

Scottish Crown Estate Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Scottish Crown Estate Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill makes provision for the management of the Scottish Crown Estate (as defined in section 2 of the Bill), providing for mechanisms to change the manager of an asset of the Scottish Crown Estate (or part of an asset) and setting out the regulatory framework within which all managers, irrespective of the size of the asset managed, must operate.

4. The Bill contains 45 sections in 4 Parts, and 2 schedules:

- Part 1 changes the name of Crown Estate Scotland (Interim Management).
- Part 2 sets out definitions and the mechanisms by which the management of the Scottish Crown Estate assets can be changed.
- Part 3 makes provision for the management of Scottish Crown Estate assets, including provision about managers' powers and duties in relation to the assets and provision about planning, reporting and accounting by managers.

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- Part 4 makes general provision about regulations, ancillary provision, consequential and minor modifications, interpretation, commencement and the short title.
- Schedule 1 makes modification of certain enactments in light of the change in name of Crown Estate Scotland (Interim Management).
- Schedule 2 makes consequential and minor modifications of other legislation.

5. Further information about the Bill's provisions is contained in the Explanatory Notes, Financial Memorandum and Policy Memorandum, published separately as SP Bill 24.

Rationale for subordinate legislation

6. The Bill contains a number of delegated powers provisions, described in more detail below.

7. In deciding whether provisions should be in primary or secondary legislation and, where relevant, what subordinate legislation powers and respective Parliamentary procedures are appropriate, the Scottish Government has had regard to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to respond flexibly to the diversity of Scottish Crown Estate assets and potential managers.

Delegated Powers

Section 3 – Transfer of management function

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

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8. 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. The persons who may be the recipient of a transfer are set out in section 3(2). 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, and section 3(6) provides that the regulations may modify any enactment.

Reason for taking power

9. The Scottish Crown Estate is diverse. The Crown owns around 50% of the 18,000 km length of Scotland's foreshore, with exceptions relating to land owned by a third party under udal tenure in the Northern Isles or acquired from the Crown over time by other landowners. Ownership of Scotland's territorial seabed, which extends out to 12 nautical miles, is currently vested in the Crown, except for some small areas where the Crown has granted, or sold, ownership to a third party. Equivalent rights in the Scottish zone (from 12 nautical miles out to 200 nautical miles) for exploiting the seabed and its subsoil other than for hydrocarbons are also vested in the Crown. The Crown has a range of other property, rights and interests in Scotland and is also a significant landowner in Scotland with land in rural estates owned by the Crown currently totalling 37,000 hectares.

10. Both the diversity of assets of which the function of managing may be transferred in the future and the diversity of possible managers means that each transfer will be unique and the terms of transfers are likely to be different in individual cases. At this stage, 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. Flexibility is therefore necessary. Subsection (6) is necessary as, for example, it may be appropriate to modify an enactment to provide that a person other than the manager of a Scottish Crown Estate asset is to grant any necessary consent to access that Crown land.

Choice of procedure

11. Section 40(4) requires regulations made under section 3(1) to be subject to the negative procedure, unless they add to, replace or omit

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any part of the text of an Act, in which case they are subject to the affirmative procedure. Regulations under this power will be making changes to the administrative arrangements for the management of one or more Scottish Crown Estate assets. The effect of the transfer is that there is a change in the person exercising the function of managing an asset but the core function (that of managing the asset in accordance with the terms of the Bill) remains the same. For that reason it is considered that the negative procedure is considered appropriate. Before making regulations under this power, section 3(5) requires the Scottish Ministers to consult each person from whom the function, right or liability is to be transferred and each person to whom the function, right or liability is to be transferred, and such other persons as the Scottish Ministers consider appropriate. The inclusion of a consultation requirement provides a safeguard to ensure that the existing manager and the proposed transferee have an opportunity to make representations to the Scottish Ministers.

