

Letter from Jonathan Bray responding to Letter from the Committee regarding the Local Services Franchises (Traffic Commissioner Notices and Panels) (Scotland) Regulations 2024, received 18 October 2024

Background

I have been actively involved in legislation pertaining to bus services in the UK for over twenty years. Part of my role as Assistant Director and then Director of the Urban Transport Group (which brings together the transport authorities for most of the UK's largest urban areas) was to lead on responding to changes to bus legislation and the wider regulatory regime including drawing up consultation responses, liaising with DfT officials, briefing parliamentarians as well as drafting and giving evidence to select committee inquiries. This includes both the 2008 and 2017 Westminster primary legislation on buses. I also provided Nexus with assistance on comms and stakeholders during their attempt to use the 2008 Westminster legislation to bring buses in the North East under public control. Since leaving UTG I am the advisor to the Welsh Government and Transport for Wales on their bus reform programme.

1. What, if any, concerns do you have about giving final approval of any proposed Scottish bus franchising scheme to a panel appointed by the Scottish Traffic Commissioner?

I have significant concerns and believe it will be both regretted and ultimately reversed in the future.

My concerns are:

Firstly, this approach borrows and amplifies the role of a panel in the failed 2008 Westminster buses legislation. Nexus (the then Tyne and Wear Passenger Transport Executive) was the only organisation to have experience of a similar panel. No other transport authority attempted to use the 2008 Westminster legislation on Quality Contract Scheme (franchising) due to the risks and uncertainties surrounding a panel decision in what is, by its nature, a challenging and unprecedented move from an unplanned and deregulated market to a planned and franchised market.

The Nexus experience of the 'Quality Contract Scheme (QCS) Board' in 2015 was a process in which ended up with one party, the transport authority, having to justify changing everything in the market place, whilst the other, commercial bus operators, only had to justify why changing just one aspect of the market place was too risky. Considerable evidence, including exceptionally complex economic analysis, was submitted to the QCS board, proving extremely difficult for an under-resourced panel to adequately consider the complexity of the proposals.

The QCS board voiced concerns regarding forecasts around funding, value for money of a QCS versus a Voluntary Partnership Agreement and also proportionality. On proportionality, whilst the QCS board accepted that the scheme put forward by Nexus would generate significant economic benefits to the public, they advised that the disbenefits to incumbent monopoly operators would be significant and disproportionate to the benefits accruing to residents in Tyne and Wear as a result of the scheme. In essence, they put the potential losses of a monopoly business ahead of the interests of the residents of Tyne and Wear in their judgement.

Furthermore, the Scotland Bill proposes powers that go beyond the English 'QCS board'. The 'QCS board' was only required to make a recommendation, with the transport authority making the final decision on whether to proceed. However, the proposed panel in the draft legislation is given the duty to make the approval for a franchising scheme. This will put great weight on the decision of the panel and may leave the panel at risk of judicial review from incumbent monopoly bus operators. Again risking the panel leaning towards the safer option of rejection.

The Nexus experience of the panel process was also one of mismatched resources with incumbent monopoly operators employing large, intimidating and expensive legal representation to seek to undermine the case for change.

Secondly, the proposal for a panel based decision fundamentally goes against the principles of local democracy. In effect the future of local bus services, and the people who rely on them, has been handed over to an unelected quango. Imagine a scenario where bus regulation is a significant factor, and manifesto pledge, in local elections giving the authority a clear democratic mandate to bring buses under public control and operate them in the public interest. Yet that mandate could be rendered null and void by a small number of unaccountable individuals.

Thirdly, one of the principles that underpins the idea of a panel is that independent experts can scrutinise the proposals and come to a balanced and independent view. However, the fact is that there are very few people involved in the bus sector that don't already have a view on franchising. Those who would have time to play a role in a lengthy panel process are most likely to skew older and in the bus industry that usually means they skew towards justifying a career in working within a deregulated bus sector. For example, the former Traffic Commissioner for Scotland, Joan Aitken, gave vent to her trenchant and hostile views about SPT's franchising case in this interview <https://www.route-one.net/news/spt-bus-franchising-approach-criticised-by-former-tc-for-scotland/>

The Government's proposal is that the Traffic Commissioner for Scotland will choose the members of the panel. As can be seen with the previous Traffic Commissioner for Scotland's views this puts a lot of power in the hands of someone who may be less than impartial. What's more the Traffic Commissioners are appointed by the UK Secretary of State for Transport. To put a UK appointed person in such a critical role in determining the future of the main form of public transport (and the form of public transport most relied upon by Scots with the least) seems a very odd thing for a Government committed to far greater autonomy of decision making for Scotland to do.

Fourthly, the Conservative Westminster administration clearly recognised that the panels were fundamentally flawed which is why they abolished them in the Westminster legislation which is now in force (Bus Services Act 2017) in England.

To introduce an approach to Scotland that has demonstrably failed in England seems both cynical and of a piece with the excessive foot dragging by officials in getting the legislation fully enacted in Scotland. It suggests a general hostility to making franchising a viable option at the very time when franchising is [demonstrating its value](#) in Greater Manchester (more passengers, more reliable services, affordable fares, more integration with other public transport modes and all with lower operating costs).

