

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

Scottish Crown Estate Bill

Policy memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Scottish Crown Estate Bill introduced in the Scottish Parliament on 24 January 2018.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 24-EN);
 - a Financial Memorandum (SP Bill 24-FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 24-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Background to the Bill

4. The "Crown Estate" is a collection of property, rights and interests owned by Her Majesty in right of the Crown and has for several decades been managed by the Crown Estate Commissioners under the Crown Estate Act 1961 ("the 1961 Act"). The 1961 Act set the framework for managing the Crown Estate and placed a duty on the Crown Estate Commissioners to maintain the value and the return obtained from the Crown Estate while having due regard to the requirements of good management.
5. Crown property rights are a major component of land ownership in Scotland. The ownership of Scotland's seabed and much of its foreshore

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

are ancient possessions of the Crown. There is a legal presumption that an area of seabed or foreshore is owned by the Crown, unless there is evidence that it has been acquired by someone else. 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.

6. 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. 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.

7. There have been calls for several years for the Crown Estate in Scotland to be devolved and for reform of how decisions are taken on charging for use of the assets. The Smith Commission on further powers for the Scottish Parliament¹ recommended that:

- Responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament. This will include the Crown Estate's seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.
- Following this transfer, responsibility for the management of those assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities. It is recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.

1 The Smith Commission Report

<http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/>

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

- The Scottish and UK Governments will draw up and agree a Memorandum of Understanding to ensure that such devolution is not detrimental to UK-wide critical national infrastructure in relation to matters such as defence and security, oil and gas and energy, thereby safeguarding the defence and security importance of the Crown Estate's foreshore and seabed assets to the UK as a whole.
- Responsibility for financing the Sovereign Grant will need to reflect this revised settlement for the Crown Estate.

8. Prior to 1 April 2017, the Crown Estate's wholly-owned assets in Scotland comprise the property, rights and interests to which section 90B(5) of the Scotland Act 1998 ("the 1998 Act") applies. The management of the property, rights and interests in Scotland that are wholly-owned by Her Majesty in right of the Crown were devolved on 1 April 2017 using the powers in section 90B of the 1998 Act (inserted by section 36 of the Scotland Act 2016 ("the 2016 Act")) and property, rights and interests continue to be owned by Her Majesty in right of the Crown. The property, rights and interests of the Crown Estate assets in Scotland are currently managed by Crown Estate Scotland (Interim Management) "CES(IM)" and the net revenue is paid into the Scottish Consolidated Fund. A modified version of the 1961 Act applies to CES(IM).

9. The Crown Estate Transfer Scheme 2017 (S.I. 2017/524) effected the devolution of the management functions for these assets, the revenue arising from those assets and competence to legislate about those functions subject to some reservations. Parliament's legislative competence is restricted by the 1998 Act in that:

- the Scottish Crown Estate assets must continue to be managed on behalf of the Crown;
- the assets must be maintained as an estate in land, or estates in land managed separately i.e. the existing assets must be maintained and any capital proceeds from asset sales must be reinvested in the existing estate or in other land, and assets acquired in the course of management will be owned by the Crown;
- the payment of hereditary revenues from the Crown Estate's wholly owned assets in Scotland is to be paid into the Scottish Consolidated Fund (in accordance with the Civil List Act 1952).

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

10. A public consultation to prepare for primary legislation on the long term management of the Crown Estate in Scotland took place in early 2017. This followed a 2016-17 Programme for Government commitment to run and manage the Crown Estate from April 2017 and consult on the future of the Crown Estate in Scotland. The Bill develops the proposals contained in the consultation and will enable the Scottish Ministers to implement the recommendations in the Smith Commission Report.

Summary of bill provisions

11. The following paragraphs summarise the provisions in the bill and the changes from the current management regime. Further detail on specific provisions is provided from paragraph 42.

12. This Bill disapplies the 1961 Act as regards CES(IM) and the management of the property, rights and interests to which section 90B(5) of the 1998 Act applies. The Bill labels those property, rights and interests as the “Scottish Crown Estate”. The Bill also reforms the duties that require to be followed in managing any one of the property, rights or interests (an asset) and enables changes in the management of individual assets on either a national or local level, on a case-by-case basis, with managers subject to a national governance framework. Similarly, the Bill changes the name of Crown Estate Scotland (Interim Management) to “Crown Estate Scotland”. This memorandum refers to the body as “Crown Estate Scotland” for ease of reference to the provisions of the Bill.

