



Law Society
of Scotland

Stage 3 Briefing

Scottish Crown Estate Bill

November 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

This briefing paper is intended to inform MSPs of our comments on the Scottish Crown Estate Bill (the Bill). The Stage 3 Debate is scheduled to take place in the Scottish Parliament on 21 November 2018.

The Bill was introduced into the Scottish Parliament by the Cabinet Secretary for the Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, on 24 January 2018.

The Bill was allocated to the Scottish Parliament's Environment, Climate Change and Land Reform Committee. The Committee issued a call for written evidence on 9 February 2018. We provided written evidence to the Committee.¹ On 29 May 2018, the Committee produced a Stage 1 Report.² The Stage 1 Debate took place in the Scottish Parliament on 19 June 2018 and the Scottish Parliament agreed to the general principles of the Bill. Amendments were made to the Bill at Stage 2.³

If you would like to discuss this paper, or if you would like more information on the points we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General comments

We are generally supportive of the objectives of the Bill. It is of importance that Crown Estate assets continue to be properly and coherently managed under the new arrangements.

While the terms of the Bill give powers to Scottish Ministers, we consider it likely that Crown Estate Scotland will be the gatekeepers for further transactions to take place in relation to the estate. It is

¹ <https://www.lawscot.org.uk/media/359886/scottish-crown-estate-bill-call-for-evidence-mar18.pdf>

² <https://sp-bpr-en-prod-cdnep.azureedge.net/published/ECCLR/2018/5/29/Stage-1-Report-on-the-Scottish-Crown-Estate-Bill/ECCLRS0518R3.pdf>

³ http://www.parliament.scot/S5_Bills/Scottish%20Crown%20Estate%20Bill/SPBill24AS052018.pdf

beneficial that the Scottish Ministers retain powers to manage the estate should this become necessary.

We note that there is a possibility that having different managers may lead to well-tailored management of individual assets, as well as empowering communities to manage assets within their local area. This could be of benefit to the Estate. We do, however, note that there is a possibility that having a number of different managers of Crown Estate assets could result in disjointed management due to different management strategies.

It must be recognised, however, that community organisations will require access to professional advice and planning in order to properly manage assets. The Committee has highlighted the need for this advice and guidance to be ongoing to ensure smaller community groups are able to successfully manage assets.⁴ It is important that assets and the Estate generally are preserved for the future benefit of the community at large.

There must continue to be full transparency and accountability in relation to management of the Estate. Consultation, scrutiny and reporting must be undertaken as appropriate.

The Bill

Sections 1 - 3

No comment.

Section 4

We welcome the amendments made to the Bill at stage 2 - Scottish Ministers are required by section 4(6) to publish any direction or revision of a direction, and notice of any revocation of a direction given under section 4. We consider that any such publication should be in writing, and in such manner as the Scottish Ministers consider appropriate as soon as is reasonably practical after it is given. A requirement to publish the direction, revision or notice of revocation as soon as reasonably practical after having been given would bring the provisions of section 4 into line with the provisions for publication of Ministerial directions under section 35 of the Bill.

In addition, we welcome the introduction at stage 2 of consultation requirements by virtue of section 4(4A).

There may be merit in consideration as to whether requirements for Parliamentary scrutiny should be introduced to this section, perhaps subject to the proviso that commercially sensitive or commercially confidential information be withheld.

⁴ Environment, Climate Change and Land Reform Committee, Stage 1 Report on the Scottish Crown Estate Bill, 3rd Report, 2018 (Session 5), paragraph 229.

Section 5

We consider it important that there is a clear mechanism for delegation agreements to be published, and for any revocation or revision of such an agreement to be made in writing and to be published.

Section 6

We welcome the opportunity under section 6(1)(b) for an organisation to be designated by Ministers as a “community organisation” if it does not otherwise meet the requirements set out under section 6(1)(a) and welcome the amendment made to the Bill at stage 2 with regard to ‘bodies corporate’ in section 6(1)(b).

We note the Committee’s comments in relation to the drafting of definitions within this section.⁵

The requirements for a community body are framed in similar terms to those found in section 19 of the Community Empowerment (Scotland) Act 2015. However, we have concerns regarding the drafting of this section. We do not consider that the meaning of “relates to a community” where it appears in section 6(1)(a) is clear. The requirements set out in section 6(2) do not appear to be inclusive – particularly those at sections 6(2)(c) and 6(2)(d). We consider that there would be merit in amending the requirements for a community organisation to fall within the terms of the Bill.

