DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

22nd Meeting, 2018 (Session 5)

Tuesday 19 June 2018

The Committee will meet at 10.00 am in the Adam Smith Room (CR5).

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

   - Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2018 [draft];
   - Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018 [draft].

3. **Instruments subject to negative procedure:** The Committee will consider the following—

   - Act of Sederunt (Fees of Solicitors in the Court of Session, Sheriff Appeal Court and Sheriff Court) (Amendment) 2018 (SSI 2018/186);
   - Sheriff Court Fees Amendment Order 2018 (SSI 2018/194).

4. **Scottish Crown Estate Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

5. **Health and Care (Staffing) (Scotland) Bill:** The Committee will consider its approach to the delegated powers provisions in this Bill at Stage 1.

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The papers for this meeting are as follows—

**Agenda Items 2 and 3**

Briefing on Instruments (private)  
DPLR/S5/18/22/1(P)

**Agenda Item 4**

*Scottish Crown Estate Bill - As Introduced*

*Scottish Crown Estate Bill - Delegated Powers Memorandum*

*DPLR Committee, 14th Report 2018 (Session 5): Scottish Crown Estate Bill at Stage 1*

Briefing Paper  
DPLR/S5/18/22/2

**Agenda Item 5**

*Health and Care (Staffing) (Scotland) Bill - As Introduced*

*Health and Care (Staffing) (Scotland) Bill - Delegated Powers Memorandum*

Briefing Paper (private)  
DPLR/S5/18/22/3(P)
DELEGATED POWERS AND LAW REFORM COMMITTEE

22nd Meeting, 2018 (Session 5)

Tuesday 19 June 2018

Scottish Crown Estate Bill: Stage 1

Response from the Scottish Government to the Committee’s Stage 1 report

BACKGROUND

1. The Delegated Powers and Law Reform (DPLR) Committee reported at Stage 1 on the delegated powers in the Scottish Crown Estate Bill (the “Bill”) on 21 March 2018, in its 14th Report, 2018 Session 5.

2. The Environment, Climate Change and Land Reform (ECCLR) Committee considered the Bill as lead committee and on Tuesday 29 May published its Stage 1 report. The Scottish Government response to the ECCLR Committee’s report, sent on Tuesday 12 June, also covered the recommendations made at Stage 1 by the DPLR Committee.

3. This paper sets out the provisions in the Delegated Powers Memorandum on which the DPLR Committee raised recommendations in its Stage 1 report and the Government’s response to those recommendations.

DELEGATED POWERS PROVISIONS

Regulation-making 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

4. 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.

5. The persons who may be the recipient of a transfer are set out in section 3(2)-the Scottish Ministers, CES (Crown Estate Scotland), a local authority, another Scottish public authority or a “community organisation” (as defined by section 6).

6. 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.

7. 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.

8. 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.

DPLR Committee consideration and recommendations

9. The Committee considered 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.

10. The Committee considered 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 Environment, Climate Change and Land Reform Committee.

11. The Committee was 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 agreed that the affirmative procedure should apply where the regulations textually amend primary legislation.

12. 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 considered 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.

13. The Committee also recognised 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 agreed that it might not be a good use of Parliamentary time, if those
Regulations are subject to the affirmative procedure rather than the negative.

**ECCLR Committee recommendations and Scottish Government response**

14. **The ECCLR Committee** recommended regulations under section 3, in relation to all assets within the Estate, should be subject to the affirmative procedure. [Referred to by the Scottish Government as recommendation 327]

15. The Scottish Government noted this recommendation, and will consider this further in the context of the recommendations 329 and 330 below.

16. The Committee was of the view that the Scottish Government and Crown Estate Scotland (Interim Management) should clearly set out a definition of what would constitute 'significance' or 'significant value' in relation to an asset, on the face of the Bill and the affirmative procedure should apply to regulations which would transfer the management of assets which are of significance or of significant value. [Referred to by the Scottish Government as recommendation 328]

17. This definition should encompass factors such as the size of the asset; the value of the asset (including any cross-subsidy it might provide to other assets); the transfer of neighbouring assets and any environmental significance the asset may have. The Committee recommended the Scottish Government brings forward amendments to address this at Stage 2 and gives consideration to the need to provide detailed accompanying guidance. [Referred to by the Scottish Government as recommendation 329]

18. The Scottish Government noted this recommendation and will consider it carefully.

19. The Committee recommended regulations to transfer the management of separate assets of relatively low value should be subject to the negative procedure. [Referred to by the Scottish Government as recommendation 330]

20. The Scottish Government welcomed the Committee’s recommendation and the further clarification this provides on recommendation 326. [Recommendation 326 is, in effect, an acceptance of the position in the Bill that the affirmative procedure should apply where the regulations textually amend primary legislation.]