13. This Bill includes provisions for changes in the management of Scottish Crown Estate assets - including the duties on management and charging for the assets. At present, the portfolio of property, rights and interests are managed as a whole by a single manager, CES(IM). In the future, the powers in the Bill could be used to enable local management of specific assets by local authorities or community organisations or for another part of the public sector to manage parts of the estate. Instead of one manager of many assets, there is the potential for there to be multiple managers, each with the responsibility of managing one or more of the assets. It is possible that some managers may only manage one asset or part of one of the asset types e.g. management of the foreshore in a part of Scotland. This Bill provides the mechanism by which management of an asset (or part of it) can be further devolved and sets out the regulatory framework within which all managers, irrespective of the size of the asset managed, must operate.

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

14. At present, under the 1961 Act, CES(IM) has a duty to maintain and enhance the revenue and capital value of the estate, having regard to the requirements of good management, and to achieve the best consideration when leasing or selling an asset or entering into another agreement on use of an asset. The Bill contains new duties on management of the assets, enabling managers to manage the assets in a way which is likely to contribute to the promotion or the improvement of socio-economic and environmental factors.

15. Changes in management will be effected via the use of enabling powers contained in the Bill. There will be the ability for the Scottish Ministers, by regulations, to transfer the function of managing a Scottish Crown Estate asset (or part of it) to a Scottish public authority, a local authority, a community organisation, the Scottish Ministers or Crown Estate Scotland. The Scottish Ministers will also be able to direct a manager to delegate the function of managing a Scottish Crown Estate asset (or part of it) to a local authority, a Scottish public authority or a community organisation.

16. There will be a framework at the national level to govern management of the assets. While enabling assets to be managed differently to reflect local priorities, the Bill includes the function of preparing a national strategic management plan for the assets which will facilitate taking a strategic overview of the assets and for this to be undertaken by the Scottish Ministers or delegated to another person. The Bill also includes proposed powers for the Scottish Ministers to conduct research and undertake other activities relating to the Scottish Crown Estate in order to enable the funding of strategic initiatives to develop the assets (e.g. co-ordinate research to support renewables development) and mechanisms that can be employed if necessary to ensure that charging for leases for the same activity does not vary significantly in different areas. These proposals were supported in the consultation and COSLA and, in discussions, the island councils have recognised the need for a national governance framework.

17. The Bill also recognises that, while at present “management” encompasses a wide range of activities, reflecting the diverse nature of the estate, in future such a wide range of activities may not be appropriate for particular assets. For instance, it may not be appropriate for all managers to be able to sell the asset (or part of it) which they are managing, even though they may be able to lease it. The proposed powers for transfer or

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

delegation, therefore, include the ability to restrict the activities that a manager can undertake as a manager.

Alternative approaches

Management Model

18. A number of alternative approaches to the management of the Scottish Crown Estate were considered and were included in the consultation paper. The current commercial approach could be maintained, which would effectively maintain the existing management regime – albeit with Crown Estate Scotland managing the Scottish Crown Estate rather than the Crown Estate Commissioners, and with the revenue going to the Scottish Consolidated Fund. This, however, would not have implemented the proposals contained in the consultation on the long term framework on managers having discretion to depart from a commercial approach when wider benefits can be obtained. This approach would also not deliver any change in who can manage the Scottish Crown Estate assets. The consultation paper set out three options for the future management of the Scottish Crown Estate, which are set out below.

Retain management of all assets at the national level

19. This is likely to have the lowest cost and would minimise disruption, retain economies of scale and be the simplest approach for marine industries, as it would enable them to deal with one manager in Scotland. It would continue the current approach for ensuring that the capital value of the land and property can provide collateral for investment in new opportunities elsewhere in the estate. It could, however, limit community empowerment and it would not implement the Smith Commission's recommendation of further devolution. Besides, the diversity of the portfolio does not necessarily require long-term management by one manager.

Devolve management of all assets to local authorities or communities

20. Devolving all the assets would provide for local control and would deliver the Smith Commission recommendation of further devolution for the islands and other local areas which wish to take responsibility for the management of Scottish Crown Estate assets. It has also been argued that some of the assets may be better managed at the local level because of synergies with other local responsibilities. It is not, however, clear at this time that all local authorities or communities would prefer to manage the

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

assets in their respective areas. Nor is it clear that the necessary skills and expertise are currently available at a local level in all parts of Scotland or that they can be developed easily.

21. This option could also lead to fragmentation of the assets, and local competition between different parts of Scotland. A national framework to define the roles and responsibilities of local managers could help address these risks. Furthermore, not all assets may be sustainable in their own right, which could result in financial burdens being placed on councils and communities if a wider management framework was not put in place.