2. Can you briefly describe the proposed system of bus franchising that you are developing on behalf of the Welsh Government? What are the key stages of the proposed approval process?

I am advising the Welsh Government and Transport for Wales on bringing buses under public control in Wales but I am not responsible for drawing up or developing the legislation in Wales.

The draft legislation has also not yet been brought before the Senedd for scrutiny and approval. This is expected to happen Spring of next year.

In the meantime the best summary of the approach in Wales is set out in the following documents:

<https://www.gov.wales/written-statement-one-network-one-timetable-one-ticket-planning-buses-public-service-wales>

<https://www.gov.wales/bus-reform-wales-our-roadmap-franchising>

In essence the approach in Wales is to ensure that all bus services in Wales are brought under public control through a collaborative process between local authorities and the Welsh Government / Transport for Wales on determining the networks to be provided. However, Transport for Wales will ultimately be the franchising authority.

This differs from the approach in England (where it is down to the LTA to bring forward a proposal for franchising with the Government playing no role once the formal process has begun) and the proposed approach in Scotland (where it is down to the LTA to bring forward a proposal for franchising and an unaccountable quango will decide whether it happens or not).

A key rationale for the Welsh approach is a desire to ensure that Wales has an integrated public transport network and that small local transport authorities do not necessarily have the resources to franchise their local bus networks themselves. The Welsh government standing behind the process also protects local authorities from battalions of expensive lawyers that incumbent monopolies may employ to protect those monopolies.

3. Are there any significant lessons from the experience of bus franchising across the UK and Europe that could inform the development of bus franchising in Scotland?

Firstly, as set out above, the decision to use panels to determine the future of bus services in Scotland is anachronistic and undemocratic. It leaves Scotland as a backwards facing outlier on public control of franchised bus services in the UK. In Northern Ireland buses are already under public control, in England there is a workable process for LTAs to move forward on franchising (which they are now doing at scale starting in the largest urban areas) and the whole of Wales is moving to public control (led by the Welsh Government).

Looking more widely in Europe there are not many examples in comparable economies in Europe of bus services being deregulated in the first place (given the failure of the UK deregulation experiment and also that in Europe bus services tend to be seen as primarily a public service). Instead, there's more likely to be a move from municipal control to franchising. Therefore it is difficult to point to other examples in Europe which are relevant to Scotland given Scotland's deregulated starting point. The most relevant examples therefore are England and Wales.

In terms of lessons on franchising in general (as in how best to carry out franchising once there has been approval to move to franchising) my starting point would be that franchising is a means to an end. The end being enforceable contracts for the operation of a service that is specified (to a greater or lesser degree) by the public sector. Compared with deregulation it also gets you integrated ticketing and networks under a single brand and with a single organisation clearly responsible for the network.

Beyond that what you get depends on a) how much funding you have available b) the nature of the franchise contract and the selected operator.

On funding bus franchising will get you more for the same amount of money because it is a more efficient way of funding bus services. It is more efficient because a) you can cross subsidise between profitable and unprofitable services as oppose to the current situation whereby operators make a profit on commercial services and on the unprofitable services which local government has to pay for b) you can eliminate excess profit and/or over bussing on the busiest corridors c) you pay for everything once as part of a single contract rather than paying for everything you want a bus service to do separately and at a cost often determined by the operators (such as green buses, fares initiatives, audio-visual announcements etc). However, these efficiencies won't buy you a major upgrade in services or a big fares reduction this will require further funding. However, again further funding buys you more than it does under deregulation for the reasons set out above.

The nature of a franchise contract can be determined by the public authority. Broadly speaking there is a spectrum between a tightly specified contract (such as that in place in London where TfL controls nearly everything including fares, timetable and colour of the buses) or a looser form of contract where the contract sets out the objectives that the authority is seeking but gives flexibility to the operator on how those objectives are to be achieved. Across Europe there are multiple examples of the full range of different types of contracts for bus services.

Given the unusual nature of this transition to franchising (from a state subsidised, de facto cartel of poorly regulated private monopolies to franchising) then the most likely, and arguably the safest bet, is to go for relatively tightly specified contracts with revenue risk sitting with the local transport authority. This is what has happened in Greater Manchester. This approach also allows you to move more quickly to an integrated public transport network and a single brand. It will probably also be more cost effective as risk sits with the transport authority rather than being priced in by bidders.

In short then:

- It is my contention that if Scotland adopts the panel approach, then this will be a serious mistake which ultimately will be seen as such (as it has been in England). It's hard to see any rational justification for it other than it serves the interests of those who wish to maintain the status quo for as long as is possible.
- Although there is an argument for adopting the Welsh approach of a partnership between local and national government based on bringing all bus services in Scotland under public control this would be a fundamental change of direction for which there is no detectable appetite at present and would also run contrary to thrust of the new Scottish primary legislation. Instead, therefore the decision on how local bus services should be determined is best taken by the most appropriate level of locally accountable transport authorities (in Scotland's case the RTPs) and the panels should be deleted from the process. This would broadly replicate the model provided by the current Westminster legislation, which is fair, reasonable and proportionate allowing a fair hearing for all interested parties, for scrutiny and testing and ultimately for legal challenge if aggrieved parties believe that the process has not been properly followed.

Jonathan Bray
18th October 2024


www.jonathan-bray.com