Section 6(2)(f) refers to “promotion of a benefit for that community”. We note that the concept of public benefit is already recognised in the law, for example in section 8 of the Charities and Trustee Investment (Scotland) Act 2005. It would be helpful if there was some consistency between these statutes particularly when section 17 of the Bill refers to the ‘public benefit’ provisions under the 2005 Act.

Section 7

We are supportive of the requirement that managers maintain and seek to enhance the value of assets and the income arising from them. We note the Committee’s comments in relation to this section⁶ and consider there would be merit in greater clarity in relation to the provisions of section 7(2).

Section 8

We consider that section 8(3) would benefit from inclusion of the wording “subject to section 10” in relation to transfer of ownership of assets.

Section 8A

This section was introduced by amendment at stage 2. We have no comment to make.

Section 9

We consider this section would benefit from clarification. We note that the explanatory notes for the Bill clarify that the purpose of the section is to exempt the manager when transacting “...from any formalities

⁵ Environment, Climate Change and Land Reform Committee, Stage 1 Report on the Scottish Crown Estate Bill, 3rd Report, 2018 (Session 5), paragraphs 300-301.

⁶ Environment, Climate Change and Land Reform Committee, Stage 1 Report on the Scottish Crown Estate Bill, 3rd Report, 2018 (Session 5), paragraphs 181-184.

that would apply if Her Majesty were transacting”. While this is welcome, the practical effect of the section is not clear.

Section 10

We note the comments by the committee in respect of the seabed.⁷ We consider it to be a political decision as to whether to permit the delegated management and/or sale of the seabed and therefore do not make any substantive comment in this regard.

Section 11

We are supportive of the general requirement that managers must make transactions at market value, subject to section 11(2) of the Bill. In respect of section 11(1)(c), we note that there are various other rights which could be granted in or over an asset – for example, servitudes, mining rights (such as for coal and minerals), fishing and shooting rights, and wayleaves. We are supportive that the requirement on managers under this section be applied to rights in or over the asset, other than ownership or lease.

Section 12

We note that the definition of “market value” used in the Bill is based on that contained within the Royal Institution of Chartered Surveyors’ (RICS) Valuation – Global Standards 2017.⁸ The definition appears to be comprehensive. Reliance on extrinsic definitions brings a risk of the basis of the definition found in the Bill being amended by its source, in this case by RICS’. While it is appreciated that Scottish Ministers have powers of amendment over the definition in terms of section 12(1), it is questionable as to whether reliance on this basis for the definition would ensure certainty in the legislation.

There are settled definitions of “market value” within existing legislation. There is generally merit in consistency of use of definitions across legislation. For example, the Taxation of Chargeable Gains Act 1992⁹, the Income Tax (Earnings and Pensions) Act 2003¹⁰, and the Corporation Tax Act 2009¹¹, all contain definitions of market value as the “price which the asset might reasonably be expected to fetch on a sale in the open market”¹². We also note that a different definition of “market value” is provided in the Crown Estate Transfer Scheme 2017 (S.I. 2017/524), which states ““market value”, in relation to an agreement, means the best consideration in money or money’s worth which can reasonably be obtained, having regard to all the circumstances of the case but ignoring for that purpose any element of monopoly value which may exist”¹³.

⁷ Environment, Climate Change and Land Reform Committee, Stage 1 Report on the Scottish Crown Estate Bill, 3rd Report, 2018 (Session 5), paragraphs 208-209.

⁸ http://www.rics.org/Global/red_book_2017_global_pgguidance_160617_rt.pdf

⁹ See section 272.

¹⁰ See section 208.

¹¹ See section 845(5).

¹² See also *Gray’s Timber Products Ltd v Commissioners for Her Majesty’s Revenue and Customs* 2009 S.L.T. 307 and *Gray’s Timber Products Ltd v Revenue and Customs Commissioners* [2010] UKSC 4 for comment.

¹³ At Schedule 4, Paragraphs 15 and 25.

In all the circumstances, it is not clear why a different definition is proposed within the Bill from that contained within existing legislation.

On a general note, we consider it appropriate that the definition can be amended by Scottish Ministers by way of regulations, although see our comments in respect of section 40 in this regard.

