

## **DRAFT LOCAL TRANSPORT BILL - CONSULTATION RESPONSE**

### **CHAPTER ONE – OVERVIEW**

- 1.1 **pteg** represents the six English Passenger Transport Authorities and Executives (PTA/Es) which between them serve eleven million people in Tyne and Wear ('Nexus'), West Yorkshire ('Metro'), South Yorkshire, Greater Manchester, Merseyside ('Merseytravel') and the West Midlands ('Centro'). Strathclyde Partnership for Transport ('SPT') and Transport for London are associate members. Since their inception the six PTA/Es have been the driving force behind the development of public transport in the areas they serve. The PTAs have enabled cross-Party and cross-District consensus to be achieved around the strategies for the city regions as a whole, while the PTEs have provided the expertise and professional commitment to deliver on those strategies – with combined investment programmes of over £1 billion a year. However, the range of powers available to the PTA/Es to deliver on their plans, policies and programmes is severely constrained when compared to Transport for London, or with comparable transport authorities in other major European cities. In particular PTA/Es ability to ensure that bus provision is extensive, integrated and of a high quality – is highly constrained.
- 1.2 **pteg** therefore welcomes the draft Local Transport Bill and strongly supports both its objectives and much of the detail of the proposals. The Bill offers a major opportunity to create more fully empowered transport authorities for the city regions. Transport Authorities which will be better able to bring about the high quality and fully integrated transport networks that are essential to the continuing sustainable and equitable development of the city regions.
- 1.3 The Bill deals with three main issues – transport governance, reform of the bus sector and road user charging.

#### **Governance**

- 1.4 The enhancements to existing PTA powers are strongly supported (ie wellbeing powers, climate change duty, and Integrated Transport Strategies). Beyond that we believe that the governance proposals strike broadly the right balance between strengthening the remit and the role of the PTA in planning and delivering the strategic priorities for the city region – whilst allowing each city region some freedom of manoeuvre on how best this might be achieved, in the light of local circumstance and local aspirations.

#### **Bus Reform**

- 1.5 The bus section of the Bill should give PTEs and local authorities elsewhere in the country a far more effective 'toolbox' of powers with which to improve bus services. These powers are urgently required as the bus is the main form of public transport

in PTE areas (about 85 per cent of all trips), yet unlike rail and light rail systems, bus travel has been in decline in the Metropolitan areas.

- 1.6 **pteg's** main concern with the Bill lies with ensuring that the bus section of the Bill is as workable as possible. There are some complex challenges involved in moving from the current deregulated market to either more comprehensive partnership arrangements, or to area franchising. The major challenge on partnership is how to balance the benefits of integration with those of competition (and by extension the role of the competition authorities). The major challenges on franchising are to find a process which is fair but proportionate, and to have effective arrangements in place for the transition from deregulation to an area-wide franchise.
- 1.7 In both these areas we suggest changes to the draft Bill which we think would be more effective in achieving the Government's overall objectives. We also request that **pteg** are given an early opportunity to work with DfT in developing any guidance to be issued.

### **Road User Charging**

- 1.8 We support the involvement of PTEs in the process of developing and delivering local road pricing schemes where this is the best way to achieve local policies, and believe that local determination of schemes developed on the basis of national standards is the right way forward.

### **Structure of this response**

- 1.9 The response is divided into four sections:-
- (A) improving the quality of local bus services - which deals with quality partnerships (voluntary and non-voluntary), quality contracts and the associated competition tests etc. (Chapter 2);
  - (B) reforming local transport governance - in particular focussing on the proposed arrangements for the reform of Passenger Transport Authorities and the review of their functions (Chapter 3);
  - (C) local road pricing schemes (Chapter 4); and
  - (D) traffic commissioners (Chapter 5) – although our position is one of principle at present, as we are currently developing our response to the specific proposals DfT published in July.
- 1.10 **pteg's** responses to the specific questions raised in the consultation paper are set out at Annex C. A summary of **pteg's** issues on the wording of the draft Bill (by section) is included in the table set out at Annex D.

## CHAPTER TWO - IMPROVING THE QUALITY OF LOCAL BUS SERVICES

2.1 This section covers the following issues:

- (A) the procedure for implementing a Quality Contract scheme (QCS);
- (B) the length of a QCS;
- (C) transitional period for a QCS;
- (D) the competition tests applicable to a QCS, Quality Partnership Schemes (QPS) and, in particular, more informal arrangements between bus operators;
- (E) the introduction of frequencies and timings for a QPS;
- (F) scope of Voluntary Partnership Agreements;
- (G) bus service operator's grant (BSOG);
- (H) vehicle ownership; and
- (I) provision of Information.

### A) QUALITY CONTRACT SCHEME PROCEDURE

2.2 **pteg** shares the Government's objective of making Quality Contracts a 'more realistic option'. We support the proposal to remove the Secretary of State's role in determining a QCS application and the introduction of a public interest test. The public interest test set out by Government is in general fair and appropriate, though we would prefer to see the test widened (see later comments).

2.3 We believe that the new process by which a QCS is approved should be transparent, fair and proportionate – whilst achieving the Government's stated aim of making QCS a 'more realistic option'. However, we are concerned that the process set out in the draft Bill may fail to meet these objectives, Firstly, because the multiple stages set out in the draft Bill make for a disproportionately convoluted process. Secondly, because giving the Traffic Commissioners and Transport Tribunals a veto over a QCS proposal adds additional layers of risk to what is already an inherently challenging process of moving from a deregulated market to franchising.

2.4 Annex A sets out in more detail **pteg's** concerns on the role of the Approvals Board and the Transport Tribunals in respect of a QCS application. Two of the principle concerns are:

- **lack of accountability** – a QCS may be deeply integrated into a city region’s transport plan and/or be the contingency upon which TIF funding is made available to the city region. The rejection of the QCS application by the Approvals Board, which is in effect, an unelected, centrally appointed body, would have a major impact on policies being pursued by elected local and regional bodies;
- **expertise** – the Traffic Commissioners’ expertise is in vehicle standards, safety operation and fleet management. Although they have a general familiarity with the bus industry, they are not familiar with transport planning more widely or with economic / competition aspects – that this is the case is implied by the addition of two experts in such fields. However, the combined panel might still not be familiar with questions of social integration; development; or environmental questions;

2.5 *We are concerned* that as it stands the QCS process set out in the draft Bill could repeat the mistakes of the Transport Act 2000, with the franchising legislation being similarly under-utilised, against a backdrop of continuing decline in fare paying bus usage.

2.6 **pteg** argues that the local transport authorities, (including any enhanced Passenger Transport Authorities) are better placed to determine questions of public interest, given their accountability to local areas and regions. We note that local authorities (with necessary safeguards) often play a dual function in terms of both promoting and determining proposals that affect their areas - in the planning arena in particular. The proposal in the Bill is in stark contrast with the draft Bill’s proposals for determination of local road pricing schemes, where locally-elected bodies are deemed to be the appropriate body to take such decisions.

2.7 However, if an element of independent review is thought necessary, **pteg** would suggest that in lieu of the arrangements proposed in the draft Bill, an independent body such as the approvals board, or to simplify matters further, the Senior Traffic Commissioner, could play a role similar to that played by the Office of Rail Regulation (“ORR”) in the context of railway closures. The detail of this proposal is set out in Annex A.

2.8 **pteg** contends that this alternative procedure would help make a QCS workable in practice with the accountable PTAs deciding whether a QCS will best deliver the improved bus services that their city regions need. Meanwhile the review by the independent body would ensure that the QCS was well-founded and adequately consulted upon.

## **B) LENGTH OF QUALITY CONTRACTS**

2.9 **pteg** welcomes the proposal to increase the possible length of a QCS and any quality contract awarded thereunder to ten years, however, we believe there is a strong case to allow a longer QCS period.

- 2.10 Although the extension to ten years is welcome this may still not provide the most effective incentive for operators to invest in new facilities and equipment. In some cases, it may not be sufficient to earn a return on substantial capital investments. **pteg** recommends that the draft Bill powers should provide for a period of up to 15 years for a QCS and up to 15 years for any contract awarded there under where such a contract is linked to substantial infrastructure investments. This proposal is supported by the House of Commons Transport Select Committee and is fully consistent with article 4(4) of the proposed draft European Union Regulation on Public Passenger Transport Services by Road and Rail<sup>1</sup>.
- 2.11 Furthermore, the draft Bill, at clause 13(5), appears to envisage the phasing of contract awards under a QCS, however **pteg** would like to see this clarified to ensure that geographical phasing of a QCS can be achieved, The extension of the maximum period of 15 years would also assist in achieving a phased implementation of a QCS. To ensure the legislation is consistent with good contracting practice we would welcome the opportunity to discuss with the DfT contract length issues, including phasing of contracts and second term contracts.

### **C) TRANSITIONAL PERIOD FOR QUALITY CONTRACTS SCHEMES**

- 2.12 The challenges and risks associated with the transition from the existing deregulated market to a QCS are considerable. In PTE areas most services are provided by major incumbents who will usually own the vehicles, depots and employ the staff. If they fail to win a QCS contract then they are under no obligation to ensure a smooth transition. The legislation needs to provide a legal framework which ensures as smooth a transition as possible for both staff, passengers and operators.

