



Lord Hendy of Richmond Hill
Department for Transport
33 Horseferry Road
London, SW1P 4DR
By email

27 January 2024

Dear Lord Hendy of Richmond Hill,

Bus Services (No. 2) Bill

I write on behalf of the Constitution Committee to express our views about the Bus Services (No. 2) Bill, in particular regarding clauses 16 and 22.

Clause 16

Clause 16 of the Bill amends the Transport Act 2000 to confer on Local Transport Authorities (LTAs) the power to make grants to operators of local bus services and to set the criteria for eligibility, and terms and conditions of those grants. This is accompanied by a guidance making power for the Secretary of State regarding the exercise of the grant payment and design powers. Clause 16(7) gives further indication of what the guidance may include: “The guidance may, in particular, include guidance— (a) about the protection of services... that are socially necessary, (b) about how the services... can contribute to economic growth and the protection of the environment, and (c) setting out practical considerations to be taken into account when exercising functions under this section.”¹ This guidance power is not subject to parliamentary procedure.

We acknowledge that there is no statutory duty for persons or authorities to follow the guidance; however, LTAs must have regard to it when exercising their grant making powers. Given the breadth of this power, with the potential scope for the Government to develop policy in relation to the grounds upon which grants might be given and the conditions attached to them, we consider to this to be a form of disguised legislation.² As such, **we recommend that the Bill should be amended to subject the exercise of this power to parliamentary approval by way of negative procedure.**

¹ [Bus Services \(No. 2\) Bill](#), clause 16(7)

² The Delegated Powers and Regulatory Reform Committee has defined ‘disguised legislation’ as “instruments which are legislative in effect but often not subject to parliamentary oversight”. Delegated Powers and Regulatory Reform Committee, [Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#) (12th Report, Session 2021–22, HL Paper 106), para 89

Clause 22

Clause 22 of the Bill concerns the safety and accessibility of stopping places. The Secretary of State may give guidance about stopping places for local services, and facilities in their vicinity, for the purposes of promoting the safety of persons using such facilities or facilitating travel by persons with disabilities. There is a duty to consult the Disabled Persons Transport Advisory Committee before making the guidance. This guidance power may include guidance about “the location, design, construction and maintenance of stopping places” used by Public Service Vehicles providing local services, and “how persons required to have regard to the guidance are to engage with other persons in relation to stopping places and facilities in the vicinity of stopping places.”³

Again, LTAs and the strategic highways company in England (Highways England) are not required to follow the guidance but to have regard to it. Nonetheless, the power is defined in wide terms. The Delegated Powers Memorandum acknowledges that this power is drawn widely and could extend to include recommendations for new infrastructure, albeit that this is not the present intention of the Government.⁴ Furthermore, given that legal consequences could flow from safety issues arising in respect of the design, construction or maintenance of facilities where government guidance has not been followed, authorities may feel obliged to follow this guidance.

We are therefore of the view that this also amounts to disguised legislation. In the light of this, **we recommend that the exercise of this power should be subject to parliamentary procedure by way of negative procedure. We also invite the Government to consider whether the power itself could be more tightly defined.**

Constitutional implications of disguised legislation

As you will be aware, the Constitution Committee’s specific remit includes considering all public bills for their constitutional implications. We have regularly raised concerns about the use of disguised legislation and the importance of clarity within the law.⁵

We consider guidance making powers to be of constitutional concern where there is a mandatory obligation to follow the guidance, or where a requirement to “have regard to” guidance could create a legitimate expectation that the guidance will be followed and may therefore give rise to legal consequences if it is not. A lack of parliamentary oversight of such disguised legislation creates constitutional concerns. In particular, when assessing the extent of this constitutional impact, we would consider such powers to be of greater concern when:

³ [Bus Services \(No. 2\) Bill](#), clause 22(2)(b)

⁴ Bus Services (No.2) Bill, [Delegated Powers Memorandum](#), para 114

⁵ For example: Constitution Committee, [Great British Energy Bill](#) (4th Report, Session 2024–25, HL Paper 50), paras 3–8; Constitution Committee, [Victims and Prisoners Bill](#) (1st Report, Session 2023–24, HL Paper 46), paras 3–7; Constitution Committee, [COVID-19 and the use and scrutiny of emergency powers](#) (3rd Report, Session 2021–22, HL Paper 15)

- there are legal consequences resulting from a failure to comply with guidance as opposed to a mandatory requirement to take guidance into account;
- the content of disguised legislation contains policy choices;
- disguised legislation contains substantive, as opposed to procedural, provisions; and,
- disguised legislation is addressed to individuals as opposed to public bodies or those performing a public function.

We would consider a requirement to consult those to whom disguised legislation is addressed when producing such material to be one way of potentially reducing the constitutional impact of such disguised legislation.

It is for these reasons that we draw attention to clauses 16 and 22 as giving rise to constitutional concern.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Drake', written in black ink.

Baroness Drake CBE
Chair of the Constitution Committee