



The Scottish Parliament
Pàrlamaid na h-Alba

Published 13 November 2018
SP Paper 420
54th Report, 2018 (Session 5)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Scottish Crown Estate Bill as amended at Stage 2



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Delegated Powers and Law Reform Committee

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

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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



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Introduction

1. At its meetings on 6 and 13 November 2018, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Scottish Crown Estate Bill as amended at Stage 2 (“the Bill”).ⁱ
2. The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
3. This Scottish Government Bill was introduced by the Cabinet Secretary for the Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, on 24 January 2018. The Environment, Climate Change and Land Reform Committee is the lead Committee. The Delegated Powers and Law Reform Committee published its Stage 1 Report on the Bill on 29 May 2018.ⁱⁱ
4. The Bill completed Stage 2 on 18 September 2018. The Government lodged a Supplementary Delegated Powers Memorandum (“SDPM”) after Stage 2.ⁱⁱⁱ The Committee reports on the delegated powers provisions in the Bill as amended as follows.

ⁱ The Bill as amended at Stage 2 is available [here](#).

ⁱⁱ The Committee’s Stage 1 report is available [here](#). The report includes a further overview of the Bill in paragraphs 4 to 10.

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

Bill overview

5. The Bill is in 4 Parts:

- Part 1 changes the name of Crown Estate Scotland (Interim Management), to Crown Estate Scotland.
- Part 2 sets out definitions and the mechanisms by which the management of the Scottish Crown Estate assets can be changed.
- Part 3 makes provision about 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.
- Part 4 makes general provision about regulations, ancillary provision, consequential and minor modifications, interpretation, commencement and the short title.

Delegated powers provisions as amended at Stage 2

6. At its meeting on 6 November 2018, the Committee considered each of the delegated powers provisions in the Bill as amended at Stage 2.
7. At that meeting, the Committee agreed that it did not need to draw the Parliament's attention to the delegated powers (as amended) in the following provisions:
 - Section 3 – Transfer of management function
 - Section 4 – Directions requiring delegation of management function
 - Section 6(1)(b) – Meaning of “community organisation”.
8. In addition, the Committee agreed to write to the Scottish Government with questions on section 14A (Rights and liabilities) of the Bill as amended. The Scottish Government responded in writing on 8 November 2018. This correspondence is reproduced in the Annex to this Report.

Section 14A – Rights and liabilities

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Revised or new power: New**
- **Parliamentary procedure: Affirmative if textually amending an Act, otherwise negative**

Provision

9. Section 14A has been added at Stage 2. The section includes power conferred on Ministers to make regulations to transfer rights or liabilities between managers of the Scottish Crown Estate, even if the management function is not to be transferred or delegated under sections 3 or 4.
10. The Government amendment resulting in the new section was agreed to without further debate at Stage 2.

Committee Consideration

11. The SDPM explains that the new section follows the lead Committee's recommendation that further consideration should be given to whether the Bill adequately covered liabilities. The new section enables Ministers to transfer by regulations a right or liability relating to a Scottish Crown Estate asset, a former Scottish Crown Estate asset or a “historic Scottish asset” from one manager to another, without also requiring the transfer of the management function.

12. A “manager” for these purposes is defined in section 2 as a person who, for the time being, has the function of managing one or more Scottish Crown Estate “assets” on behalf of the Crown.
13. A “former Scottish Crown Estate asset” is an asset which once formed part of the “Scottish Crown Estate” as defined by section 2 of the Bill, by reference to the Crown Estate property, rights and interests which devolved in accordance with section 90B(5) of the Scotland Act 1998. A “historic Scottish asset” is defined differently, by schedule 2 of the Crown Estate Transfer Scheme 2007. In essence this covers Scottish land assets which once formed part of the Crown Estate, but which were not within the assets that transferred to Crown Estate Scotland (Interim Management) under the Transfer Scheme.
14. The Committee (per the annexed correspondence) sought an explanation from the Scottish Government on various matters, to clarify aspects of this power and how it could be used. The Committee welcomes that a detailed explanation has been provided.
15. The Scottish Government has acknowledged in relation to section 14A that- “there are a wide range of possible scenarios that could arise in relation to the creation of rights and liabilities, depending on the asset in question, the manager involved and the history of the asset, and the power is accordingly broad in order to cater for this wide range of scenarios.”