Consider on a case-by-case basis the appropriate manager

22. The Bill provisions have been developed to implement this approach. A case-by-case assessment would allow a geographic or functional approach to be followed. This would enable delivery of the Smith Commission recommendations, while recognising the diversity of the Scottish Crown Estate portfolio. It would enable a tailored approach, allowing local authorities, tenants, local communities and others with an interest in, or who depend on, the use of Scottish Crown Estate assets to be directly involved in the management. It could be designed to increase local control over decision-making, with shared supporting arrangements to reduce duplication and fragmentation.

Legal framework

23. The 1961 Act applies to CES(IM) by virtue of section 36(7) of the 2016 Act. One option could have been to continue with the arrangement whereby the 1961 Act provides the legal framework of powers and duties for CES(IM) and for the same powers and duties to be applied to new managers. However, given the passage of time since the 1961 Act was passed and its application to the whole of the United Kingdom, some of its provisions are more appropriate to laws of England and Wales and the nature of the Crown Estate at the time the legislation was made. For example, oil was not found in the North Sea until 1965 and the first salmon farms were not established until the late 1960s. The 1961 Act, therefore, to an extent reflects the relative value and utilisation of the various constituent parts of the Crown Estate at the time that the Act was passed.

24. The 1961 Act would not, of itself, apply to other managers to whom the function of managing Scottish Crown Estate assets was transferred or

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

delegated. It was also considered that retaining the 1961 Act as well as the provisions in this Bill would make the legislative landscape more complicated for practitioners and managers. It was decided, therefore, to disapply the 1961 Act as regards CES(IM) and for the Bill to contain provisions as to the course of management. The Scottish Government considered that some aspects of the 1961 Act remained relevant and necessary, and so the Bill contains some provisions equivalent to those of the 1961 Act.

National Governance Framework

25. The necessity for a national governance framework was also considered. Given the fragmentation of the Scottish Crown Estate by further devolution, the framework seeks to provide for the continuation of strategic planning for the assets while enabling local management and to maintain a common charging approach where appropriate. Common charging approaches are currently employed for leases to marine industries such as aquaculture and providing the potential to continue common charging arrangements may reduce the administrative costs of marine industries having to deal in future with different managers. Further, as only the management is devolved and the net revenue is paid into the Scottish Consolidated Fund, the framework, including the accounting provisions, ensures common standards of openness, transparency and accountability across the Scottish Crown Estate.

26. It is considered that the policy objective of reforming the duties on a manager and enabling restructuring of the management of Scottish Crown Estate assets under a national governance framework, on either a national or local level, and on a case-by-case basis, could only be achieved by legislation giving the Scottish Ministers the power to transfer or delegate the function of managing Scottish Crown Estate assets.

Consultation

27. The Scottish Government launched a public consultation on the long-term arrangements for the Crown Estate in Scotland, which was a commitment included in the 2016-2017 Programme for Government. The consultation ran from 4 January until 29 March 2017 and sought respondent's views on the following areas:

- the overall aims for the estate;

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

- the basis for operational decisions on management of the property, rights and interests including leasing and sale of assets;
- who should manage the transferred functions in the future, including further devolution to the local level;
- the establishment of a national governance framework for management; and
- how the revenue should be used in future.

28. A total of 212 responses were received (115 from organisations and 97 from individuals) from a range of individuals, community groups, the ports and harbour sector, fisheries/seafood bodies; leisure and tourism bodies, land and estates; enterprise or coastal management bodies; local authorities; natural heritage/conservation bodies and commercial bodies. The Scottish Government commissioned The Research Shop to undertake the independent, formal analysis of the consultation responses received and their final draft report was received on 6 June 2017. The report, along with all the non-confidential responses to the consultation is being published at the same time as this Bill.

29. The summary analysis of responses to key questions in the consultation is as follows:-

Views on the vision for the Crown Estate in Scotland

30. The majority of the respondents who provided a view considered that the future approach for managing the Crown Estate in Scotland should be changed from the current duty to manage assets on a commercial basis. The view of the majority of those who commented was that there should be a power to take account of wider socio-economic or other benefits in managing Crown Estate assets.

31. The majority of the respondents who provided a view considered that the requirement on “good management” should be retained; and most respondents held the view that the requirement on “good management” should be amended to take account of environmental implications in relation to the management function.

32. The majority of respondents who provided a view considered that manager(s) of Crown Estate assets should need to seek the approval of

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

Scottish Ministers for sizeable sales. There was much agreement that the general presumption against selling the seabed should be maintained.

