of the schedule of the Bill) for non-compliance.

99. However, some types of services may be exempted from complying with partnership schemes. For example, it would be inappropriate for tour operators or community bus permit holders who stop in the area of a partnership scheme to have to comply with the service standards set for operators of local services. Regulations made under section 3L will set out the types of service that local transport authorities may decide to exempt from a scheme and can further provide that some types of service must be exempted.

#### *Service standards – sections 3C and 3D*

100. Section 3C sets out what may be agreed by way of a service standard for inclusion in a partnership scheme. These standards may be in respect of almost any aspect of the service, from the buses used to provide the service, setting a maximum level for the fares that may be charged in certain cases through to design of tickets used.

101. Operators of local services in a scheme's area will be bound by the scheme and the service standards contained in it. That will be the case even if a given operator did not participate in the preparation of the scheme and objected to it being made (a voting mechanism which is subject to a requirement for a sufficient number of persons to object).

102. There are two categories of service standard: route service standards (see section 3C(1)(a)) and operational service standards (see section 3C(1)(b)).

103. A 'route service standard' is one which relates to the frequency and timing of a particular service or, a particular service and other local services taken together (for example, where there are several services operating in an area, the route requirement can set frequency or timing requirements for a service which take into account there being other options available for bus users).

104. It is possible that, due to an increase in the number of operators, it may become impossible for a route service standard which, for example, imposes a maximum frequency of services, to be complied with. For example, it may be that services on a route are limited to operating four times an hour and there are now five operators each wishing to provide an hourly service.

105. In those circumstances, section 3D provides that the local transport authority which made the partnership scheme must modify the route service standard in such a manner as is necessary to make it possible for each registered operator to provide a service. This modification is a variation of the partnership scheme but, unlike other variations, the limited circumstances and the need to ensure that new operators are not prevented from entering the market on this ground, means that the full procedure for variation<sup>6</sup> does not need to be complied with. However, the

---

<sup>6</sup> See new inserted section 3H, schedule A1 and the material on variations elsewhere in the document.

section does contain a power enabling the Scottish Ministers to make regulations providing for the procedure to be followed before a modification may be made. Such regulations could include the requirement of notice being given or a consultation being carried out with persons who are likely to be affected.

106. The regulation-making power also anticipates that the effect of the modification may be postponed. For example, if the operators are able to agree a means of complying with the service standard without the need for a modification, that may be a preferable outcome.

107. An ‘operational service standard’ is a standard which relates to anything other than the timing or frequency of a service. Subsection (3) offers some examples of what may be imposed but it is not an exhaustive list (i.e. a standard could relate to other matters than those listed). These service standards can therefore cover a wide variety of different types of requirements that operators will have to comply with if they wish to run a service in the area of the partnership scheme.

108. Section 31(2)(a) of the Bill includes a provision amending the 1985 Act which requires that service standards have to be recorded with the particulars of the service that are registered. This is to help ensure that the service standards are met.

#### *Making partnership plans and schemes to implement them*

109. Section 3A(1) enables a local transport authority<sup>7</sup> to make a partnership plan when it considers it appropriate to do so. 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.

110. Inserted section 3B(1) requires the making of at least one scheme to implement a partnership plan.

111. To make a partnership scheme the local transport authority must be satisfied that the scheme will contribute to the implementation of the policies that are in the partnership plan itself and their relevant general policies (inserted section 3B(6)). In a situation where there are two or more local transport authorities acting jointly, each must be satisfied that the scheme will contribute to the implementation of their own relevant general policies.

112. In addition, the local transport authority have to be satisfied that the scheme will either bring benefits to users of the services by improving the quality or effectiveness of the services or otherwise reduce or limit traffic congestion, noise or air pollution.

#### *Procedure for making a partnership plan or scheme - Part 1 of new schedule A1*

113. To make a partnership plan and scheme or a partnership scheme or schemes in respect of an existing plan, the local transport authority must follow the procedure set out in Part 1 of

---

<sup>7</sup> Local transport authority is defined in section 82(1) of the 2001 Act. As explained at paragraph 135 below, two or more local transport authorities may act jointly to put in place a partnership plan and scheme.

schedule A1. That procedure involves giving notice to and consulting a range of interested people at different stages in the process. The process also gives operators of local services a right to be involved in the preparation of the partnership plan and the scheme. This collaborative working element recognises the intrinsic role that operators have in delivery of service improvements under any partnership plan and scheme that is put in place. Operators do not, however, have to participate in the preparation process if they do not want to.

114. Another significant aspect of the procedure is that the operators of local services in the area of a proposed partnership plan or scheme are given an opportunity to object to a draft partnership plan or scheme (paragraphs 4 and 5 of schedule A1). If a sufficient number of such operators object, the scheme cannot proceed and the local transport authority will either need to revise it and go through the process again or start again with a new proposal.

115. What will constitute a sufficient number of operators to prevent a partnership proposal from progressing will be set out in regulations (see Part 4 of schedule A1). This reflects that there will be a wide range of possible circumstances that need to be covered, taking into account both the number of operators and their share in the market, and that there may need to be regular updates to reflect different trends in how bus services operate.

116. The process also includes an opportunity for the local transport authority to modify the proposed partnership plan or scheme before formally making the plan or scheme. This is likely to arise where the consultation that has been carried out has raised issues that need to be addressed. Paragraph 7 of schedule A1 governs the procedure for this. Again the local transport authority must give notice of the modifications to persons with an interest and give the operators of local services an opportunity to object to the partnership plan or scheme as modified.

117. Finally, once the partnership plan or scheme has been made, the local transport authority must give a notice confirming that fact within the period of 14 days starting on the day after the partnership plan or scheme was made. The plan or scheme will not have effect if this notice is not given within the time period.

#### *Traffic regulation orders – section 3E*

118. In some cases, to deliver what is proposed under a partnership plan or a scheme, it may be necessary for a traffic regulation order to be made. In many cases, the local transport authority will be the traffic authority and so will be able to proceed on that basis. However, for those roads where the traffic authority is the Scottish Ministers, new section 3E of the 2001 Act requires that the creation or variation of a partnership scheme will have to be made with the local transport authority and the Scottish Ministers acting jointly.

119. In practice, this means that at the point it is identified that such a traffic regulation order is required (perhaps as part of the preparation of a partnership scheme), it will be necessary for the local transport authority to contact the Scottish Ministers in relation to the proposal and involve them in the process for finalising what is to be in the partnership scheme. The Scottish Ministers will become akin to a local transport authority at that point and will be a party to the final partnership scheme as made or varied. The precise working arrangements between the local transport authority and the Scottish Ministers will vary from scheme to scheme.

120. Paragraph 1 of the schedule of the Bill amends section 1 of the Road Traffic Regulation Act 1984 to enable the local transport authority to make the necessary traffic regulation order. To do so they must have the consent of the Scottish Ministers.

*Postponement – section 3G*

121. A local transport authority may also postpone the coming into operation of all or part of a partnership scheme by up to 12 months. This may be useful where there are unexpected circumstances which delay the provision of a facility or a measure or operators need more time to adapt to a new service standard. The procedure for postponing a partnership scheme (or any part) is set out in paragraphs 9 and 10 of schedule A1.

*Variation and revocation of partnership plans and schemes – sections 3H and 3I and Parts 2 and 3 of new schedule A1*

122. Sections 3H and 3I set out the situations where a local transport authority may undertake a process to vary or revoke a partnership plan or a scheme.<sup>8</sup>

123. A partnership scheme may only be varied under section 3H where the local transport authority are satisfied that the scheme, as varied, will contribute to the implementation of the policies that are in the partnership plan itself and the relevant general policies of the local transport authority. In a situation where there are two or more local transport authorities working together, each must be satisfied that the variation will contribute to the implementation of their own relevant general policies.

124. In addition, the local transport authority have to be satisfied that the scheme as varied will either bring benefits to users of the services by improving the quality or effectiveness of the services or otherwise reduce or limit traffic congestion, noise or air pollution.

125. The variation of schemes specifically allows for new local transport authorities to join an existing partnership plan. This may be where services operate across the areas of the authorities or if the authorities wish to promote consistency across a region. In those circumstances the new authority (the prospective authority) must also be satisfied that the scheme as varied will contribute to the implementation of the policies of the partnership plan they are joining and their relevant general policies and bring benefits to service users or reduce or limit traffic congestion etc. in the same way as they would if they were making a plan. This replicates the situation that would arise if the prospective authority were proposing a new partnership plan for their area.

126. Part 2 of inserted schedule A1 sets out the procedure for varying a partnership plan or scheme under section 3H. This follows a similar approach to that for making a partnership plan or a scheme in the first place with notices being given, operators having an opportunity to object to the variation or revocation and a confirmatory notice being given at the end. As with making a scheme, it is possible for an authority to postpone the coming into operation of a variation or a part of a variation for up to 12 months.

---

<sup>8</sup> It is also possible to vary or revoke a partnership scheme where the scheme itself provides for that. See section 3B(10) and the further explanation elsewhere in the document.

127. Subsection 3I provides that a partnership plan or a scheme may be revoked where the local transport authority consider it appropriate to do so. Where a partnership plan is revoked, the scheme or schemes that are in place to implement it must also be revoked. Similarly, if all the schemes relating to a partnership plan are to be revoked, the partnership plan itself must also be revoked.

128. Part 3 of inserted schedule A1 sets out the procedure for revoking partnership plans and schemes. There are fewer steps to this procedure (in that there is no need to prepare the revocation or modify the proposals) but operators still have an opportunity to object to the revocation. If a sufficient number object, the partnership plan and schemes may not be revoked.

*Variation or revocation in accordance with the terms of a partnership scheme – section 3B(10)*

129. As part of a partnership scheme, a local transport authority and operators may decide to include provision for the scheme to be varied or revoked if certain conditions are met or events occur. For example, a scheme could provide that it will be revoked (or become revocable) if the number of users of the service do not meet the specified expectations within a certain time period. In this situation, the scheme will set out what is to happen and what process is to be followed.

130. The Scottish Ministers may make regulations under section 3L about the types of situations where this method of variation and revocation is available (or not available) and the process which may or must apply.

*Competition test*

131. Paragraph 3(2) of the schedule of the Bill amends the competition test in section 37 of the 2001 Act to ensure it is applied whenever a local transport authority is considering making or varying a partnership scheme. That reflects the potential impact that such a scheme has in relation to the bus services market in an area. Where a scheme would have a significantly adverse effect on competition and that effect cannot be justified by reference to the benefits to be gained, the scheme cannot go ahead.

132. As a further competition safeguard, the Competition and Markets Authority are mandatory consultees at a number of stages in the process of making and varying partnership plans and schemes.

*Reports on partnership schemes*

133. Section 3J requires each local transport authority to prepare an annual report on the effectiveness of each of the partnership schemes made by the authority which are still in force. Where the local transport authority are, in fact, a number of local transport authorities acting jointly it will be sufficient for one of them to report on the scheme, but the duty to co-operate in section 47 of the 2001 Act combined with the effect of inserted section 3K(3) will mean each may be required to contribute to the report.

*Guidance*

134. Section 79 of the 2001 Act, as amended by paragraph 3(6) of the schedule of the Bill, will require a local transport authority to have regard to any guidance issued by the Scottish Ministers in relation to the authority's exercise of the functions relating to a BSIP. This is intended to provide best practice advice in relation to the new provisions and regulations.

135. Any guidance issued must be published.

*Multi-authority partnership plans – inserted section 3K*

136. While the majority of the provisions simply make reference to a local transport authority making a partnership plan, it is open to 2 or more such authorities to act jointly to make a partnership plan and the necessary scheme or schemes. In those cases, where there is a reference to the area of local transport authority which is a combination of local transport authorities acting jointly, it is to the combined area of all of them. However, a reference to the relevant general policies<sup>9</sup> of a local transport authority is a reference to the relevant general policies of each of the local traffic authorities which are acting together.

137. Where two or more local transport authorities choose to work together to make a partnership plan, it will be for them to decide how best to achieve that administratively. This is supported by the duty in section 47 of the 2001 Act (as amended by paragraph 3(4) of the schedule of the Bill) which requires authorities to co-operate in relation to BSIP arrangements.

138. However, section 3K(3) confirms that once the authorities start acting jointly in respect of a partnership plan or scheme, they must continue to do so for the life of the partnership plan or scheme. For example, it would not be open to one authority to revoke the partnership plan without the co-operation of the other authorities.

*Further provision – section 3L and Part 4 of schedule A1*

139. Section 3L confers power on the Scottish Ministers to make regulations about the BSIP arrangements. The regulations are expected to provide further details on a broad range of matters from the required content of a partnership plan or a scheme as well as in respect of a number of procedural matters.

140. Regulations made under Part 4 of schedule A1 will set some important aspects of the procedure for deciding if a partnership plan or scheme may go ahead (particularly in relation to which operators qualify as having a right to object). However, the nature of the material is such that it may need to be fairly specific to operate effectively and it is considered more appropriate that this is therefore left to regulations to enable adjustment and fine tuning in light of experience.

141. By virtue of section 81 of the 2001 Act, regulations made under section 3L may make different provision for different cases and classes of case any may include incidental, supplementary, consequential saving or transitional provision. This will allow the regulations to

---

<sup>9</sup> Defined in section 48 of the 2001 Act.

differentiate between the different types of operations and circumstances that exist and make tailored provision where necessary.

142. Further, section 81(3) provides that regulations under section 3L will be subject to the negative procedure. Section 81(4) (as amended by the schedule to the Bill) provides that regulations made under paragraph 26 of schedule A1 will be subject to the affirmative procedure.

#### *Interpretation*

143. Section 48 of the 2001 Act is amended by paragraph 3(5) of the schedule of the Bill to define a number of words and expressions for the purpose of the sections relating to BSIPs. The paragraph also removes redundant expressions relating to quality partnership schemes.

#### *Registration of local service and functions of traffic commissioner – section 31*

144. Section 31 of the Bill makes a number of changes to the Transport Act 1985 to deal with the implications of a BSIP plan and scheme being in place on the registration of local services and the functions of the traffic commissioner.

145. Several of the changes made in section 31 are aimed at ensuring that operators who are not in a position to comply with operational service standards are either refused registration under section 6 of the 1985 Act or are at risk of having such a registration cancelled if they do not comply. This therefore prevents operators from providing services which do not meet the imposed operational service standards and represents a significant aspect of the means by which partnership schemes are enforced.

#### *Application for registration where partnership scheme in operation – inserted section 6K of the 1985 Act*

146. New section 6K of the 1985 Act caters for situations where a partnership scheme has imposed an operational service standard on a local service and a person is either applying to be registered to provide that service or to vary an existing registration that they have in respect of that service.

147. The section requires the traffic commissioner to refuse such an application where the traffic commissioner considers that the applicant is unlikely to be able to comply with the service standard in relation to the services. The traffic commissioner does not have any discretion in this respect.

#### *Cancellation of registration when operational service standards not met – section 6L*

148. New section 6L (read with the new subsection (7ZA) of section 6) enables the traffic commissioner to cancel a registration in circumstances where the traffic commissioner considers that an operator is not providing a registered service in accordance with an operational service standard that has been imposed in relation to the service (or services) that the operator provides.