Recommendations

16. **The Committee considers that regulations under section 14A should be subject to the affirmative procedure (rather than the negative) if they make provision for the transfer of a right or liability which relates to an asset all or part of which is situated in, or relates to, the Scottish marine area or the Scottish zone. This would reflect the provision in section 40(1A) that regulations under section 3(1) which transfer the management of assets, if they so relate to that area or zone, are subject to the affirmative procedure. This takes into account the significance of these marine assets.**
17. **The Committee agrees that regulations under section 14A which textually amend an Act are subject to the affirmative procedure.**

Annex

LETTER TO THE SCOTTISH GOVERNMENT 6 NOVEMBER 2018

The Delegated Powers and Law Reform Committee considered the above Bill today, Tuesday 6 November, and seeks an explanation of the following matters. To enable the Committee to consider the Government's response to these matters prior to Stage 3, a reply by 12 noon, Thursday 8 November is requested.

Section 14A – Rights and liabilities

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Revised or new power: New**
- **Parliamentary procedure: Affirmative if textually amending an Act, otherwise negative**

Section 14A has been added at Stage 2, to confer power on Ministers to make regulations to transfer rights and liabilities between managers, even if the management function is not to be transferred or delegated under sections 3 or 4. In relation to the new power in section 14A, the Committee asks the Scottish Government the following questions:

(a) The Supplementary Delegated Powers Memorandum explains that the power is “to cover the potential scenario that a manager may encounter difficulties in managing a liability, but does not require the Scottish Ministers to transfer the management of an asset at the same time”. Why therefore is it considered appropriate that the power extends to the transfer of rights in assets, as well as liabilities?

(b) (i) Why is it considered appropriate that the power extends to the transfer of rights and liabilities in former Scottish Crown Estate assets and “historic Scottish assets”, as well as existing assets within the Estate; given that—

- **the power enables transfers between “managers”, which section 2 defines as persons who for the time being have the function of managing one or more of the existing Scottish Crown Estate assets, and**
- **the whole provisions of and restrictions in the Bill, apart from section 14A, apply to the “Scottish Crown Estate assets” and managers of those assets, and do not extend to former or historic assets not in the Estate?**

(ii) What is the difference between the categories of “former Scottish Crown Estate assets” and “historic Scottish assets with the meaning of paragraph 1 of schedule 2 of the Crown Estate Transfer Scheme 2017”?

(c) Why is it appropriate that the affirmative procedure applies to the transfer of management functions by regulations under section 3, where it applies to an asset situated in or relating to the Scottish marine area or the Scottish zone, but the negative procedure applies to regulations under section 14A that transfer a right or liability in such an asset (unless the regulations textually amend an Act)?

(d) Could some examples be provided of how this power might be exercised, including in relation to former or historic assets?

RESPONSE FROM THE SCOTTISH GOVERNMENT 8 NOVEMBER 2018

Scottish Crown Estate Bill after Stage 2

Thank you for your letter of 6 November 2018 to James Hynd, Head of Cabinet, Parliament and Governance Division, on behalf of the Delegated Powers and Law Reform Committee (“DPLRC”) requesting information on various aspects of the Scottish Crown Estate Bill (“the Bill”) as amended at Stage 2. I am replying in my capacity as lead official on the Scottish Crown Estate Bill and have addressed each point in turn below.

Section 14A – Rights and Liabilities

This section gives the Scottish Ministers a power to make regulations transferring rights and liabilities between Scottish Crown Estate managers which can be exercised at a time when the management function is not also being transferred or delegated. This power is additional to the power contained in section 3(1)(b) to transfer rights and liabilities, which may be used only at the time when a transfer of management of an asset is being made. The power relates to rights and liabilities relating to Scottish Crown Estate assets, former assets and historic Scottish assets (assets which once formed part of the Crown Estate in Scotland but did not form part of the Estate when management was transferred to Crown Estate Scotland (Interim Management (“CES(IM)”)).