Design options for the Crown Estate in Scotland

33. Three design options for managing the Crown Estate assets in Scotland were put forward in the consultation. Option 1 proposed to retain management of all assets at the national level; option 2 proposed devolving management of all assets to local authorities or communities; and option 3 proposed consideration on a case-by-case basis. There was support expressed for each option, but the option receiving most support from respondents was option 3. Most respondents who commented supported a functional approach to guide the reform of the management of the Crown Estate in Scotland. A small majority of respondents who provided a view supported management on a geographic basis being led by communities.

Delivering more control for communities

34. Respondents provided views on which assets they considered should be managed at the national level. Some respondents felt that all assets should be managed at this level. Others highlighted: rights over cables and pipelines; rights to mining and naturally occurring gold and silver; rural estates; leasing for wave and tidal energy and offshore wind energy; and marine assets. A few respondents considered that individual fisheries, local moorings and, where there is interest, rural estates, could all be managed at community level.

Delivering further devolution of Crown Estate assets

35. 57% of the 169 respondents who provided a view considered that local authorities or communities should be expected to make a case for further devolution, with most respondents (86% of 118 responding) agreeing that local authorities or communities should be required to demonstrate the capability to provide appropriate management, to maintain service delivery and to deliver increased benefits.

Strategic planning and a national framework

36. A majority of the respondents who provided a view considered that there is a need for strategic planning and a long-term investment strategy in order to co-ordinate work to enhance the value of the estate.

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

37. Almost all of the respondents who provided a view envisaged benefits of putting in place a national framework to govern further devolution opportunities. Many supporters emphasised the need for the framework to provide guidance only, so as not to be overly prescriptive. Most of the respondents who gave their view considered that there should be consistent charging approaches between areas to avoid competition between different parts of Scotland.

38. Many of the respondents providing a view perceived a need for a phased approach to introduce reforms to the management of Crown Estate assets in Scotland.

Securing the benefits for Scotland and communities

39. The majority of the respondents providing a view considered that the arrangement whereby the capital value of one part of the estate can be used to enhance opportunities elsewhere in the estate should be continued. The majority view amongst the respondents who gave their opinion, was in favour of discretion for capital proceeds from a sale in one area to be invested anywhere in Scotland. Most respondents who provided a view considered that it should be possible for capital and maintenance requirements for an individual asset to be funded from another part of the estate.

40. A majority of those respondents who provided a view agreed that funding of strategic activities from Crown Estate assets should continue; and a majority of the respondents commenting considered that these strategic activities should be managed at the national level.

41. A majority of the respondents who gave a view were in favour of those taking responsibility for management of an asset to also take the responsibility for managing the associated liabilities.

Policy objectives: specific provisions

42. This summary offers more details on the key policy areas addressed by the Bill. Each section below sets out what will change from the present situation and how stakeholder views have been considered.

Part 1 – Crown Estate Scotland

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

43. Crown Estate Scotland (Interim Management) was the name given to the organisation in the Crown Estate Scotland (Interim Management) Order 2017 (S.S.I. 2017/36) (the “Crown Estate Scotland Order”). The Bill provides for the organisation’s name be changed to “Crown Estate Scotland” while retaining its existing status as a Scottish public body that is accountable to Scottish Ministers and the Scottish Parliament. This will reflect its continuing status as the manager of each asset until such time as the management of an asset can be further devolved and also that it is likely that some assets will need to continue to be managed at a national level.

Part 2 – Changes in management of Scottish Crown Estate assets

44. The Bill creates two mechanisms for devolving the function of managing a Scottish Crown Estate asset: transfer and delegation. It can be transferred by regulations (see section 3), which can also set out the extent of the rights and liabilities which are transferred and any restrictions on the function of managing being transferred and to whom the rights, liabilities and management function is being transferred. The intention is for the Bill to be as inclusive as possible in extending the range of bodies to whom the function of managing of an asset (or part of it) could be transferred or delegated, while providing for case by case consideration and being mindful of the duty to maintain and seek to enhance the value of the asset (see section 7).

45. Whereas local authorities and other public bodies are creatures of statute and any legislation which wound them up would be able to include provisions for the transfer of functions, rights and liabilities, this is not the case for community organisations, which are defined in section 6. It is necessary, therefore, to make provision for the continuing management of a Scottish Crown Estate asset, should the community organisation with the function of managing it cease to exist, by requiring notification of any change to a community organisation which would change its status for the purposes of this Bill.

46. Section 4 sets out an alternative to the transfer of the management of an asset, and provides the Scottish Ministers with the power to direct a manager to delegate the management to another person. Under a delegation the manager would maintain a relationship with the delegate, which would be set out in the agreement between the two parties, while

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

enabling the delegate to take on management activities relating to an asset. The scope for continued provision of support by the manager may be preferred by some persons. Delegation cannot be from a community organisation or to the Scottish Ministers.