Section 4 – Directions requiring delegation of management function

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

12. Section 4 provides an alternative means of changing the arrangements for management of a Scottish Crown Estate asset, whereby the Scottish Ministers may direct the existing manager to delegate management to another person. This provides for such a direction to be made to a manager who is Crown Estate Scotland, a local authority or another Scottish public authority. The persons to whom a manager can be directed to delegate the function of managing Scottish Crown Estate assets are a local authority, another Scottish public authority or a community organisation (as defined in section 6).

13. The direction must be set out in writing and must set out any terms and conditions on which the function is to be delegated, as required by section 4(4). Section 4(5) requires the consent of the person to whom the function is to be delegated before the direction can be given. As it is necessary that third parties know the status of the person managing the asset and the extent of their powers, section 4(6) requires the Scottish Ministers to publish notice of any such direction or any revocation of the

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same. 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 the delegation. Under section 5(6)(b) the Scottish Ministers must consent to the terms and conditions (and a purported delegation without that consent has no effect).

Reason for taking power

14. As with the transfer of management function, each delegation of management function will be unique in terms of the asset in respect of which management is being delegated and in the person to whom management is being delegated.

15. It is likely that there will be even greater diversity as regards the terms and conditions on which the function of management is to be delegated than there will be as regards transfer of management function. Some persons, for example some community organisations, may prefer to be a delegate rather than a transferee, as delegation retains a link with the delegator. At this stage, 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. Flexibility is therefore necessary.

Choice of procedure

16. This is an administrative direction-making power of the Scottish Ministers rather than a legislative power. The delegation will be effected on a contractual basis via a delegation agreement. The Scottish Ministers must, however, obtain the consent of the prospective delegate before making a delegation, and must publish notice of any such direction or revocation of the same. The Scottish Ministers consider that the requirements for publication and consent are sufficient safeguards for both the public and the prospective delegate.

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

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

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17. Section 3(2) sets out the persons who can be the recipient of a transfer of the function of managing a Scottish Crown Estate or of rights and liabilities in relation to the asset. One such category of persons is “community organisations”. Similarly, section 4(3) provides that a person who is a community organisation can be the prospective delegate named in a direction given under section 4(1).

18. Section 6(1) sets out which bodies are classed as a “community organisation” for the purposes of the Bill. A body is a community organisation if it satisfies the requirements of section 6(1)(a), or if it is designated as a community organisation under section 6(1)(b). Designation under subsection (1)(b) means that the body has been designated as a community organisation by the Scottish Ministers by regulations. The Scottish Ministers can also designate a class of bodies as community organisations under this power.

Reason for taking power

19. Section 6(1)(a) sets out the criteria that need to be met by a body to be automatically classed as a community organisation. However, there may be circumstances in which a body does not meet that criteria but there are good reasons for that body taking on the function of managing an asset, as a transferee or delegate. The power to designate a body (or a class of bodies) as “community organisations” under section 6(1)(b) enables a degree of flexibility to enable a body to be eligible to become a manager where it is appropriate.

Choice of procedure

20. Section 40 requires regulations made under section 6(1)(b) to be subject to the negative procedure. Such a designation is only for the purposes of this Bill and not for any other purposes. The nature of the power is that it may involve the addition, from time to time, of particular bodies or classes of bodies and it is considered that this sort of modification is not of such significance as to require affirmative procedure. The negative procedure is, therefore, considered appropriate.

Section 9(4) – Transactions on behalf of Her Majesty
Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish
statutory instrument

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Parliamentary procedure: negative

Provision

21. Section 9(2) provides that a document relating to a Scottish Crown Estate asset which is executed by the manager of the asset in the name of Her Majesty may be “registered” as if the manager were acting on behalf of a person other than Her Majesty. Section 9(4) confers on the Scottish Ministers the power to modify, by regulations, the definition of “registered” in respect of documents relating to a Scottish Crown Estate asset executed by a manager on behalf of Her Majesty.