149. It is worth noting that the wording of subsection (2) gives the traffic commissioner discretion about cancelling the registration in order to enable other means of resolving the

situation to be explored first (including the imposition of penalties or attaching conditions to the registration).

#### *Appeals – section 6M*

150. This new section provides the Scottish Ministers with the power to make regulations for appeals against service standards decisions.

### **Local services franchises**

#### **Introduction**

151. Section 32 of the Bill introduces a suite of new provisions into the 2001 Act (section 13A to section 13S) to enable a local transport authority<sup>10</sup> to create and operate local bus services under a franchising model. The model will involve putting in place an overarching franchising framework and then entering into franchise agreements with bus operators in respect of the local services within the area of the framework. The framework will set out the services to be provided, the standards to be met in doing so and any additional facilities that are to be provided in the framework area.

152. A franchising framework under the Bill will have the effect of displacing the standard arrangements for providing local services within the framework area and will prevent operators from providing services in the area otherwise than under a franchise agreement (subject to a few exceptions which are detailed below). Those operators who do enter into franchise agreements to provide services within the scheme will therefore have the exclusive right to operate the local services specified in their agreement.

153. Because of the implications of making a framework, the local transport authority will be required to carry out a comprehensive assessment of the suitability and viability of adopting the proposed model before it is adopted. Many of the provisions in the new chapter 2 are directed at ensuring that this assessment takes place. The chapter also makes provision for an independent audit of the financial implications of any proposed framework as well as requiring that an independent panel must approve the making of the framework. Approval is also required for a framework to be varied or revoked.

154. The franchising model adopted is an update on the Quality Contract approach of the 2001 Act which the new provisions replace. While all the provisions relating to Quality Contracts have been replaced, there are several procedural similarities between the processes for establishing a franchising framework and a Quality Contract scheme so aspects of the process should be familiar. Others have been added to improve the assurance process and, so far as possible, attempt to improve the likely effectiveness of franchising frameworks.

155. Where the new model differs significantly from the Quality Contract model is in the tests that must be satisfied before the framework may be made. Section 13(1) of the 2001 Act allowed a Quality Contract scheme to be made only if:

---

<sup>10</sup> Local transport authority is defined in section 82(1) of the 2001 Act. As explained at paragraph 209, two or more local transport authorities may act jointly to put in place a franchising framework.

- it was necessary for the purpose of implementing the local transport authority's relevant general policies in the area to which the proposed scheme related; and
- the proposed scheme would implement those policies in a way which was economic, efficient and effective.

156. Under the new franchising model these tests have been removed. Instead the statutory assessment process will require the local transport authority to consider (among other things) how and to what extent the franchising framework will contribute to the implementation of their relevant general policies and the independent panel will be able to assess whether, in those circumstances, the local transport authority have come to a reasonable conclusion in deciding to make such a framework. This change of approach is designed to increase the range of situations in which a local transport authority can consider the franchising model option.

### Franchising frameworks and franchise agreements

#### *Franchising frameworks and franchise agreements – sections 13A and 13B*

157. These sections authorise the entering into of franchise frameworks and agreements, set out what a franchising framework is and the effect it has, and define what is meant by a franchise agreement for the purposes of the chapter.

158. Section 13A(3) sets out the main components of a franchising framework. It should, however, be read in conjunction with section 13D (proposed franchising frameworks) which contains a number of specific requirements about the content of a franchising framework.

159. A franchising framework gives a local transport authority the power to determine what local services are required in the area of the framework, set standards for those services and make decisions about what facilities may be required to support them. The framework can also specify types of service which should not be affected by the making of the framework (such as those of tour operators who use stops in the area but are not providing local services in the usual manner<sup>11</sup>).

160. Section 13B provides that by making a franchising framework, the local transport authority disappplies several of the provisions relating to the registration and provision of local bus services under the Transport Act 1985. Those provisions generally allow persons who hold the relevant PSV operator licences to register and operate local services in any area that they choose. Under franchising, only those operators who have entered into a franchise agreement will be permitted to provide services in the area of the framework<sup>12</sup>.

161. Operators who enter into franchise agreements may be paid for providing the services or indeed may pay for the opportunity to provide them. This reflects that in different prevailing market conditions it may be necessary to pay operators and in others that the profitability is such that operators will pay for the exclusive right to provide them. However, in a situation where a local transport authority spend money on entering into a franchising agreement, and that

---

<sup>11</sup> See also section 13S(2)(b) which allows for the Scottish Ministers by regulations to require certain types of service to be exempted.

<sup>12</sup> Subject to certain exceptions explained at paragraph 168.

spending could be considered to be subsidising the provision of services under section 88(1) of the 1985 Act, section 13A(7) disappplies the requirements contained in sections 88 to 92 which would otherwise require to be satisfied to provide a subsidised service.

162. A franchising framework may be made in respect of the whole or any part of the local transport authority's area. Where two or more local transport authorities<sup>13</sup> work together to make a franchising framework, the franchising framework can cover all of the combined areas or a part of the combined area. This reflects the fact that local services frequently cross between the areas of local transport authorities.

163. Section 13A(2), read in conjunction with section 13C, requires a local transport authority to follow the process in chapter 2 in order to make a framework.

#### *Process for making a franchising framework*

##### *Overview of process to make franchising frameworks – section 13C*

164. Section 13C pulls together the key steps that a local transport authority must complete before it is able to make a franchising framework for its area. It must:

- prepare a proposed framework;
- prepare an assessment of the proposed framework;
- obtain a report from an independent auditor on the financial implications of the proposed framework;
- consult on the proposed framework;
- if necessary, modify the proposed framework and, where the modifications materially affect an aspect of the assessment, go through the process of assessment, audit and consultation again; and
- obtain approval to make the proposed framework from a panel convened by the traffic commissioner for that purpose.

165. Paragraph (g) of subsection (1) confirms that a local transport authority must also comply with any additional procedural requirements that may be imposed by the Scottish Ministers under section 13S.

166. Once that approval is obtained, the local transport authority may make the framework and give the requisite notices under section 13K.

##### *Proposed franchising framework – section 13D*

167. This section sets out the required content of a proposed franchising framework. Once prepared by a local transport authority, the proposed framework forms the basis of what the assessment that must be prepared under section 13E will consider and the subsequent independent audit and consultation.

---

<sup>13</sup> The ability to act jointly is addressed in section 13R.

168. It is possible for the franchising framework to specify certain local services (or descriptions of local services) within the area of the framework that are not to be subject to the franchising arrangements. Where it does so, section 13B(5) provides that the conditions for the exemption act as the prescribed particulars for registration under section 6 of the 1985 Act. This gives flexibility to cater for the various circumstances that may arise locally. For example, operators who are primarily providing longer distance services may be exempted so that they can continue to use stopping places within the area of a franchise agreement made under the framework.

169. Also of note is that subsection (4) requires that the franchising framework must provide for the revocation or variation of any existing partnership plan or any scheme made under such a partnership plan to the extent that there is an overlap between the framework and the scheme. This reflects that a partnership scheme under Chapter 1 of the 2001 Act (inserted by section 29 of the Bill) cannot operate in respect of the same local services at the same time as a franchising framework (due to the exclusivity elements of the franchising model). It is possible, however, for a partnership plan and a franchising framework to co-exist in so far as the plan may cover a broad geographical area, within which franchising may operate in some areas. The ability to vary the partnership plan in subsection (4)(b) is to enable appropriate dovetailing of the two models.

170. The making of a franchising framework will have the effect of varying or revoking the existing partnership plan or scheme without any requirement to follow the processes which would otherwise apply in order to make such a variation or revocation (such as obtaining the consent of a proportion of operators providing services in the area). However, the processes for preparing, assessing and making a franchising framework involve extensive consultation and independent approval which provides procedural safeguards.

#### *Assessment of proposed franchising framework – section 13E*

171. Section 13E requires local transport authorities to prepare a detailed assessment of the proposed franchising framework. As noted in the introduction to this chapter, this assessment is adopted in place of the tests that exist for Quality Contract schemes in section 13(1) of the 2001 Act.

172. The assessment provides a basis for an independent audit of the financial implications of the framework and the overall approval of the framework (after consultation) by a panel convened by the traffic commissioner. A report on the assessment is also to be made available as part of the consultation on the proposed framework that the local transport authority is required to carry out.

173. In preparing the assessment, the local transport authority must have regard to the guidance issued by the Scottish Ministers in relation to such assessments (subsection (5)). It is anticipated that the guidance will be similar in many respects to existing best practice guidance around producing business cases in the public sector.

174. The local transport authority must also engage with operators in their area to obtain their views on the proposal. While this is short of formal consultation, it provides an opportunity to engage at an early stage in the process and test the viability of the proposed framework.

175. There are several mandatory elements to the assessment. To deal with each in turn:
- (a) The local transport authority must believe that, at least to some extent, the proposed framework will contribute to the implementation of their relevant general policies. The exact way and extent to which it contributes to these policies then has to be set out in the assessment;
  - (b) The local transport authority will have to consider the other available options and set out in the assessment why they consider franchising to be suitable;
  - (c) There must be consideration of the impact of the framework on areas adjacent to the proposed framework. This sits with the duty of the local transport authority under section 47 of the 2001 Act (as amended by paragraph 3(4) of the schedule) to have regard to the desirability of making the framework jointly with the local transport authority of another area;
  - (d) The assessment requires the local transport authority to set out their proposals for operating the framework and to seek to identify if there are concerns around finding operators for all of the local services to be provided under the framework. This practical element is of importance to the determination of whether, in practice, the framework is likely to be viable;
  - (e) The financial implications have to be considered and set out. This key element is the primary basis of the independent audit and it is expected that the guidance from the Scottish Ministers will have a particular emphasis on this aspect;
  - (f) The final mandatory element of the assessment is the local transport authority's proposal in relation to how they will review the effectiveness of the framework. As each framework will be tailored to local circumstances, it is expected that the local transport authority will need to identify relevant data in order to enable them to benchmark progress.

176. Additionally, subsection (3) confirms that a local transport authority may include such other elements in their assessment as they think fit. For example, this could relate to particular local circumstances which have a bearing on why the local transport authority consider it desirable to pursue a franchising framework.

*Audit of proposed franchising framework – section 13F*

177. Section 13F sets out the requirements for an independent audit of the financial implications in the assessment. A local transport authority must obtain a report from such an auditor before they are able to proceed with the consultation on the proposed framework.

178. To be an auditor for these purposes, a person (which may be an individual or a firm) must be eligible for appointment as a statutory auditor under section 1211 of the Companies Act 2006. This includes, for example, appropriately qualified members of the Institute of Chartered Accountants of Scotland.

*Consultation on proposed framework and any modifications – sections 13G and 13H*

179. Section 13G sets out the process for consultation in relation to the proposed franchising framework. This involves giving notice of the intention to make a franchising framework and then conducting a consultation with the persons listed in subsection (4).

180. Section 13H anticipates that the consultation may lead to the local transport authority making adjustments to the proposed framework. Subsections (3) and (4) provide that, where necessary, the local transport authority should repeat the assessment, audit and consultation steps of the process in respect of the framework.

*Approval – sections 13I and 13J*

181. Sections 13I and 13J provide for a mechanism for a local transport authority to obtain approval for them to make their proposed franchising framework.

182. To do this, they must request that the traffic commissioner convene a panel for the purpose of approving the making of the proposed framework and provide the commissioner with a range of relevant information for passing to the panel.

183. On receipt of such a request, the traffic commissioner must give notice in such manner as the commissioner considers appropriate (for example, perhaps by publishing it in a local paper or putting it on its website) that the local transport authority are seeking approval and inform interested persons that they may make representation to the commissioner (who will then pass them on to the panel (see section 13J(2))).

184. Under section 13J, the traffic commissioner must appoint a panel to consider the application. The criteria and process for appointment to a panel will be set out in regulations made under section 13S.

185. It is open to the panel to approve the framework subject to the local transport authority making modifications to the approved framework before it is made (i.e. giving a conditional approval).

*Making of franchising framework – section 13K*

186. Once the local transport authority have the approval of the panel, they may proceed with making the framework. They have 6 months from the date of approval to do so (and thereafter a year to put in place the necessary franchise agreements to implement it – see section 13Q). It is open to the local transport authority to postpone the coming into force of the framework under section 13M.

187. Within 14 days of the framework being made, the local transport authority must publish notice of having made the framework and send a copy of the framework as made to the traffic commissioner. The notice must set out where the framework can be viewed (for example, it may be in local libraries or online).

188. Subsection (5) sets out that a franchising framework comes into operation by reference to the local services contained in the framework and that there are two possibilities for commencement. Either, the framework comes into force at a date specified in the framework or (if no date is specified in the framework) it comes into operation at such date as is provided for in a franchise agreement which has been entered into under the framework in respect of the local service in question.

*Entering into franchise agreements*

*Entering into franchise agreements – section 13L*

189. Once a local transport authority have made a franchising framework, they may start to enter into franchising agreements for the provision of local services under the framework. This process is governed by the procurement requirements set out in both EU legislation (EU Regulation 1370/2007) and domestic law.

190. Subsections (3) and (6) confirm that tenders may be accepted only from (i) operators who hold valid PSV operator licences which are not subject to conditions preventing them from operating the local services to which the tender relates, or (ii) operators who hold community bus permits.

191. Subsections (4) and (5) provide that whenever a local transport authority and an operator enter into a new franchise agreement, the local transport authority must give notice to the other operators who the authority think are likely to be affected and to the traffic commissioner.

192. The notice must contain details of the local services covered by the franchise agreement, the date when it is to come into operation and state for how long the agreement will last.

193. This notice will likely be of practical importance as the granting of a franchise agreement will mark the point at which provision of the local services in question will start to become restricted to the operator with the franchise agreement and this notice will make operators aware of that.

*Operation, variation and revocation of franchising arrangements*

*Postponement of franchising framework coming into operation – section 13M*

194. In some circumstances, it may be necessary to postpone when a franchising framework is to come into operation as it relates to a particular local service. For example, this may be useful where unexpected events have occurred with the result that the preparations for launching a service are behind schedule. However, a local transport authority cannot postpone the coming into operation of a framework where the framework itself provides for its coming into force on a particular date. Where they need to do that, they should seek approval to vary the framework under section 13N.

195. Where the date of coming into force of the framework is determined by a franchise agreement, a local transport authority can postpone the date on which the framework (so far as relating to a local service) is to come into operation for up to a year. Before doing so, they must

consult the operators who are likely to be affected by the decision, and the traffic commissioner. They must also then give notice in accordance with section 13M(4) of having gone ahead with the postponement. In a similar manner, they can postpone the coming into effect of a variation (in so far as relating to a local service).

196. The Scottish Ministers have power under subsection (5) to make regulations which may provide for a different maximum period of postponement.

*Variation or revocation of franchising frameworks – sections 13N and 13O*

197. Sections 13N and 13O provide a means for a local transport authority to vary the terms of a franchising framework or revoke one before it comes to its natural end.