#### **Services**

- 2.13 In the event that a major incumbent operator loses a franchise process it would be open to them to pull out of commercial routes and networks with the statutory 56 days notice. This could cause considerable disruption during the transition period. The prospect of such disruption could also act as a further deterrent to a QCS application. One remedy would be to extend the powers available to the Traffic Commissioner during the transition period. For example, once a QCS has been made (or even earlier in the process), there could be an automatic extension to the minimum period for deregistrations, alongside other associated measures designed to ensure that any withdrawal by an incumbent during the transition phase are coordinated with replacement services put in place under contract by the LTA.

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<sup>1</sup> See the Common Position of 11 December 2006, (2007/C 70 E/01)

2.14 PTEs should also have limited operator of last resort powers. The PTE's operating powers in section 10 (1)(i) of the Transport Act 1968 were removed in 1986 by statutory instrument. Narrowly defined powers to operate may assist in two scenarios:-

- i) During the transitional period, to mitigate the effect of an incumbent operator withdrawing from the market; and
- ii) If an operator defaults during the period of a QCS.

2.15 Whilst PTEs do have powers to contract for such services – this process can take time to put in place, and the PTE may need to step in as operator for a short period of time.

### **Staff**

2.16 A major issue raised by operators as part of the market consultation on QCS carried out by Nexus/SYPTE in 2006, was the critical importance of the availability of drivers and by extension the applicability of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ('TUPE'). TUPE applying is of importance to both incumbent (non QCS) operators (as it prevents redundancy situations), the QCS contract service provider (as they need the trained drivers available in order to provide the services), and to the staff and their unions.

2.17 At present it is not clear whether TUPE applies upon the award of a QCS. Advice from leading Queen's Counsel is that the draft Bill should be used to ensure TUPE is more likely to apply. This can be achieved if deeming provisions are included within the Bill deeming, for example, that upon award of a QCS contract that there is a 'service provision change'. This is a critical area for operators, staff and PTEs alike and **pteg** would welcome the opportunity to work with the DfT to ensure the draft Bill contains the appropriate provisions.

## **D) APPLICATION OF COMPETITION LAW – COMPETITION TESTS**

2.18 **pteg** welcomes the draft Bills moves to clarify competition issues, and the role of the competition authorities, within the bus sector. In particular we welcome the moves towards introducing specific competition tests for the bus sector – rather than the application of general competition legislation. We have carried out a detailed consideration of the competition provisions of the draft Bill in relation to their application to a QCS and any contracts awarded thereunder, voluntary quality partnerships, and a QPS. This consideration and **pteg**'s proposals are set out in Annex B.

2.19 **pteg**'s main concerns on competition issues are in summary:-

- **pteg** questions whether any competition test (in addition to a pure public interest test) is necessary in relation to a QCS. A QCS replaces

open access free market provision of bus services with a competition to provide a specified network. Competition is transferred to the stage of tendering for the provision of the services. A QCS will only be put in place where public interest test has been met. Arguably in such circumstances the free market has already failed and in such case, **pteg** would submit that there is little reason for competition concerns. It seems unnecessary to have a specific competition test as envisaged at clause 7 of the draft Bill particularly as any contract awarded under a QCS will be the subject of a rigorous procurement process.

- **pteg** would propose making the competition test a more general proportionality test as part of the proposed public interest test. Under such a test the QCS promotor would be required to demonstrate that the effect on bus operators is justified by the public interest/legitimate purpose in introducing a QCS ('fair balance' test). Such a test would assist in demonstrating compliance with human rights legislation. **pteg** would welcome the opportunity to look at this element of the public interest test with the DfT. .
- Whether or not a QCS competition test is retained **pteg** believes that the Bill should clarify the position of both the application of the Competition Act 1998 (which **pteg** submits should be ousted) and the role of the OFT. In particular, if a competition test is retained should the OFT have the power to consider on its own motion whether the competition test applicable to a QCS is in fact met once that scheme has been made? **pteg** would submit that for reasons of legal and contractual certainty, it should not, but rather should raise such concerns during the consultation process only.
- If a competition test is retained for a QCS **pteg** believes it should be simplified and the wording amended such that it is clear what is meant by 'significant adverse effect' in the context of this particular provision, i.e. can the lack of existing competition be a consideration and is the removal of theoretical future 'on road' competition relevant?
- **pteg** welcomes the concept of a tailored test to apply to a voluntary partnership agreement to take them out of the ambit of the Competition Act 1998. However, **pteg** suggests that in the formulation of the new test to apply to such partnerships (referred to in *Annex B* as the New VBA Test), the possible purposes of the VBA, VMA or concerted practices are too limited. **pteg** would like to see both the definition of a voluntary partnership agreement in Clause 24 of the draft Bill and the objectives of such an agreement in proposed clause 4C(3) to Schedule 10 expanded (see respectively paragraph 2.29 and Annex B paragraph 8 below).
- **pteg** would reiterate this comment in respect of the categories to the existing 'purposes' of the QP/Schedule 10 Test – the draft Bill is a good opportunity to amend them to enhance their 'workability'.

- **pteg** suggests that the definition of which agreements fall within the new test should be made clearer, or made the subject of guidance as this will come to be very significant in practice.

### **Unresolved Issues**

2.20 In addition to those matters raised above, there are a number of competition matters that **pteg** submits are not resolved by the draft Bill:

- **de minimis** – **pteg** submits that some form of *de minimis* threshold could be introduced into the competition tests applicable to a QCS, QPS or voluntary partnership agreements to avoid concerns in relation to competition issues in relation to smaller schemes. Such a *de minimis* threshold could be framed by reference to number of routes or passenger affected;
- **application of the Competition Act** – **pteg** understands that the Department believes that the Competition Act 1998 does not apply to a QPS as they are not agreements between undertakings. This could be further clarified by amending the draft Bill to make it expressly clear that the Competition Act 1998 provisions do not apply to a QPS; and
- **ticketing** – the draft Bill should take the opportunity to further clarify and simplify the provisions that apply to ticketing schemes under the Transport Act 2000. Whilst the provisions under the 2000 Act have been used, they have proved ineffective in delivering integrated ticketing at affordable yet commercially viable prices. The arrangements need to be strengthened to reflect the stronger role in ticketing and pricing envisaged in the QPS model being proposed. In particular, the specification of maximum fares (or the setting of fares more generally) in relation to multi-operator tickets under ticketing schemes has always been a difficult issue but if maximum fares can now be agreed under QPS in relation to bus operators' own tickets, we believe that more flexibility to specify maximum fares for multi-operator tickets is also required.

## **E) SCOPE OF QUALITY PARTNERSHIPS SCHEMES (QPS)**

2.21 **pteg** welcomes the extension of the scope of quality partnerships to encompass frequency of services, timings, and the specification of maximum fares.

2.22 However, **pteg** believes that there are two fundamental changes that need to be implemented in order to ensure that quality partnerships which specify frequencies, and timings can be delivered in practice.

2.23 Firstly, the powers of the Traffic Commissioners need to be significantly bolstered (beyond what is proposed) to allow them to police, support and

enforce a QPS once it is put into place. Secondly the minimum period for registering or de-registering services needs to be significantly extended in so far as it applies to services provided under a QPS, to prevent long-term objectives being undermined by short term actions of bus operators.

- 2.24 **pteg**'s proposal is that frequencies will be determined following consultation with bus operators, in accordance with the normal consultation requirements for a QPS. Those frequencies will then be specified in the QPS. Traffic Commissioners should be empowered a) to refuse to register services which are not compatible with the minimum frequency and network proposals set out in the scheme b) to refuse to register services where such registrations have the potential effect (intentional or otherwise) of destabilising existing registered services and adversely affecting the Scheme, and c) to even out the times between registered services to ensure regular headways.
- 2.25 In addition, to allow local transport authorities time to respond to changes in the market and to provide for sufficient certainty of service, the minimum registration period applicable to services within a QP scheme should be significantly lengthened beyond the existing 56 day period.
- 2.26 Linked to the above, a power is required for the LTA to tender for extra services required to meet the minimum service frequencies specified in the QPS which have not been met by the commercial market within a specified time period of the commencement of the QPS.
- 2.27 **pteg** would welcome further discussion as to how maximum fares and timetabling provisions could be derived in practice in a manner that recognises the commercial requirements of operators, and the need to cater for new entrants to the market. **pteg** is keen to develop practical mechanisms in discussion with operators and DfT, that enables further improvements in services and capped fares to be offered through partnership, building on the success that PTA/PTEs have in this area.

## F) VOLUNTARY PARTNERSHIP AGREEMENTS

- 2.28 **pteg** welcomes the concept of a tailored competition test to apply to voluntary partnership agreements to take them out of the ambit of the Competition Act 1998 and we consider that the competition test is generally well formulated. However, **pteg** suggests that in the formulation of the new test to apply to such partnerships (referred to in Annex B as the New VBA Test), the possible objectives of the VBA, VMA or concerted practices are too limited – **pteg** would like to see the objectives in proposed paragraph 4C(3) to Schedule 10 to the Transport Act 2000 expanded. (On this see further Annex B, paragraph 8.)
- 2.29 In addition, **pteg** submits that far more agreements should fall to be assessed under this test as opposed to the general competition test. As currently drafted, it is only agreements under which the local transport authority undertakes to provide *facilities* that are included (see clause 24(2)). Local

transport authorities often enter into agreements with bus operators which do not involve the provision of *facilities*. These agreements should also be subject to the more specific New VBA Test, as opposed to general competition law, as the new test must surely be more appropriate. *pteg* suggests that a “voluntary partnership agreement” for the purpose of clause 24 of the draft Bill should be an agreement between one or more LTAs, and one or more operators of local services, relating to the provision of local services by the operators who are party to the said agreement. There are many instances where there are agreements relating to local services that do not relate to the provision of facilities by the LTA. For example an agreement may relate to the meeting of prescribed outputs or the provision of something other than facilities, such as journey times, branding, ticketing, marketing, real time information, traffic light priority and agreed levels of investment not linked to specific facilities.

