



Public Call for Evidence by the Regional Development Committee with Respect to the Transport Bill 2010

A Response by the Northern Ireland Transport Holding Company



Foreword

This response is made by the Northern Ireland Transport Holding Company, whose main operating subsidiaries are Ulsterbus, Citybus (Metro) and Northern Ireland Railways. These subsidiary companies trade under the name of Translink. For ease of reference, we use the name “Translink” throughout the document to refer to the parent undertaking, the subsidiaries and the Group in general.

Translink notes that the Regional Development Committee (the “Committee”) will be considering the Transport Bill during its formal Committee Stage in the Assembly. It also notes that written evidence will be accepted until August 16th 2010 and that the Committee intends to produce a report on its consultation findings during the first half of October 2010. As an organisation with an unrivalled interest in the promotion and modernisation of public transport policy in Northern Ireland, we welcome the opportunity to submit evidence to the Committee at this particular time, and in the future.

In broad terms, Translink welcomes the Bill and the opportunity to comment on, and contribute to, its content prior to passing into legislation. For the most part, the Bill represents a significant step in the process toward modernising public transport and instilling best practice throughout the wider EU transport sector. The Bill provides greater transparency and certainty in terms of funding, relationships, and joined-up service provision.

Translink therefore supports the Department for Regional Development (“DRD”) in its vision to improve the present public transport regime along the broad lines envisaged in the Bill. New public transport law is arguably long overdue. Primary legislation in this area has been passed in 1948 and more recently in 1967. Forty three years on, the time is ripe to look afresh at the various enforcement, financial, contractual, governance and other related building blocks to ensure Northern Ireland retains a modern, fit for purpose public transport system. It is in everyone’s interests that this Bill delivers a progressive framework, not just for the short term, but also for the longer term.

We submit the following comments along with four specific recommendations, and look forward to further engagement and feedback in due course.



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Translink

Introduction

1. Translink notes the Committee wishes that written submissions should be structured to address the specific clauses of the Bill. Insofar as we have been able to do so, our comments address each of the six Parts of the Bill, and a number of individual clauses where appropriate. There will however be some general themes and issues which are not clause-specific. Rather, such general themes capture two wider points which we believe need to be considered and our submission starts with these.

Executive Summary / General Themes

The Distribution of Functions between DRD and its new Agency

2. We note the new powers and functions being given to the DRD in what we would call blanket terms. Translink, being one of a number of transport operators, will have a direct and extremely important regulatory relationship with the new Agency. The Bill does not demarcate which of the DRD functions, powers and duties will be vested in the Agency and which will be vested in the DRD as transport policy lead (and Translink sponsor). It would be very helpful for the industry and for customers to understand what new powers, competencies and role will go to the new Agency, and indeed how the DRD envisage the day to day interactions and operation of the Agency's new regulatory relationships will work. Neither the Bill nor the sub-Regulations appear to address this information gap.

Recommendation 1: Translink recommends that it would be helpful for the Committee and for stakeholders in general to have a better understanding of the nature and extent of the work and remit of the new DRD Agency (for example by way of an information-memorandum which would deal with items such as constitution, operation, interactions, and costs).

The Light-Touch Use of Primary Legislation

3. The Bill is drafted well and is succinct, numbering no more than fifty clauses. This is a distinct benefit to those who will come to rely on the resultant legislation in due course. Brevity in the primary legislation will add a degree of flexibility as future public transport arrangements evolve, but this is not entirely without risk.
4. The permissive nature of the Bill, which cedes prescriptive detail to possibly more than nine sets of subordinate Regulations, requires some further thought. The real prospect of less legislative scrutiny for the detailed Regulations (using the negative resolution procedure) could have unintended effects. For example, the Committee may wish to seek better information on the scope of bus passenger conduct rules, the rationale the DRD will use when designating shared facilities or indeed whether there might be any further indirect extensions of the criminal law by use of Regulations.

Recommendation 2: Translink recommends that the Committee explores the intended use and phasing-in of subordinate Regulations by the DRD, and considers the case for alternatives. (i.e. using Directions instead of Regulations, or conversely, by adding more primary-legislative certainty to the existing Bill where it can be accomplished (for example by incorporating subsidiary company provisions into the Bill and thereby dispensing with potentially unnecessary Regulations which Clause 15 envisages).