198. For both variation and revocation the local transport authority must request the traffic commissioner to convene a panel to approve the variation or revocation and supply a range of information as part of an application to the commissioner for onwards transmission to the panel to enable it to make its decision. The traffic commissioner must thereafter publish a notice under section 13O(2) (read with subsection (3) of that section) inviting representations from persons with an interest and the traffic commissioner is obliged to pass them to the panel once constituted.

199. In proposing a variation, it will be necessary for the local transport authority to consider many of the same issues as they did when proposing and assessing the framework in the first place. The documents that will result from that consideration are set out in subsection (3) of section 13N and form part of the application to the traffic commissioner. Where the local transport authority are proposing a variation which will have a material effect on the matters considered as part of the assessment prepared under section 13E, they may consider it necessary to carry out a new assessment of the framework (or a part of it) and, in those circumstances, the provisions around assessment, audit, consultation and modification apply to the variation as they applied to the original proposed framework by virtue of subsection (5). For minor variations, however, this will not be necessary.

200. The panel convened by the traffic commissioner has largely the same range of options in relation to its decision to approve a variation as it would have in relation to the making of a proposed framework. This includes, by virtue of section 13O(4)(b), the power to require the local transport authority to adjust the proposed variation.

201. In relation to revocations, the options available to the panel are slightly more restricted as there is no need for them to be able to require modifications to be made to a framework that is being revoked.

202. Once the panel has given approval, the variation or revocation must be publicised in the same manner as the making of a framework under section 13K.

*Reports on franchising frameworks – section 13P*

203. A local transport authority must prepare an annual report on the effectiveness of the franchising framework. This obligation to report starts on first anniversary of the date when local services first start being provided under the franchising framework.

204. In preparing the report, the local transport authority have to consult such persons as they consider necessary to be able to assess the effectiveness of the framework and also must consider any other relevant representations which have been made to it relation to the period under review.

205. Once prepared, the report must be published in such manner as the local transport authority consider appropriate.

*Non-implementation of franchising frameworks – section 13Q*

206. Section 13Q(1) acts as a long-stop provision to prevent franchising frameworks being made and left unimplemented for more than 12 months by providing for them to cease to have effect at that point. This also provides a means of extinguishing frameworks (short of formal revocation) where it transpires that franchise agreements cannot be entered into in respect of all the services in the framework (for whatever reason).

207. However, the framework is not extinguished if, at the time the framework would otherwise be extinguished, the local transport authority has applied for approval of a variation and the decision for that has not been made. In those circumstances, the expiry of the framework is suspended until either a decision is made refusing the variation (which will mean the framework ceases to have effect at that point) or, where the decision is to approve the variation, on a date six months after the date of approval (if the variation has not been implemented in the meantime by the local transport authority who sought it).

208. Subsection (4) enables the Scottish Ministers to make regulations amending the section to substitute a different period for when a franchising framework will expire. This is to enable the period to be adjusted in light of operational experience. Such regulations are subject to the affirmative procedure (see the amendment of section 81 of the 2001 Act in paragraph 3(7) of the schedule).

*Multi-authority franchising – inserted section 13R*

209. While the majority of the provisions simply make reference to a local transport authority making a franchising framework or agreement, it is open to two or more such authorities to act jointly to make a franchising framework and the necessary agreements. In those cases, where there is a reference to the area of a local transport authority which is, in fact, a combination of local transport authorities acting jointly, it is to the combined area of all of them. However, a reference to the relevant general policies<sup>14</sup> of a local transport authority is a reference to the relevant general policies of each of the local traffic authorities which are acting together.

---

<sup>14</sup> Defined in section 48 of the 2001 Act.

210. Where two or more local transport authorities choose to work together to make a franchising framework, it will be for them to decide how best to achieve that administratively. This is supported by the duty in section 47 of the 2001 Act (as amended by paragraph 3(4) of the schedule of the Bill) which requires authorities to co-operate in relation to franchising frameworks.

211. However, section 13R(2) confirms that once the authorities start acting jointly in respect of a franchising framework, they must continue to do so for the life of the framework. For example, it would not be open to one authority to revoke the framework or any agreement without the co-operation of the other authorities.

*Further provision about franchising arrangements – section 13S*

212. This section confers on the Scottish Ministers a power designed to supplement the provision in the chapter with matters of administrative and procedural detail. Examples of the kind of thing in contemplation are listed in subsection (2). Subsection (3) anticipates that there is likely to be a particular requirement to deal with the transitional arrangements for the start, variation and end of franchising framework arrangements.

**Information relating to services**

**Provision of service information when varying or cancelling registration – section 33**

*Overview*

213. Section 6 of the 1985 Act and supporting regulations<sup>15</sup> deal with the registration of local services. The section and regulations also deal with the circumstances in which such a registration can be varied or cancelled. Without this registration, a local service cannot be provided by an operator.

214. Section 33 of the Bill inserts a series of three new sections into the 1985 Act. These provisions enable any affected authority (see paragraphs 231 to 233 below) to obtain specific service information from an operator who proposes to vary or cancel the registration of a local service and, in limited circumstances, share it with other people who may wish to bid to provide a similar service to the one being withdrawn or varied. Where an operator does not provide the information (or does not provide it timeously) the Scottish Traffic Commissioner will be able to impose a financial penalty on the operator (see section 33(2) of the Bill).

215. These new powers to obtain and share information are designed to facilitate more effective competition in the bus market and follows recommendations made by the Competition Commission. The Policy Memorandum accompanying the Bill provides full details about this aspect.

216. The new powers should be contrasted with a similar power to obtain information in section 43 of the 2001 Act, which enables a local transport authority to request information at any time in connection with the formulation of their relevant general policies. Though the section 43 power enables a local transport authority to request similar information about passengers,

---

<sup>15</sup> Public Service Vehicles (Registration of Local Services) (Scotland) Regulations 2001 (SSI 2001/219)

journeys and fares as that under the new provision, it does not allow for requesting revenue information (see paragraph 220 below), nor does it have any particular sanction attached to it for failure to comply. Further, it only requires operators to provide information that they currently have. The new power, however, backed by the ability to make regulations under section 6ZC, requires operators to ensure that they have appropriate records and that they are in a position to share them prior to deciding to change or discontinue a service. If they fail to do so, they may find themselves subject to a variety of sanctions.

217. Further, the material obtained under the section 43 power may not be disclosed where it relates to the affairs of an individual or business during the lifetime of the individual or the existence of the business. Although there are some exceptions (set out in section 43(5)), this is a significant limitation.

218. An additional constraint is that the section 43 power can only be used in relation to the formulation of general policies: it does not assist local transport authorities (and others with similar duties) where they are dealing with a specific service withdrawal and they need to secure an alternative.

*Provision of service information when varying or cancelling registration: inserted section 6ZA*

219. Inserted section 6ZA(1) sets out that the remainder of that section applies where the operator notifies an affected authority of its intention to cancel or vary a registered local service.<sup>16</sup> The affected authority (or authorities) then may require the operator to provide them with information about the service (subsection (2)). Regulations made under section 6ZC may, however, provide for exceptions to this rule; for example, if the variation is to add stops or increase the frequency of service it would be inappropriate (and unnecessary) for the authority to look at the specific service information. The regulations may also prescribe the time period which the authority has to make the requirement.

220. The information that the affected authority can request will be fully set out in regulations, but it will be limited (by virtue of section 6ZA(3)) to two types of information, namely:

- information about passenger numbers, journeys and fares (which is sometimes referred to in the industry as “patronage information”); and
- information about the revenue obtained by the service (the “revenue information”).

221. Further restrictions on the information that an authority may seek are set out in subsection (4).

222. The first restriction (subsection (4)(a)) is that they may only request the information in connection with their functions under section 9A of the Transport Act 1968 (where the affected authority is SPT) or under section 63 of the 1985 Act (where the Authority is a local transport authority or a Transport Partnership other than SPT).

---

<sup>16</sup> Notification is a requirement under the regulations governing the registration of local services (currently the Public Service Vehicles (Registration of Local Services) (Scotland) Regulations 2001).

223. Under section 9A of the 1968 Act, a Passenger Transport Authority must formulate general policies with respect to the descriptions of public passenger transport services the Authority considers is appropriate for the Passenger Transport Executive to secure for their area for the purpose of meeting any public transport requirements within their area which in the view of the Authority would not be met apart from any action taken by the Executive for that purpose. This is supplemented by a duty on the part of the Executive to secure the provision of such services as they consider it appropriate to secure for meeting any public transport requirements within their area in accordance with those policies. The functions of the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive under section 9A were transferred to SPT by order made under section 10 of the Transport (Scotland) Act 2005.

224. Under section 63 of the 1985 Act, the functions relate to the authority's duties to (i) secure that there are sufficient services to meet the public transport requirements in their area which would not be met without action being taken by the authority and (ii) formulate from time to time general policies as to the descriptions of services that the authority proposes to secure in terms of that duty.

225. The information sought must therefore relate to the authority's obligation to ensure that there is a sufficient service provision and the formulation of general policies in connection with that. This may manifest itself in different ways. For example, it makes it clear that an authority cannot request information in relation to their wider transport planning duties or for the purposes of informing a proposal to make a franchising framework under section 13A of the 2001 Act. However, it will inform decisions about subsidising services and the possibility of the authority providing services under the new section 71A of the 1985 Act (inserted by section 28 of the Bill).

226. The second restriction (subsection (4)(b)) is that the authority can require information in respect of the preceding 12 months only (or a shorter period if the service hasn't been operating that long). Section 6ZC provides that the Scottish Ministers may, however, adjust the length of that period by regulations.

227. Subsection (5) deals with operators' responses to requirements for information and has two elements.

228. The first element is that an operator must respond with the required information within a period to be set by regulations. That period is expected to start with the day that the operator receives the requirement from the authority.

229. The second element is that an operator can, at the same time as sending the required information, also request that the authority do not disclose it on the basis that disclosure of the information is likely to harm the operator's business. In making such a request they are required to provide evidence of their assertion. This evidence will be assessed by the authority under inserted section 6ZB(6). If they decide that disclosure of the information is likely to harm the operator's business they cannot disclose it.

230. Subsection (6) of section 6ZA defines an affected authority.

231. The authorities that can be affected are local authorities and regional Transport Partnerships which have functions under section 9A of the 1968 Act or section 63 of the 1985 Act<sup>17</sup> (see paragraphs 223 and 224 above). For these purposes, it is worth noting that section 63 is not available to a local authority whose area forms part of the Strathclyde Passenger Transport area (the area served by SPT).

232. For these authorities to be affected, they must have a bus stop in their area (or region) somewhere on the route of the service which the operator is proposing to vary or cancel.

233. It is therefore possible for more than one authority to be an affected authority and the disclosure requirements in section 6ZB reflect that by allowing for sharing of information between such authorities. It is expected that in such cases that the authority which is most affected by the proposal will take the lead in requesting the information, but there is no bar on all affected authorities from doing so.

#### *Sanctions*

234. Where an operator fails to comply with the duties in section 6ZA, the Scottish Traffic Commissioner will be able to take enforcement action against them.

#### *Provision of service information: extent of permissible disclosure: inserted section 6ZB*

235. This section sets out the limited circumstances in which information obtained by an affected authority may be disclosed. In doing so, it draws a distinction between the two different types of information, patronage and revenue, with the latter having a narrower group of potential recipients and additional controls placed on what may be disclosed. In both cases, however, the information may be shared with other affected authorities (who may not then disclose the information to anyone else).

236. Subsection (2) deals with the disclosure of patronage information. This may be shared with persons who the affected authority consider are likely to bid to provide a supported service to replace or supplement the service that is being varied or cancelled by the operator. This then will allow the authority to share the information with other operators who may wish to make a bid.

237. The section also provides the Scottish Ministers with a basis for making regulations to extend the people to whom patronage information may be disclosed. Any extension would be subject to the consultation requirements set out in that section and described below.

238. Subsections (3) and (4) deal with the disclosure of revenue information. Like patronage information, the affected authority are able to share information with people who they think are likely to bid in a tender process. However, the information has to be aggregated into an annual figure to preserve commercial confidentiality. The authority are also prevented from disclosing it

---

<sup>17</sup> While not obvious on the face of the 1985 Act, section 10 of the Transport (Scotland) Act 2005 allowed for the transfer (by order) of certain transport functions to regional Transport Partnerships. Three such orders have been made to date. The first of these orders transferred a number of functions (including the function in section 9A of the 1968 Act) to SPT. The remaining two orders transferred a number of functions (including the function in section 63 of the 1985 Act) to SWestrans and to Zetrans respectively.

where they have decided to take on the revenue risk for the service as there would be no practical benefit in its disclosure.

239. There are essentially two approaches to revenue risk in contracts for supported services. In the first, known as the “minimum cost approach”, the operator tenders for the whole cost of running the service and the authority keeps any revenue generated by passengers – so assuming the risk. In this way, the operator’s costs are completely covered by the authority regardless of how much revenue is actually generated by passengers. Any difference between estimated and actual passenger revenue will require to be absorbed by the authority. In the second approach, known as the “minimum subsidy approach”, the operator retains the revenue from passengers and tenders for the whole costs of operating the service less the estimated passenger revenue. As such, the local transport authority pays a fixed sum by way of subsidy and if actual passenger revenue falls short of estimates, that shortfall will be absorbed by the operator.

240. Subsections (6) and (7) deal with where an operator requests (under section 6ZA(5)(b)) for the information provided not to be disclosed if it considers that disclosure is likely to cause damage to its commercial interests. Where the affected authority decide that they agree with that assessment, subsection (7) confirms that they may not disclose the information. It also makes clear that the authority cannot disclose any information which the operator has asked not to be disclosed until they have considered the evidence, made their decision and notified the operator accordingly.

241. Subsection (8) makes it an offence for an affected authority to disclose information which they are not permitted to disclose. Subsection (9) provides that the penalty for such a disclosure is a fine of up to level 5 on the maximum scale (currently £5,000). Further, subsection (10) sets out circumstances where, if the disclosure is attributable to an individual employed by the authority, that individual may also be prosecuted for the offence.

242. Subsection (11) defines a supported service as one which is subsidised under section 9A(4) of the 1968 Act or section 63(5) of the 1985 Act.

*Provision of service information: further provision - inserted section 6ZC*

243. This section enables the Scottish Ministers to make regulations to provide further detail about the duties and processes in inserted sections 6ZA and 6ZB and also to provide for exceptions where the core duty to provide information will not apply.

244. Before making regulations under this section, the Scottish Ministers must carry out a consultation with the various groups who are most likely to be affected by changes to the system, including those who are representative of operators, passenger groups and affected authorities.

**Power to require information about local services – section 34**

*Introduction*

245. Section 34 adds a new section 35A to the 2001 Act. The provision confers a power on the Scottish Ministers to require bus operators, local transport authorities and the Scottish traffic commissioner to provide information in relation to local services. It also enables Ministers to

require persons who are applying for registration of a local service under section 6 of the Transport (Scotland) Act 1985, or applying to vary or cancel such a registration, to provide information in connection with the application.