This letter provides the further information requested under each of the specific questions on Section 14A.

(a) The Supplementary Delegated Powers Memorandum explains that the power is “to cover the potential scenario that a manager may encounter difficulties in managing a liability, but does not require the Scottish Ministers to transfer the management of an asset at the same time”. Why therefore is it considered appropriate that the power extends to the transfer of rights in assets, as well as liabilities?

Section 14A also provides for a right relating to a Scottish Crown Estate asset to be transferred as well as the transfer of a liability relating to a Scottish Crown Estate asset, a former asset or a historical Scottish asset and complements section 3(1)(b) by not also requiring the function of managing the asset as required under section 3(1)(a) to also be transferred. The power in section 14A mirrors that of section 3(1)(b) in terms of what is capable of being transferred between persons. There are a wide range of possible scenarios that could arise in relation to the creation of rights and liabilities, depending on the asset in question, the manager involved and the history of the asset, and the power is accordingly broad in order to cater for this wide range of scenarios.

Section 14A provides for the situation where a manager had the liability transferred to them at the time the function of managing the asset was transferred to them and it subsequently transpires that the manager lacks the capability to manage the liability associated with the asset or where the liability straddles assets managed by two or more managers, and it would be practical for another manager to act as the manager of the related right or liability. The costs of meeting the liability will, of course, be met by the Scottish Crown Estate. It may, in some cases, be necessary to transfer a right to pursue a particular liability (e.g. against a third party) from one manager to another.

(b) (i) Why is it considered appropriate that the power extends to the transfer of rights and liabilities in former Scottish Crown Estate assets and “historic Scottish assets”, as well as existing assets within the Estate; given that—

- **the power enables transfers between “managers”, which section 2 defines as persons who for the time being have the function of managing one or more of the existing Scottish Crown Estate assets, and**
- **the whole provisions of and restrictions in the Bill, apart from section 14A, apply to the “Scottish Crown Estate assets” and managers of those assets, and do not extend to former or historic assets not in the Estate?**

The Crown Estate Transfer Scheme 2017 (SI 2017/524) transferred all the rights and liabilities of historic Scottish assets to CES(IM). Since April 2017 CES(IM) has been responsible for the rights and liabilities relating to these historic assets as well as management of the assets in Scotland transferred under the devolution arrangements. As the manager, CES(IM) has powers to transfer the ownership of the assets, the management of which was devolved and it may be desirable or necessary to retain a right or liability in relation to a Scottish Crown Estate asset after the transfer of the ownership of a Scottish Crown Estate asset (e.g. to retain mineral rights or liabilities arising from the requirements of the Environmental Protection Act 1990). In such a transaction these rights or liabilities in relation to the transfer of the ownership of the asset which had been devolved would become a right or liability in relation to a former Scottish Crown Estate asset. This is a separate category to rights or liabilities in relation to a former Crown Estate asset in Scotland that ceased to form part of the Crown Estate in Scotland (see paragraph 1 of schedule 2 of the Crown Estate Transfer Scheme 2017) because it was sold before 1 April 2017, and those rights and liabilities which are categorised as historic Scottish assets.