47. Section 5 provides further detail on such delegation agreements and makes clear that the delegation can restrict the exercise of the function of management. Delegation may be for a specified period and may include restrictions on the exercise of the function of managing the asset, as well as specifying when and why the agreement may be terminated. The Scottish Ministers must consent to the terms of any delegation agreement to which they are not a party. It is envisaged that some bodies, including some community organisations, may prefer delegation.

48. “Community organisation” has a particular meaning for the purposes of the Bill, with a definition in section 6. A body may, if it is satisfied that management would be compatible with its status, request a transfer or delegation, and the requirements for these will be provided in guidance. In particular there will need to be careful consideration on a case-by-case basis by charitable organisations of whether it would be appropriate for them to carry out the function of managing an asset.

49. A regulated community organisation, particularly a Scottish charitable incorporated organisation (SCIO) or community benefit society, should establish with the appropriate regulatory body whether management of a Scottish Crown Estate asset (or part of it) is compatible with its status in the particular circumstances of the individual case.

50. The Scottish Ministers can, if they deem it appropriate, designate a given body or class of bodies as a community organisation for the purposes of this Bill under section 6(1)(b).

Part 3 – Management of Scottish Crown Estate assets

51. Part 3 sets out the framework within which all managers with the function of managing a Scottish Crown Estate asset (or part of it) must operate. The overall framework therefore normally applies both to Crown Estate Scotland and to any other body to whom the function of managing a Scottish Crown Estate asset (or part of it) has been transferred. This includes the requirements of annual reports, management plans, keeping accounts and audit, although some of the provisions of Part 3 do not apply

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

to Crown Estate Scotland as there are equivalent requirements in the Crown Estate Scotland Order.

Managers' powers and duties

52. In developing the policy and provisions of this Bill, Scottish Ministers have sought to retain those elements of the current management requirements which enable Crown Estate Scotland and any other managers to manage the Scottish Crown Estate in the future in an open and transparent way.

53. Section 7 sets out the duty of a manager to maintain and seek to enhance the value of the Scottish Crown Estate asset(s) under their management, and the income arising from the asset(s). That duty can be discharged in a way which is likely to contribute to the promotion or the improvement of socio-economic and environmental factors and reflects the policy of the Scottish Ministers that management should enhance the likelihood of management decisions resulting in benefit to Scotland and local communities.

54. Although a manager's powers are as wide as those of the owner (the Crown) and a manager can enter into transactions on behalf of Her Majesty, the Scottish Ministers will have the ability to restrict these powers in the regulations effecting the transfer, including restricting the power to transfer ownership of an asset under a manager's management. Such a disposal could diminish the value of the Scottish Crown Estate or fragment the seabed as a national strategic asset, which may not be in the wider interests of the people of Scotland. In addition, decisions on disposals may impact on the net revenue from the Scottish Crown Estate that is to be paid into the Scottish Consolidated Fund.

55. The Bill places a duty on the manager of a Scottish Crown Estate asset to obtain market value for a transfer (which includes granting a lease in respect of an asset) with the ability to depart from that if the manager is satisfied that the transfer is likely to contribute to the promotion or the improvement in Scotland of socio-economic and environmental factors. The definition of market value is 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") based on current International Valuation Standards (IVS). This contains mandatory rules, best practice guidance and related commentary for all members

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

undertaking valuations². These are used for the purposes of this Bill as the terms and the standards are familiar to valuers.

56. In the Red Book, “market value” is defined as “The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion”, whereas “market rent” is defined as “The estimated amount for which an interest in real property should be leased on the valuation date between a willing lessor and willing lessee on appropriate lease terms in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion”.

57. The provisions in section 11 permit managers to take other factors into consideration and to accept less than market value if the manager is satisfied that there are potential socio-economic and environmental benefits.

58. The provisions allow the Scottish Ministers to direct a manager (or managers) as to the amount to be charged in rent for a lease or in connection with any other agreement and how such charges are calculated. At present, the calculation of aquaculture rents, for example, is set by a standard formula. For finfish, charges depend on net gutted weight and species, and for shellfish, the calculation is based on species, length of rope and other types of equipment. The direction-making power in section 13 could be used to enable similar arrangements to be followed in future whereby similar rates are charged for certain types of leases, or to adjust the way in which rents are calculated.

59. Section 14 sets out a prohibition on granting leases or other rights for a period of more than 150 years. This prohibition has been carried forward from the 1961 Act.