246. Creating the requirement by way of regulations offers the Scottish Ministers the ability to adapt the requirements to advances in technology and ensure that the level of technical specification is appropriate.

*Information that may be required about services*

247. Subsection (2) of section 34 restricts the Scottish Ministers to requiring information solely for the purpose of facilitating the provision of information to users (and potential users) of buses. This is a different purpose from the other powers to obtain information contained in the 1985 Act and 2001 Act<sup>18</sup>, which are focused on local traffic authorities being able to require information in respect of the formulation of their general policies in relation to bus transport or in connection with their duties to secure a suitable service. Further, information obtained under the other powers is more likely to be commercially sensitive and so is subject to strict limitations on its disclosure.

248. The information that may be required under the new section is set out in subsection (3). There are two elements to this:

- information about routes, timetable, stopping places, fares and tickets (and changes to them); and
- information about the operation of services including, in particular, real time information about services when they are running.

249. The power also enables the Scottish Ministers to require the information to be provided in a particular format (subsection (4)(c)) and to a particular standard (which may be a standard which changes over time (subsection (6))). The regulations may also require the information to be provided at a particular time or times (subsection (4)(b)). This may be immediately upon the information becoming available.

250. This range of information coupled with the ability to specify format means that the power can be used to create or support services such as Traveline Scotland or bus tracker applications. The provision in subsection (7) in relation to the disclosure of the information ensures that the Scottish Ministers are able to specify that the information can be used for these purposes without a charge to bus users for accessing it.

251. The provisions anticipate that it is likely that the local transport authority or traffic commissioner may be better placed to provide certain types of information than operators and so the power caters for that too.

---

<sup>18</sup> Such as section 43 of the 2001 Act or the new sections 6ZA, 6ZB and 6ZC of the 1985 Act being inserted by the Bill.

### *Recipients of the information*

252. The regulations will specify to whom information is to be provided. By virtue of subsection (5), this may only be the Scottish Ministers, local transport authorities or a specified person (most likely a company or statutory body) who is given responsibility for any system which makes information available to the public.

### *Consequences of failure to comply*

253. Where a bus operator doesn't provide information required under the regulations the traffic commissioner may impose a penalty under section 39(1) of the 2001 Act (by virtue of the amendment of that section by 34(3) of the Bill). The penalty that may be imposed is capped in accordance with section 39(3).

### *Consultation*

254. Before making any regulations under this section, the Scottish Ministers must consult a range of interested persons, including those bodies that they think represent the interests of operators of bus services, bus users and local transport authorities. The Scottish Ministers must also consult the Competition and Markets Authority and such other people as they consider appropriate.

## **PART 3 – TICKETING ARRANGEMENTS AND SCHEMES**

### **Introduction**

255. Part 3 of the Bill makes changes to the existing legislation in the 2001 Act about ticketing arrangements and ticketing schemes for bus travel. In particular it—

- extends these arrangements and schemes to include certain connecting rail and ferry services;
- gives the Scottish Ministers the power to set a national technological standard for the implementation and operation of smart ticketing arrangements;
- sets up a National Smart Ticketing Advisory Board;
- makes changes to what a ticketing scheme can include and the process for making one;
- requires local transport authorities to produce annual reports on ticketing arrangements and schemes; and
- gives the Scottish Ministers the power to direct a local transport authority to make or vary a ticketing scheme.

### **General Background**

256. Sections 28 to 32 of the 2001 Act contain existing provision on ticketing arrangements and ticketing schemes in relation to local services. They require local transport authorities to keep under consideration what ticketing arrangements are needed in their area and give authorities a power to make ticketing schemes requiring such arrangements to be put in place if they are not able to arrange for them voluntarily.

257. “Ticketing arrangements” are defined in section 28(5) to mean arrangements where a single transaction (e.g. buying a ticket) gives a person the right to make more than one journey on particular bus services or to make a single journey on two or more services or to choose between different operators providing the same journey.

258. By virtue of sections 54(2) of both the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006, the tram services provided under those Acts are treated as “local services” and so are covered by the definition of ticketing arrangements despite not being bus services.

259. Section 28 requires local transport authorities to keep under review what ticketing arrangements should be made available for their area. If an authority thinks that some arrangements are not being made available which should be, they are to work with the operators of local services to make the ticketing arrangements available.

260. Section 29 gives local transport authorities the power to make ticketing schemes requiring operators of local services to implement ticketing arrangements. The power can only be exercised if the authority considers the proposed scheme would be in the interest of the public and would implement the authority’s general policies and if the competition test set out in section 37 is met.

261. Sections 30 and 31 set out the process for making a ticketing scheme including consultation and notification.

262. Section 32 provides that operators of local services must implement any ticketing arrangements required under a ticketing scheme.

#### *Ticketing arrangements – section 35*

263. Section 35(2) of the Bill inserts a new section 27A into the 2001 Act which defines “ticketing arrangements” and other terms. It also inserts a new Chapter heading to group together the existing provisions on ticketing arrangements and schemes.

264. Section 27A(1) defines “ticketing arrangements”. Paragraphs (a) to (c) are the same as the existing definition in section 28(5). Paragraph (d) is a new part of the definition and extends ticketing arrangements to include arrangements where a person can travel on a local bus service and on a connecting rail or ferry service.

265. Section 27A(2) defines “smart ticketing arrangements”. These are ticketing arrangements where the proof of a person’s right to travel can be held or produced by the person in electronic form. For example, arrangements where a person’s ticket can be stored on a smartcard or an app on a mobile phone would be smart ticketing arrangements. Ticket arrangements that are put in place by operators can still be smart ticketing arrangements even if they allow for paper tickets as well as electronic ones.

266. Section 27A(3) and (4) set out the meaning of “connecting rail or ferry service” which is used in the definition of “ticketing arrangements” and elsewhere.

267. Section 27A(5) and (6) give the Scottish Ministers the power to add new types of arrangements to the definition of “ticketing arrangements”. These arrangements must involve travel on a local service and on a service of another kind specified in the regulations.

268. Subsection (3) of section 35 repeals the existing definition of “ticketing arrangements” in section 28(5) of the 2001 Act as it has been superseded by the new definition in section 27A(1).

269. Subsection (5) provides that the regulation-making power in section 27A(5) is subject to the affirmative procedure.

*National technological standard for smart ticketing – section 36*

270. Subsection (2) inserts a new section 27B into the 2001 Act which confers on the Scottish Ministers the power to specify and publish a technological standard for the implementation and operation of smart ticketing arrangements.

271. The standard specified is particularly relevant to ticketing schemes made under section 29 of the 2001 Act. Future ticketing schemes will only be able to specify ticketing arrangements which comply with the national technological standard (see section 38(2)(a)).

272. Rather than setting out the full details of the standard, Ministers may choose to specify a standard that already exists and has been published elsewhere – see section 27B(2).

*National Smart Ticketing Advisory Board – section 37*

273. Subsection (2) inserts a new section 27C into the 2001 Act which establishes the National Smart Ticketing Advisory Board.

274. The Board’s functions are to advise the Scottish Ministers in relation to smart ticketing arrangements generally and the national technological standard for smart ticketing. In relation to the latter, section 27B(4) (inserted by section 36(2)) provides that Scottish Ministers must consult the Board before specifying a standard (or varying or revoking an existing specification).

275. The Board is an advisory committee of individuals – it does not have separate legal personality. The process for appointing and remunerating members is to be set out in regulations made by the Scottish Ministers (section 27C(3) and (4)). Those regulations may also specify the decision-making process that the Board must follow, e.g. by making provision about voting. Before making the regulations, the Scottish Ministers must consult the organisations set out in section 27C(4).

*Ticketing schemes – section 38*

276. Section 38 makes a number of changes to sections 29 to 31 of the 2001 Act. Section 29 provides for local transport authorities to make ticketing schemes which require operators of local services to implement ticketing arrangements. Section 30 sets out the consultation requirements before a ticketing scheme can be made and section 31 sets out the procedure for making the scheme after consultation.

277. Subsection (2)(a) inserts new subsections (3A), (3B) and (3C) into section 29. The effect of subsection (3A) is that local transport authorities will only be able to make schemes requiring operators of local services to implement smart ticketing arrangements which comply with the national technological standard for smart ticketing.

278. Subsections (3B) and (3C) elaborate on the kinds of things that a local transport authority may specify in a ticketing scheme.

279. Subsection (2)(b) is a consequential change resulting in the definition of “ticketing arrangements” being moved from section 28(5) to new section 27A(1).

280. Subsection (2)(c) inserts new subsections (7) and (8) into section 29 requiring local transport authorities to co-operate with one another and to consider ticketing schemes that will facilitate travel to adjoining areas or the adoption of similar ticketing arrangements in adjoining areas. In consequence, subsection (5) of section 38 of the Bill removes ticketing schemes from the existing duty to co-operate in section 47 of the 2001 Act.

281. Subsection (3) makes two changes to section 30. The effect of the change in paragraph (a) is that notice of a proposed ticket scheme no longer needs to be given in a local newspaper; instead local transport authorities can give notice of it in the way they think appropriate to bring it to the attention of people in the scheme area. The list of persons and bodies that are to be consulted in extended to include everyone mention in subsection (3)(b).

282. Subsection (4)(a) inserts new subsection (1A) into section 31 of the 2001 Act. Given the definition of “ticketing arrangements” in section 27A (see section 35 above), ticketing schemes can include ticketing arrangements involving travel on connecting rail or ferry services. Subsection (1A) means that a ticketing scheme that includes such ticketing arrangements cannot be made unless the operator on the rail or ferry service in question consents.

283. Subsection (4)(b) makes changes to the notice requirements in section 31(3) of the 2001 Act. As with the consultation requirements above, it substitutes the requirement to publish a notice in a local newspaper with discretion on behalf of the local transport authority to determine the best way to publicise the scheme in the scheme’s area. It also extends the requirements to include notifying operators of connecting rail and ferry services where appropriate and notifying anyone who was consulted under section 30 but not already listed in section 31(3).

284. Subsection (4)(c) changes section 31(4)(b) to ensure that the notice identifies the connecting rail or ferry services that are affected by a ticketing scheme (if any).

285. Subsection (4)(d) adds new subsections (5), (6) and (7) to section 31 of the 2001 Act. These confer on local transport authorities the power to vary or revoke a ticketing scheme. The same procedure (set out in sections 29 to 31) applies to variation and revocation as applies to the making of a ticketing scheme.

*Directions about ticketing schemes – section 39*

286. Subsection (2) inserts a new section 32A into the 2001 Act giving the Scottish Ministers the power to issue directions to local transport authorities about ticketing schemes.

287. Inserted section 32A(1) confers the power to issue a direction requiring a local transport authorities to use their powers under sections 29 and 31 to make or vary a ticketing scheme.

288. The direction may require particular ticketing arrangements or kinds of arrangements to be specified in the scheme and for those arrangements to have specific characteristics as set out in the direction. It may also require the scheme to apply to a particular kind of local service.

289. Inserted subsections (3) to (5) set out some procedural matters including a requirement to consult the National Smart Ticketing Advisory Board before issuing a direction and a requirement for any direction to be in writing and published.

*Reports on ticketing arrangements and schemes – section 40*

290. Subsection (2) inserts a new section 32B into the 2001 Act requiring local transport authorities to produce annual reports on ticketing arrangements and ticketing schemes.

291. Inserted section 32B(1) provides for the reports to be published.

292. The content of a report is set out in inserted subsection (2). The report is to include:

- information on determinations under section 28(1) (determinations as to what ticketing arrangements should be made available for the local transport authority's area);
- information on arrangements made under section 28(4) (arrangements with operators of local services to make ticketing arrangements) and on the extent to which they are smart ticketing arrangements complying with the national technological standard for smart ticketing; and
- information on ticketing schemes made, varied or revoked during the year.

293. Inserted section 32B(3) clarifies that, where a scheme has been made jointly by more than one authority, each of those authorities must include the scheme within their report.

*Guidance – section 41*

294. This section makes some changes to existing provisions of the 2001 Act which relate to guidance issued by the Scottish Ministers.

295. The amendments in subsection (2) mean that Scottish Ministers have the power to issue guidance about:

- the determination by local transport authorities of what ticketing arrangements should be made;

- ticketing schemes in general; and
- the preparation by local transport authorities of reports under section 32A (see section 40 above).

296. Section 79 of the 2001 Act provides that local transport authorities must have regard to any guidance issued under that section. The guidance must be published.

297. Subsection (3) makes a consequential change to the interpretation section of the 2001 Act to provide a definition of “ticketing arrangements” for the purposes of section 79.

## **PART 4 – PAVEMENT PARKING AND DOUBLE PARKING**

### **Introduction**

298. This Part of the Bill makes provision prohibiting parking on pavements (footways and footpaths) and “double” parking (defined as parking more than 50 cm away from the edge of a carriageway).

299. The provisions take into account the concerns that had been identified by the Local Government and Regeneration Committee and stakeholders during Stage 1 of the Footway Parking and Double Parking (Scotland) Bill which fell in March 2016 due to the Parliament being dissolved for the 2016 election. The Bill is being taken forward following devolution of legislative competence to the Scottish Parliament via the Scotland Act 2016. The 2016 Act devolves legislative competence for the parking of vehicles on roads to the Scottish Parliament. The Bill will also enable local authorities, under order making powers, to exempt footways from the pavement parking prohibition where it is not appropriate given the different circumstances which may prevail across local authority areas, different regions and towns across Scotland.

300. Under the Road Traffic Regulation Act 1984, traffic authorities can use Traffic Regulation Orders (TROs) to apply local restrictions, which are enforceable when the appropriate road signs or markings are displayed. TROs are used by traffic authorities to give effect to traffic management measures on roads within their areas (e.g. single and double yellow lines). The restrictions can be applied for various reasons and could cover particular hotspots or larger areas. They can have the effect at all times or during specific periods, and apply to certain classes of vehicles. Local traffic authorities cite that the work and cost involved in producing TROs and the cost of the associated signage can be a disincentive to implementing pavement parking restrictions.

301. The provisions within the Bill will introduce a ban on parking on pavements and double parking in Scotland. This replaces the need for each local authority to introduce pavement parking restrictions via TROs.

302. The new duties will require local authorities to assess if necessary, what footways should be exempt from the national prohibition on pavement parking, in accordance with directions to be given by the Scottish Ministers to local authorities.

303. Since Police Scotland's decision to remove its traffic warden service as a result of a review on resources in 2013, the number of local authorities who have decriminalised parking enforcement (DPE) powers has increased (from 14 to 20 and is expected to increase to 21 by the end of 2018). DPE is a regime which enables a local authority to enforce its own parking policies using parking attendants employed by the Council or outsourced to a third party on behalf of a Council. The powers enable parking attendants to issue Penalty Charge Notices (PCNs) to motorists breaching parking controls in specific areas. In areas of DPE, stationary traffic offences cease to be part of the criminal law enforced by the police and instead become civil matters enforced by local authorities.

