

Net Zero, Energy and Transport Committee
Tuesday 8 October 2024
30th Meeting, 2024 (Session 6)

Legislative Consent Memorandum on the UK Passenger Railway Services (Public Ownership) Bill

Background

1. The [Passenger Railway Services \(Public Ownership\) Bill](#) is a UK Government Bill introduced in the House of Commons on 18 July 2024. The Bill will bring rail passenger services into public ownership on termination of any existing franchise contracts.
2. On 1 August, the Scottish Government lodged a [Legislative Consent Memorandum](#) (LCM) on the Bill. The Scottish Government recommends that consent should be given to the UK Parliament to legislate on the devolved matters in the Bill.
3. The Net Zero, Energy and Transport Committee has been designated lead Committee for scrutiny of the LCM, which means it must consider and report on it.
4. The Bill has been moving quickly at Westminster and (assuming it is agreed to) is expected to be passed by the end of October.
5. The Cabinet Secretary for Transport was invited to give evidence on the LCM on [3 September](#).
6. A letter was sent to the Cabinet Secretary on 10 September seeking clarification of a point raised in her evidence (see **Annexe A**). A response was received on 20 September (see **Annexe B**).
7. A draft report has been produced for the Committee's consideration on the basis of the evidence heard.

Consent process for UK Bills affecting devolved matters

8. Chapter 9B of the Scottish Parliament's Standing Orders sets out a formal process to give the Scottish Parliament the opportunity to consent (or not) to UK legislation making provision in relation to devolved matters. An LCM lodged by the Scottish Government must —

- summarise what the Bill does and its policy objectives;
- specify the extent to which the Bill makes provision about devolved matters;
- explain why the Scottish Government considers it appropriate that consent is given or refused.

9. A motion on legislative consent is a motion seeking consent to relevant provisions or seeking refusal of the Scottish Parliament's consent to provisions in the UK Bill affecting devolved matters. A UK Bill considered to trigger a need for an LCM may affect devolved competence in more than one way. A motion may therefore propose consent to some of these elements but non-consent to others. Standing Orders specifies that a motion (whether consenting, refusing consent, or a mixture of both) should normally be lodged. If the Scottish Government does not intend to lodge a motion at the time of lodging the memorandum the LCM should explain why not.

Next steps

10. The Committee is invited to agree a report to the parliament on the LCM.

Clerks

Net Zero, Energy and Transport Committee

Annexe A – letter to the Cabinet Secretary for Transport

Dear Fiona,

Passenger Railway Services (Public Ownership) Bill

Thank you for your evidence to the Committee on 3 September on the Scottish Government's Legislative Consent Memorandum (LCM) in relation to the UK Government legislation, the Passenger Railway Services (Public Ownership) Bill.

During the evidence session, we discussed whether it would remain possible for Scottish Ministers to award contracts for passenger railway services to private operators if this Bill passes. You advised the Committee that:

“I understand that the legislation would operate with an interplay between sections 24 and 30 of the 1993 act, but the UK Government is doing that in quite a technical way. I would interpret that in layman's terms as leaving a window open and not closing it completely.

If services were exempted from designation by order, the duty under section 30 would not apply and the Scottish ministers could make alternative arrangements to secure the provision, which could include a contract award to a private operator. That is our understanding of what the UK Government is doing—as I said, it is leaving the window open.”

Whilst recognising that the Scottish Government is not the author of the Bill, it will have received advice (including legal advice) on its impact on the executive powers of the Scottish Ministers, as part of its work in laying the LCM. It would therefore be helpful if you could provide an update to the Committee of your best understanding, in the light of legal or other advice, as to the extent to which this Bill would enable the Scottish Ministers to award contracts for the provision of passenger rail services to private operators. In particular, could you clarify whether the powers in the Bill could be used to exempt all Scottish passenger rail services from the requirement to be provided by a publicly owned company, or whether this is a narrow power (for example, to allow for the continued provision of services by open access operators)?

Given this Bill is moving somewhat quickly at Westminster, I would be grateful for a response by Tuesday 24 September so that the Committee can ensure it is clear on this matter before considering a draft report.

Yours sincerely,

Edward Mountain MSP
Convener
Net Zero, Energy and Transport Committee

Annexe B – response from the Cabinet Secretary for Transport

Dear Edward,

I am writing to you to follow up on the recent evidence session of the Net Zero, Energy and Transport Committee on the Scottish Government's Legislative Consent Memorandum in relation to the UK Government's Passenger Railway Services (Public Ownership) Bill (the Bill), and in response to your letter to me of 10 September 2024.

As you will be aware, there were a few items I had agreed to come back to members on during the session and I have addressed these in my letter below along with the specific question you raised in your letter.

The Committee (Douglas Lumsden MSP) had asked if the recent appraisal carried out in relation to replacement of the intercity train fleet could be shared with them. I wish to advise you, and Committee members, that unfortunately the Scottish Government cannot release the appraisal on the grounds that it contains commercially sensitive information that is pertinent to a live procurement.

I also wish to clarify that the reference to plans for a 65% replacement of ScotRail fleet, which was cited by Bob Doris MSP during the session, is not a Scottish Government commitment. It was included in a contract notice made by ScotRail Trains Limited and published on Public Contracts Scotland (PCS) website in 2022 as part of a procurement management process. The 2022 PCS entry related to procuring legal support for train procurement, rather than train procurement itself. This may be what has caused some confusion. It remains the case that the Scottish Government remains committed to renewing ScotRail's train fleet appropriately over time as is illustrated by my announcement at Committee of the procurement for replacement of ScotRail's High Speed Trains.

In relation to your letter of 10 September 2024, you asked about the extent to which the Bill would enable the Scottish Ministers to award contracts for the provision of passenger rail services to private operators.

As the Legislative Consent Memorandum states, and as I said in my evidence to the Committee, the Bill will amend the Railways Act 1993 (the 1993 Act) to replace the presumption that rail passenger services designated under section 23(1) ought to be delivered by franchise agreements with a presumption that they ought to be provided according to franchising authorities' duty at section 30(1). The Bill will amend section 30 so that franchising authorities may secure the provision of services in furtherance of their duty at section 30(1) only by making a direct award of a public service contract to a public sector company. On that basis, the Bill does not contain any provisions, or make any amendments to the 1993 Act, which would enable the Scottish Ministers to award contracts for the provision of services to private operators.

Appropriate designating authorities, like the Scottish Ministers, have a power in section 24 of the 1993 Act to grant exemption from designation under section 23(1) of the 1993 Act (which, when the Bill comes into force, will mean designation as

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services which ought to be provided under section 30) in respect of such services as they may specify. The Bill makes only consequential amendments to section 24 to remove references to franchising where appropriate.

The Bill will not make any changes to provisions of the 1993 Act which may be relevant to arrangements for open access operators.

Finally, I would also like to inform you and the Committee that the Secretary of State for Transport, Louise Haigh, has written to me formally confirming that the UK Government now accepts the Scottish Government's position that the whole of the Bill engages the legislative consent process (as is noted in the Legislative Consent Memorandum, the UK Government had previously held the view that clause 2(3) of the Bill did not).

Can this letter be shared with all Committee members as well as Graeme Simpson MSP who attended committee on the day.

Yours sincerely

FIONA HYSLOP
Cabinet Secretary for Transport