## **G) BUS SERVICE OPERATORS GRANT (BSOG)**

- 2.30 *pteg* welcomes the Government’s proposal to replace the way in which BSOG is currently administered. Whilst BSOG is not the subject of the draft Bill, the continuing debate is relevant to the new models of planning bus services that Bill sets out. We fully support the reform of BSOG and consider that other methods of supporting bus services will assist in achieving both transport and environmental objectives more effectively.
- 2.31 However, any transition to a new subsidy regime needs to be carefully considered as operators may react to the loss of BSOG by reducing services and increasing fares. *pteg* is discussing with Government the option of PTEs taking over responsibility for BSOG payments - which would allow them to phase in more locally appropriate subsidy regimes, thereby incentivising operators to switch to greener and cleaner vehicles and to better target the subsidy to support bus networks which met the city regions’ wider economic, social and environmental objectives. For example, BSOG subsidy could be partially re-directed to subsidise particulate filter traps or to support the introduction of GPS equipment on buses (enabling bus performance to be properly monitored and real time information systems to be introduced). It could also assist the introduction of smartcard-readers on buses – which would support the national concessionary fares schemes and allow integrated smartcards (like London’s successful Oystercard) to be rolled out across the country.
- 2.32 Diverting the current BSOG subsidy within a QCS environment should not present many practical difficulties as bidders for a QCS contract would factor in the lack of BSOG subsidy into their bids. Instead the BSOG subsidy could be routed to the franchise authority – allowing a better specified franchise contract. A similar process could be possible under a comprehensive Quality Partnership Scheme. We therefore propose payment of BSOG direct to PTEs in those situations where PTEs propose the change alongside the introduction of QCS or QPS schemes. This would create a positive incentive for

investment in fuel-efficient vehicles and would assist PTEs in the delivery of their proposed new duty relating to Climate Change policies.

## H) VEHICLE OWNERSHIP

- 2.33 At present, unlike District Councils, PTEs are not allowed to own or lease buses. The power to own and lease vehicles may be a best value option in some situations.
- 2.34 At present this issue is being addressed to some extent by way of a draft regulatory reform order (Regulatory Reform (Public Service Vehicles) Order 2005). This order would have allowed PTEs to let vehicles in connection with an agreement providing for service subsidies entered into under section 9A(4) of the Transport Act 1968. For many reasons *pteg* believes it is desirable for PTEs to a more general power to own and lease buses.
- 2.35 *pteg* believes that the Statutory Instruments that removed the PTE's powers under Section 10(1)(viii) to let passenger vehicles on hire should be revoked and suitable provisions added to the Bill to allow vehicle ownership and provision powers for a range of purposes including in connection with tendered services under Section 89 of the Transport Act 1985, a QCS, and for supporting community transport.
- 2.36 Additionally *pteg* would like to see the Bill used to widen the scope of Section 106 of the Transport Act 1985 (Grant making powers) such that the section relates to grant making for the purpose of the provision of public transport generally (not just restricted to the purpose of facilitating travel by members of the public who are disabled). This would be particularly useful as many community transport operators have a wider remit than just the disabled, and this would fit much better with a wider social inclusion agenda. The draft Bill is a good opportunity to deal with such powers and we would welcome the opportunity to discuss with the DfT how best this can be achieved.

## I) PROVISION OF INFORMATION

- 2.37 A significant barrier to improving facilities and allowing local transport authorities to target investment efficiently can be the lack of information provided by bus operators in terms of journey times and passenger numbers at service level. Section 143 of the Transport Act 2000 currently regulates the information an operator must make available if required. However such information is only required to be provided at a much higher aggregated level. In order for a local transport authority to make better informed decisions, and so it can meet its own, and the government's targets and ambitions for improving bus service performance and punctuality, disaggregated information is required. Adequate disaggregated information on patronage will be required by any authority attempting to make a QCS. This will be necessary to ensure value for money. The Bill is a good opportunity to make changes to section 143.

## CHAPTER THREE – REFORMING LOCAL TRANSPORT GOVERNANCE

### A) PTA/E GOVERNANCE

- 3.1 **pteg** believes that the governance proposals strike broadly the right balance between strengthening the remit and the role of the PTA in planning and delivering the strategic priorities for the city region – whilst allowing each city region some freedom of manoeuvre on how best this might be achieved, in the light of local circumstance and local aspirations.
- 3.2 **pteg** welcomes the power for new PTAs to be established in England if the Secretary of State considers that it will improve the exercise of statutory functions relating to transport and the effectiveness and efficiency of transport within the area.
- 3.3 **pteg** in particular, would emphasise that ‘one size fits all’ is not an appropriate solution for all city regions. The issues which PTAs face going forward are best determined locally. Although the six city regions served by PTA/Es are among the largest conurbations outside London, their socio-economic characteristics vary, as does the nature of their transport networks. For example Greater Manchester is made up of ten Districts; the core built up area spans District boundaries; and Greater Manchester is considering taking forward a TIF bid based on road user charging. In comparison, South Yorkshire is far more polycentric; is made up of four districts; and is not considering becoming an early adopter of road user charging.
- 3.4 **pteg** would therefore reiterate that ‘no one size fits all’ and that city regions should be allowed to develop formats for governance that best suit local circumstances and local priorities. However, just as it would be wrong to attempt to impose a single model of governance on the city regions, it would be equally wrong not to encourage city regions to take a fresh look at what structures of transport governance would best support the equitable and sustainable economic development and regeneration of their areas. **pteg** thus welcomes the powers to encourage and accelerate progress where a city region fails to rise to the challenge or where the progress of a city region as a whole is being slowed down by the politics of the ‘lowest common denominator’.
- 3.5 **pteg** also welcomes the flexibility that the provisions in Chapter 2 of the draft Bill provide for the reorganisation of powers and functions between PTAs, PTEs and district councils following a considered review. **pteg** is concerned that a review under clause 40 could be carried out by, for example, a district council alone within a passenger transport area. **pteg** would submit that the effectiveness and efficiency of transport within a passenger transport area will in most cases best be assessed across that area as a whole, not on a district by district basis. In some areas it may be appropriate to make adjacent

authorities jointly responsible so that the options for extending the boundaries of PTAs are considered in a balanced manner. **pteg** would also like to see more explicit provision in the draft Bill, or by way of guidance, as to how a PTA or PTE might trigger a direction by the Secretary of State that a review be carried out under clause 40 in order that the powers under clauses 44 to 46 could then be exercised, if appropriate after the review.

- 3.6 **pteg** does have some concerns that the draft Bill, as currently worded, could provide the Secretary of State with a great deal of potential power to impose solutions on PTAs. Although the Secretary of State does need a wide-range of options to allow for different packages of reforms for different city regions there should be duties imposed on the Secretary of State in the exercise of those powers. These duties should ensure that any reforms are designed to improve the coordination and integration of transport provision within the areas served, and have regard to wider environmental, economic and social policies for those areas.
- 3.7 **pteg** welcomes the responsibility for PTEs to draw up an Integrated Transport Strategy (ITS) and accompanying implementation plans. These new powers are welcome with the latter ensuring that there is a clear strategic transport plan for the conurbation – and a timetable for its implementation. However, if the ITS is to have force, it is important that it acts both as agreed framework for the city region's transport policy and aspirations and as a key conduit for local transport funding (as **pteg** believes is the Government's intention).
- 3.8 We welcome the granting of 'wellbeing' powers to PTAs. However, we submit that PTEs, in addition to PTAs, need such powers as, pending any alterations to functions as a result of a review, it will be the PTEs that will need to implement any proposals which require 'wellbeing' powers.
- 3.9 **pteg** notes that the constitutional arrangements in relation to which the Secretary of State may make an order are very widely drafted. **pteg** would welcome clarification or guidance as to whether they would encompass appointment of members to transport authorities by way of direct election?
- 3.10 The opportunity for the Secretary of State to delegate functions (their own and/or local authority functions) is very welcome as it could provide the flexibility authorities may require in future to keep up with local social, economic and environmental needs. However, **pteg** would appreciate some guidance about how to trigger such a delegation so that its members could prepare systems accordingly.
- 3.11 The consultation paper raises the issue of local rail services, though the draft Bill is silent on rail powers. We believe that it is essential that local influence within the nationally-led franchise specification process is retained. We would want to ensure that the Secretary of State has adequate powers, using the draft Bill as appropriate, to approve a governance structure that allowed an appropriate degree of local influence. This should allow significant variation of franchised services both at the specification stage and during the franchise, to

ensure that local rail services play an effective and fully integrated role in the delivery of local transport policies.