304. The Bill (and regulations to be made under it) provide for enforcement of the new restrictions to be undertaken by local authorities. The Bill confers on local authorities the power to impose penalty charges. As not all local authorities have decriminalised parking enforcement powers and therefore the associated resources and infrastructure to undertake enforcement, the Bill will also enable local authorities to engage third parties to enforce the prohibitions on their behalf if they so wish.

305. The Bill provisions enable secondary legislation to be made placing a duty on all local authorities to keep accounts, as well as to prepare and publish statements relating to the income and expenditure local authorities have received in connection with the enforcement of the new restrictions.

306. Currently local authorities with DPE powers have a duty under section 55 of the Road Traffic Regulation Act 1984 to keep accounts of their income and expenditure in connection with decriminalised enforcement in their areas and to "ring-fence" the income. Any "surplus" may only be used to make good any amount charged to the general fund over the preceding four years or for certain transport-related purposes including:

- the provision and maintenance of off-street parking;
- where the local authority considers that further provision of off-street parking is not necessary or desirable, the provision or operation of (or facilities for) public passenger transport services; and
- road improvement projects in the local authority area.

307. It is the Scottish Government's intention that any "surplus" generated through the enforcement of the new prohibitions should remain within the local authority in whose area the penalty charges were levied and that it should be ring-fenced as is currently arranged for DPE.

308. As there will be considerable preparatory work needed in connection with the new prohibitions the Bill provisions allow the commencement of these prohibitions on a region by region basis across Scotland depending on the readiness of the local authority.

## **Pavement parking prohibition**

### *Pavement parking prohibition – section 42*

309. Subsection (1) of this section provides that a person must not park a motor vehicle on a “pavement”, which is defined as meaning a footpath or footway to be construed in accordance with section 151(2) of the Roads (Scotland) Act 1984. A footway is a road (within the meaning of section 151(1) of that Act) which is associated with a carriageway and over which there is a public right of passage by foot only. A footpath is a road (within the same meaning) which is not associated with a carriageway and over which there is a public right of passage by foot only. This prohibition is referred to in this Part of the Bill as the “pavement parking prohibition”.

310. For the purposes of the pavement parking prohibition, subsection (4) provides that “motor vehicle” has the meaning given by section 185(1) of the Road Traffic Act 1988, meaning a mechanically propelled vehicle intended or adapted for use on roads. But it does not include:

- a mechanically propelled vehicle which is an implement for cutting grass, is controlled by a pedestrian and is not capable of being used or adapted for any other purpose;
- any other mechanically propelled vehicle controlled by a pedestrian, or an electrically assisted pedal cycle of a class, as may be specified by regulations made by the Secretary of State for the purposes of section 136 of the RTRA (and section 189 of the Road Traffic Act 1988) (see, for example, the Electrically Assisted Pedal Cycle (Amendment) Regulations 2015 (S.I. 2015/24) amending the Electrically Assisted Pedal Cycles Regulations 1983 (S.I. 1983/1168)).

311. Furthermore, the definition of “motor vehicle” for the purposes of the pavement parking prohibition also excludes a “heavy commercial vehicle” within the meaning of section 20(1) of the Road Traffic Act 1988, meaning any goods vehicle which has an operating weight exceeding 7.5 tonnes. The pavement parking prohibition does apply to heavy commercial vehicles as section 19 of the Road Traffic Act 1988 provides that it is an offence for those vehicles to park wholly or partly on a footway (with “footway” having the same meaning as in the Roads (Scotland) Act 1984 – see section 192(2) of the Road Traffic Act 1988).

312. In addition, section 185(1) of the Road Traffic Act 1988 is subject to section 20 of the Chronically Sick and Disabled Persons Act 1970 (the “1970 Act”). This means that the definition of “motor vehicle” for the purposes of the pavement parking prohibition does not include an “invalid carriage” (within the meaning of section 20 of the 1970 Act) which complies with requirements set out in regulations made by the Secretary of State and which is being used in accordance with conditions set out in regulations. This is because section 20(1)(a) of the 1970 Act provides that where an “invalid carriage” is mechanically propelled, it is to be treated as not being a motor vehicle for the purposes of the Road Traffic Act 1988. (“Invalid carriage” is defined by section 20(2) of the 1970 Act as meaning “a vehicle, whether mechanically propelled or not, constructed or adapted for use for the carriage of one person, being a person suffering from some physical defect or disability”.)

313. Subsection (2)(a) provides that a motor vehicle is parked on a pavement for the purposes of subsection (1) if it is stationary and one or more of its wheels (or any part of them) is on any part of the pavement.

314. Subsection (2)(b) provides that a motor vehicle is stationary (in order to be considered to be “parked” on a pavement) whether or not the driver of the vehicle is in attendance or the vehicle’s engine is running.

315. The pavement parking prohibition is subject to the exceptions (which also apply to the double parking prohibition) set out in section 47.

*Exemption orders – section 43*

316. Subsection (1) provides that a local authority may make an order (“an exemption order”) providing that the pavement parking prohibition does not apply to a footway within its area that is specified in the exemption order.

317. Subsection (2) provides a local authority may not specify a footway in an exemption order unless the footway, or the carriageway with which the footway is associated, has the characteristics that are specified in a direction given by the Scottish Ministers under section 56(1).

318. While an exemption order may apply to all or part of a footway, it may not apply only at certain times or to certain classes of vehicle or be subject to any conditions (see subsection (3)).

319. Where the local authority that is proposing to make an exemption order is not the traffic authority for the footway concerned, the local authority may not make the order without the traffic authority’s consent (see subsection (4)).

320. An exemption order is not a Scottish statutory instrument within the meaning of section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 (the “2010 Act”), so no parliamentary procedure applies to the making (or amendment or revocation) of such an order. But an exemption order is a “Scottish instrument” for the purposes of Part 1 of the 2010 Act, meaning that the power conferred by subsection (1) to make an order includes a power to revoke, amend or re-enact an exemption order made by virtue of the power conferred by subsection (1) (see section 6 of the 2010 Act). Furthermore, the power may be exercised from time to time (see section 7(1) of the 2010 Act).

*Exemption orders: form and procedure – section 44*

321. Subsection (1) confers power on the Scottish Ministers, by regulations subject to the negative procedure (see section 72(5)), to make provision in connection with the making, amendment or revocation of an exemption order. Examples of the kind of provision that may be made in these regulations are set out in subsection (2).

*Exemption orders: traffic signs – section 45*

322. Where an exemption order is made under section 43(1), the traffic authority for the footway to which the order relates must place (or secure the placement of) traffic signs in connection with the exemption order and it must maintain (or secure the maintenance of) those signs (see subsections (1) and (2)).

323. Under subsection (3), if the traffic authority is not the local authority that made the exemption order (which would be the case in relation to a trunk road or a special road mentioned in paragraph (b) of the definition of “roads authority” in section 151(1) of the Roads (Scotland) Act 1984), the traffic authority may enter into arrangements with the local authority under which the local authority places (or secures the placement of) traffic signs in connection with the exemption order and maintains (or secures the maintenance of) those signs. Alternatively, the traffic authority could retain the duty to place and maintain the traffic signs but enter into an arrangement with the local authority that made the exemption order for that local authority to assist the traffic authority in relation to the placing and maintenance of traffic signs in connection with the exemption order. This assistance could include the local authority making a financial contribution to the cost of placing (and maintaining) the traffic signs.

324. If the traffic authority enters into an arrangement mentioned in subsection (3)(a) with a local authority, the local authority is obliged to comply with any directions given in connection with the placing of traffic signs under section 65(1) of the Road Traffic Regulation Act 1984 (“the RTRA”).

325. “Traffic signs” is defined in this section as having the meaning given by section 64(1) of the RTRA, meaning that the Scottish Ministers have the power by regulations made under section 64(1)(a) of that Act to specify, or to otherwise authorise, the type of traffic signs that must be placed and maintained under that section in connection with exemption orders.

**Double parking prohibition**

*Double parking prohibition – section 46*

326. Subsection (1) of this section provides that a person must not park a motor vehicle in such a way that no part of the motor vehicle is within 50 cm of the edge of the carriageway. In this Part of the Bill, this prohibition is referred to as the “double parking prohibition”. “Edge of the carriageway” is defined for the purposes of the double parking prohibition in subsection (5), taking account of the different ways in which the edge of a carriageway is signified, whether it is marked by a painted solid white line or by a kerb, or it is without a painted solid white line or a kerb but falls where the surface of the carriageway meets the verge of the road.

327. A motor vehicle is “parked” for the purposes of the double parking prohibition if it is stationary, whether or not the driver of the vehicle is present or the engine of the vehicle is running (see subsection (2)). However, a motor vehicle is not parked for the purposes of the double parking prohibition if it is stationary due to the necessities of traffic or as a result of other circumstances beyond the control of the driver of the vehicle (see subsection (3)).

328. “Motor vehicle” has the same meaning for the purpose of the double parking prohibition as it has for the purpose of the pavement parking prohibition except that in the case of the double parking prohibition it also includes a heavy commercial vehicle.

329. The double parking prohibition is subject to the exceptions (which also apply to the pavement parking prohibition) set out in section 47.

*Exceptions to parking prohibitions - section 47*

330. This section sets out the exceptions to the pavement parking prohibition and the double parking prohibition (referred to collectively in this section (and this discussion of the section) as the “parking prohibitions”).

331. In summary, the parking prohibitions do not apply in the following cases:

*Emergency services etc.*

- where the motor vehicle is being used for the purposes of the emergency services or the military etc. and the achievement of those purposes etc. would be likely to be hindered if the motor vehicle were not parked on a pavement or “double parked” (i.e. parked as mentioned in section 46(1));

*Works in roads, removing obstructions, waste collection and postal services*

- a motor vehicle is being used for:
  - “works in roads” (defined as meaning “road works”, “works of road purposes” or “major works for road purposes” (see discussion of these terms in paragraph 365 of these notes) or cleaning etc. any equipment or structure placed on or over a road by or on behalf of a roads authority);
  - the removal of an obstruction to traffic;
  - the collection of waste by or on behalf of a local authority;
  - postal services provided by the Post Office or a private provider;

and the vehicle cannot reasonably be so used without being parked on the pavement or double parked and it is not parked for any longer than is necessary for that use;

*Medical professionals*

- the motor vehicle is being used by a registered medical practitioner, registered nurse or registered midwife for or in connection with the provision of urgent or emergency health care, the provision of that care would be likely to be hindered if the motor vehicle were not parked on a pavement or double parked, and the vehicle is parked for no longer than is reasonable in connection with the provision of the care (“registered medical practitioner”, and “registered” in relation to nurse and midwife, each take the meanings given in schedule 1 of ILRA);

*Delivery or collection etc. of goods*

- the motor vehicle is being used in the course of business for the purpose of delivering or collecting goods or for loading or unloading the vehicle; that action cannot reasonably be carried out without the vehicle being parked on a pavement or double parked; and the vehicle is not parked for a continuous period of more than 20 minutes;

*Parking in an authorised or designated parking place*

- the motor vehicle is parked wholly within an authorised or designated parking place (authorised or designated under section 32(1)(b) or 45 of the RTRA respectively);

*Permission by a constable*

- the motor vehicle is parked in accordance with permission given by a constable in uniform;

*Saving life or responding to another emergency*

- where a person has parked the motor vehicle for the purpose of saving life or responding to another similar emergency, the achievement of that purpose would be likely to be hindered if the vehicle were not parked on a pavement or double parked, and the vehicle is not parked on a pavement or double parked for longer than is necessary for that purpose;

*Providing assistance at an accident or breakdown*

- where a person has parked the motor vehicle for the purpose of providing assistance at an accident or breakdown, that assistance could not be safely or reasonably provided without the vehicle being parked on a pavement or being double parked, and the vehicle is not parked on a pavement or double parked for longer than is necessary for that purpose.

332. Subsection (11) confers power on the Scottish Ministers to, by regulations, modify this section. The regulations are subject to the affirmative procedure – see section 72(2).

**Enforcement of parking prohibitions**

*Imposition of penalty charges – section 48*

333. Subsection (1) provides that a penalty charge is payable where a person parks a motor vehicle in contravention of the pavement parking prohibition or the double parking prohibition.

334. Subsection (2) provides that where a local authority considers that a penalty charge is payable in respect of a contravention occurring in its area, the local authority may issue a penalty charge notice, which must be issued in accordance with regulations to be made by the Scottish Ministers under section 49(1).

335. Under section 54, a local authority may enter into arrangements with another person for that person to issue a penalty charge notice under subsection (2) on behalf of the local authority.

336. A penalty charge notice may be issued by (or on behalf of) a local authority under subsection (2) only on the basis of either: (a) conduct observed by an authorised enforcement officer (see the definition of “authorised enforcement officer” in subsection (6) – discussed below) or (b) a record produced by an “approved device”, meaning a device approved under or in accordance with regulations made by the Scottish Ministers under section 49(1) in connection with the enforcement of the pavement parking and double parking prohibitions (see definition of “approved device” in subsection (6)).

337. Subsection (4) provides that a penalty charge imposed by a penalty charge notice is payable by the registered keeper of a motor vehicle (meaning the person in whose name the vehicle is registered under the Vehicle Excise and Registration Act 1994 at the time of the contravention to which the penalty charge relates) or, in circumstances that may be specified in regulations made by the Scottish Ministers under subsection (4)(b), by another person who may be specified in those regulations. This power to specify other persons who are liable to pay a penalty charge is likely to be used to specify, among other things, that where a hire car is parked in contravention of the pavement parking or double parking prohibition, the driver of the hire car (rather than the car hire company which is likely to be the registered keeper of the vehicle) is responsible for paying the penalty charge.

338. Under subsection (5), the Scottish Ministers have power by regulations to make provision for or in connection with the amount to be imposed as a penalty charge, which may be used, for example, to prescribe a specific amount that may be imposed by local authorities as a penalty charge, or it could be used to specify a maximum amount that may be imposed as a penalty charge. In addition, the Scottish Ministers may specify in these regulations that discounts or surcharges may be applied to the amount of a penalty charge, the circumstances in which a surcharge or discount may be applied and the amount of any surcharge or discount that may be applied by a local authority.

339. Under subsection (6), an authorised enforcement officer is a person employed in connection with the pavement parking or double parking prohibitions by the local authority issuing a penalty charge notice or employed by another person with whom the local authority has entered into arrangements as mentioned in section 54. An authorised enforcement officer is also required to wear a uniform of a type to be determined by the local authority issuing the penalty charge notice (or on whose behalf the penalty charge is issued) and that determination is to be made in accordance with any directions given to the local authority under section 56(1).

#### *Enforcement of parking prohibitions – section 49*

340. Subsection (1) confers power on the Scottish Ministers to make regulations making provision for or in connection with the enforcement of the pavement parking and the double parking prohibitions.