Detailed Commentary on the Main Body of the Bill

Part 1 – Public Passenger Transport Services: Regulation 1370/2007

5. Clause 1 (3): We welcome the commitment that most public passenger transport services will continue to be provided by Translink. Whilst recognising and welcoming the public mood to increase competition in transport, Translink's fully integrated public transport network is the most developed and effective base from which to consider and serve additional routes and services.
6. The Bill provides a framework for bringing Northern Ireland into line with Regulation EU 1370/2007. Northern Ireland's public transport arrangements will keep pace with EU best practice in terms of transparency, new public service contracts for services/permits and routes, and links between funding streams and network/service provisions. The devil in the detail remains of course subject to the content of individual public service contracts, and any subsequent Regulations which will govern them. Nonetheless we repeat our support of the new arrangements which will create consistency, certainty and transparency in the discharge of public service obligations and public transport functions in general.

Part 1 – Public Passenger Transport Services: DRD's New Powers

7. Clause 1 (2): We note the taking of six new statutory powers by the DRD, in order to secure the provision of public passenger transport services with due regard to economy, efficiency, and safety of operation.
8. We refer to our first general theme as previously outlined. Translink maintains that for reasons of legal certainty and market confidence that the precise split between the Agency's independent role and the DRD's policy and Translink-sponsor role should be set out as a matter of priority. This explanation should also assist in understanding which of the two will be taking and using the powers at Clause 1 (2) of the Bill. For example, will it be the Department as Translink sponsor which exercises the power to set the level and structure of fares, or will it be the Agency as independent regulator? We assume the latter (for reasons of perceptions of conflict of interest if it were the former), but along with the Committee, would benefit from greater clarity.
9. We note with particular interest the Department's intended new power at clause 1 (2) (f) of the Bill to exploit commercial opportunities in the public transport arena. We would be keen to gain an appreciation as to how such a power sits alongside Translink's similar property holding and commercial mandate. The Committee will note that the Holding Company is required by law to act in accordance with the Transport Act (NI) 1967 "as if it were a company engaged in a commercial enterprise".
10. Having successfully endeavoured to act as a commercial enterprise since 1967, and having benefited from the diverse private and public sector expertise from our non-executive and executive directors over the period, Translink has become accustomed to the identification and treatment of commercial risk. We have a track record of identifying and exploiting commercial opportunities. We trust that the DRD's new power to acquire and dispose of land and exploit commercial opportunities will be used thoughtfully and with care. Translink anticipates that such power will not

conflict with or supervene in any case Translink's property holding and commercial mandate.

Recommendation 3: Translink recommends that the Committee seeks assurance on the ambit of the DRD and the Agency's new powers, and that Translink's statutory mandate for exploiting its property holdings and commercial opportunities will not be compromised or subsumed as a result.

Part 1 – Public Passenger Transport Services: DRD/Agency Fare Determinations – Consultation Requirements

11. Recognising the new legal powers being taken by the DRD and/or the Agency, we note that DRD will be subject to greater consultation requirements as a result. In exercising the power at clause 1 (2) (d) to *"determine the general level and structure of fares"*, the Department will be mindful of the need to exercise this Determination in the manner befitting of similar public law powers . i.e. after due procedural care, full ventilation of the fare options and only after intelligent debate with stakeholders has taken place.
12. The way in which fares will be regulated is not a focal point of the Bill. That said it is probably one of the most important features of the new arrangements as viewed through the eyes of paying customers and service operators. The degree to which transport operators can cover their costs, make a reasonable margin, and bear commercial risk is not presently clear. Translink would like to draw attention to the logic that if this clause remains in the Bill, then greater commercial risk arising from fare-setting by a third party should be accompanied by greater commercial freedom for operators, not less. To illustrate the point, Translink and other operators need to understand whether or not the regulatory model will use risk-loaded net cost contracts or fully recoverable gross cost contracts, so that appropriate budgeting control can be used for particular services run by particular operators.

