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Lagh

Scottish Crown Estate Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 20 February, 13 and 20 March 2018, the Delegated Powers and Law Reform Committee considered the delegated powers in the Scottish Crown Estate Bill (“the Bill”).ⁱ The Committee submits this report to the lead Committee for the Bill (the Environment, Climate Change and Land Reform Committee) under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ
3. In this report:
 - “the 1961 Act” means the Crown Estate Act 1961,
 - “asset” means an asset within the Scottish Crown Estate,
 - “CES” means Crown Estate Scotland,
 - “CES(IM)” means Crown Estate Scotland (Interim Management),
 - “the Commissioners” means the Crown Estate Commissioners,
 - “the Government” means the Scottish Government.

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Bill overview

4. This Government Bill was introduced by the Cabinet Secretary for the Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, on 24 January 2018.
5. The Crown Estate is a collection of assets throughout the UK, with property, rights and interests held in both urban and rural land, as well as the foreshore and seabed. The assets are owned by Her Majesty in right of the Crown, rather than as Her personal property. Her Majesty takes no involvement in the management of the estate. Up to April 2017, the assets were managed by the Commissioners on behalf of the Crown.
6. The Commissioners have operated under the Crown Estate Act 1961.
7. On 1 April 2017, the management of the Crown Estate assets in Scotland was transferred to CES(IM), from the Commissioners. The transfer was achieved by the Crown Estate Transfer Scheme 2017 (S.I. 2017/524), which was made by virtue of powers contained in section 90B of the Scotland Act 1998.
8. As well as devolution of legislative competence in relation to the Crown Estate assets in Scotland, the Smith Commission also recommended the further devolution of the management of individual assets to local authority areas or other areas who seek such responsibilities. The Bill proposes mechanisms to enable the assets to be managed by local authorities and others. The Financial Memorandum states that the intention is that CES(IM) will continue to manage all the Scottish assets at national level, until such time as functions in relation to particular assets are further devolved by means of the mechanisms in the Bill. CES(IM) would also continue to manage assets appropriate for management at the national level.
9. The Bill contains four Parts and two schedules. Part 1 changes the name of Crown Estate Scotland (Interim Management), to Crown Estate Scotland. Part 2 sets out definitions and the mechanisms by which the management of the Scottish Crown Estate (as defined in section 2 of the Bill) can be changed. Part 3 makes provision about the management of the assets, including provision about managers' powers and duties in relation to the assets and provision about planning, reporting and accounting by managers. Part 4 makes general provision about regulations, ancillary provision, consequential and minor modifications, interpretation, commencement and the short title. Schedule 1 modifies certain enactments in light of the change in the name of Crown Estate Scotland (Interim Management). Schedule 2 makes some minor and consequential modifications of other legislation.
10. Further information on the provisions is contained in the Explanatory Notes, Financial Memorandum and Policy Memorandum to the Bill. The SPICe Briefing on the Bill contains further details of the assets within the Scottish Crown Estate.ⁱⁱⁱ

ⁱⁱⁱ The SPICe Briefing on the Scottish Crown Estate Bill (paper 18/20, 9 March 2018) is available [here](#).

Consideration of the Bill

11. At its meeting on Tuesday 20 February, the Committee agreed to write to the Government to raise questions in relation to the delegated powers in the Bill. The Committee's questions, and the response received from the Government to them, is included in the Annex.
12. The Committee reports as follows on the delegated powers in the Bill. The Committee is content with the remaining delegated powers.

Section 3 – Transfer of management function

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise negative**

Provisions

13. Section 3(1) confers on the Scottish Ministers the ability to transfer, by regulations, the function of managing a Scottish Crown Estate asset, and rights and liabilities in relation to the asset, to certain persons.
14. The persons who may be the recipient of a transfer are set out in section 3(2)- the Scottish Ministers, CES, a local authority, another Scottish public authority or a "community organisation" (as defined by section 6).
15. Section 3(3) provides that the regulations under subsection (1) may include provisions to restrict the exercise of the function, and may transfer different rights or liabilities to different persons. Section 3(4) provides that the regulations may make specific provisions where the transferee is a 'community organisation'. Section 3(6) provides that the regulations may modify any enactment.
16. Before making regulations, section 3(5) requires Ministers to consult each person both from, and to whom, the function, right or liability is to be transferred, and such other persons as Ministers consider appropriate.
17. Section 3(1) allows the regulations to make provision "for or in connection with" the transfer of the management functions as further set out in the subsection.