## **B) FUNDING**

- 3.12 The draft Bill reviews and makes proposals on the structures of governance of PTAs but it does not cover funding issues. The regulatory impact assessment indicates at paragraph 3.34 that financial matters will be discussed as part of the consultation procedure.
- 3.13 *pteg* understands that funding arrangements for city region transport authorities are necessarily linked with wider reviews and potential reforms of local, sub-regional and regional financing and funding arrangements. We support in principle the devolvement and extension of greater funding freedoms and flexibilities to local, sub-regional and regional level. In particular if the PTA/Es are to have an enhanced role at a sub-regional level there are clearly implications for how they are to be financed. This includes the potential for more direct funding of PTAs and for more flexibility for PTAs to raise additional funding through a wider range of channels, including those proposed by Lyons.

## CHAPTER FOUR – LOCAL ROAD PRICING SCHEMES

- 4.1 **pteg** recognises that public transport improvements alone will not be sufficient to tackle traffic congestion. Given the background growth in car ownership and use, measures directly to control levels of traffic will also be needed. Road user charging is one way in which traffic growth can be restrained and **pteg** welcomes the powers in the Bill which will give the city regions the practical means by which road user charging schemes could be introduced.
- 4.2 **pteg** welcomes the proposals in the draft Bill to allow local authorities the freedom to develop road pricing schemes in a manner which reflects local priorities and without recourse to central Government. In particular it welcomes the proposal that PTAs may take the role of charging authorities as part of a joint scheme.
- 4.3 However, it's important to stress that firstly, it should be a matter for locally accountable politicians in each city region to decide whether or not road user charging is a viable option for them. Secondly, there is considerable variation both within and between the city regions on the strength of their local economies, and in their levels of current and forecast traffic congestion. This is one reason why city regions are at very different stages in considering whether road user charging is an appropriate traffic management tool for them. It is also why **pteg** welcomes the powers in the Bill but it is also why individual city regions must be free to decide how to respond to set out their views on the Government's wider policies on road user charging pilots.
- 4.4 **pteg** welcomes the proposals that funds generated should be spent at the local/regional level to meet local priorities. To achieve this, transport authorities should be allowed to run and administer the schemes and apply the revenues, as well as being able to work creatively with the finance. For instance, using the funds to invest in schemes, borrow against future income streams, match private sector funding and so on.
- 4.5 **pteg** is pleased that the draft Bill attempts to bring consistency to all local schemes in terms of technology. **pteg** submits that this is needed to help communicate the benefits of road charging and ensure that the public are not confused by varying schemes throughout the country. However, the detail of these matters remains to be fleshed out in regulations. Without knowing more of the thrust of these regulations it is difficult to provide detailed comment.

## CHAPTER FIVE – TRAFFIC COMMISSIONERS

- 5.1 **pteg** welcomes an enhancement to the powers of traffic commissioners. As mentioned above, **pteg** believes that they must play a greater role in policing the provisions of quality bus partnerships, in particular in relation to the control of frequencies. **pteg** have set out possible ways of introducing frequencies and timings into a QPS and these require enhanced Traffic Commissioner powers and involvement, see paragraphs 2.21 to 2.27 above and Annex D.
- 5.2 The Traffic Commissioners role in respect of QCS approval needs careful consideration and we have made proposals that we believe are appropriate, see Annex A “Alternative procedure”.
- 5.3 However, in any enhanced role, the question of resources becomes key and **pteg** would be concerned that traffic commissioners might not be provided with the resources they would require. We are not convinced that either of the models Government is suggesting is the most appropriate way forward, and believe that there is scope for a clearer definition of roles with the model that DfT is proposing, possibly with some local variation of function depending upon the Governance structure each city region adopts. These could include the potential for devolution of some traffic commissioner roles to PTEs on an agency basis. PTEs are better resourced to carry out some Commissioner roles (such as monitoring of performance) and also have better local knowledge.
- 5.4 **pteg** will be submitting a full response to the further consultation launched in late July, and will develop these thoughts further in that response.

7<sup>th</sup> September 2007

## ANNEX A – QUALITY CONTRACT SCHEME PROCEDURE

### *The Current Procedure*

- 1 The Transport Act 2000 requires a local transport authority to be satisfied that:
  - (a) making a QCS is the only practicable way of implementing the policies set out in its bus strategy or strategies in the area to which the proposed scheme relates; and
  - (b) the proposed scheme will implement those policies in a way which is economic, efficient and effective (s.124).
  
- 2 A local transport authority proposing to make a QCS must give notice of the scheme and consult with various parties including all persons operating local services in the area to which a QCS relates, all other persons holding a PSV operator's licence or community bus permit who would, in the authority's opinion, be affected by it, representatives of users of local services and the traffic commissioner (s.125).
  
- 3 Once the notice and consultation procedure is complete, if the local transport authority is still satisfied as to the matters above and wishes to proceed, it must apply to the appropriate national authority for its approval. In the context of England, this will be the Secretary of State. The application must supply reasons for the making of the scheme. Consultees may make written representations to the Secretary of State. The Secretary of State can then approve of the scheme, with or without modifications, if he is satisfied that the two criteria above are met and, in addition, that it is in the interests of the public that it is made (s.126).
  
- 4 If the Secretary of State proposes to make the scheme with modifications, a further round of consultation is necessary before the scheme is made.

### *Problems with the current procedure and PPF proposals*

- 5 PPF proposed revising the legal test that needs to be passed before a QCS can be implemented. PPF accepted that the current test was too exacting and difficult to meet. The Government concluded that the current powers under the Transport Act 2000 in relation to a QCS need to be reformed, in order to make them a realistic option whilst ensuring that the revised powers placed appropriate obligations on local authorities.
  
- 6 PPF considered that more appropriate "public interest" criteria should be substituted for the test above in order to state more directly the circumstances in which it would be appropriate for the Secretary of State to allow a QCS, and which are less onerous to prove.

- 7 PPF proposed a set of criteria along the following lines:
- *“the local authority concerned should have a plan to improve services in measurable respects. These would need to include increases in bus patronage, improved accessibility in line with local targets and improved vehicle speeds on critical parts of the road network. Other priorities could also be included such as improving environmental performance;*
  - *the plan should be fully costed with evidence that it can be funded;*
  - *it should be demonstrably in the public interest and should be good value for money;*
  - *there should be appropriate governance arrangements to ensure effective implementation (as noted below, this will be particularly important in PTA areas); and*
  - *there should be obligations on the relevant local authorities to show that the scheme will be supported by and in turn facilitate wider demand management measures, including measures to give buses more priority.”*
- 8 PPF stated that there should be a transparent process for local authorities to demonstrate that they have satisfied those criteria and for those likely to be affected to test their conclusions and methodology.
- 9 PPF recognised that the approval role of the Secretary of State places decision-making at the wrong level and complicates the discharge of the Secretary of State’s wider policy responsibilities and inhibits Ministers and officials from discussing proposed schemes, complicating any TIF application interactions.
- 10 PPF proposed removing the requirement for the Secretary of State’s approval for a QCS. However, PPF stated that there were attractions in retaining an independent approval role to allow explicit and public testing of a local authority’s proposals: to encourage local authorities to articulate their rationale, objectives and implementation plans; and to give more protection for bus operators. A panel including the Senior Traffic Commissioner was suggested.
- 11 Irrespective of the question of independent approval, PPF believed there was a need for an effective, fit for purpose appeal mechanism. It stated that judicial review was an expensive, time-consuming process that is limited in the redress it can provide – an alternative appeal option as “a first port of call” was therefore preferable. It suggested the Transport Tribunal.
- 12 Thus the procedure under PPF would, according to PPF (p.43) be:
- a local authority proposes a QCS;

- the Senior Traffic Commissioner acting together with a panel of expert assessors decides whether to approve it;
  - appeals against decisions are made to the Transport Tribunal.
- 13 In its response paper to PPF of April 2007 (“the Response Paper”), **pteg** commented that the new process would comprise at least 5 stages which, even with all things going well, would take **nearly 4 years** from proposal to implementation (including appeals to the Transport Tribunal, but not including revisions to the relevant LTP/bus strategy or further legal action beyond a Transport Tribunal decision).
- 14 A detailed consideration of each necessary stage by consultants Steer Davies Gleave (SDG) was carried out on **pteg’s** behalf and formed part of **pteg’s** response to PPF.

### ***The draft Bill***

- 15 In accordance with the proposals in PPF, the draft Bill replaces the “only practicable way” test with a new set of public interest criteria (clause 7). Broadly, these criteria are that a proposed QCS will, in the area to which it relates:
- (a) result in an increase in the use of bus services (or will reduce, arrest or reverse a *decline* in the use of bus services);
  - (b) bring benefits to persons using local services in the area, by improving the quality of those services;
  - (c) contribute to the implementation of local transport policies of the authority;
  - (d) contribute to the implementation of those policies in a way that is economic, efficient and effective; and
  - (e) meet the competition test.
- 16 **pteg** generally agrees with the formulation of the public interest test in clause 7. However, **pteg** submits that the reference to *the implementation of local transport policies* needs to be clarified to avoid any concerns that local transport plans made prior to the proposed changes to s.108 of the Transport Act 2000 would not constitute local transport policies and as such, a local transport authority could not implement a QCS until it had developed a local transport policy under s.108 as proposed to be amended. Consideration should also be given to widening the remit of the public interest test to ensure that proper consideration could be made of how a QCS could contribute to the local transport authority’s wider vision and how this in turn contributes to the wider social, economic and environmental goals of the area. Also **pteg** would like to widen the test so that it could relate to an increase in the use of

public transport generally and not just to an increase in the use of bus services.