Part 1 – Public Passenger Transport Services: Service Agreements and Service Permits

13. Clause 6: Translink has already stated its appreciation of the benefits that well drafted, sensible public service contracts will bring. When applying for a contract, or a service permit, the matters to which DRD must have regard prior to award should be fairly clear to all. Customers need to be protected from operators cherry picking the most remunerative routes to the detriment and neglect of non-profitable routes - for example many of Northern Ireland's rural community services. In various industries which serve the public interest, different mechanisms are used (grants in the water sector, postalised tariffs in the gas sector, cross-subsidies etc) to bring a form of assurance and equalisation to ensure universal protection to all users of a wide and disparate network.
14. For public transport purposes, country-wide safeguards in the award of contracts and permits and for the setting of fares should be put in place. The Committee will want to satisfy itself that Translink retains the ongoing commercial ability to maintain the contracted network (through grants, or cross subsidies or through other means) in order to discharge its public service obligations for all of Northern Ireland's transport users.

15. In light of recent events this July at Lurgan, it is germane to the delivery of future rail public service contracts that full account is taken of the impact of civil unrest and other factors outside the control of the operator. We believe that the Committee and the DRD will take cognisance of this factor when considering the scope and drafting of public service contracts. Like any contract, there will be circumstances and events which cannot be envisaged, where experience and authority will necessarily take precedence over the strict letter of terms and conditions. Translink has unparalleled experience of dealing with such circumstances often on an emergency basis, and will continue to deploy the skill and experience of trained local staff whenever unrest or other unforeseeable events occur in future. Common sense treatment of such (not uncommon) incidents will be important for performance measurement and contract monitoring by the Agency.

Part 2 – Buses, Taxis & Trains: General

16. Clause 18: The renaming of the road service licence to the bus operator licence is a modernising step. DRD's forward thinking here is to be welcomed.
17. Clause 21: Whilst noting the modernising changes to the 2008 Taxis Act, Translink is of the view that in time there may be merit in extending the scope of transport law to include taxi regulation more formally within the public transport network. This could be achieved by looking at network coverage, fares, ticketing, information, service quality, general regulation and enforcement. We query whether it is a little premature and possibly outside the scope of the present, all be it permissive Bill, to facilitate this future extension. The Committee should note though that allowing for discretionary regulations which can be made in future is not uncommon in Northern Ireland statutory terms. Such a step would avoid the need for future primary legislation to enter into the Assembly timetable in the short to medium term future.
18. Clause 22: DRD have updated Translink's founding legislation in a small number of places. This particular example modernises the primary statutory duty of Translink's railway undertaking (Northern Ireland Railways Company Limited). It is a refreshing and progressive piece of updating which we commend to the Committee.

Part 3 - Consumer Council

19. Clauses 22-24: As a significant policy stakeholder in the public transport field, the clarification of the role of CCNI is welcomed. Translink values the contribution of CCNI to many areas of its service provision, and trusts the Agency will take high regard of CCNI's viewpoints when it engages on essential areas of fare-setting and service provision in future.

Part 4 – Enforcement: General Comment

20. Translink accepts and agrees with the need for strong enforcement powers, backed by criminal law where necessary, to police the compliance with permits, agreements and other requirements. We note that a civil regime replete with financial penalties and legally binding undertakings has not been preferred as a means to deliver compliance in public transport. We question whether this is a missed opportunity, as in other industries here (e.g. water and energy regulation), civil sanctions have led to improved company behaviour and the prospect of more finances being retained in Northern Ireland for the benefit of the industries and the infrastructure concerned.

Part 4 – Enforcement: The Role and Responsibilities of Authorised Persons

21. Clause 25 et seq: Authorised officers are an important part of the enforcement framework to ensure that the highest operational standards are adhered to. Perhaps more detail will be released in due course, but it is not completely clear to Translink as to the types and numbers of DRD staff, Agency staff, and other ~~constables~~ which may be enlisted and named as Authorised persons from time to time. To have a somewhat flexible group of authorised officers may be helpful, but to have no clear boundaries or lists about who is or who can be an authorised person probably requires further thought. One risk with a loose definition of an authorised person is that the regime may be subject to abuse by rogue-enforcers purporting to inspect and seize other operators property; for these reasons greater assurance as to the identities, experience and numbers of authorised persons would be greatly welcomed.
22. Clauses 26-28: We wonder what type or quality of evidence will be required before an authorised person moves to having the reasonable suspicion or ~~reason~~ to believe+ that an offence is taking place allowing him or her to exercise the considerable power to seize property? Training in handling evidence and dealing with suspected persons fairly would be a pre-requisite which we are sure the Department (or Agency) will properly consider and wish to set in place.