Comments

Identification of future managers in the Bill

18. The Government's response has initially provided reasons to the Committee why it has not been considered appropriate to state on the face of the Bill at least the proposed managers of those assets which are of national economic and environmental significance. The approach taken has been that the most appropriate process is to enable decisions in respect of the future management of particular assets to be taken on a case by case basis (as a matter of policy). This would take

account of the particular environmental or economic significance of the asset at the time of a transfer of the management function.

19. The Government has also not considered it appropriate to determine the future managers of the assets at this stage, given the possibility that the powers and duties of a manager under the Bill could be adjusted by amendments at Stage 2. It is also not sufficiently clear to the Government, at this stage, which are the assets that communities have an aspiration to manage locally. CES(IM) will continue to manage each asset until the Bill mechanisms are exercised to effect a transfer.
20. The Committee notes that the approach taken to the powers in sections 3 to 5 of the Bill is designed to enable the Scottish Ministers to implement the recommendations in the Smith Commission Report for further devolution of the management of the assets to local authority areas or other areas which seek such responsibilities (paragraphs 7 to 10 of the Policy Memorandum). Therefore significant policy considerations underlie—
 - (a) the Government's decision not to seek to identify the future managers of particular assets on the face of the Bill, and
 - (b) any decisions on the timing of the transfer of management of particular assets.

Scrutiny procedure

21. The Committee also asked in the written correspondence, given the obvious significance of some of the assets within the Scottish Crown Estate, why it has been considered that in respect of all the assets, the power to make regulations should be subject to scrutiny by the negative rather than the affirmative procedure (unless the regulations modify an enactment) (Questions 2(a) and (b)).
22. In summary the Government's response offers as justification for the use of the negative procedure that, as there might possibly be a substantial number of regulations for different assets, it is not considered to be a good use of Parliamentary time to scrutinise the transfers under the affirmative procedure, unless the regulations modify primary legislation.
23. A further justification offered is that the Scottish Government considers that the national interest would be protected by the provisions for a national framework (controls on management, to provide scrutiny of the management of assets for the Crown) in Part 3 of the Bill, and by the Crown Estate Transfer Scheme 2017 (S.I. 2017/524) for so long as assets continue to be managed by CES(IM).
24. The Committee notes that the 2017 Scheme, which transferred the Scottish management functions from the Commissioners to CES(IM), was subject to affirmative procedure at Westminster. This was determined by provisions in the Scotland Act 1998 as amended by the Scotland Act 2016.
25. It is also noted that the powers to make regulations are capable of being exercised so that the management of all the assets within the Scottish Crown Estate could be transferred by one set of regulations, or that the management of several assets of significant value could be transferred in one set.

26. It also appears that, at least for some of the assets, the regulations would require to contain significant provisions, beyond specifying the new manager/s. In relation to the transfer to CES(IM), the schedules to the Crown Estate Transfer Scheme 2017 include provisions for the protection of employment of Crown employees, and the protection of UK-wide interests related to defence and national security, telecommunications and the exploitation of oil and gas and electricity infrastructure, as well as accounting and audit provisions. The regulations might also make significant provisions to transfer the management of rights in an asset to different persons.

Ancillary powers

27. The Government's response (to questions 3(a) and (b) in the Annex) provides an explanation of how it may be necessary to exercise the power to make provision "for or in connection with" the transfer of the management functions, and the ancillary powers in section 41 to make supplementary etc. provision.