341. Subsection (2) sets out examples of the kind of provision that may be made in these regulations. In particular, the regulations may make provision for or about:

- the devices that may be approved by the Scottish Ministers for use in connection with the detection of the contravention of a parking prohibitions (these devices are likely to include cameras);
- the notification of penalty charges;
- timing and manner of payment of a penalty charge;
- reviews and appeals in connection with the imposition of penalty charges– it is intended that a right of appeal against the a penalty charge will be available to the First-tier Tribunal for Scotland in certain circumstances following an unsuccessful review;
- the manner of enforcement of a penalty charge;
- steps that may be taken by (or on behalf of) a local authority following the cancellation of a penalty charge, which may include issuing another penalty charge in respect of the same contravention.

342. The regulations may not confer power to stop motor vehicles (see subsection (3)) but they may create criminal offences to be triable summarily (punishable by a fine of no more than level 5 on the standard scale (currently £5,000) or a lower amount as may be prescribed by the regulations) (see subsection (4)(a)). In addition, the regulations may provide that a penalty charge is not required to be paid, or is to be refunded, where the conduct in respect of which the penalty charge is issued is conduct that is the subject of: criminal proceedings, a fixed penalty notice (within the meaning of section 52(1) of the Road Traffic Offenders Act 1988, issued as an alternative to an offence), or a penalty charge (issued under section 66(1) of the Road Traffic Act 1991 under the decriminalised parking regime which applies in the majority of Scotland’s local authorities) (see subsection (4)(b)).

343. Under subsection (4)(c), the regulations may provide that a record produced by a device that is approved under or in accordance with regulations under section 49(1) is sufficient evidence of the fact that is recorded in that record in the circumstances specified in the regulations.

344. Regulations under subsection (1) are subject to the affirmative procedure where they create a criminal offence and are otherwise subject to the negative procedure – see section 72(3).

*Power to install devices etc. for detection of contravention of parking prohibitions – section 50*

345. Subsection (1) confers power on a traffic authority to install and maintain “approved devices” on a road in connection with the detection of a contravention the pavement parking prohibition or the double parking prohibition.

346. If the traffic authority is not the local authority for the area in which a device is to be installed, the traffic authority may enter into arrangements with the local authority under which the local authority installs (or secures the installation of) the device. Alternatively, the traffic authority could retain the duty to place and maintain the devices but enter into arrangements with the local authority (for the area in which the device is to be installed) to assist the traffic authority in relation to the installation and maintenance of the device. This assistance could

include the local authority making a financial contribution to the cost of the installation (and maintenance) of the device.

*Removal of vehicles parked contrary to parking prohibitions – section 51*

347. Subsection (1) confers power on the Scottish Ministers to, by regulations, make provision for or about the removal from a road of a motor vehicle which is parked in contravention of the pavement parking or the double parking prohibition. The regulations will confer power on local authorities (and any person with whom a local authority has entered into arrangements with as mentioned in section 54) to remove such motor vehicles from a road. Note that “road” takes the meaning given by section 151(1) of the Roads (Scotland) Act 1984 (“1984 Act”) (see section 58 of the Bill) and includes a “pavement” as defined in this Part. This Part of the Bill defines a “pavement” as being a footway or a footpath in terms of section 151(2) of the 1984 Act (see sections 42(4) and 58 of the Bill) and section 151(2)(a) and (b) of the 1984 Act defines a footway and a footpath as being a type of road for the purposes of the 1984 Act.

348. Subsection (2) sets out examples of the kind of provision that may be made in regulations under subsection (1) in connection with the removal of motor vehicles.

349. The power under subsection (1) is subject to the negative procedure – see section 72(5).

*Moving vehicles parked contrary to parking prohibitions – section 52*

350. Subsection (1) confers power on the Scottish Ministers to, by regulations, make provision for or about moving a motor vehicle which is parked in contravention of the pavement parking or the double parking prohibition from its position on a road to another position on that road or on another road. The regulations will confer power on local authorities (and any person with whom a local authority has entered into arrangements with as mentioned in section 54) to move such motor vehicles.

351. Subsection (2) sets out examples of the kind of provision that may be made in regulations under subsection (1) in connection with the moving of motor vehicles.

352. The power under subsection (1) is subject to the negative procedure – see section 72(5).

*Disposal of abandoned vehicles – section 53*

353. Subsection (1) confers power on the Scottish Ministers to, by regulations, make provision for or about the disposal of a motor vehicle which has been removed from a road pursuant to regulations under section 51(1). The regulations will confer power on local authorities (and any person with whom a local authority has entered into arrangements with as mentioned in section 54) to dispose of such motor vehicles in circumstances as may be specified in the regulations.

354. Subsection (2) sets out examples of the kind of provision that may be made in regulations under subsection (1), which will include the procedure that must be followed before a vehicle may be disposed of under the regulations.

355. The power under subsection (1) is subject to the negative procedure – see section 72(5).

*Arrangements in connection with enforcement – section 54*

356. This section allows local authorities to enter into arrangements (under a contract) with any person for that person to exercise functions relating to the enforcement of the pavement parking and double parking prohibitions which are conferred on local authorities by or under section 48(2), 49(1), 51(1), 52(1) or 53(1) of the Bill.

**Other provisions relating to parking prohibitions**

*Accounts – section 55*

357. This section confers power on the Scottish Ministers to by regulations make provision for or about:

- the keeping of accounts by local authorities in connection with their functions under this Part of the Bill;
- the purposes for which any surplus in an account kept by a local authority in accordance with these regulations may be applied.

*Ministerial directions – section 56*

358. This section confers a general power of direction on the Scottish Ministers in relation to the exercise of local authorities' functions under this Part.

359. Subsection (2) sets out some examples of the kind of matters to which directions may relate including the assessments that are to be carried out before an exemption order is made under section 43(1) of the Bill, provision relating to the uniforms to be worn by authorised enforcement officers, and the information to be published by local authorities in connection with this Part of the Bill. Directions given by the Scottish Ministers under subsection (1) will also specify the characteristics that a footway (or a road with which a footway is associated) must have for the footway to be specified in an exemption order under section 43(1) meaning that the pavement parking prohibition does not apply to that footway (see section 43(2)).

360. Subsection (3)(a) and (b) provides that a direction may be general or relate to a particular function or local authority or it may be given to:

- each local authority;
- a particular local authority (in relation to the whole or part of its area);
- local authorities of a particular description.

361. Subsection (3)(c) provides that directions must be in writing and be published, as must any revision or revocation of a direction (see subsection (6)).

362. A direction may be revised or revoked (see subsection (4)) and subsection (5) specifies examples of some of the ways in which a direction may be revised.

*Ministerial guidance – section 57*

363. Subsection (1) requires a local authority to have regard to any written guidance given by the Scottish Ministers about the exercise of the local authority's functions under this Part of the Bill. The Scottish Ministers must publish any such written guidance in an appropriate matter and as soon as reasonably practicable after it is given (see subsection (2)).

364. It is intended that Ministerial directions or guidance given to local authorities under section 56 or 57 will be published in a single document about parking standards.

## **PART 5 – ROAD WORKS AND THE SCOTTISH ROAD WORKS COMMISSIONER**

### **Interpretation**

*Expressions to describe different types of work in a road:*

365. The Roads (Scotland) Act 1984 (“the 1984 Act”) and the New Roads and Street Works Act 1991 (“the 1991 Act”) use a variety of expressions to describe the different situations and circumstances in which a road may be affected by work. These expressions are important as various duties are set by reference to the type of work being carried out. The main expressions are:

“*works in a road*” is defined by reference to section 151(1) of the 1984 Act (see the entry for “works”). This covers the broadest range of works that can affect a road and, unless otherwise specified, includes the other types of works that are listed below;

“*road works*” is defined by subsection (3) of section 107 of the 1991 Act. However, it needs to be read in conjunction with the rest of that section and also section 145(2) of the 1991 Act (as works for roads purposes are excluded from the definition of road works). Broadly speaking, road works relate to activities and operations which put, move, access or remove apparatus (such as pipes and cables) in or under a road. For example, digging up a road to put in a cable for the provision of broadband internet would be road works. To carry out road works, a person (known as an undertaker) must have a statutory right to do so or have been given permission under section 109 of the 1991 Act. Road works must be distinguished from ‘works for roads purposes’ and ‘major works for roads purposes’, which are focused on making changes to the road or road network (and connected features);

“*works for road purposes*” is defined by section 145(2) of the 1991 Act. This expression is focused on works which are for the maintenance or improvement of the road itself; the signage connected with it; or providing access for vehicles to cross a footway. For example, repairing potholes or erecting new traffic lights would be works for roads purposes;

“*major works for road purposes*” is defined by section 145(3) of the 1991 Act. This relates to specific types of significant work (set out in full in the section) in or to a road which consists of or includes a carriageway. In accordance with section 151 of the Roads (Scotland) Act 1984, a carriageway means (broadly speaking) a road over which vehicles have a public right of passage. Major works for roads purposes are mainly focused on operations which are for the benefit of the roads network or particular roads (for example, reconstruction or widening a road; adding a cycle path or road hump; or tunnelling or boring under the road.).

*Other expressions:*

366. There are also a number of other expressions used in relation to work in roads:

“*Commissioner*” is defined by section 112A of the 1991 Act and means the Scottish Road Works Commissioner. This post was created in the 2005 Act;

“*roads authority*” is defined by section 151(1) of the 1984 Act. For a road other than a trunk road, it will be the local authority for the area that the road is situated in. For a trunk road, in relation to the functions with which this Part of the Bill is concerned, it will be the Scottish Ministers;

“*road works authority*” is defined by section 108(1) of the 1991 Act. Who is the road works authority for a given piece of work depends on whether the road in question is a public or a private road. If it is a public road, the road works authority will be the roads authority for that road (although there are certain duties relating to trunk roads that can be delegated to local authorities). If it is a private road, the road works authority will be the road managers for the road (that is, the authority, person or body who is liable to the public for the maintenance and repair of the road, and if there is none, any authority, body or person having management or control over the road);

“*SRWR*” means the Scottish Road Works Register – see section 112A of the 1991 Act;

“*undertaker*” is defined by section 107(4) and (5) of the 1991 Act. As noted in the definition of road works above, it is the person with a right to carry out road works.

**Scottish Road Works Commissioner: status and functions**

*Status of the Scottish Road Works Commissioner: section 59*

367. The office of the Scottish Road Works Commissioner was established in October 2005 under section 16 of the Transport (Scotland) Act 2005 (“the 2005 Act”).

368. Where a person in Scotland holds a public office it is generally considered that the person does so in a separate capacity from that of the person as an individual. For example, where the person enters into a contract to employ staff or buy property, they are doing so as the office-holder and not in any personal capacity.

369. Section 59 of the Bill amends section 16 of the 2005 Act to confirm that this is the case for the Scottish Road Works Commissioner. It is not regarded as a making change to the status of the Commissioner.

*Inspection functions: section 60*

370. Although the Scottish Road Works Commissioner has the power to require roads authorities, undertakers and road works authorities to provide certain information (see sections 118(4) and 119(2B) of the 1991 Act and section 18 of the 2005 Act), the Commissioner currently has no general inspection function and therefore no independent means of establishing levels of compliance with road works obligations. Section 60 addresses this by inserting a number of new sections into the 2005 Act, under which the Commissioner will be able to establish the facts in

relation to specific instances of suspected non-compliance and to monitor levels of compliance by roads authorities and undertakers more generally.

371. New section 18A of the 2005 Act confers a number of inspection functions on the Commissioner. The specific actions which may be taken are set out in subsection (1) of the new section and include entering specified land or premises such as road works sites and related offices (but excluding private dwelling-houses), obtaining documents or other information, and examining or testing equipment used in connection with road works. However, the functions may only be exercised for the purposes specified in subsection (2) of the new section. These inspection functions may be exercised by the Commissioner personally or by a member of the Commissioner's staff who is designated as an inspector by the Scottish Ministers.

372. New section 18B of the 2005 Act allows a warrant to be granted authorising the exercise of the powers conferred by section 18A. The obtaining of a warrant will be necessary (and can be granted) only where entry to the premises is refused, is expected to be refused, or where there is no occupier present to allow access – either because the premises are unoccupied, or because the occupier is temporarily away.

373. The ability to obtain a warrant is limited to premises of the type mentioned in section 18A(3)(a); land under section 18A(3)(b) is likely to be a road and therefore access to it would not be impeded by a locked door or an occupier's refusal to allow entry. A warrant may only be granted if there are reasonable grounds for entering the premises for a purpose for which the right of entry may be exercised (essentially, establishing whether a specified duty has been breached or an offence committed).

374. It should be noted that, under the Courts Reform (Scotland) Act 2014, it is not just a sheriff who may grant such a warrant: a summary sheriff is also entitled to do so (see the consequential amendment made to the 2014 Act in schedule 1 of the Bill).

375. The granting of a warrant authorises the Commissioner or inspector to enter the premises and exercise any of the other inspection powers conferred by section 18A. If necessary, reasonable force may be used in doing so. A warrant expires when it is no longer needed, unless the warrant itself makes provision for it to expire earlier.

376. New section 18C of the 2005 Act sets out rules that apply when an inspection function is exercised (whether it is exercised under the authority of section 18A or under the authority of a warrant). Entry must take place at a reasonable time of day, and a person exercising an inspection function must produce identification and evidence of their authorisation if asked to do so. The person exercising the functions may also bring someone else along with them, or any materials or equipment that are required.

377. Where the powers are exercised under a warrant, it may be that there is no occupier present to allow access to the premises – either because the premises are unoccupied, or because the occupier is temporarily away. Accordingly, the Commissioner or inspector must, if taking possession of anything (as opposed to taking copies and leaving the originals on site), leave a notice explaining that this has been done. The premises must also be left as secure as on arrival.

378. New section 18D of the 2005 Act provides that it is an offence to fail (without reasonable excuse) to comply with a requirement of the Commissioner or an inspector, or to intentionally obstruct such a person. This applies whether the inspection power being exercised is one conferred by the Bill or one conferred by regulations made under new section 18F. The penalty that may be levied for committing this offence is a fine. On summary conviction, this fine is capped at the statutory maximum (currently £10,000) and on indictment it is unlimited.

379. New section 18E of the 2005 Act provides that neither the Commissioner nor an inspector will incur any personal liability (either civil or criminal) for anything done in the exercise of their inspection functions. The exception to this is where it can be proved that they acted in bad faith, without exercising a reasonable degree of care and skill, or were not acting on reasonable grounds. However, this section deals only with personal liability: it does not affect any liability which might attach to the Commissioner as an office-holder either as a result of the Commissioner's own actions or on the grounds of vicarious liability.

380. New section 18F of the 2005 Act allows the Scottish Ministers to make further provision about inspection functions. For example, this could cover granting new inspection functions as well as putting limits on when inspection functions can be exercised. By dint of a consequential amendment made to section 52 of the 2005 Act by section 60(3) of the Bill, regulations under this section are subject to the affirmative procedure.<sup>19</sup>

381. Section 60(4) of the Bill deals with reporting by the Commissioner. A new requirement is introduced requiring the Commissioner's annual report to the Scottish Ministers to include details of how the new inspection functions have been exercised. It also confirms that the Commissioner may make recommendations to Ministers in that report.