Part 5 - Grants

23. Clauses 33-34: The DRD is to be credited for the clarity they bring through the Bill to the linking of grants to various policy priorities and end-uses. A transparent means of evaluating and benchmarking performance between various recipients of grants should be stipulated, and will no doubt occur as the DRD and Agency seek to measure value for public money, from service to service, and from operator to operator.

Part 6 - Miscellaneous and Supplementary: General

24. Clauses 38-40: In developing a key aspect of this response, Translink notes and understands that the Department will be keen to take powers over land if it is to make full use of its intended property holding and commercial exploitation functions. We note the Second Stage Reading of the Bill which says it contains,

“powers for the Department to acquire and dispose of land where that is necessary for public transport purposes”
25. We have already said at paragraphs 9 and 10 of this response that DRD’s use of new powers to hold property indeed brings commercial opportunities for the government but also brings an element of commercial risk. Translink’s Holding Company was established in 1967 precisely to hold property and act as if it (and its subsidiaries) were a commercial enterprise. And so it follows that Translink would welcome an assurance confirming that respective commercial mandates will not collide or overlap, and that the Holding Company’s powers in this field will not be curtailed or removed.
26. Clause 42: We welcome the plan to roll out a similar system of byelaws for bus facilities as that which is currently in place at rail facilities. Subsequent Regulations for this purpose might include all land in the ownership of public transport operators and the regulation of conduct in relation to (for example) fly tipping / littering. The

periodic change of penalty for breach of byelaws could be readily facilitated by the Regulations or perhaps by a use of Directions which could be issued under Regulations.

Part 6 - Miscellaneous and Supplementary: Shared Facilities Directions

27. Clause 43: Having been accustomed to managing and owning various properties and premises since its establishment, Translink would helpfully suggest that quite significant powers to direct ~~shared~~ transport facilities+ need to be exercised with some measure of sensitivity and care. Directions under Part 6 need to take a balanced approach when weighing multiple-operator interests against the rights of businesses and owners of ~~shared~~ facilities to lawfully enjoy their property and possessions. There would need to be proportionate limits and thresholds as to what can be done on someone else's property (especially as in most cases the property in question would not in fact comprise public space or public property). Translink, as a significant property holder, respectfully reserves a right to constructively contribute to any subordinate Regulations which DRD intend to use to flesh out the details underlying shared facilities.

Recommendation 4: Translink recommends that the Committee satisfies itself as to the intended use of shared facilities directions, and to the types of premises they can cover.

28. Clause 43: On a point of clarification we suggest that the Bill's description of shared transport facilities as comprising ~~any place~~+ is amended to realign with the more precise language of the Explanatory and Financial memorandum, and of previous Hansard reporting (Volume 54, No 2). We suggest that the potential designation of ~~any place~~+ is wider than the designation of any ~~premises or facilities~~+.
29. We believe that even the prospect of using ~~premises or facilities~~+ is potentially too wide. The designation could alternatively refer to those essential facilities used by passengers to access services, including bus stops. Specific exclusions could encompass engineering works, back-office areas and financial/HR premises. Designations of shared facilities are therefore not without their challenges. Wide designations may be practically difficult, legally and commercially problematic and operationally inefficient. Nevertheless we remain committed to assisting the DRD to the fullest extent to deliver future sharing arrangements which are well thought through, commercially fair and most importantly, beneficial to the paying customer.

Final Commentary

30. We note the stakeholder evidence gathering event in September 2010 as planned by the Regional Development Committee at its 23rd June meeting. Translink will of course be delighted to attend such an event and we look forward to receiving further details from the Committee.
31. We thank the Committee again for the opportunity to comment on this timely and constructive Bill which we at Translink support in broad terms.