Recommendations

28. **The Committee considers that significant policy considerations underlie:**
- (a) the Scottish Government's decision not to seek to identify the future managers of particular assets within the Scottish Crown Estate ("the Estate") on the face of the Bill, and**
 - (b) any decisions on the timing of the transfer of management of particular assets by regulations.**
29. **The Committee considers that such significant policy considerations, which are fundamental to the proposed framework for the management of assets in the Bill, should properly be considered by the Environment, Climate Change and Land Reform Committee.**
30. **The Committee is not persuaded that the regulations under section 3 should in relation to all assets within the Estate be subject to scrutiny by the negative procedure, rather than the affirmative. The Committee agrees that the affirmative procedure should apply where the regulations textually amend primary legislation.**
31. **The framework proposed in section 3 for the future management of assets means that the powers are capable of being exercised so that management of all the assets within the Estate could be transferred by one set of regulations, or that several assets of significance could be transferred by one set. The Committee considers that the affirmative procedure rather than the negative should apply to regulations which would transfer the management of assets which are of significance, or of significant value. In the Committee's view, how that significance is assessed involves policy considerations which could be considered by the Environment, Climate Change and Land Reform Committee.**
32. **The Committee also recognises that, under the framework proposed, it is possible that several regulations might be used to transfer the management**

of separate assets of relatively low value. The Committee agrees that it might not be a good use of Parliamentary time, if those regulations are subject to the affirmative procedure rather than the negative.

Section 4 – Directions requiring delegation of management function

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: direction**
- **Parliamentary procedure: none**

Provisions

33. Section 4 provides an alternative means of changing the arrangements for management of a Scottish Crown Estate asset. The Policy Memorandum explains that these proposed powers aim to implement the policy objectives for the future management of the Estate, in at least a couple of ways:
- (a) to have a long term framework with managers of particular assets having discretion to depart from a commercial approach when wider benefits can be obtained, and
 - (b) to enable restructuring of the management of the assets under a national governance framework, at either a national or local level and on a case-by-case basis, by giving Ministers the power to transfer or delegate the management of the assets. (Paragraphs 17 and 21 of the Policy Memorandum).
34. Ministers may direct the existing manager to delegate management to another person. Such a direction may be made to CES, a local authority, or another “Scottish public authority”. This does not apply where the existing manager is the Ministers themselves, or a ‘community organisation’. The persons to whom a manager can be directed to delegate the function of managing an asset (or assets) are a local authority, another Scottish public authority or a community organisation (as defined in section 6).
35. The direction must be in writing, and must set out any terms and conditions on which the function is to be delegated. The consent of the person to whom the function is to be delegated is required, before the direction can be given. The Ministers must publish notice of a direction, or any revocation.
36. The delegation which has been directed will be effected by a delegation agreement under section 5, which will set out the terms and conditions as provided for in the direction, any additional terms and conditions, and the period of delegation. Under section 5(6)(b) the Ministers must consent to the terms and conditions (and a purported delegation without that consent has no effect).

Comments

“Scottish public authority”

37. The Government's response has clarified that "Scottish public authority" where used in the Bill takes the meaning which is imported by the Interpretation and Legislative Reform (Scotland) Act 2010- "any public body (except the Parliamentary corporation), public office or holder of such an office whose functions (in each case) are exercisable only in or as regards Scotland."
38. Section 4(1) enables the Ministers to direct the manager of an asset to delegate the management function to 'another person' as mentioned in subsection (3). This includes delegation to "another Scottish public authority".
39. The Government's response has undertaken to further consider whether section 4(3) is sufficiently clear and delivers the policy intention. The intention is that Ministers are not able to direct a manager of an asset to delegate the management function to the Scottish Ministers.

Parliamentary procedure applying to directions

40. The Government's response explains that it considered whether directions under section 4(1) should be subject to a form of Parliamentary procedure. On balance the Government has considered that this is not necessary, as these directions would be more administrative than legislative in nature, as they would be an instruction as to how the management function should be exercised, via a delegate. The delegation only results by agreement with the delegate body, and it is the terms and conditions of the delegation agreement under section 5 which give legal effect to the delegation.
41. The Committee agrees that these powers of direction would not be more appropriately exercised in the form of regulations (which could be made subject to Parliament procedure), rather than directions. Sections 4 and 5 set out, as a policy proposal, an alternative mechanism to devolve the function of managing an asset, namely by direction and delegation agreement.
42. In relation to scrutiny however, there is a contrast between:
 - (a) the minimum details of directions under section 4 which must be published by notice (subsection (6)) and not laid before the Parliament, and
 - (b) that Ministerial directions under section 35 must be published. Lists of those general and specific directions must be included within managers' annual reports under section 24(4), and those reports must be laid before the Parliament by Ministers (section 25).
43. The Government's response comments that, while there is no Parliamentary procedure in respect of section 4 directions, there are publication requirements for a notice of a direction or revocation under section 4(6). The notice of directions under section 4(7) would have at least minimum details of what must be published. That information is considered by the Government as likely to be in the public interest (ie., the fact the direction has been given, the manager, the asset and the delegate body). There may be a requirement not to disclose information in a direction which is of a commercially sensitive nature, or is commercially confidential.
44. It appears possible that, depending on the asset within the Estate being managed, the terms and conditions of a direction and a delegation agreement under section 5 (apart from sensitive or confidential information) could be of public interest. The