Reason for taking power

22. Section 9(3) currently defines “registered” as meaning: recorded in the Register of Sasines, registered in the Land Register of Scotland, or registered for execution or preservation in the Books of Council and Session or in sheriff court books. Subsection (4) confers power allowing the Scottish Ministers to modify this definition of “registered” by regulations as Ministers recognise that, over time, there may be changes to the existing registers etc. This power enables Ministers to modify the definition of “registered” in section 9(2) of the Bill to reflect such changes.

Choice of procedure

23. The power to modify the definition of “registered” is administrative and technical in nature. The power relates to the “registration” of documents and, if necessary, it will be used to keep pace with any changes to the system relating to the registration or recording of documents in Scotland. As such, the negative procedure is considered appropriate.

Section 12(4) – Meaning of “market value”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

24. Section 11(1) provides that managers may not enter into relevant transactions for consideration of less than market value, subject to subsection (2). Section 12(1) defines “market value” for these purposes. Section 12(2) provides for a modified application of that definition where a transaction is or may occur more than 10 years after it is agreed,

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meaning that the estimated amount is to be determined on the day on which the transaction is or may occur rather than on the day on which the transaction is agreed to. Section 12(4) enables the Scottish Ministers to modify the definition of market value set out in subsection (1) and the application of that definition in subsection (2).

Reason for taking power

25. The definition of “market value” provided in the Bill uses terms and standards that are familiar to valuers, based on the definitions of “market value” and “market rent” in the Royal Institution of Chartered Surveyors’ RICS Valuation, Global Standards 2017 (“the Red Book”)¹, which is based on current International Valuation Standards. It is, however, possible that, over time, best practice for surveyors and valuers may change the basis of such definitions. The ability to modify the definition of market value in the Bill will enable the Scottish Ministers to reflect any such changes.

Choice of procedure

26. It is considered appropriate that this power should be subject to the affirmative procedure to allow Parliament a higher level of scrutiny of a modification of the definition of “market value”, given the potential impact the definition may have on the capital value of the Scottish Crown Estate and the revenue paid into the Scottish Consolidated Fund.

Section 35 – Power of Ministerial direction

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

27. Section 35 confers a general power of direction on the Scottish Ministers in relation to the exercise of a manager’s functions on management of a Scottish Crown Estate asset and specifies that directions must be in writing and be published, as must any revocation of such a direction. A direction may be given to each manager, a particular manager or managers of a particular description.

Reason for taking power

28. Given the importance of the Scottish Crown Estate revenues to the Scottish Consolidated Fund, the Scottish Ministers have a special

¹ <https://www.rics.org/uk/knowledge/professional-guidance/red-book>

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interest in the management of the Scottish Crown Estate. There may be circumstances where the Scottish Ministers, for policy reasons or practical reasons, may want managers of Scottish Crown Estate assets to do certain things in relation to the management of the assets.

29. The effect of the power of direction is that, having taken on the management of an asset, a manager or groups of manager may be obliged to act in particular ways. The power to direct is general in nature, but sections 13(1), 16(a)(iii), 27(2), 28(3), 29(2) and 32(3) each set out specific examples of such directions.

30. Section 13(1) provides that the Scottish Ministers may specify, by directions under section 35(1), the amount that a manager may charge by way of rent for the lease (or another agreement relating to use) of a Scottish Crown Estate asset in order to provide for consistency where appropriate. This reflects the existing position whereby the calculation of aquaculture rents is done on a consistent basis.

31. Section 16(a)(iii) provides that the Scottish Ministers may specify, by directions under section 35(1), investments other than those specified in section 16(a)(i) and (ii) that a manager of one or more Scottish Crown Estate assets may invest in, recognising the possibility of future developments in financial products.

32. In some instances, a manager cannot take a particular action in the absence of a direction, for instance under section 27(2), which provides that a manager of one or more Scottish Crown Estate assets may transfer sums from the manager's income account to the capital account if directed to do so by the Scottish Ministers.

33. Similarly, under section 28(3), a manager must allocate gross income from mining leases between the income and capital accounts in the proportions specified by the Scottish Ministers in a direction made under section 35(1). Such an allocation can be used to reflect the reduction on the capital value of the asset being managed as a result of mining and enable a portion of the revenue to be reinvested in the Scottish Crown Estate.