Section 13

It is our understanding that various methods are currently used for the calculation of rents for the lease of Crown Estate assets.

Current practice for a number of types of rents is for a standard formula to be used to fix the payable amount. For example, for fin-fish, a rent is currently set on the basis of a rate per kilo of fish produced from a farm site. Rents are subject to review on a cyclical basis. In other circumstances, a substantial sum may be paid initially by a tenant to a landlord under a lease, and thereafter, a peppercorn annual rent paid. Finally, there are also methods used for the sharing of revenues derived from the foreshore between the Crown Estate and lessee. It is important that these practices can continue to be accommodated under the provisions of the Bill.

We consider that the terms of section 13 are sufficiently wide in scope to facilitate different methods for the calculation of rents being used.

Section 14

The Crown Estate Act 1961 prohibits the granting of leases of over 150 years' in duration in relation to Crown Estate assets.¹⁴ We therefore consider it appropriate that the Bill's provisions are in line with this.

Section 14A

This section was introduced by amendment at stage 2. The section confers regulation-making powers on the Scottish Ministers for the transfer of a right or liability from a manager to another manager, even if the management function is not to be transferred or delegated. The powers complement existing provisions in section 3 of the Bill.

Sections 15 - 16

No comment.

Section 17

See our comments on section 6.

¹⁴ Crown Estate Act 1961, section 3(2).

Section 18

We note that section 18(2) does not apply to Crown Estate Scotland but that the Crown Estate Scotland Order contains a requirement that Crown Estate Scotland (Interim Management) must operate in a transparent and accountable manner.¹⁵ The terms of the Bill will amend this to read 'Crown Estate Scotland'. We consider that it would be clearer if the transparency and accountability provisions contained in section 18 are extended to include Crown Estate Scotland. These could be in line with the terms of the Crown Estate Scotland Order to ensure unnecessary duplication would not be required.

Section 19

No comment.

Section 20

We are supportive of the requirement for Scottish Ministers to prepare a plan for the management of the Scottish Crown Estate. We suggest that a timeframe for preparation of the initial plan is included in the Bill. We also welcome the requirement that Scottish Ministers must lay a copy of the plan before the Scottish Parliament.

We note that the management plan is required to set out plans in relation to the acquisition of new assets. We consider that it would be appropriate for the plan also to cover any planned disposals of assets. We note the recommendation of the Committee that proposals to maintain cross-subsidisation of assets should be set out in any management plan.¹⁶ This may be of significance to the management of the estate and therefore we consider there would be merit in such information being included in the plan.

Section 21

We note the requirement for review of the plan. In the event that Scottish Ministers are of the view that the plan should not be revised, we consider that the statement to be laid before the Scottish Parliament to this effect should also reflect the reasons for such view.

Section 22 and 23

We consider the terms of these sections to be appropriate in scope. We note that Crown Estate Scotland is exempted from the requirements under these sections. We appreciate that there is provision under the Crown Estate Scotland Order¹⁷ requiring Crown Estate Scotland (Interim Management) and following passage of the Bill, to require Crown Estate Scotland, to produce a corporate plan.

However, there are differences between the requirements for management plans under the Bill and the requirements for a corporate plan by Crown Estate Scotland as contained in the Order. We consider that there would be benefit in there being greater parity between the requirements on Crown Estate Scotland

¹⁵ The Crown Estate Scotland (Interim Management) Order 2017/36, Article 4.

¹⁶ Environment, Climate Change and Land Reform Committee, Stage 1 Report on the Scottish Crown Estate Bill, 3rd Report, 2018 (Session 5), paragraph 279.

¹⁷ The Crown Estate Scotland (Interim Management) Order 2017/36, Article 19.

and on other managers of assets. Such parity would mean that sections 22 and 23 could apply to Crown Estate Scotland without the need for duplicate reports to be prepared.

Sections 24 and 25

No comment.

Sections 26 - 33

We have no substantive comment on these sections. We consider the accounting controls and audit arrangements to be satisfactory, although others will be better placed to make comments on these sections.

Sections 34 - 39

No comment.

Section 40

In respect of the Bill's regulation making powers, we consider it would be appropriate for a consultation requirement to be included to ensure transparency and accountability. We welcome the amendment to the Bill at stage 2 in respect of regulations under section 3(1) which will now be subject to the affirmative procedure in certain circumstances.

For further information, please contact:

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