- 17 The draft Bill also proposes changes to the procedure for the approval of a QCS. These reflect PPF. An appropriate approval authority is substituted for the appropriate national authority. There is accordingly no change in the situation in Wales but in England, it is proposed that the authority approving a QCS will be an Approvals Board. The approvals board will consist of the Senior Traffic Commissioner (subject to certain exceptions where it will be another Traffic Commissioner) with two other persons appointed by the Secretary of State. The Consultation Paper suggests that these persons will have expertise in transport planning and economics. Guidance will be issued as to how the approvals board is to exercise its functions.
- 18 The Approvals Board would hold a public inquiry if it thought fit and could make an order for the payment of costs to the Secretary of State by such party to the inquiry as the board thought fit as to costs incurred by the Board or the Secretary of State in connection with the holding of the inquiry.
- 19 There would then be a right of appeal to the Transport Tribunal against the decision of the approvals board by either the local authority or any person consulted by the authority in accordance with s.125(3). The authority could not proceed to issue invitations to tender for a QCS until the time for making an appeal had expired (*pteg* notes that the draft Bill does not specify what this time period is) or any appeals are finally disposed of.
- 20 The Transport Tribunal would have the power to:-
  - (a) dismiss the appeal in whole or in part;
  - (b) quash the whole or any part of the decision of the approvals board;
  - (c) approve the scheme with such modifications as the Tribunal may specify;
  - (d) remit the matter to the authority with one or more directions to consider or reconsider matters; consult or further consult as respects those matters; or make such modifications of the scheme as may in consequence appear appropriate to the authority; or
  - (e) remit the matter to the approvals board with a direction for the board to propose such modifications or further modifications of the scheme as the Tribunal may specify.
- 21 The Consultation Paper states that this appeal route should limit the need for recourse to judicial review (which it states is time consuming and limited in the redress it can provide). It states that the Tribunal currently comprises judicial members (who must be legally qualified), and lay members (who have experience in transport operations and its law and procedure). The

Consultation Paper recognises that the proposed new appeal function would be a significant extension of the Tribunal's role, and it would be important to ensure the pool of lay members included knowledge of the bus industry and relevant economic expertise.

- 22 **pteg** submits that this new two-tier approach is unsuitable for a number of reasons and does not achieve the objectives that the Government sets out in PPF and in the Consultation Paper.

***The role of the approvals board and the Transport Tribunal***

- 23 **pteg** has the following criticisms of the role of the Approvals Board:

- **locality** – para. 3.14 of the Consultation Paper refers to the Local Government White Paper which highlights the importance of ensuring appropriate freedom and flexibility at a local level and states that the current framework for the decision-making in relation to a QCS is placed at the wrong level in relation to schemes in England. However, it is not clear how the approvals board is any way 'local' or at a better level to make such decisions than the Secretary of State. Indeed the draft Bill expressly encourages the traffic commissioner on any particular board **not** to sit if the QCS relates to his or her area (clause 10);
- **lack of accountability** – a QCS may be deeply integrated into a city region's transport plan and/or be the contingency upon which TIF funding is made available to the city region. The rejection of the QCS application by the Approvals Board, which is in effect, an unelected, centrally appointed body would have a major impact on policies being pursued by elected local and regional bodies;
- **expertise** – the traffic commissioners' expertise is in vehicle standards, safety operation and fleet management. Although they have a general familiarity with the bus industry, they are not familiar with transport planning more widely or with economic / competition aspects – that this is the case is implied by the addition of two experts in such fields. However, the combined panel might still not be familiar with questions of social integration; development; or environmental questions;
- **appropriateness** – essentially, the approvals board will be deciding whether the relevant criteria set out in s.124(1) of the Transport Act 2000 (as amended) are met and whether the scheme is in the public interest (s.126(4)). Previously, the Secretary of State made this decision. **pteg** submits that it is inappropriate for an unelected, centrally appointed body now to make such a decision based on weighing up policy

considerations as to what may or may not be in the interest of the public in a particular area<sup>2</sup>.

24 In relation to the role of the Transport Tribunal, it is appropriate first, to note that the Transport Tribunal is a court of record consisting of members appointed by the Lord Chancellor and by the Secretary of State. Under Schedule 14 to the Transport Act 1985, from the Transport Tribunal there is a statutory right of appeal to the Court of Appeal upon questions other than as to fact or locus standi. Any subsequent decision of the Court of Appeal is final. The draft Bill makes no amendments to these provisions of the Transport Act 1985. *pteg* has the following criticisms of the role of the Transport Tribunal:

- **Judicial review v. appeal** – the Consultation Paper states that providing the new appeal route to the Transport Tribunal should “limit the need for recourse to judicial review”. This is not exactly correct – in fact there will be no judicial review whatsoever. Given that under the Transport Act 1985 an appeal to the Court of Appeal is provided for but then further appeal is precluded, judicial review will never arise. Rather, in fact, whereas under the current situation, a decision of the Secretary of State confirming a QC would be amenable to judicial review (i.e. a limited ability to challenge, if locus were established and leave/permission granted, on administrative grounds, e.g. unreasonableness, manifest error or procedural impropriety), the amendments proposed by the Bill would mean that there would be an *appeal as of right* on all matters to the Transport Tribunal and then a further appeal to the Court of Appeal on all matters other than questions of fact or locus standi. To say as the Explanatory Notes do that only points of law would be considered by the Court of Appeal could give a misleading impression – for example, matters of discretion and appreciation are not questions of fact and would fall to be considered by the Court of Appeal. Accordingly, as opposed to reducing appeals, the new structure would lengthen them by introducing a whole additional level of appeal and broaden them beyond mere judicial review. This can only increase delay, uncertainty and cost;
- **locality / accountability** – again, the Transport Tribunal is not local and is not accountable democratically;
- **appropriateness** – the Transport Tribunal is a court of record – it is not appropriate that a judicially constituted court should evaluate matters of policy and weigh considerations of competing policy to come to a conclusion as to what is and what is not in the public interest in a particular region or locality;
- **delay** – the very nature of this appeals process involving both the Transport Tribunal and the Court of Appeal and on matters beyond those

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<sup>2</sup> cf. the situation in Wales, where the decision will continue to be made by the democratically accountable Welsh Ministers.

that would be considered in judicial review will inherently cause delay and **pteg** is concerned that the Local Transport Bill risks repeating the mistakes of the Transport Act 2000, with QC schemes being similarly under-utilised.

***Alternative procedure***

25 **pteg** submits that the local transport authorities themselves, in particular enhanced Passenger Transport Authorities are better placed to determine questions of public interest given their direct or indirect accountability to local areas and regions.

26 However, if an element of independent review is thought necessary, **pteg** would suggest that in lieu of the arrangements proposed in the Bill, an independent body could play a role similar to that played by the Office of Rail Regulation (“ORR”) in the context of railway closures. This role, which is essentially one of ratification, is one that we suggest could be mirrored by the approvals board as constituted or more simply again, the enhanced Senior Traffic Commissioner under the draft Bill could play the role alone. Crucially, the Approvals Board/Commissioner would not be being asked to consider anything significantly outside its normal expertise.

27 Under the Railways Act 2005, the proposed closures of railway services, stations or networks are ultimately referred to the ORR. The ORR then determines whether the consultation on the proposed closure has been properly carried out and whether the proposed closure is in accordance with guidance issued by the Secretary of State. Broadly, the Railways Act 2005 provides that the ORR’s role is then<sup>3</sup>:

(a) to consider whether the person making the proposal properly carried out the consultation he was required to carry out in accordance with the Railways Act 2005; and

(b) unless it is satisfied that-

i. there has been a failure or other defect in the carrying out of the consultation, and

ii. the failure or defect makes it inappropriate for the Office to make the determination required by this paragraph,

to determine whether the proposal or (as the case may be) the proposal as modified, satisfies the criteria set out in the relevant part of the closures guidance.