documents may set out the terms and restrictions for the management by a delegate body of, for example, rights to exploit the seabed, or significant parts of the Scottish foreshore. Sections 4 and 5 provide no requirement to publish the terms and conditions.

45. The Committee therefore draws attention to the difference of approach in relation to the laying of directions before the Parliament, as described in paragraph 42 above.

Recommendations

46. **The Committee notes that the Scottish Government has undertaken to consider whether section 4(3) is sufficiently clear, to deliver the policy intention. The intention is that the Scottish Ministers should not be able to direct a manager of an asset to delegate the management function to the Ministers. The Committee will return to consider this aspect after Stage 2.**
47. **The Committee considers that the terms of directions issued by the Scottish Ministers under section 4 should be laid before the Parliament and published, although commercially sensitive or commercially confidential information may be withheld.**
48. **The Committee recommends that the Environment, Climate Change and Land Reform Committee could consider whether any terms of directions and delegation agreements under sections 4 and 5 should be published, beyond the minimum details of directions that must be in a published notice in accordance with section 4(7).**

Section 6(1)(b) – Meaning of “community organisation”

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Negative**

Provisions

49. Section 3(2) sets out the persons who can be the recipient of a transfer of the function of managing an asset. One such category of person is a “community organisation”. Similarly, section 4(3) provides that a person who is a “community organisation” can be the prospective delegate named in a direction under section 4(1).
50. Section 6(1) defines a “community organisation”. A body must satisfy the requirements of section 6(1)(a) and (2), or must be designated under section 6(1)(b), by regulations. Ministers can also designate a class of bodies as “community organisations”.

Comments

51. The Government has explained in its response that in certain circumstances a body may not meet all the criteria specified, but there may still be good reasons for the body to manage the asset as a “community organisation”. For example, in certain

circumstances it might be appropriate for an organisation in a remote area which is made up of a community, but has less than 20 members, to be a “community organisation”.

52. Regarding the lack of criteria specified for a body that may be designated under section 6(1)(b), the Government comments that the power is couched in the same terms as equivalent powers in the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2003. The response to question 7(b) gives some examples of small size bodies which might be designated.
53. The Committee accepts that flexibility is required to designate a wide variety of possible types of “community organisation” by regulation, to implement the policy which is desired. It is noted however that the similar powers to designate a “community body” for the purposes of the community right to buy land in section 34(A1)(b) of the 2003 Act, and in section 97D(1)(b) for “Part 3A community bodies” for the right to buy abandoned etc. land, are subject to scrutiny by the affirmative procedure. (Section 98(5) of that Act, as amended by the 2015 Act.)
54. The Committee considers that the affirmative procedure may similarly be more appropriate for the exercise of this power, given that section 6(1) specifies no further community-related criteria for how a body may be designated by regulations.

Recommendations

55. **The Committee considers that, given that no further criteria are specified as to how a body might relate to a community before it can be designated, the regulations mentioned in section 6(1)(b) should be subject to scrutiny by the affirmative procedure.**
56. **The Committee notes that the affirmative procedure applies to regulations under section 34(A1)(b) and section 97D(1)(b) of the Land Reform (Scotland) Act 2003, which similarly designate “community bodies” and “Part 3A community bodies” that do not fall within the criteria otherwise set out in those sections.**
57. **The Committee asks the Scottish Government to consider, in relation to section 6(1)(b), whether there is any policy intention that a community organisation that may be designated could be the trustees of a trust, given that a trust is not an incorporated “body”.**

Annex

Correspondence with the Scottish Government

1 March 2018

Scottish Crown Estate Bill at Stage 1

Thank you for your letter of 20 February setting out the questions raised by the Delegated Powers and Law Reform Committee during their consideration of the delegated powers contained the Scottish Crown Estate Bill. I have addressed each point in turn below.