382. In addition to these changes to the existing annual report, the Commissioner is given explicit power to publish and provide Ministers with a report on anyone who is failing to comply with their obligations under the 1991 Act or failing to follow good practice in the carrying out of road works. This will allow the Commissioner to raise the profile of any failings which are identified as a result of an inspection.

#### *Compliance notices: section 61*

383. At present, the Commissioner can give directions to undertakers and road works authorities under sections 118 and 119 of the 1991 Act and can also, by virtue of section 119A, issue Commissioner penalties in relation to breaches of those sections. Beyond that, enforcement of obligations relies on the road works authority (which can issue fixed penalty notices under the 1991 Act), or the Crown (which can prosecute offences reported to it).

384. Section 61 of the Bill introduces a new concept of compliance notices into the 1991 Act, which will allow the Commissioner to intervene where a person such as an undertaker, road works authority or roads authority fails in the carrying out of their duties. It will also allow the Commissioner to intervene in a way designed to resolve the problem which has arisen, rather than the person merely being issued with a fine.

---

<sup>19</sup> For details of the affirmative procedure, see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

385. Inserted section 153A establishes the concept of a compliance notice (a notice requiring someone to take the steps set out in it in order to address their breach of a duty) and sets out the duties in respect of which such a notice may be issued.

386. Inserted section 153B provides that only one compliance notice can be issued in respect of the same act or omission which constitutes a breach of a duty. However, if the notice is withdrawn then it would be possible to re-issue it. It also provides that a compliance notice cannot be issued requiring someone to stop committing an on-going offence if criminal proceedings have already been brought against the person for that offence. It should be noted that where an offence is committed, the compliance notice may be about taking steps to stop committing the offence but it may also be about taking steps to avoid a recurrence of the offending behaviour arising. Where the compliance notice is exclusively about the latter, its issue would not be incompatible with criminal proceedings also taking place in respect of the offence.

387. Inserted section 153C makes provision about the content and form of a compliance notice. It must set out why it has been issued, the steps that the person is required to take, the date of issue, the time allowed for compliance with it, how representations about or appeals against the notice can be made, and what the consequences are of non-compliance with a notice. The time allowed for compliance must always be at least 28 days. The Scottish Ministers may by regulations make further provision about the form and content of notices. As noted in relation to inserted section 153B, where an offence has been committed, the steps that the person is instructed to take may be about stopping committing an on-going offence but may also be about taking action to avoid a recurrence of the offending behaviour.

388. Inserted section 153D allows the time that a person is given in which to comply with a compliance notice to be extended (but not shortened) after it has been issued. This may be done at any time during the compliance period. As an extension is of benefit to the recipient, this does not alter the period within which an appeal against the notice may be made.

389. Inserted section 153E allows a compliance notice to be withdrawn. A notice which is withdrawn is treated as never having been issued. However, a notice may not be withdrawn after the person who received it has complied with it, so a person who complies with a notice will benefit from the protection against criminal proceedings offered by inserted section 153H.

390. Inserted section 153F allows for an appeal to be made against a compliance notice provided it is made within 21 days of the notice being issued. Where an appeal is in progress, the compliance period is suspended. It should be noted that, under the Courts Reform (Scotland) Act 2014, it is not just a sheriff who may hear such an appeal: a summary sheriff is also entitled to hear an appeal against a compliance notice (see the consequential amendment made in schedule 1 of the Bill).

391. Inserted section 153G deals with the consequences of failing to comply with a compliance notice. It is an offence for a person to fail to comply with a notice issued to them, unless they have a reasonable excuse for not doing so. On conviction, they are liable to a fine (capped at £50,000 on summary conviction, and unlimited where the conviction is on indictment). However, if the person takes alternative steps to those set out in the compliance

notice and the Commissioner confirms in writing that those alternative steps are acceptable, the person will be treated as having complied with the compliance notice.

392. Inserted section 153H makes provision in relation to compliance notices which are about requiring someone to take steps to cease committing an on-going offence. In such cases, criminal proceedings may not be brought against the person during the period the person has been given in which to comply with the notice. In addition, compliance with the notice (or what amounts to compliance through the taking of agreed alternative steps) will guarantee that the person cannot be convicted of the offence in relation to the particular breach in question.

393. Inserted section 153I allows the Scottish Ministers, by regulations, to make supplementary, incidental or consequential provision in connection with compliance notices. This is a general power but, in particular, this can be used to make provision about cases where the compliance notice relates to an offence and a fixed penalty notice may also be issued in respect of the offending behaviour. Under section 61(3) of the Bill, any regulations under this section which modify the text of an Act (specifically inserted section 153G or paragraph 6 of schedule 6B) are subject to the affirmative procedure.

*Fixed penalty notices: section 62*

394. A number of offences under the 1991 Act can currently be dealt with by the issue of a fixed penalty notice in accordance with section 154A of that Act. This allows the person who committed the offence to pay a fixed penalty as an alternative to prosecution. The offences for which a fixed penalty notice may be issued are listed in schedule 6B of the 1991 Act. The Scottish Ministers have the power to amend the offences listed there.

395. Currently, a fixed penalty notice may only be issued by an authorised officer of a road works authority. Section 62(3)(a) of the Bill allows the Commissioner and authorised members of the Commissioner's staff to issue these notices too. A number of minor consequential changes are made by section 62(3) as a result.

396. Section 62(2) of the Bill makes failure to comply with a compliance notice (as to which, see section 61 of the Bill) a fixed penalty offence. As a compliance notice may only be issued by the Commissioner, the decision to deal with its breach by this means is restricted by section 62(3)(b) to the Commissioner and authorised members of the Commissioner's staff. Slightly different rules will apply to the fixed penalty notices too:

- The maximum penalty is to be set by regulations but may not exceed £100,000 (section 62(3)(d)). The rule which applies to other fixed penalty offences could not operate here as it is based on the maximum fine for the offence, but conviction on indictment for the offence of failure to comply with a compliance notice is subject to an unlimited fine;
- There will be no discount for early payment (section 62(3)(e)).

397. Section 62(3)(g) of the Bill provides the Scottish Ministers with the ability, by regulations, to make further provision about fixed penalty notices. In particular, this would allow Ministers to make provision for the situation where a fixed penalty notice is issued by both a

road works authority and the Commissioner in respect of the same offence, and it is therefore necessary for one of the notices to be cancelled.

### **Permission to execute works in a road**

*Permission to execute works in a road: section 63*

398. At present there are two, substantially similar, legislative powers under which permission may be granted to a person to carry out works involving apparatus: namely, section 61 of the 1984 Act and section 109 of the 1991 Act.

399. Section 63 of the Bill removes the power contained in section 61 of 1984 Act and therefore requires all permissions which relate to apparatus to be sought and granted under section 109 of the 1991 Act. The repeal of subsection (8) of section 109 confirms that this may include works for road purposes which relate to apparatus.

400. Paragraphs 5 and 6(2) and (6) of the schedule make a number of other amendments to the 1984 Act and 1991 Act respectively in consequence of the repeal of section 61 of the 1984 Act.

### **Safety measures for the carrying out of works in roads**

*Works in roads: safety measures: section 64*

401. Section 64 of the Bill makes a number of changes to the 1984 Act concerning the safety of road users while works that involve the road being excavated or obstructed in some way are carried out.

402. Section 60 of the 1984 Act imposes a variety of requirements on anyone who obstructs or digs up a road. This includes such things as ensuring that there are adequate lighting measures in place for oncoming traffic to see the work and having sufficient fencing and signage in place. As matters stand, these requirements do not apply to roads authorities themselves when carrying out works in roads.

403. Subsection (2) of section 64 of the Bill therefore imposes this duty on roads authorities, making such authorities subject to the same safety requirements as other people who may obstruct or dig up roads. Where a roads authority fail to comply with this duty, rather than commit an offence, they breach a statutory duty and may be forced to comply with the requirements under section 45(b) of the Court of Session Act 1988.

404. Subsection (3) of section 64 inserts section 60A into the 1984 Act. This new provision enables the Scottish Ministers to issue or approve<sup>20</sup> codes of practice in respect of the requirements of section 60 of the 1984 Act. This means that the Scottish Ministers will be able to provide much more detail about the kind of actions that a person who is obstructing or digging up a road must take. It also provides for the consequences where a person complies (or fails to comply) with a code. Following on from the changes made to section 60 of the 1984 Act

---

<sup>20</sup> As is currently the case for other codes of practice under the 1991 Act, codes are likely to be prepared initially by the Roads Authorities and Utilities Committee for Scotland and passed to the Scottish Ministers for approval through the Scottish Road Works Commissioner.

outlined above, a code of practice will apply to anyone obstructing or excavating a road, including the roads authority for that road.

405. The power to issue or approve ‘codes’ (as opposed to a code) envisages that the Scottish Ministers may make or approve different codes and so provides a measure of flexibility. This could enable codes in respect of particular requirements (such as one focusing on lighting) or a code covering multiple aspects.

406. The new provision is similar to section 124 of the 1991 Act. That provision enables the Scottish Ministers to issue or approve codes of practice for undertakers in respect of certain kinds of road works. It is expected that the codes issued or approved under section 60A will follow a similar approach and, indeed, it is possible that a combined code may be issued or approved.

407. Provided that a person or a roads authority complies with the code of practice, the person will be treated as complying with the requirements of section 60(1) or, in the case of a roads authority, section 60(3A). The significance of this is that it means that a person carrying out works can have confidence that if they meet the standards of the code then they will not be liable to prosecution under section 60(3) for failing to fulfil their duties (and similarly that a roads authority who complies will not face any enforcement proceedings). The converse is also true. If a person (or authority) fails to comply with the code, that will be evidence for the purposes of a prosecution or enforcement proceedings for a failure to meet the requirements of section 60.

408. Subsection (4) of section 64 increases the penalty for the offences in section 60 from level 3 to level 5 on the standard scale. At present, a level 3 fine is £1,000 and a level 5 fine is £5,000. This brings the penalties into line with those for similar offences under section 124 of the 1991 Act.

*Qualifications for supervisors and operatives: section 65*

409. Section 126 of the 1991 Act already requires the majority of road works<sup>21</sup> which involve breaking up the road (or any drains, sewers or tunnels under it) or tunnelling or boring under the road to be supervised by a suitably qualified person, and also requires a suitably qualified trained operative to be present on site whenever this kind of work is taking place. There is nothing to prevent a suitably qualified person from being both a supervisor and a trained operative (assuming that they are in a position to discharge both functions adequately).

410. Section 65 of the Bill, which inserts section 61B into the 1984 Act, extends these requirements to when other types of ‘works in a road’ are taking place with the result that the supervisory requirements will extend to most operations that involve working in a road, including improvements to the road carried out by the roads authority and the subsequent reinstatement of the road.

---

<sup>21</sup> In this context, ‘road works’ has the technical meaning given in section 107(3) of the 1991 Act (see paragraph 365). The most common example is where utility companies and similar organisations carry out work to install, inspect or repair their pipes, cables or other apparatus under a road.

411. In order to ensure that the supervisory obligations are being complied with, the roads authority may serve a notice on the person responsible for the works which requires the person to provide the name of the supervisor of the works (and any or all previous supervisors). They may also require the name of any trained operative on the site at a particular time or the names of all the trained operatives who have worked the site. In addition, the notice can require the production of evidence as to the supervisor's or operative's credentials.

412. Notices may only be served either during the works or within such a period after the works have finished as the Scottish Ministers may set out in regulations. A roads authority may serve more than one notice in respect of the same works.

413. Failure to comply with the requirements of a notice is a criminal offence carrying a penalty of a fine of up to level 5 fine on the standard scale (currently £5,000) (see inserted section 61B(7) and (8)).

414. The Commissioner may also serve a notice in respect of any works in a road being carried out requiring the roads authority to provide details of the individuals who are (or have been) the supervisor and trained operatives for the works, including evidence of their credentials. This covers not only works in a road being carried out by the roads authority, but works by other persons too. Failure of the roads authority to comply with this notice may be dealt with through section 45(b) of the Court of Session Act 1988 or under the compliance notice regime being introduced under section 61 of the Bill.

415. Section 61B(9) provides the Scottish Ministers with the power to make regulations to prescribe the qualifications required of the supervisors and trained operatives as well as a range of other related matters. Importantly, these regulations may provide for exceptions when the supervisor and trained operative duties will not apply and circumstances in which more than one trained operative must be on site.

416. Subsection (2) of section 65 of the Bill amends section 126 of the 1991 Act by adding three new subsections.

417. New subsections (1ZA) and (2ZA) confirm that road works being executed by undertakers must be supervised until the point that the road is reinstated, and that a trained operative must be on site at all times works are ongoing (including the road's reinstatement). This is already the case (see the broad definition of road works in section 107 of the 1991 Act). However, the new subsections are being added to avoid the risk of any confusion being caused by an explicit reference to reinstatement in the inserted section 61B.

418. New subsection (2ZB) adds to the regulation-making powers of section 126 of the 1991 Act to enable the Scottish Ministers to specify circumstances in which more than one trained operative needs to be on site (and how many trained operatives there should be). The regulations are subject to the negative procedure.<sup>22</sup>

---

<sup>22</sup> See section 28 of the Interpretation and Legislative Reform (Scotland) Act for a description of what constitutes negative procedure.

## **Commencement and completion notices**

### *Commencement and completion notices – section 66*

419. Under the 1991 Act, undertakers and roads authorities are under a range of duties to enter information into the SRWR and give information to other persons who have apparatus under the road.

420. A number of these duties require information about when it is intended that the works are going to start and when it is expected that they will finish. The exact duties depend on whether the person carrying out the works is an undertaker, road works authority or roads authority and also on the type of work involved.

421. Section 66 adds to the duties by amending the relevant sections of the 1991 Act to require the person carrying out the works to enter in the SRWR the date that the works actually start, not just the proposed start date. The time frame for the person doing so will be set by regulations, but in most cases the expectation is that the notice will be required on the same day as the works commence. The ability to impose similar duties in relation to the completion of works is also provided for (including the ability to set a time frame for providing that information). Ministers may by regulations require other information, aside from just the start or completion date, to be provided as well.

### *Undertakers*

422. The duties imposed on undertakers merit specific discussion.

423. The new section 114A being inserted into the 1991 Act requires undertakers to give a notice of the date when the works actually began to other persons who have apparatus in the road in question. The undertaker must also enter a copy of the notice in the SRWR. This replicates the position in section 114 of the 1991 Act for proposed works. In practical terms, it means the same people should get notice that works are proposed and a further notice on or shortly after commencement of the works. Failure to give this new second notice is a criminal offence carrying a penalty of a fine up to level 3 (currently £1,000) on the standard scale. (Starting work without having given notice under section 114 is also offence, and carries a penalty of a fine of up to level 4 on the standard scale (currently £2,500)).

424. As with section 114 of the 1991 Act, a person who doesn't give a notice has a defence to criminal proceedings where they did not know that another person had apparatus in the ground (having made appropriate inquiries to check that).