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<sup>3</sup> s. 32(5) Railways Act 2005

- 28 Closures guidance has been issued by the DfT which prescribes how the appraisal of the scheme should be carried out by the proposer and requires that the proposer considers that the closure represents good value for money. The ORR has stated in its guidance<sup>4</sup> that it would expect to see this consideration demonstrated in the closure proposal. The ORR states that "*it is important to reiterate ..that we are carrying out a review of the assessment that has already been done: we will not be carrying out our own assessment or substituting our judgements for the judgements of the submitting authority. We will be checking to see that the assessment contains all the elements, and has followed the assessment methodology, that are required by the closures guidance.*"
- 29 A similar approach could be adopted in relation to a QCS. The local transport authority could propose the QCS and an independent body could then review whether the consultation required under s.125 of the Transport Act 2000 was adequately carried out and that the proposed scheme is in accordance with the guidance to be published under clause 22 of the draft Bill, the local transport plan or its successor and any bus strategy. This independent body could refuse to ratify any QCS if it was not so satisfied. Crucially, the independent body would not consider whether the QCS was in the public interest – the proposing authority would already have certified in its proposal that the QCS was, in its view, in the interests of the public of its area.
- 30 It should be noted that the ORR can impose requirements in relation to closures that it ratifies - it would need to be considered whether it would be appropriate for the Senior Traffic Commissioner to have a similar power.
- 31 The decision of the proposer to refer the closure to the ORR and the decision of the ORR to ratify a closure under the Railways Act 2005 would be susceptible to judicial review in the normal way, although such a review would only encompass the respective roles of the proposer and the ORR under the Act – in particular, it would not go into the substantive merits of the assessment initially carried out by the proposer of the closure save to the extent that the decision was unreasonable or irrational. Similarly, under the proposed alternative, judicial review would be available in the usual way in respect of the decision of the PTA to make the QC and the subsequent ratification of that decision by the Approvals Board/Senior Traffic Commissioner.

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<sup>4</sup> ORR's procedures for reviewing closure references, ORR, 1 December 2006.

## **ANNEX B – DETAILED COMPETITION CONSIDERATIONS**

1. Annex B contains the following sections:-
  - A. The Current Situation (paragraphs 2-4);
  - B. The Proposed Changes (paragraphs 5-10); and
  - C. *pteg's* Commentary/Proposals (paragraph 11).

### **A. *The Current Situation***

2. It is useful briefly to consider the current application of competition law to QCSs, QPSs and voluntary arrangements between local authorities and one or multiple bus operators. Currently, there are two competition tests available: one under the Chapter I prohibition of the Competition Act 1998 (“the Competition Act Test”) and the other under Schedule 10 to the Transport Act 2000 (“the Schedule 10 Test”).

**The Competition Act Test** is broadly that the agreement, decision or concerted practice in question, if it affects trade within the United Kingdom and has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom:

(a) must contribute to:

- i. improving production or distribution, or
- ii. promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) must not:

- i. impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- ii. afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

3. Clearly, the Competition Act Test is generic and not geared to any industry in particular. A specific test to apply to the exercise of functions under the Transport Act 2000 (QPSs, ticketing schemes and tendering of bus services) was introduced in Schedule 10 to that Act.

**The Schedule 10 Test** is that the exercise of the relevant function does not or is not likely to have a significantly adverse affect on competition or, if it does, then it is justified on the basis that it:

- (a) is with a view to achieving:
  - i the securing of improvements in the quality of vehicles or facilities used for or in connection with the provision of local services;
  - ii the securing of other improvements in local services of substantial benefit to users of local services; or
  - iii the reduction or limitation of traffic congestion, noise or air pollution; and
- (b) its effect on competition is or is likely to be proportionate to the achievement of the above purposes.

4. The current application of these competition tests to a QPS, a QCS and voluntary arrangements can be summarised as in the table below:

Agreement / decision:	Competition law application:	Role of the OFT:
<b>QCS</b>	<p>The Schedule 10 Test does not apply to a QCS (s.153 Transport Act 2000). No specific provision is made in the Transport Act 2000 as to the application of competition law to a QCS.</p> <p>A QCS is therefore either subject to the Competition Act Test or to no competition test at all.</p> <p>There is an argument that a QCS will effect competition (by its very nature, a QCS ousts the open market for the provision of bus services) and that a QCS once made will constitute an agreement between undertakings on the basis that the term "undertaking" covers any natural or legal person engaged in economic activity, regardless of its legal status and the manner in which it is financed. It cannot be said with certainty that a transport authority in specifying a QCS would not be carrying out an economic activity, particularly considering that in so doing it will be in effect specifying the</p>	<p>If the Competition Act Test applies, the OFT will play its normal role of enforcement under the Competition Act 1998 and can step in at any time if it is of the opinion that the Competition Act Test is not met.</p>

	<p>cost of bus services in specific areas and or on specific services.</p> <p>However, given the very high threshold criteria for a QCS to be made in the first place (the only practicable way) it is almost certain that the Competition Act test would be met and as such the QCS would be exempt from the prohibition in the Competition Act.</p>	
<b>QPS</b>	<p>The Schedule 10 Test applies to a QPS (s.153 Transport Act 2000).</p> <p>However, there is no explicit disapplication of the Competition Act Test. As with a QCS, it is not clear that the Competition Act Test does not apply – arguments based on the question of whether an economic activity is being carried out can again be raised.</p>	<p>The OFT may investigate and enforce the requirements of the Schedule 10 Test (at any time)<sup>5</sup>.</p> <p>In addition, upon the application of a local authority or a bus operator, the OFT will decide whether a (proposed) scheme meets the Schedule 10 Test.</p>
<b>Voluntary agreements</b>	<p>The Schedule 10 Test does not apply to voluntary agreements (s.153 Transport Act 2000). No specific provision is made in the Transport Act 2000 as to the application of competition law to voluntary agreements.</p> <p>Voluntary agreements will be subject to the normal Competition Act Test.</p>	<p>The OFT will play its normal role of enforcement under the Competition Act 1998 and can step in at any time if it is of the opinion that the Competition Act Test is not met.</p>

**Table One: Application of current law**

## **B. The Proposed Changes**

### ***The New VBA Test***

- As suggested in PPF, the draft Bill proposes a new competition test that would apply to voluntary arrangements between local authorities and one or multiple bus operators which have the object or effect of preventing, restricting or distorting competition, referred to in the draft Bill as voluntary bilateral agreements (“VBAs”) and voluntary multilateral agreements (“VMAs”) respectively and would also apply to agreements, decisions or concerted practices (collectively referred to in this paper as “concerted practices”) connected with VBAs or VMAs and which have the object or effect of preventing, restricting or distorting competition.

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<sup>5</sup> It is assumed for these purposes that the Competition Act does not also apply.

6. The draft Bill proposes implementing a more tailored competition test (“the New VBA Test”) to apply to VBAs, VMAs and concerted practices similar to the Schedule 10 Test.

The **New VBA Test** is that the VBA, VMA or concerted practice:

- (a) contributes to:
  - i. securing improvements in the quality of vehicles or facilities used in connection with the provision of local services;
  - ii. securing other improvements in local services of substantial benefit to users of local services; or
  - iii. reducing or limiting traffic congestion, noise or air pollution; and
- (b) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- (c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the services in question.

7. A new paragraph 4E of Schedule 10 to the Transport Act 2000 would then expressly provide that the Chapter I prohibition of the Competition Act 1998 would not apply to VBAs, VMAs and concerted practices.
8. In effect, the Schedule 10 Test and the New VBA Test contain the same elements, with the exception that the Schedule 10 Test does allow the function, for example the making of a QPS, to eliminate competition in respect of the services in question, provided the effect on competition is proportionate, whereas the New VBA Test does not. One further difference is the use of the concepts of ‘indispensability’ in the New VBA Test and ‘proportionality’ in the Schedule 10 Test – **pteg** questions whether this is an intentional difference and if so what the significance is? Is indispensability intended to be a higher threshold than proportionality?
9. In relation to the New VBA Test, **pteg** welcomes the concept of a tailored test to apply to such agreements and to take them out of the ambit of the Competition Act 1998. However, **pteg** suggests that in the formulation of the New VBA Test, the possible objectives of the VBA, VMA or concerted practices (set out in Schedule 10, Part 2, Clause 4C(3)) are too limited – the criteria are restricted to securing improvements in the quality of vehicles or facilities, securing other improvements in local services of substantial benefit to users of local services and reducing or limiting traffic congestion, noise or air pollution – PTA/Es would have a legitimate interest in entering into such

arrangements to secure the provision of services to increase efficiency in order to increase capacity of transport into cities from the surrounding regions in response to increased surrounding populations but such arrangements might not engender any measurable reduction in congestion or pollution. In addition, what of slightly more intangible but equally worthwhile benefits? For example, improving accessibility for certain areas and/or certain communities. **pteg** would like to see the categories in proposed paragraph 4C(3) to Schedule 10 to the Transport Act 2000 expanded.

### ***The New QCS Competition Test***

10. In addition to the New VBA Test, the draft Bill in effect introduces a separate competition test that relates to QCSs (“the New QCS Competition Test”). The New QCS Competition Test is negatively expressed in the draft Bill (clause 7(7)) and accordingly will be met unless both: the QCS does have a significant adverse effect on competition and the making of the scheme is not justified on the grounds that it is not proportionate to the achievement of the new objectives for a QCS in paragraphs (a) to (d) of clause 7. Fundamentally, the only difference between the New QCS Competition Test and the Schedule 10 Test is in relation to the permitted objectives of the scheme – these are more strict in relation to the New QCS Competition Test than in relation to the Schedule 10 Test. This difference in the test does not seem inappropriate given the nature of a QCS.