Section 3 – Transfer of management function

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise negative**

1. The Delegated Powers Memorandum (DPM) explains that “the policy is not to take decisions on who will manage assets, but to provide a mechanism by which decisions can be taken on who would be the most appropriate manager, on a case by case basis”.

Please explain why the Scottish Government has considered that it is not appropriate to specify on the face of the Bill at least the proposed managers of those assets which are of national economic and environmental significance (including the rights of ownership in, and to exploit, the seabed and foreshore), possibly supplemented by a power to amend who the managers would be in future?

In considering changes to the future management of individual assets, the Scottish Ministers have not classified the assets into particular categories such as those which are of national economic or environmental significance, or those which are of less significance. Indeed the economic or environmental significance of an asset may change over time. The approach taken by the Scottish Ministers has been that the most appropriate process is to enable decisions in respect of the future management of particular assets to be taken on a case by case basis. That would of course take into account the particular economic or environmental significance of that asset at that time. This approach is to ensure that the best decision is taken at the time of a change in management, and to also take into account that there may be further changes in the future.

Also, part of the decision making process will be that a prospective manager is capable and suitable to take on the powers and duties of a manager under the Bill. Those powers and duties may be amended during the Parliamentary passage of the Bill and if that occurs then a prospective manager deemed capable and suitable under the present Bill may not be considered such under an amended Bill. For that reason the Scottish Ministers do not consider it is appropriate to determine future managers at this stage.

It is also not sufficiently clear at this stage which are the assets that communities have an aspiration to manage locally in different parts of Scotland. It was not considered necessary or practical, therefore, to provide a list of proposed managers. The effect of the model

provided for in the Bill is that Crown Estate Scotland (Interim Management) will continue to manage each asset until the Bill mechanisms are exercised to effect a change in management of a particular asset.

2. Given the obvious significance of some of the assets within the Scottish Crown Estate:

(a) please explain why it has been considered that in respect of all the assets the power to make regulations in section 3 should be subject to scrutiny by the Parliament by the negative rather than the affirmative procedure (unless the regulations modify an enactment)?

The Smith Commission on further powers for the Scottish Parliament recommended that, following the transfer of responsibility for the management of the Crown Estate's economic assets in Scotland, responsibility for the management of these assets will be further devolved to local authority areas such as the Islands or other areas who seek such responsibilities. Where any regulations under section 3 would amend primary legislation it was considered appropriate for these regulations to be subject to the scrutiny by the Parliament by the affirmative procedure. The Scottish Ministers think that otherwise it is appropriate for regulations under section 3 to be subject to the negative procedure. Furthermore, given that there may also be a substantial number of regulations for different assets in different parts of Scotland we do not consider it a good use of valuable parliamentary time to scrutinise under affirmative procedure transfers unless primary legislation is to be amended.

A further reason why the negative procedure is considered appropriate is because the national interest would be protected by the provisions in the Bill as the management of these assets would be governed both by the national framework in this Bill and by the 2017 Transfer Scheme. The Bill sets out the duties which all managers have to abide by and includes a range of planning and reporting procedures that help ensure that there is adequate scrutiny of a transferee's exercise of the management function.

(b) Has the Scottish Government considered whether the regulations in respect of those assets which are of national economic or environmental significance should be subject to scrutiny and approval by the Parliament by the affirmative procedure, whereas the regulations in respect of the commercial and rural estate assets of lesser value could be subject to scrutiny by the negative procedure?

We have not made the assumption that the commercial or rural estate assets are of lesser value than other assets. The Scottish Ministers do not consider that it would be appropriate in practical terms for a value threshold to determine which procedure would apply in relation to an asset. This is because the relative value of an asset would depend on several factors such as commercial potential for revenue generation, capital value, intrinsic or strategic national importance, environmental sensitive or uniqueness. We considered that a standard approach for the transfer or delegation was more practical. Furthermore, given that there may also be a substantial number of regulations for different assets in different parts of Scotland we do not consider it a good use of valuable parliamentary time to scrutinise under affirmative procedure transfers unless primary legislation is to be amended. In addition, given the controls contained in the Bill to protect the national interest it was considered appropriate to only require an affirmative procedure where primary legislation is being amended. The transferee under Regulations made under section 3 will be subject to the legal duties contained in the Bill, which are designed to protect the national interest. We consider that scrutiny by the negative procedure is appropriate.