60. Sections 15 to 17 set out further restrictions and duties on managers, including a prohibition on granting securities, rules on investment and permission to make charitable donations. Sections 18 and 19 create a duty

² <https://www.rics.org/uk/knowledge/professional-guidance/red-book>

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

to be transparent and accountable and to observe equal opportunities requirements.

Planning and reporting

61. The Scottish Ministers see benefit in there being an overall strategic plan for the Scottish Crown Estate assets as a whole, in order to co-ordinate work to enhance the value of the estate in future.

62. Section 20 sets out the requirements for the preparation of a strategic management plan in respect of the Scottish Crown Estate to be laid before the Scottish Parliament. These include the objectives, priorities and policies of the Scottish Ministers as regards the Scottish Crown Estate, and how these align with the Scottish Ministers' other objectives, priorities and policies – for example, with the National Performance Framework. There is also provision for regular reviews of the plan, which must also be laid before the Scottish Parliament. Further, there is a requirement, set out in section 21, to review the plan at least every 5 years, after which Scottish Ministers should revise the plan or, if they conclude that such revision is not necessary, lay a statement to that effect before the Scottish Parliament. The functions of the Scottish Ministers under sections 20 and 21 can be delegated to Crown Estate Scotland under section 37.

63. Section 22 sets out the requirement that managers of Scottish Crown Estate assets must prepare a management plan in respect of the assets. The management plan should set out how the manager plans to manage the asset over the next 3 years. In particular, the plan should set out how the manager proposes to carry out the duty to maintain and seek to enhance the value of the Scottish Crown Estate assets under section 7 of the Bill, and what plans the manager has as regards the disposal of any Scottish Crown Estate assets during the period covered by the plan.

64. Management plans are seen by the Scottish Ministers as an important part of the framework for public scrutiny of managers, thus provision is made for the timely preparation and submission of plans to the Scottish Ministers. Crown Estate Scotland does not have to prepare a management plan as it prepares a corporate plan under the Crown Estate Scotland Order, which is broadly equivalent.

65. Annual reports are also an important part of the governance framework. In essence, they provide an assessment of how a manager has

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

performed against the objectives and carried out the activities which are set out in the management plan. As such, annual reports and management plans will be one of the sources of information about the performance of the managers of the assets. Should the Scottish Ministers be concerned about the performance of a manager, they have the power under section 3 of the Bill to transfer the function of managing the asset to another manager. An important part of the annual report is the list of directions from Scottish Ministers or the Secretary of State under which the manager has been exercising the function of managing a Scottish Crown Estate asset, as that will make clear what, if any, restrictions the manager has been operating under.

66. To aid the Parliamentary scrutiny of the management of the Scottish Crown Estate, these reports will be laid before Parliament. Whether that is done by laying each individual report, or by consolidating the reports into one document, is a matter for the Scottish Ministers to decide under section 25(2). This function can be delegated to Crown Estate Scotland under section 37.

Financial matters

67. As part of the governance framework, the Bill makes provision for financial accountability. There are some provisions which reflect the special nature of the Scottish Crown Estate assets and these are explained more fully below.

68. There is a requirement in section 26 to keep separate income and capital accounts. Keeping the separate accounts enables the manager of a Scottish Crown Estate asset to maintain appropriate segregation between categories and readily identify their value at any given time.

69. Provision is made in section 27 for a manager to transfer a sum of money from the income to the capital account, if so directed by the Scottish Ministers. This reflects and facilitates the duty to maintain and enhance the value of the asset through capital expenditure and investment in the capital. The section also makes provision for such transfers to be made, provided the exact same amount is repaid to the original account within the same financial year. The Scottish Ministers can transfer at their discretion (subsection (6)).

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

70. The allocation of particular sums between income and capital accounts is set out in section 28. Section 28(2) recognises that the income from mining is also running down the capital value of the asset and, therefore, the estate, hence the requirement to allocate part of the income to the capital account. The Scottish Ministers will specify in a direction to the manager the proportion of income to be paid into the capital account.

71. The purpose of the provision in section 29 for a manager to transfer a sum of money to another manager's account, if so directed by the Scottish Ministers, is to retain the existing ability for one part of the Scottish Crown Estate to make a transfer to another part to maintain the overall value of the assets. This was supported in the consultation and is necessary because some assets of the Scottish Crown Estate produce a significant return while other assets do not, and are unlikely to, produce a significant return. On the other hand, there may be costs incurred by an asset not producing a significant return which the manager of that asset cannot cover. The ability to make a transfer enables such costs to be covered, thus maintaining and enhancing the overall value of the Scottish Crown Estate.

72. Provision is made in section 30 for grants and loans from the Scottish Ministers as an alternative means of covering such costs, as managers cannot grant securities and are not permitted to borrow other than from the Scottish Ministers (see sections 15 and 30(2)).