## **Reinstatement of roads following works**

### *Reinstatement quality plans: section 67*

#### *Background*

425. Section 129 of the 1991 Act contains the general requirement on an undertaker carrying out road works to reinstate the road. In addition, there is a range of other provision relating to the

timing of the reinstatement, the speed at which it should be completed, the notice of completion that is required, etc. Failure to comply with the requirements of section 129 is an offence.

426. Section 130 of the 1991 Act imposes duties on undertakers to comply with requirements as to the materials used to reinstate a road after completing road works and the performance standards to be observed for the reinstatement. These requirements are prescribed in detail by regulations,<sup>23</sup> which, in turn, hook into a code of practice approved by the Scottish Ministers under section 130(4). Failure to comply with a duty under section 130 is also an offence.

427. Road works authorities have an inspection power under section 131(1) of the 1991 Act to allow them to determine whether an undertaker's duties in relation to reinstatements have been met. Authorities may issue notices requiring undertakers to take remedial action in cases where those undertakers have failed to comply with any of their Part IV duties in relation to reinstatement. The authorities may also in certain circumstances carry out the remedial works themselves and recover the costs of doing so from the undertakers.

#### *Overview of section 67 of the Bill*

428. In section 67, the Bill adds to the suite of duties by inserting new sections 130A to 130C into the 1991 Act.

429. Inserted section 130A requires anyone (other than a roads authority) who is proposing to carry out works that will involve reinstatement of the road to enter a plan detailing the intended approach to reinstating the road after the work is complete in the SRWR. This plan will cover reinstatement following most types of work involving a road, from road works to install or repair utilities through to improvement works. A plan may only be entered in the SRWR after it has been approved by the Commissioner. In the case of a roads authority, however, section 130B(2) provides that the obligation to enter an approved plan in the SRWR arises only if the Commissioner requires it.

430. Both inserted section 130A and 130B are supplemented by inserted section 130C, which allows the Scottish Ministers to issue or approve codes of practice for these plans and to make regulations about the form and content of the plans and any associated procedural matters they consider necessary. As with any regulations made under Part IV of the 1991 Act, prior consultation on the making of any such code will be required by virtue of section 163A of the 1991 Act.

#### *Inserted section 130A*

431. Generally, it is open to the person who is proposing the works to prepare either a plan which is specific to reinstating the road after the works in question or to put in place a plan covering their operations involving reinstatement of the road in a variety of situations which can cover multiple works. It would also be possible to have a combination of approaches in certain cases. Where the proposer of the works intends to rely on a general plan in relation to a given piece of work, a notice must be entered into the SRWR to confirm that there is a plan in place and enable the Commissioner to identify that plan.

---

<sup>23</sup> The Road Works (Reinstatement) (Scotland) Regulations 1992 (SI 1992/1674).

432. The Commissioner may, in certain circumstances, require a person proposing to do works to prepare a new plan for approval and entry into the SRWR. This might, for example, be required if there has been a change in regulatory standards since the plan was approved or a change in what constitutes good practice for the type of work in question. The Scottish Ministers may, in regulations made under section 130C (on which, more below) set out specific circumstances in which the Commissioner must do this. Otherwise it will be at the Commissioner's discretion.

433. Inserted section 130A(4) provides that, to approve a plan, the Commissioner must be satisfied that the plan demonstrates the person is competent to safely and effectively execute the reinstatement of the road, and has in place quality control procedures sufficient to ensure that the reinstatement of the road is to a sufficient standard and in compliance with the statutory obligations applicable to the works. If the Commissioner is not so satisfied, the plan cannot be entered in the register and the works cannot proceed. Failure to enter an approved plan on the SRWR when required to do so is an offence, subject to a fine not exceeding level 5 on the standard scale.

434. It will generally be for the Commissioner to set out the process that is to be followed for obtaining approval of a plan. Given the detailed nature of the material and the specific requirements of different types of work, there may be a degree of discussion and refinement required. However, to assist with the process, under new section 130C, the Scottish Ministers can issue or approve codes of practice setting out practical guidance for the content of plans and are also given power to make regulations on a range of matters to do with reinstatement plans, including information that the plans must contain. This will therefore influence how the Commissioner approaches the task of approving plans.

#### *Inserted section 130B*

435. New section 130B of the 1991 Act deals with the situation where the works in question are to be carried out by a roads authority. As noted in the overview, the obligation here is that the roads authority are under a duty to enter an approved reinstatement plan in the SRWR only when one has been requested by the Commissioner in relation to specific proposed works. It is envisaged that this kind of request may arise in relation to complicated works or where there has previously been an issue about the quality of reinstatement in relation to particular works.

436. Subsection (5), however, confirms that it is open to a roads authority to ask for a plan to be approved for entry into the SRWR in circumstances where they think it is appropriate to do so.

437. The matters that the Commissioner must be satisfied about before approving the plan are similar to those for other persons executing works in the road under section 130A. The differences reflect the status of a roads authority as having general responsibility for the state of the roads – ultimately if the reinstatement isn't up to standard, it will fall to the roads authority to address any defects. Further, the question of whether a roads authority is generally competent to execute reinstatement works should not arise in the same way as it may for an undertaker. However, it is possible in given situations that the authority may not have put in place appropriate arrangements to ensure the safety and effectiveness of the reinstatement works and the test in subsection 130B(3)(a) therefore reflects that.

*Inserted section 130C*

438. This section confers two powers on the Scottish Ministers, both of which are designed to bolster the operation of the preceding sections.

439. Subsection (1) provides the Scottish Ministers with the ability to issue or approve<sup>24</sup> codes of practice relating to the new duties about reinstatement plans imposed by sections 130A and 130B (and any regulations made under section 130C). The code (or codes) will give guidance to anyone who needs to prepare a reinstatement plan as to how best to comply with the duties.

440. Subsection (2) gives power to the Scottish Ministers to make regulations about reinstatement plans. Subsection (2) is general in its terms while subsection (3) elaborates on the power in subsection (2) and provides a non-exhaustive list of the types of provision that are expected to be made. As set out in the subsection, it includes regulations about the form and content of reinstatement plans and the notices that can be given under section 130A(2)(b)(ii), regulations about the procedure and process, and the ability of Ministers to require the review of existing plans in certain circumstances. This latter ability is primarily aimed at ensuring those general plans which deal with reinstatement works in a range of situations are kept up to date and in line with current standards.

441. Of particular note is that the regulations under subsection (2) may make provision about the consequences of complying or failing to comply with a code of practice issued or approved under the section. As with other codes of practice under the 1991 Act, it is expected that the regulations will provide for a person who complies with the code to be deemed to have met the obligations imposed under section 130A or 130B (at least in so far as they comply) whereas a failure to comply with the code will be evidence of a failure to comply with the duties under those sections.

442. Subsections (4) and (5) make it clear that the regulations may create criminal offences with a maximum penalty of a fine on level 5 of the standard scale (currently £5,000). For example, a failure to comply with any requirement of periodic review of plans imposed under the regulations is likely to be a criminal offence. Regulations under subsection (2) which create criminal offences are subject to the affirmative procedure in accordance with subsection (6).

**Information about apparatus**

*Information about apparatus: section 68*

443. The 1991 Act contains a duty on undertakers to keep and make available records of the location in roads of the apparatus belonging to them. However, for various reasons the section imposing this duty (section 138) was never brought into force.

444. Many undertakers have, however, voluntarily provided details of their apparatus in a part of the SRWR which is referred to as the Community Apparatus Data Vault (“the Vault”). The

---

<sup>24</sup> As is currently the case for other codes of practice under the 1991 Act, codes are likely to be prepared initially by the Roads Authorities and Utilities Committee for Scotland and passed to the Scottish Ministers for approval through the Scottish Road Works Commissioner.

Vault contains information from undertakers and others who carry out works in roads and is widely used in the planning and construction stages of works in roads.

445. In order to improve the comprehensiveness of the Vault, section 68 of the Bill replaces section 138 of the 1991 Act with a new section 138A. The new section requires undertakers and other people who are carrying out works in a road to enter in the SRWR details of the apparatus which belongs to them as soon as reasonably practicable after they complete works involving that apparatus, or whenever they discover or are informed about the location of apparatus belonging to them (but in respect of which no information has been stored in the Vault).

446. The details that require to be entered in respect of each piece of apparatus will be set out in regulations made under new section 138A (in accordance with section 163 of the 1991 Act). This will include the location of the apparatus and a description of the apparatus itself.

447. Regulations under new section 138A can, by virtue of section 163, also provide for exceptions to the general rule. This may include, for example, where the apparatus is in a particular place in a road or where there are matters beyond the control of the person which make it difficult or impossible to comply with the duty.

448. Under subsections (3) and (4) of the new section 138A, failure to enter the information in the register is a criminal offence and a person who is convicted of that offence is liable to a fine of up level 5 on the standard scale (currently £5,000).

449. In addition, the failure to comply may give rise to civil liability for any losses or damages incurred by another person in consequence of the breach of duty.

450. However, a person has a defence to criminal or civil proceedings where the person has taken all reasonable care to secure that no such failure should occur. This defence extends to the situation where the works were carried out by the employees of the person or indeed by third party contractors.

## **PART 6 – MISCELLANEOUS AND GENERAL**

### **Regional Transport Partnerships: finance**

#### *Regional Transport Partnerships: finance – section 69*

451. Section 69 of the Bill amends section 3 of the Transport (Scotland) Act 2005 to adjust the basis on which Transport Partnerships are funded.

452. Section 3 of the 2005 Act currently provides that the constituent councils (or council) that make up a Transport Partnership must fund the balance of the Partnership's costs after grant and other income is taken into account.

453. Section 69(1) of the Bill changes this so that constituent councils must fund the balance of the Transport Partnership's *estimated* costs rather than actual costs. In practice this means that a Partnership will be able to carry surplus funds from one year to the next where its actual costs

for a year are less than its estimated costs. Paragraph (b) of subsection (1) alters the calculation of a Partnership's net expenses to take in account the possibility that the Partnership allocates surplus funds from a previous year to meet expenses in the current year. Paragraph (c) adds a requirement on Transport Partnerships to prepare a forecast of its net expenses each year and provide it to constituent councils to aid them in meeting their duty under section 3(1) of the 2005 Act.

454. Section 69(2) of the Bill extends the provisions of schedule 3 of the Local Government (Scotland) Act 1975 to Transport Partnerships. The effect of this is that Transport Partnerships can hold and operate capital funds, renewal and repair funds and insurance funds in a similar way to councils. Subsection (2)(b) inserts an additional provision into the schedule to prevent Transport Partnerships from using money held in these funds to meet the costs of any company set up by the Partnership.

455. Section 69(3) of the Bill extends the provisions of section 165 of the Local Government etc. (Scotland) Act 1994 to Transport Partnerships. The effect of this is that regulations under section 165 will be able to confer on Transport Partnerships the power to borrow and lend money and to operate a loan fund, subject to the terms of the regulations. (Borrowing by Transport Partnerships will also be subject to regulations made under paragraph 5 of schedule 3 of the 1975 Act by virtue of the change in section 69(2).)

### **Scottish Canals**

#### *Canals – section 70*

456. Section 70 of the Bill relates to the British Waterways Board which, following the transfer of the Board's English and Welsh functions to the Canal and River Trust in 2012, now operates as Scottish Canals. In accordance with the Transport Act 1962, the Board currently comprises a Chair, Vice Chair and between one and four other members. This means that the Board as a whole must currently consist of between three and six members.

457. This section increases both the minimum and maximum number of other members of the Board: the minimum becomes four and the maximum becomes nine. Accordingly, the Board as a whole will be required to comprise at least six but no more than 11 people.

### **General**

#### **Minor and consequential amendments and repeals: section 71 and the schedule**

458. Section 71 introduces a schedule which contains a variety of minor and consequential amendments repeals.

459. The schedule contains amendments and repeals which are of a minor nature or which are required in consequence of other more substantive provisions in the Bill.

*Part 1: Bus services*

460. Part 1 of the schedule makes consequential amendments and repeals which relate to the changes made in Part 2 of the Bill (bus services).

*Part 2: Road Works*

461. Part 2 of the schedule makes consequential amendments and repeals which relate to the changes made in Part 5 of the Bill (road works). In addition, it makes two minor amendments connected to road works which are highlighted here.

462. Paragraph 6 of the schedule deals with the New Roads and Street Works Act 1991.

463. Sub-paragraph (2) corrects an error which occurred in the drafting of the Transport (Scotland) Act 2005. Section 117 of the 1991 Act permits a roads authority, in cases where substantial works are to be carried out, to restrict any further work on a road for a period of 12 months. The provision adjusts section 117 to change the period from 12 months to such period as the Scottish Ministers may prescribe in regulations. This was also the intention of section 22 of the Transport Act 2005 but there was a mistake made in the way that it was done. (The relevant provision of section 22 of the 2005 Act is repealed by paragraph 7(2) of the schedule.)

464. The regulations under section 117 of the 1991 Act may make different provision for different purposes. This means that the Scottish Ministers may specify different time periods by reference to the types of circumstances that may exist. This will interact with the ability of the Scottish Ministers in the existing power under section 117(1) to set out what constitutes substantial works for the purposes of the restriction. Accordingly, the Scottish Ministers will have some flexibility around the periods for which restrictions may be imposed.

465. Regulations made under section 117 are subject to the negative procedure.

466. Paragraphs 6(7) and (8) and 7(3) remove a series of provisions which have never come into force. The provisions in question were intended to provide a new mechanism for imposing requirements on undertakers to resurface roads. Agreement on the operation of the provisions was never reached and they have been superseded by a different approach. These provisions are therefore being repealed as redundant.

**Regulations – section 72**

467. Section 72(1) allows regulations under the Bill to include ancillary provision and to make different provision for different purposes and for different areas.

468. Subsections (2) to (5) make provision about the parliamentary procedure which applies to different sets of regulations. This section does not apply to exemption orders made under section 43(1) as they are in the form of orders rather than regulations (and they are not subject to parliamentary procedure as they are not Scottish statutory instruments (as defined in section 27(1) of the Interpretation and Legislative Reform (Scotland) Act 2010)).

**Ancillary provision – section 73**

469. Section 73 allows the Scottish Ministers, by regulations, to make “standalone” ancillary provision in relation to the Act or any provision made under it.

470. By virtue of section 72(5) any ancillary provision amending primary legislation will be subject to the affirmative procedure, otherwise ancillary provision will be subject to the negative procedure.

**Commencement – section 74**

471. This section makes provision in relation to the commencement of the Bill. By virtue of section 72(6), commencement regulations made by the Scottish Ministers are subject to the “laid only” procedure. The sections on commencement, regulations and the short title commence automatically on the day after the Bill receives Royal Assent. The other substantive provisions will come into force in accordance with regulations made by the Scottish Ministers.

*This document relates to the Transport (Scotland) Bill (SP Bill 33) as introduced in the Scottish Parliament on 8 June 2018*

# **TRANSPORT (SCOTLAND) BILL**

## **EXPLANATORY NOTES**

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - [www.scottish.parliament.scot](http://www.scottish.parliament.scot)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: [www.scottish.parliament.scot/documents](http://www.scottish.parliament.scot/documents)