3. Section 3(1) allows the regulations to make provision “for or in connection with” the transfer of the management functions as further set out in the subsection. The ancillary powers in section 41 would also allow supplementary provisions by regulations, for the purposes of the Act and the regulations under section 3.

(a) Please explain how it is envisaged that the power to make provision “in connection with” the transfer of management functions could be exercised?

As well as provision effecting the transfer of the management function itself, the Scottish Ministers consider it that it will likely be necessary (depending on the circumstances of particular instances in which the function of management is transferred) to make provision for connected purposes. As an indication of the type of provision that it might be necessary to be made the Scottish Ministers directs the Committee to the provisions of the Crown Estate Transfer Scheme 2017 (‘the Scheme’).

It is possible that a transfer will involve some of the assets managed by the existing manager but not all of the assets. For audit and accounting purposes it may be desirable to make provision requiring a statement of account to be made in respect of those assets the function of which is being transferred, and for that to be audited. That would aid both the former manager and the transferee in discharging their responsibility for accounting for the assets which each person manages following the transfer. Such provision was made in respect of the transfer of functions from the Crown Estate Commissioners to Crown Estate Scotland (Interim Management) (‘CES(IM)’) by paragraph 9 of the Scheme.

Other provision that it might be desirable to make in certain circumstances is provision equivalent to paragraphs 10 to 13 of the Scheme, which concerned the treatment and apportionment of receipts in relation to the assets between the Commissioners and CES(IM). Those provisions also dealt with sums paid in error by a third party to the former manager when such sum was due to be paid to the new manager and vice versa.

(b) Why is it appropriate both to confer that power, and the power to make provision supplemental to it? How is it envisaged that this supplemental power could be exercised?

Section 41 allows the Scottish Ministers to make ancillary provision for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Such provision is common in Acts of the Scottish Parliament and was considered appropriate and necessary to ensure that any unexpected issues which arise and which require further changes when implementing the Bill can be dealt with effectively – that includes when exercising the power in section 3. The process of transferring the function of managing assets of the Scottish Crown Estate is (depending on the circumstances and the asset in question) potentially complex. It may be that issues emerge following the making of regulations under section 3 that would require stand-alone provision under section 41 to be made, particularly if it relates to rights and liabilities of managers in relation to an asset under their management or to the relationship between the previous manager, the new manager and third parties. Further, if provision is made under section 41 which is supplemental to the provisions of the eventual Act it may be the case that for that to be effective it would also be necessary to make supplemental provision in relation to Regulations already made under section 3.

Section 4 – Directions requiring delegation of management function

- **Power conferred on: the Scottish Ministers**

- **Power exercisable by: direction**
- **Parliamentary procedure: none**

4. Section 4(1) enables the Scottish Ministers to direct the manager of an asset to delegate the management function to ‘another person’ as mentioned in subsection (3). This includes delegation to “another Scottish public authority”.

(a) Is it intended that ‘another Scottish public authority’ in section 4(3)(b) includes the Scottish Ministers themselves, or not? Accordingly is the meaning of that paragraph (b) sufficiently clear, given that “Scottish public authority” is not defined in the Bill?

(b) Is it intended that “Scottish public authority” wherever used in the Bill has the meaning specified in section 126(1) of the Scotland Act 1998?

The intention is that the Scottish Ministers are not to be able to direct a manager of an asset to delegate the management function to the Scottish Ministers. It is not intended that the Scottish Ministers are capable of being a delegate under the Bill.

The Scottish Ministers confirm that it is intended that the expression ‘Scottish public authority’ has the meaning specified in section 126(1) of the Scotland Act 1998 (‘the 1998 Act’). Section 25 of the Interpretation and Legislative Reform (Scotland) Act 2010 (‘the 2010 Act’) provides that in an Act of the Scottish Parliament, the words and expressions listed in schedule 1 of the 2010 Act are to be construed according to that schedule. Schedule 1 of the 2010 Act provides that the expression ‘Scottish public authority’ has the meaning given to it by section 126(1) of the 1998 Act.

