

TRANSPORT (SCOTLAND) ACT 2019

EXPLANATORY NOTES

THE ACT

Part 9 – Road Works

Interpretation

Expressions to describe different types of work in a road:

457. 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:

458. 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 Act 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 109](#)

459. 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”).

460. 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.

461. Section 109 of the Act 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 110](#)

462. 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 110 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.

463. 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

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the Commissioner personally or by a member of the Commissioner's staff who is designated as an inspector by the Scottish Ministers.

464. 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.
465. 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).
466. 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 Act).
467. 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.
468. 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.
469. 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.
470. 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 Act 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.
471. 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.
472. 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

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dint of a consequential amendment made to section 52 of the 2005 Act by section 110(3) of the Act, regulations under this section are subject to the affirmative procedure.¹

473. Section 110(4) of the Act 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.
474. 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 111](#)

475. 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).
476. Section 111 of the Act 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.
477. 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.
478. 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.
479. 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.
480. 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

¹ For details of the affirmative procedure, see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

to the recipient, this does not alter the period within which an appeal against the notice may be made.

481. 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.
482. 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 Act).
483. 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.
484. 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.
485. 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 111(3) of the Act, 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 112](#)

486. 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. Section 112(2) of the Act makes failure to comply with a compliance notice (as to which, see section 111 of the Act) a fixed penalty offence.
487. Currently, a fixed penalty notice may only be issued by an authorised officer of a road works authority. Section 112(3)(a) of the Act 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 112(3) as a result.
488. As a compliance notice may only be issued by the Commissioner, the decision to deal with its breach by means of a fixed penalty notice is restricted by section 112(3)(b) to the Commissioner and authorised members of the Commissioner's staff. Slightly different rules will apply to the fixed penalty notices too:

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- The maximum penalty is to be set by regulations but may not exceed £100,000 (section 112(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 112(3)(e)).
489. Section 112(3)(g) of the Act 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.

Functions in relation to the Scottish Road Works Register

Functions in relation to the Scottish Road Works Register: [section 113](#)

490. Section 113 of the Act makes a minor change to section 112A of the 1991 Act regarding the provision of public access to the Scottish Road Works Register. Rather than requiring direct access to the physical register, which in practical terms would require specific training and knowledge to be able to navigate, section 112A of the 1991 Act, as amended, requires that the Commissioner make specified information contained within the register publicly available. This duty extends specifically to information regarding the timing, location, duration and purpose of the work, as well as any other information prescribed by Scottish Ministers.
491. The Commissioner is also required to make information in the register available to persons authorised to carry out works of any description in a road, and to persons who appear to the Commissioner to have a sufficient interest in the information to be permitted to access it.

Permission to execute works in a road

Permission to execute works in a road: [section 114](#)

492. 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.
493. Section 114 of the Act 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.
494. 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 115](#)

495. Section 115 of the Act 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.
496. 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.

497. Subsection (2) of section 115 of the Act 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.
498. Subsection (3) of section 115 inserts section 60A into the 1984 Act. This new provision enables the Scottish Ministers to issue or approve² 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 outlined above, a code of practice will apply to anyone obstructing or excavating a road, including the roads authority for that road.
499. 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.
500. 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 of the 1984 Act will follow a similar approach and, indeed, it is possible that a combined code may be issued or approved.
501. 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) of the 1984 Act. 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.
502. Subsection (4) of section 115 increases the penalty for the offences in section 60 of the 1984 Act 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 116](#)

503. Section 126 of the 1991 Act already requires the majority of road works³ 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).
504. Section 116 of the Act, which inserts section 61B into the 1984 Act, extends these requirements to when other types of ‘works in a road’ are taking place, including improvements to the road carried out by the roads authority which involve excavation of a road, and any non-excavation works which require obstructions to be placed on a

2 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.

3 In this context, ‘road works’ has the technical meaning given in section 107(3) of the 1991 Act (see paragraph 434). 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.

road. Where excavation is carried out, the duty extends to the subsequent reinstatement of the road and associated activities, such as replacing road markings.

505. 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.
506. 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.
507. 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)).
508. 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 111 of the Act.
509. Inserted 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.
510. Subsection (2) of section 116 of the Act amends section 126 of the 1991 Act by adding three new subsections.
511. 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 that 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.
512. 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.⁴

Commencement and completion notices

Commencement and completion notices – [section 117](#)

513. 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.
514. 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

⁴ See section 28 of the Interpretation and Legislative Reform (Scotland) Act for a description of what constitutes negative procedure.

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.

515. Section 117 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

516. The duties imposed on undertakers merit specific discussion.
517. 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).)
518. 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 118](#)

Background

519. 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.
520. 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,⁵ 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.
521. 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 118 of the Act

522. In section 118, the Act adds to the suite of duties by inserting new sections 130A to 130C into the 1991 Act.

⁵ The Road Works (Reinstatement) (Scotland) Regulations 1992 (SI 1992/1674).

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523. 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.
524. 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

525. 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.
526. 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.
527. 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.
528. 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

529. 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.

530. 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.
531. 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

532. This section confers two powers on the Scottish Ministers, both of which are designed to bolster the operation of the preceding sections.
533. Subsection (1) provides the Scottish Ministers with the ability to issue or approve⁶ 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.
534. 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.
535. 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.
536. 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 119](#)

⁶ 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.

*These notes relate to the Transport (Scotland) Act 2019
(asp 17) which received Royal Assent on 15 November 2019*

537. 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.
538. 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 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.
539. In order to improve the comprehensiveness of the Vault, section 119 of the Act 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).
540. 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.
541. Regulations under new section 138A can, by virtue of section 163 of the 1991 Act, 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.
542. 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).
543. 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.
544. 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.