**Summary**

21. In summary therefore, there is consistency between the Committee’s and the ECCLR Committee's recommendations on section 3, and the Scottish Government has undertaken to consider the recommendations carefully for Stage 2.
Section 4 – Directions requiring delegation of management function

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

Provisions

22. 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).

23. 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).

24. 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.

25. 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).

DPLR Committee consideration and recommendations

26. The Committee noted 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.

27. The Committee considered 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.

28. The Committee recommended 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).

**ECCLR Committee recommendations and Scottish Government response**

29. The Committee welcomed the Scottish Government commitment to consider whether section 4(3) is sufficiently clear and, if required, bring forward related amendments at Stage 2. [Referred to by the Scottish Government as recommendation 331]

30. The Scottish Government welcomed the Committee’s recommendation and is considering the terms of an appropriate amendment.

31. The Committee agreed with the DPLR Committee 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. [Referred to by the Scottish Government as recommendation 332]

32. The Scottish Government noted the Committee’s recommendation. The directions are not legislative in nature and it is not therefore appropriate for them to be laid before the Parliament. The giving of a direction is an executive function and any direction will be published in accordance with section 4(6).

**Summary**

33. In summary therefore, there is consistency between the Committee’s and the ECCLR Committee’s recommendations on section 4. The Scottish Government has undertaken to consider the clarity of section 4(3) in advance of Stage 2. However the Government has not accepted the recommendation that directions under section 4 should be both laid before the Parliament and published, although commercially sensitive or commercially confidential information may be withheld.
Section 6(1)(b) – Meaning of “community organisation”

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

Provisions

34. 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).

35. 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”.

DPLR Committee consideration and recommendations

36. The Committee considered 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.

37. The Committee noted 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.

38. The Committee asked 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”.

ECCLR Committee recommendations and Scottish Government response

39. Given no further criteria are specified as to how a body might relate to a community before it can be designated, the Committee agreed with the recommendation of the DPLR Committee that regulations mentioned in Section 6(1)(b) should be subject to the affirmative procedure. [Referred to by the Scottish Government as recommendation 333]

40. The Scottish Government noted the Committee’s recommendation, whilst also noting the provisions of Part 5 of the Community Empowerment (Scotland) Act 2015 (which relate to asset transfer requests). Section 77(2) of that Act the power to designate as a community transfer body for the purposes of, amongst others, managing land (section 79(2)(b)(iii)) - is subject to negative procedure.
The Scottish Government considered that these powers are more broadly similar to the power in section 6(1)(b) than sections 34(A1)(b) or 97D(1)(b) of the Land Reform (Scotland) Act 2003, and so the choice of procedure taken in the Bill is appropriate.

Summary

41. In summary therefore, the Scottish Government has not accepted the Committees’ recommendations that the affirmative procedure should apply.

WIDER COMMENTS BY THE ECCLR COMMITTEE

42. The ECCLR Committee made some wider comments in relation to the DPLR Committee’s report. These are outlined below along with the Scottish Government’s response.

ECCLR Committee recommendations and Scottish Government response

43. The Environment, Climate Change and Land Reform Committee agreed with the findings and recommendations of the DPLR Committee. The Committee shares the concern of the DPLR Committee that Scottish Ministers anticipate dealing with most regulations arising from the Bill via a negative Parliamentary procedure. The Committee similarly considered to do so would restrict the ability of the Scottish Parliament to scrutinise the content of these regulations. [Referred to by the Scottish Government as recommendation 324]

44. The Committee was conscious, however, of the need to strike an appropriate balance between matters that are operational decisions for Crown Estate Scotland and those that require further Parliamentary scrutiny. [Referred to by the Scottish Government as recommendation 325]

45. The Scottish Government recognised the Committee’s concern that regulations should be adequately scrutinised. Our responses to recommendations 327, 328, 329 and 330 provide further information. (Those recommendations are outlined above).