73. Further provision is made in section 31 for the Scottish Ministers (or other managers with the consent of the Scottish Ministers) to make grants to prospective managers or delegates so that they can undertake preparation for taking over the management function. For example, IT systems may be required, or other systems developed to comply with the requirements of separate accounts (see section 26 - particularly subsection (1)(c) - and section 32(5)). The Scottish Ministers would not want the lack of funds to undertake necessary preparations to be an impediment to a body seeking to take over the management of an asset.

74. Not only is the management of the Scottish Crown Estate on behalf of the Crown, it can impact on the funds available in the Scottish Consolidated Fund. It is, therefore, necessary to ensure that both income and capital are properly accounted for. Managers are required, by section 32, to keep proper accounts and accounting records, and to prepare a statement of accounts for each financial year, separate from any other accounts and

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

records kept, and statements prepared, by the manager in any other capacity the manager may have. Section 33 sets out the arrangements whereby the statements of accounts of all managers are consolidated into one statement of accounts for the Scottish Crown Estate, and submitted to the Auditor General for Scotland for auditing. Using the power to delegate in section 37, the Scottish Ministers can delegate to Crown Estate Scotland their functions under section 33.

End of management

75. It is acknowledged that management of an asset can end for a number of reasons and it is necessary to ensure that the asset and any money and investments connected to the asset are properly accounted for. If the manager has no assets left, and does not hold any money or investments, section 34(1) requires reports and accounts prepared and sent to the Scottish Ministers within 3 months. But if the manager has no assets left but does still have money or investments, the manager is still treated as a manager for all purposes until they hand over the money or investments. This means they are still subject to accounting and reporting duties, and can also buy new assets forming part of the Scottish Crown Estate while they still have money.

Ministerial directions etc.

76. Section 35 sets out the general ministerial power of direction in respect of a manager's exercise of the function of managing a Scottish Crown Estate asset. A direction may be given to each manager, a particular manager or managers of a particular description. The effect of the powers of direction is that, having taken on management of an asset, a manager or type of manager may be obliged to act in particular ways. Charities and other types of potential manager will have to consider if this would be compatible with their constitution.

77. Managers are also required to have regard to written guidance from the Scottish Ministers about the performance of their management functions, and to provide Ministers with such information or advice as Ministers may require. These requirements are connected with the need for the overall strategic management of the Scottish Crown Estate and the retention of the element of cross-subsidy across the Scottish Crown Estate portfolio. The Scottish Ministers may choose to provide guidance to managers regarding 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

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

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.

78. The Scottish Ministers have a number of functions under this Bill relating to the preparation and review of a strategic plan for the Scottish Crown Estate, the laying and publication of managers' annual reports and the preparation and submission of consolidated accounts to the Auditor General. In the short term, Crown Estate Scotland will manage the largest part of the Scottish Crown Estate and has duties in respect of reporting and accounts under the Crown Estate Scotland Order. Section 37 gives the Scottish Ministers the power to delegate these functions to Crown Estate Scotland.

79. In order to inform the Scottish Ministers' decision-making, it may be necessary for managers to provide information and advice about the assets under their management. Section 38 puts a duty on managers to provide information and advice when required.

80. Given the value of the Scottish Crown Estate to the Scottish Consolidated Fund, it is right that current activities such as research undertaken to date by the Crown Estate Commissioners and Crown Estate Scotland (Interim Management) can be continued. It is, however, recognised that small community organisations, for example, managing a small part of a Scottish Crown Estate asset may not have the resources necessary to take on such tasks. Provision is therefore made for the Scottish Ministers to undertake such research.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

81. The Scottish Government has assessed the potential impacts of the Bill on equal opportunities. The Bill does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) either directly or indirectly. The Bill's objective is to provide a national governance framework for the management of Scottish Crown Estate assets, including

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

the further devolution of management of these assets or parts thereof to local communities. It is expected that any effects will not be specific to any one protected characteristic.

Human rights

82. The Scottish Government considers that the Bill does not give rise to any human rights concerns and complies with the European Convention on Human Rights (ECHR).

83. The exercise of the powers contained in Part 2 of the Bill to effect a change in management of an asset potentially engages rights under Article 1 Protocol 1 ECHR (A1P1) (protection of property). An existing manager might have entered into contracts or other agreements with third parties for the provision of goods, services or other matters. It is conceivable that exercising the power in section 3 of the Bill to transfer management could result in such contracts and other agreements being interfered with, such that a third party incurs loss. Such an event could amount to an interference with that third party's possessions within the meaning of A1P1 in certain circumstances.