The Scottish Ministers will further consider whether section 4(3) is sufficiently clear and delivers the policy intention.

5. Some of the assets within the Scottish Crown Estate have obvious national significance. A direction under section 4(1) would have legislative effects, to delegate to a person the function of managing an asset. The delegate may have all the powers and duties of the manager, in terms of section 5(7).

(a) Has the Scottish Government considered whether it may be appropriate that a direction under section 4(1) could be subject to a form of parliamentary procedure, to provide scrutiny of the exercise of the power, and if so what form of procedure could be suitable?

(b) In that respect, has the Scottish Government considered whether it could be appropriate that directions in respect of those assets which are of national economic or environmental significance could be subject to scrutiny and approval by the Parliament by means of the affirmative procedure, whereas directions in respect of the commercial and rural estate assets of lesser value could be subject to lesser procedure (such as a requirement only to lay the directions before Parliament)?

(c) If it is considered that the directions could be subject to parliamentary procedure, why is the form of instrument properly directions, rather than regulations?

(d) Otherwise, please fully explain why it is considered that directions under section 4(1) should not be subject to any form of parliamentary procedure, nor requirements to report to the Parliament on the use of the direction-making power?

The Scottish Ministers have considered whether a direction given under section 4(1) should be subject to a form of Parliamentary procedure, but on balance do not think that would be necessary in the circumstances. The direction is an instruction as to how the management function should be exercised (i.e. via a delegate), and is, in the view of the Scottish Ministers of more administrative character than legislative.

A direction under section 4(1) is addressed to a particular manager of a particular Scottish Crown Estate asset, and is an instruction to that manager. It does not have general legislative effect, does not create obligations for any person other than the manager and does not itself result in a delegation occurring. Indeed, it may be that following the giving of a direction to a manager a delegation ultimately does not occur – a situation for which section 4(5)(b) specifically provides.

The direction is an instruction to a manager to enter into a delegation agreement with a proposed delegate. It is the delegation agreement, and the terms and conditions of that agreement, that give effect the delegation and which is the legal basis for the delegation, rather than the direction being the legal basis. The delegation agreement is of a contractual nature and governs the relationship between the manager and the delegate. The basis for the delegate being treated as the manager is section 5(7) of the Bill. Such treatment is expressly subject to the terms of the delegation agreement.

This is different to a transfer of functions under section 3 in that regulations made under section 3 are the legal basis for a transfer, and rather than being treated as the manager the transferee becomes the manager as a result of the provisions of regulations made under section 3. Under a transfer, the function is taken from the existing manager and given to the transferee, meaning there is not the same continuing relationship as there is between manager and delegate.

A delegation agreement must also contain provision as to the period of the delegation, meaning there must be an end-point or a method of determining an end-point (see section 5(4)). It is also possible that an agreement will contain further provision as to the circumstances in which the agreement may, or is to, be terminated. Thus the delegation agreement and the parties determine the continuance of a delegation whereas under a transfer, a further exercise of the power conferred by section 3 would be required to transfer the management function again.

While there is no Parliamentary procedure in respect of directions under section 4(1), there are publication requirements under section 4(6).

6. Section 4(6) and (7) require the Scottish Ministers to publish a notice of a direction, which must set out the matters stated in subsection (7).

Why does this not extend to publishing the whole direction, including the terms and conditions of the required delegation of the management function?

The details listed in section 4(7) are the minimum of what must be published by the Scottish Ministers. It is open to the Scottish Ministers to publish the entire direction. The information required in section 4(7) is likely to be the information that is of wider public interest and it is possible that no further information will be included in the direction. However in certain circumstances it is possible that a term or condition specified in the

direction is of a commercially sensitive nature and could contain commercially confidential information. Section 4(6) and (7) provide the flexibility to publish the whole direction but also to take into account that some details may not be appropriate for publication.

Section 6(1)(b) – Meaning of “community organisation”

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Negative**

7. In relation to the power in section 6(1)(b), the DPM explains that this power “enables a degree of flexibility to enable a body to be eligible to become a manager where it is appropriate”.