34. At present, all the assets are managed by one manager and revenue-generating parts of the Scottish Crown Estate can cross-subsidise other parts. In the future, when many managers are managing the Scottish Crown Estate assets, the Scottish Ministers may wish to

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maintain this element of cross-subsidy. A manager managing an asset(s) that does not generate revenue may require funds to meet some liability arising from the management of a Scottish Crown Estate asset or to make necessary improvements or renovations. The Scottish Ministers may wish to direct the manager of a revenue-generating asset to transfer funds from that manager's income account to the income account of the manager in need of funds.. Section 29(2) provides that managers can transfer sums of money to another manager when the Scottish Ministers so direct to facilitate this cross-subsidy. Managers cannot do so in the absence of a direction.

35. Section 32(3) provides that the statement of accounts prepared by Crown Estate Scotland and any other manager of one or more Scottish Crown Estate assets must be in the form, contain the information and be prepared in accordance with the methods or principles as may be directed by the Scottish Ministers under section 35(1). This direction-making power ensures transparency and consistency and that any changes in accountancy practice can be introduced and followed.

Choice of procedure

36. This is an administrative direction-making power of the Scottish Ministers rather than a legislative power. Directions and revisions or revocations of directions will, however, be in writing and be published, and managers are required, under section 24 of the Bill, to include in their respective annual reports a list of any directions given to the manager, or revised or revoked, during the financial year for which the report is being prepared. As the Scottish Ministers must, under section 25 of the Bill, lay a copy of each annual report before the Scottish Parliament, there will be the opportunity for Parliamentary scrutiny of the use of this power.

Section 41 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

37. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or

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saving provision as they consider appropriate for the purposes of, in connection with or for giving full effect to this Bill or any provision made under it. The regulations may modify any enactment.

Reason for taking power

38. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. The power is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provisions in the Bill.

39. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues. For example, it is possible that when the policy is implemented there may be unforeseen issues and this power would allow such changes to be made without the need for further primary legislation. Without such a power it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the ambit and policy intentions of the Bill. That would not be an effective use of either the Parliament's or the Government's resources. Although the application of this power is potentially wide, it is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purposes of giving full effect to the Bill.

40. The power is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, in connection with, or for giving full effect to any provisions in the Bill or any provision made under the Bill.

Choice of procedure

41. Section 40 requires regulations made for the purposes of section 41 to be subject to the affirmative procedure if they contain provision which adds to, replaces or omits any part of the text of an Act. Any other regulations made under this section are subject to the negative procedure. These procedures are typical for ancillary powers.

Section 44 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

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Parliamentary procedure: laid, no procedure (in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010)

Provision

42. This provision allows the Scottish Ministers to commence provisions in this Bill (other than sections 40, 41, 43, 44 and 45, which come into force on the day after Royal Assent) on such day as they appoint by regulations. The regulations can include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

It is standard for the Scottish Ministers to have powers in respect of the commencement of a Bill. The power is necessary to enable the Scottish Ministers to commence the provisions of the Bill appropriately by allowing them to take into account the existing law and provide for a smooth transition. For instance, the Bill disapplies the provisions of the Crown Estate Act 1961 (“the 1961 Act”) and puts in place new duties and powers which managers are to operate under, including reporting duties. Crown Estate Scotland (Interim Management) currently operates under the 1961 Act and so control over commencement of the Bill will aid in the transition between management regimes.

Choice of procedure

43. Section 40(5) has the effect that any such commencement regulations will not be subject to Parliamentary procedure. It is normal practice for commencement regulations to be laid before the Scottish Parliament and not be subject to additional procedure. Commencement regulations bring into force provisions, the policy behind which has already been considered by the Scottish Parliament during the passage of the Bill. As is usual for commencement regulations, the default laying requirement applies (as provided for by section 30(1) and (2) of the Interpretation and Legislative Reform (Scotland) Act 2010).

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