### ***C. pteg commentary on Proposed Tests***

11. The application of the proposed competition tests under the draft Bill to QCSs, QPSs and voluntary arrangements, and **pteg**'s comments in relation to it is summarised in the table below:

<b>Agreement / decision:</b>	<b>Competition law application:</b>	<b>Role of the OFT:</b>
<b>QCS<sup>6</sup></b>	The New QCS Competition Test will apply as part of the general public interest test. As set out above in paragraph [2.17], <b>pteg</b> questions the need for any competition test in relation to the making of a QCS and submits that a more general requirement of proportionality would be appropriate. However, this table considers the proposed test as it is currently framed.  There is still no express exclusion of	The role of the OFT in relation to the New QCS Competition Test is wholly unclear under the provisions of the draft Bill. As the New QCS Competition Test is not to be part of Schedule 10 to the Transport Act 2000, it is assumed that the OFT will have <u>no</u> role in policing the New QCS Competition Test and instead the Test will be policed by virtue of the role of the approvals board, the

<sup>6</sup> It should be emphasised that **pteg**'s comments as to the unsuitability of the proposed procedure for the implementation of QCS are set out in section 2 to this paper. The comments and submissions that **pteg** makes in this section are without prejudice to that position.

	<p>the Competition Act 1998. <i>Pteg</i> understands that the Department is confident that the Competition Act Test would not apply to a QCS. However, for the reasons given above, <b><i>pteg</i> submits that there would be much greater certainty if, in any event, it could be made clear on the face of the Act that the Competition Act 1998 has no application to the making of a QCS (as it is expressly stated in relation to VBAs/VMAs under the proposed new paragraph 4E of Schedule 10).</b></p> <p>In addition, <i>pteg</i> submits that the drafting of the New QCS Competition Test could be more simply phrased to avoid the double negative.</p>	<p>Transport Tribunal and the Court of Appeal. Given that, in particular, the approvals board and the Transport Tribunal will have no real familiarity with questions of competition law, <i>pteg</i> can envisage that those two bodies might seek to obtain guidance from the OFT on such matters or that the publication of initial guidance by the OFT would be useful. <b><i>pteg</i> submits that the extent to which such guidance can be sought or reference made by these bodies should be expressly set out in the draft Bill.</b></p> <p><b><i>pteg</i> submits that in any case, the role of the OFT in relation to the New QCS Competition Test be expressly clarified in the draft Bill.</b></p>
<p><b>QPS</b></p>	<p>The Schedule 10 Test applies to a QPS (s.153 Transport Act 2000).</p> <p>Again, there is still no express exclusion of the Competition Act 1998 and again, for the reasons given above, <b><i>pteg</i> submits that there would be much greater certainty if, in any event it could be made clear on the face of the Act that the Competition Act 1998 has no application to the making of a QPS</b></p>	<p>The OFT may investigate and enforce the requirements of the Schedule 10 Test (at any time)<sup>7</sup>.</p> <p>In addition, upon the application of a local authority or a bus operator, the OFT will decide whether a (proposed) scheme meets the Schedule 10 Test.</p> <p><b><i>pteg</i> submits that the ability of OFT investigate and enforce should be limited to the period up to the making of the Scheme, this would remove any uncertainty once a scheme is in place.</b></p>
<p><b>Voluntary agreements (VBAs, VMAs and concerted practices)</b></p>	<p>The New VBA Test will apply (paragraph 6 of Schedule 2 to the draft Bill).</p> <p>The Competition Act is expressly excluded.</p> <p>As set out in paragraph 8 of this Schedule, <i>pteg</i> submits that the objectives set out in the formulation of the New VBA Test are too limited.</p>	<p>The OFT may investigate and enforce the requirements of the Schedule 10 Test (at any time).</p> <p>Unlike in relation to the Schedule 10 Test, the local authority or bus operator will not be able to apply to the OFT for a decision as to whether or not the New VBA Test is met.</p> <p><b><i>pteg</i> submits that it would be useful to have the ability to</b></p>

<sup>7</sup> It is assumed for these purposes that the Competition Act does not also apply.

		<b>consult the OFT on whether a particular agreement meets the New VBA Test.</b>
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**Table Two: Application of draft Bill proposals**

**ANNEX C****RESPONSE TO SPECIFIC QUESTIONS POSED IN THE CONSULTATION PAPER****Chapter 3 – Improving the quality of local bus services****Page 39, Box 3.4 Competition legislation – issues for consultation**

Consultation question / request for comment	<i>pteg</i> response
<p>(i) the proposal in the draft Bill for a “revised Schedule 10” test would leave in place and unchanged the existing competition test in Schedule 10 which applies to the functions of making and varying quality partnership schemes, making and varying ticketing schemes, and inviting and accepting tenders for subsidy contracts. We would however welcome views on whether it continues to be necessary to retain any specific competition test relating to any or all of these functions;</p>	<p>If it is understood that the Competition Act would not apply to the functions then <i>pteg</i> would question the need for this test at all, and particularly in respect of tenders for subsidy contracts. If a competition test is deemed desirable then, <i>pteg</i> believes that it is important that these functions should fall to be assessed against a competition test which is tailored to the functions in question and should not merely be subject to the general test under the Competition Act.</p>
<p>(ii) the draft Bill currently does not apply the “revised Schedule 10 test” to agreements between undertakings, decisions by associations of undertakings and concerted practices arising out of the making of a quality partnership scheme, even though such agreements etc. might be more likely to occur once frequencies, timings and fares can be part of such a scheme. These would continue to be subject to the appropriate provisions in the Competition Act 1998. We would welcome comments as to whether such agreements etc. should be made subject to the “revised Schedule 10 test”;</p>	<p>As stated, <i>pteg</i> believes that the revised test should apply to a broader range of agreements than currently proposed, but also that it should apply to agreements between undertakings, decisions by associations of undertakings and concerted practices arising out of the making of a quality partnership scheme. The same logic must apply that such agreements are more appropriately assessed against a tailored test.</p>
<p>(iii) with the proposed introduction of the “revised Schedule 10 test” we intend to disapply the Chapter 1 prohibition in the Competition Act 1998 in respect of</p>	<p>As stated above (Annex B), <i>pteg</i> particularly welcomes this approach and would wish to see it expanded to the original Schedule 10 test also.</p>

<p>agreements that are subject to the revised test. This test would be no less stringent than the Competition Act test but, because it is specifically tailored for the bus market, may have advantages in that it is clearer. We welcome views as to the merit of this;</p>	
<p>(iv) the draft Bill does not specifically address enforcement in relation to the revised Schedule 10 test. A subject for further consideration is whether all the enforcement provisions in Chapters 3 and 4 of Part 1 of the Competition Act 1998 should be applied. We will be developing proposals in this area in conjunction with the Office of Fair Trading (OFT) in parallel to this consultation, but would welcome the views of stakeholders on the current and any alternative regime; and</p>	<p><b>pteg</b> is concerned in relation to the question of enforcement to ensure certainty. In respect of a QPS <b>pteg</b> believes that the OFT should have no role beyond the date the Scheme is made in order to give the certainty needed before funds are committed to delivering facilities. In <b>pteg's</b> view, a Quality Contract scheme in particular, should not be exposed to the risk of being deemed to be anti-competitive once made. We would be keen to see the OFT's role clarified and, if they have any role, their powers should be limited to an involvement to the stage at which the scheme is made (it is after all at that point which any anti-competitive effect should be assessed).</p> <p><b>pteg</b> would be grateful if it could be afforded the opportunity to comment on the proposals that are developed in this area.</p>
<p>(v) under Schedule 10 to the Transport Act 2000, local authorities and operators can apply to the OFT for a decision as to whether the exercise or proposed exercise of functions to which that Schedule applies meet the competition test. The OFT strongly believes these provisions should be removed as they are inconsistent with the procedures in other markets and enforcement of EC competition law in other Member States. We would welcome the views of stakeholders on the removal of these provisions.</p>	<p><b>pteg</b> in principle believes that such references to the OFT are useful, and if the OFT engage in the process this can give comfort to a local transport authority at an early state in respect of an area that is specialist and upon which expert guidance is very helpful. The same principle applies to the revised test which would also be very helpful to operators entering into such agreements.</p>

**Page 49 – Questions for Consultation**

Consultation Question	<i>pteg</i> response
1. What are your view on the proposals relating to:	
(a) voluntary partnership agreements;	<i>pteg</i> generally supports the proposals, see Chapter 2, sections D and F and Annex B
(b) quality partnership schemes;	<i>pteg</i> generally supports the proposals, but would like to see them developed see Chapter 2, sections D, E and Annex B
(c) quality contract schemes;	<i>pteg</i> generally supports the proposals, and has specific proposals to improve the proposals see Chapter 2, sections A, B, C and Annexes A and B
(d) bus punctuality;	No specific views
(e) community transport;	In principle <i>pteg</i> supports the approach to expanding the role of community transport, but the relationship to BSOG reform needs consideration as does the relationship to the safety, training and competency standards for smaller operators.
(f) other measures?	<i>pteg</i> welcomes the proposals to improve bus services generally.
2. What are your views on the specific questions relating to competition legislation? (Box 3.4)	<i>pteg</i> welcomes the changes and has specific comments, see above and Chapter 2, section D and Annex B
3. Do the proposed “public interest” criteria for quality contracts schemes cover the right issues (Box 3.5)? Do they strike the right balance between making schemes a realistic option and protecting the legitimate interests of bus operators?	Yes, <i>pteg</i> believes that the public interest test for quality contracts is broadly appropriate. However, as set out in Chapter 2, <i>pteg</i> questions the need to include the competition test and would prefer to see a more relevant “proportionality” test.
4. How can the proposed new bus punctuality regime (paragraphs 3.32 to	No specific comments.