(a) How is it envisaged that this power could be used? Which bodies relating to a community might be designated as a “community organisation”?

Section 6(1)(a) and (2) set out the criteria which the Scottish Ministers consider a body should meet in the usual course of events in order to be a manager of a Scottish Crown Estate asset. However, at the same time the Scottish Ministers recognise that in certain circumstances a body may not meet all the criteria but that there are still good reasons for that body to manage an asset. For instance, it is possible that there are organisations in remote and sparsely populated locations which represent or are made up of a community, and which do not have 20 members. For example, some islands have populations less than that, and so would be excluded from taking over the management of an asset. The power to designate could overcome that.

(b) Could the power be more narrowly drawn, in respect that it enables *any* body (or class of body) to be designated in regulations as a “community organisation”, without any criteria being specified in the section as to how a body may relate to a community, before it can be designated?

We are satisfied with the extent of the power and that there are no criteria specified as to how a body which is designated under section 6(1)(b) may relate to a community. The power is couched in the same terms as equivalent powers in the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2003. The power reflects the diversity of the Scottish Crown Estate portfolio of assets, ranging from the seabed out to the 200 nautical mile limit, to salmon fishing rights in an inland stretch of river. The ‘community’ for the fishing rights could be, for example, those living on the banks of the river, or those who obtain some of their livelihood from the exercise of fishing rights – the local fishing tackle shop, the hotel where the salmon fishers stay – or the angling club which currently leases the fishing rights from Crown Estate Scotland, to name but three. Given that most, if not all, assets could be sub-divided for the purpose of management, to try to specify what counts as a community for each and every one would be impractical to cover exhaustively in legislation.

Section 35 – Power of Ministerial direction

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Direction**

- **Parliamentary procedure: None**

8. The Committee seeks an explanation of the following in relation to the powers of Ministerial direction in sections 13 and 35:

The use of the power in section 13(1) will in effect regulate the amounts that managers may charge by way of rent for the lease of the assets, or in connection with any other agreement for the use of the assets. Please explain why directions are the appropriate form of instrument for the use of this power, rather than regulations made by Scottish statutory instrument?

Current aquaculture rents are set by Crown Estate Scotland (Interim Management) by a formula, which is published on the Crown Estate Scotland website. A formula based approach is also used to set lease charges for other activities. None of these rates are set by regulations.

Section 13 of the Bill is designed to enable Scottish Ministers to ensure that all managers follow these arrangements in future when management has been devolved. This would allow rents to continue to be set on the same technical basis, but also to recognise that, over time, the formula may have to change. Currently, the formula for aquaculture relates to the price of 4-5kg fresh Atlantic Salmon on the French Rungis market – Fin Fish Review January 2017 [58e4d2b3859cd_CES-report-2017-finfish.pdf](#).

As the rents and formula for leasing of Scottish Crown Estate assets are not currently set by legislation and are based on technical and operational factors the Scottish Ministers regard it as appropriate to continue this approach and that it is not necessary for this to be done legislatively in the future. Similar considerations apply for other licences and charges in respect of Scottish Crown Estate assets.

Section 36 – Ministerial guidance

9. The Committee noted that, in relation to the power to issue guidance in section 36, an explanation of this power should have been included in the DPM.

The Committee now asks for an explanation of this power.

The Scottish Ministers do not consider that section 36 has the effect of delegating a power and so did not consider it necessary to refer to section 36 in the Delegated Powers Memorandum.

The Scottish Ministers have an inherent power to issue guidance. Rather than confer a power on the Scottish Ministers, or any other person, section 36 has the effect of imposing duties on managers and on the Scottish Ministers. Those duties are that managers must have regard to any written guidance given by the Scottish Ministers about the exercise of the management function, and that the Scottish Ministers must publish any such guidance after it is given.

An example of the subject matter of guidance that the Scottish Ministers may choose to provide to managers is guidance on the duty under section 11(1) to obtain market value for the transfer of ownership etc. of a Scottish Crown Estate asset and the discretion to depart from that duty under subsection (2) of that section, which also requires managers to have regard to the likely effect of such a departure on the overall value of the Estate as required under subsection (3) of that section.

Yours sincerely