In the response to question b(ii) below I have set out the difference between a “former Scottish Crown Estate assets” and “historic Scottish assets”. The power to transfer the function of a Scottish Crown Estate asset in section 3 of the Bill, is concerned with the power to transfer rights and liabilities in relation to an asset the management of which is actually being transferred. It is not possible to transfer the management of a historic Scottish asset because by definition it is not something which is part of the Crown Estate in Scotland, as there is no asset any more. Section 14A therefore is the only mechanism by which rights and liabilities associated with these historical Scottish assets can be transferred to someone who becomes a Scottish Crown Estate asset manager by way of the provisions within the Bill. Rights and liabilities in relation to a former Scottish Crown Estate asset or a historic Scottish asset may relate to or align closely to a specific asset that still forms part of the Scottish Crown Estate, such as retained rights to part of the foreshore in a particular area that no longer forms part of the Scottish Crown Estate but is adjacent either side to other parts of the foreshore which do form part of the estate. The function of managing part of the foreshore that forms part of the Scottish Crown Estate and the rights and liabilities in relation to that part of the foreshore may be transferred to a community organisation and retained rights and liabilities in relation to an adjacent part of the foreshore that once formed part of the estate may at the time of transfer remain with CES(IM). In parallel, another part of the foreshore nearby may be transferred to a local authority. If it were to transpire that the community organisation was not able to manage some or all of the rights and liabilities in relation to the asset for which the management function had been transferred to them it may be appropriate to transfer one or more of the rights or liabilities to another person mentioned in section 3(2) while enabling the community organisation to continue to manage the asset.

The right or liability could be transferred to CES(IM) but there may be a scenario where there is a better arrangement. For example, in relation to the foreshore it may be the case that the local authority already owns most of the foreshore in the area and that the transfers of the management of the foreshore described above formed the last part of the foreshore in the local authority area that formed part of the Scottish Crown Estate. It may be agreed by the relevant parties that it would be better for the local authority to take on the management of the right or liability in relation to the asset managed by the community organisation and also the rights and liabilities in relation to the adjacent foreshore which was an historic Scottish asset or former Scottish Crown Estate asset, recognising that all the costs would be paid from the Scottish Crown Estate rather than by the local authority.

The other duties in the Bill apply to the property, rights and interests to which section 90B(5) of the Scotland Act applies. This means that they apply to the assets transferred under the Crown Estate Scotland Order 2017 as well as retained rights and liabilities in relation to an asset sold since 1 April 2017. The only section of the Bill that is concerned with historical Scottish Crown Estate assets is section 14A, because as I have explained above, a historic Scottish asset is by definition something which is no longer part of the Crown Estate in Scotland because there is no longer an asset.

(ii) What is the difference between the categories of “former Scottish Crown Estate assets” and “historic Scottish assets with the meaning of paragraph 1 of schedule 2 of the Crown Estate Transfer Scheme 2017”?

A “former Scottish Crown Estate asset” is an asset which once formed part of the Scottish Crown Estate but the ownership of it has subsequently transferred so that it no longer forms part of the Scottish Crown Estate.

“Historic Scottish assets” are defined by Schedule 2 of the Crown Estate Transfer Scheme 2017 as “any property, rights or interests (excluding any limited partnership rights) in land in Scotland (i) which once formed part of the Crown Estate, but (ii) which immediately before the transfer date are not Scottish assets. “Scottish assets” means any property, rights and interests to which section 90B(5) applies (paragraph 2 of the Transfer Scheme).

Section 2 of the Bill defines “Scottish Crown Estate” as being the property rights and interests to which section 90B(5) applies, so “historic Scottish assets” are not therefore part of the Scottish Crown Estate. They are a separate category of property, rights and interests held by CES(IM).

(c) Why is it appropriate that the affirmative procedure applies to the transfer of management functions by regulations under section 3, where it applies to an asset situated in or relating to the Scottish marine area or the Scottish zone, but the negative procedure applies to regulations under section 14A that transfer a right or liability in such an asset (unless the regulations textually amend an Act)?

The transfer of the function of management of part of the seabed was considered to be a significant transfer for which the affirmative procedure would be appropriate. Section 14A is limited to the transfer of rights or liabilities in relation to an asset and does not extend to the transfer of the function of managing an asset. Regulations made under this section will be subject to affirmative procedure if they textually amend an Act and otherwise will be subject to the negative procedure.

(d) Could some examples be provided of how this power might be exercised, including in relation to former or historic assets?

Please see the information provided in paragraphs 3 and 4 of the response to question (b).

I trust that this information will be of assistance to the DPLRC.