84. However, it is not inevitable that an exercise of the powers contained in Part 2 of the Bill will result in an interference with a third party's possessions arising from the change in management. Firstly, it may be that there are no such third party interests in a given case. More widely, if such third party interests are present in a particular case, it is possible that third parties would be content with the change in manager, that the existing manager's interest could be assigned or transferred to the new manager such that there is no interference, or that other measures could be taken to alleviate the impact on third parties caused by a change in manager, such that there is no interference. If an exercise of the powers did result in an interference, it may be that the interference is justifiable in the circumstances. A1P1 rights are not absolute and may be interfered with if this can be justified in the public interest, is proportionate and is subject to conditions provided for by law. This would fall to be determined on a case-by-case basis.

85. It is expected that the focus of the Bill on transferring and delegating management functions in respect of Scottish Crown Estate assets to local authorities and community organisations will be neutral in respect to human rights. In so far as the change in management provisions could impact on

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

third parties, the Scottish Ministers will seek to ensure that the powers are exercised in a manner compatible with human rights.

Island communities

86. The Bill introduces reformed duties on management and powers for the Scottish Ministers to implement changes in who manages the assets. These changes will enable the management of the Scottish Crown Estate to contribute to the Scottish Government's objective of ensuring that there is a sustained focus across the Scottish Government and the wider public sector to meet the needs of island communities both now and in the future. The consultation paper sought views on whether consideration of further devolution opportunities in the island areas should be prioritised. Whilst there was no outright majority for or against this proposal from those respondents who provided a view, more respondents were in favour than against. Local authority bodies were amongst those most strongly in favour. Discussions are continuing with the three island councils on a possible pilot of local management of some or all of Scottish Crown Estate assets. While no final decisions have been taken, it is anticipated that pilots will assist the Scottish Ministers in reaching final decisions on implementation of the Bill as soon as possible.

Local government

87. The Bill provisions will create a new power to change the manager of a Scottish Crown Estate asset and to transfer or delegate the function to a local authority. Twelve local authorities submitted responses to the formal public consultation on the proposals for the Bill. A common view amongst local authorities was that the principles of the Smith Commission report should be followed, with devolution of the management of Scottish Crown Estate assets to local authorities. Furthermore, local authorities in particular were of the view that devolution of the management of the Scottish Crown Estate to local authority level was more appropriate in the short-term and considered that this level of management is appropriate for most assets in view of the democratic accountability held by local authorities.

Sustainable development

88. Sustainable development is integral to the Scottish Government's efforts to improve outcomes for all communities across Scotland. The Government Economic Strategy, which has Inclusive Growth at its heart, sets out the Scottish Government's dual ambition to tackle inequality and

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

boost competitiveness, so that the benefits of a flourishing Scotland can be shared by all, including rural, coastal and island communities.

89. The Scottish Government's approach to delivering Scotland's Economic Strategy is underpinned by four priorities for sustainable growth.

- Investing in our people and our infrastructure in a sustainable way;
- Fostering a culture of innovation and research and development;
- Promoting inclusive growth and creating opportunity through a fair and inclusive jobs market and regional cohesion; and
- Promoting Scotland on the international stage to boost our trade and investment, influence and networks.

90. The Scottish Ministers consider that devolving management and decision-making in respect of Scottish Crown Estate assets to the local level will provide new opportunities to invest in people and facilitate investment in local infrastructure. Similarly, this will provide local communities with opportunities for innovation in how the assets are managed. Section 39 of the Bill specifically provides for the Scottish Ministers conducting research into any matter relating to the Scottish Crown Estate and will ensure there are appropriate powers for such research and development. Further, it is intended that devolving management and decision-making for assets to the local level will promote inclusive growth and create opportunity, given that, for example, much of the Scottish Crown Estate foreshore lies in remote and less-advantaged coastal and island communities.

91. Scotland's National Marine Plan provides a comprehensive overarching framework for all marine activity in Scotland's waters. The Plan is designed to enable sustainable development and use of Scotland's marine area in a way which will protect and enhance the marine environment whilst promoting both existing and emerging industries. Therefore any decision which may arise from the transfer or delegation of management functions in respect of marine assets will need to be consistent with the National Marine Plan.

92. The Scottish Government is committed to continuing to engage with stakeholders on the detail of this work as it develops. The Scottish

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

Government is also committed to undertaking full Strategic Environmental Assessments if and when necessary.

This document relates to the Scottish Crown Estate Bill (SP Bill 24) as introduced in the Scottish Parliament on 24 January 2018

Scottish Crown Estate Bill

Policy memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

www.scottish.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.scot/documents