3.39) best be designed to achieve the desired benefits at minimum cost, particularly for smaller operators?	
5. Do the proposals to amend the existing powers relating to subsidy contracts provide sufficient flexibility to meet local authorities' needs (paragraph 3.47)?	<b>Pteg</b> welcomes the Bills provisions to amend the existing provisions relating to subsidy contracts.

#### Chapter 4 – Reforming local transport governance

##### **Page 66 - Questions for consultation**

Consultation Question	<b><i>pteg</i></b> response
6. Do you agree that governance arrangements in the metropolitan areas outside London require reform?	See Chapter 3
7. Do you agree that there is a need for flexible arrangements which allow for variation in the governance developed for different areas?	<b><i>pteg</i></b> fully supports such flexible arrangements, see Chapter 3.
8. Do you agree that the cities themselves should be asked to publish proposals on revised governance? Do you have views on which body or bodies should be asked to prepare those proposals?	<b><i>pteg</i></b> believes firmly in local determination of any revised governance arrangements, see Chapter 3 and in particular paragraph 3.5.
9. Do you agree that the Bill should enable broad changes, or should there be limitations on what change might be allowed?	<b><i>pteg</i></b> supports a regime that allows broad flexibility to meet local circumstances.
10. Do you think that the power to review and amend governance arrangements should allow development over time, or should the powers lapse after an initial review?	<b><i>pteg</i></b> supports ongoing development as such changes may need to be phased in over time.

11. Do you agree with the changes we are proposing to the powers and duties of PTAs in all the metropolitan counties?	In general <b>pteg</b> agrees with the proposals. We would like to see the “wellbeing” powers extended to cover PTEs in existing PTA areas.
12. Do you agree with the proposed changes to Local Transport Plans described in paragraphs 4.43 to 4.45? Should these changes be applied only to the metropolitan counties, or should they be applied elsewhere, for example to other city regions?	As set out in paragraph 37 we welcome the proposals and will be commenting in more detail on changes to the LTP process in light of the government’s additional consultation paper on LTPs.  In principle these changes should be applied elsewhere, but that is a matter for the city regions to determine locally.

## Chapter 5 – Taking forward local road pricing schemes

### **Page 80 – Questions for Consultation**

Consultation Question	<b>pteg</b> response
13. What are your views on the proposals relating to	
(a) local freedom, flexibility and accountability (paragraph 5.18), including the proposals in Box 5.1;	<b>pteg</b> generally welcomes the Bills emphasis on local determination and would clearly wish to input in respect of any guidance and any regulations.
(b) consistency and interoperability (paragraph 5.22); and	<b>pteg</b> welcomes efforts to ensure interoperability between schemes.
(c) information (paragraphs 5.26 and 5.29)?	<b>pteg</b> would be concerned if the data provision costs were substantial and the burden of providing information to DfT excessive.

## Chapter 6 – Traffic commissioners

### **Page 85 – Questions for Consultation**

Consultation Question	<b>pteg</b> response
14. To what extent is there a problem of ‘inconsistency’ between the approaches of the different traffic commissioners, and what costs does this impose on PSV and	No specific response at this stage, but this will be addressed in <b>pteg’s</b> separate response to the DfT’s further

goods vehicle operators?	consultation.
15. Do you agree that the proposals outlined here would help to reduce these costs?	No specific response at this stage, but this will be addressed in <b>pteg's</b> separate response to the DfT's further consultation

**ANNEX D****Drafting points relating to specific clauses not dealt with elsewhere in *pteg response*****Part 2 – Bus Services****Quality Partnership Schemes**

<b>Clause No</b>	<b>Section</b>	<b>Issue</b>	<b>Proposal</b>
3.	Quality Partnership Schemes	Section 3 (5) Allows maximum fares to be prescribed but under the new section 114 (6C) of the 2000 Act the setting of a maximum fare appears to be only with agreement of the operator	Delete proposed section 114(6C) as it makes the provision almost unworkable.
4.	Making a scheme: different dates for different facilities or standards etc	Introduces concept of phasing in of facilities and services. However the wording is difficult and would benefit from simplification	Wording should be simplified to aid clarity. In particular, can different phases of a scheme end on different dates?
5.	Postponement of provision of particular facilities or standards of service	If postpone start dates does end date automatically move out.	Make wording clear

	Other comments	<ul style="list-style-type: none"> <li>• Does section 162(4) need amending to update list of sections where reference to PTA means PTE;</li> <li>• Need provisions allowing for the extension of QPSs (similar to those in the Bill for the extension of Quality contract Schemes) – otherwise, once a QPS expires, it seems that cannot be renewed it unless there is provision of further new facilities;</li> <li>• Can you allow lower standard for services that don't use all facilities</li> </ul>	<ul style="list-style-type: none"> <li>• Additional provisions are required in the draft Bill to address extension to a QPS.</li> <li>• Review section 162(4) in light of new provisions.</li> </ul>
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### Quality Contract Schemes

Clause No	Section	Issue	Proposal
7.	Quality contracts schemes	<ul style="list-style-type: none"> <li>• Section 7(2) Amends subsection (1) of section 124 TA 2000. New 124 (e), is “competition test” requirement necessary?</li> <li>• Section 7(2)(a) and 7(6) relate to increasing the use of bus services and</li> </ul>	<ul style="list-style-type: none"> <li>• Clarify need for competition test and if required the Bill should go on to expressly exclude the Competition Act in a similar way to how it deal with VPA's. <b>pteg</b> proposes a more general “proportionality” test.</li> </ul>

		<p>are confusing;</p> <ul style="list-style-type: none"> <li>• Section 7(2)(a) should not be confined to increasing or ameliorating the decline in bus patronage but should be widened to cover an increase or ameliorating the decline in public transport use generally.</li> <li>• Need to ensure that bus type proposals can be covered by a QCS i.e. bus rapid transit schemes.</li> </ul>	<ul style="list-style-type: none"> <li>• Combine section 7(6) into 7(2)(a) to make it clear that the proposed scheme will either reduce or arrest the rate of decline in bus usage or increase bus usage.</li> <li>• Widen section 7(2) generally.</li> </ul>
8.	Notice and consultation requirements	Chief Finance Officer – PTE do not have such a position.	Need provision to cover PTEs.
10.	Approval boards for England	Section 10 introduces concept of “Approvals Board”. <i>pteg</i> have concerns as to whether this approach is correct. .	See Appendix A
11.	Inquiries by approvals boards for England	See 10 above	See Appendix A
12.	Appeals relating to applications for approval: areas in England	See 10 above	See Appendix A
13.	Making of scheme	Does Section 13 (5) Amend section 127(2)(b) of 2000 Act such that a district wide scheme could be approved with a phased approach i.e. different geographical areas being subject to the	<ul style="list-style-type: none"> <li>• Make it clear that district wide scheme can be adopted and phased in over a period of time</li> <li>• Provisions needed for longer scheme</li> </ul>

		scheme from different dates .	period (see section 2 paragraph B above).
20.	Variation or revocation of scheme	This section does not address the issue which pertained under the original S132 of the 2000 Act which means that once a scheme is approved many variations which would be normal day to day contract management issues i.e. removing or adding a service, require the approval of the Approval Authority and the procedure followed to make the scheme i.e consultation etc to be followed. This makes a Scheme unworkable in practice.. This issue needs addressing otherwise a QCS is not deliverable in a way that allows proper management	This is a very important issue that needs to be addressed. A potential solution is to build in tolerances or exceptions. <b>pteg</b> would like to work with DfT to address this issue.

### **Extension of the competition test**

	Section	Issue	Proposal
24.	Voluntary partnership agreements	(2) Definition of Voluntary Partnership Agreement seems unduly narrow and may exclude agreements that are entered into such that the Competition Act will apply rather than the Schedule 10 test	See section 2 paragraph F and Annex B

**Part 3 – General Provisions relating to passenger transport etc**

**Subsidised services**

Clause No	Section	Issue	Proposal
36.	Extension of maximum length of subsidised services agreements	<ul style="list-style-type: none"> <li>• The amendment to section 90(1) of TA 1985. Is 8 years long enough or should it be 10 years as with the QC proposal (consistent with proposed EU Regs)</li> <li>• Does the contract once awarded need protection against competition? A rival operator could undermine the viability of a contract by competing, this may be a particular issue for smaller operators</li> </ul>	<ul style="list-style-type: none"> <li>• Draft Bill should allow for 10 years, this allows more scope for investment by operators in vehicles etc</li> <li>• Could allow Traffic Commissioner to refuse or regulate registrations where an LTA has awarded a contract, if in the opinion of the Traffic Commissioner, having consulted with the LTA, it would undermine the viability of the contracts</li> </ul>

**Part 4 – Passenger Transport Authorities etc****Power to promote well-being**

	Section	Issue	Proposal
60.	Power to promote well-being	<ul style="list-style-type: none"> <li>• Power does not as currently drafted, extend to PTE's.</li> <li>• Does not allow vehicle ownership due to previous legislation removing Section 10 (i) and (xiii) TA '68.</li> </ul>	<ul style="list-style-type: none"> <li>• Need to ensure existing PTEs benefit from well-being powers</li> <li>• Need to deal with vehicle ownership here or elsewhere</li> </ul>