



OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 20 February 2018

Session 5



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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
6th Meeting 2018, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

Claudia Beamish (South Scotland) (Lab)

*Donald Cameron (Highlands and Islands) (Con)

*Finlay Carson (Galloway and West Dumfries) (Con)

*Kate Forbes (Skye, Lochaber and Badenoch) (SNP)

*Richard Lyle (Uddingston and Bellshill) (SNP)

*Angus MacDonald (Falkirk East) (SNP)

*Alex Rowley (Mid Scotland and Fife) (Lab)

*Mark Ruskell (Mid Scotland and Fife) (Green)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Mallon (Marine Scotland)

Mike Palmer (Marine Scotland)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 20 February 2018

[The Convener opened the meeting at 09:40]

Decision on Taking Business in Private

The Convener (Graeme Dey): Good morning and welcome to the Environment, Climate Change and Land Reform Committee's sixth meeting in 2018. I remind everyone present to switch off mobile phones and other electronic devices, as they may affect the broadcasting system. We have received apologies from our colleague Claudia Beamish.

Agenda item 1 is consideration of whether to take agenda item 3 in private. Do members agree to do so?

Members *indicated agreement.*

Scottish Crown Estate Bill: Stage 1

09:40

The Convener: Agenda item 2 is evidence on the Scottish Crown Estate Bill at stage 1. In this first evidence session, we will hear from Scottish Government officials on the background to and content of the bill. I welcome David Mallon, who is the head of the Crown estate strategy unit of Marine Scotland; Mike Palmer, who is deputy director in the aquaculture, Crown estate, recreational fisheries, European maritime and fisheries fund and Europe division of Marine Scotland, which is quite a title; and Douglas Kerr, who is a solicitor in the Scottish Government's legal directorate. Good morning, gentlemen.

Let us kick off by looking at the duties in section 7. How might those duties make a difference to how Crown Estate assets are managed?

David Mallon (Marine Scotland): Good morning. I will kick off by outlining the Scottish ministers' policy perspective on that. My legal colleague, Douglas Kerr, can add anything else that is worth saying.

The first thing to highlight is that the duty in section 7 is a reform of the duty in the Crown Estate Act 1961, which requires the manager to "maintain and enhance" the value of the estate

"and the return obtained from it, but with due regard to the requirements of good management."

However, "good management" has never been defined. It has sometimes been interpreted as requiring good stewardship; at other times, it has been interpreted as having the ability to take account of other factors. There are examples of the Crown Estate Commissioners in the past, and Crown Estate Scotland currently, using that second interpretation at small scale, but the existing managers have always been wary about the legal vires of that. Therefore, in thinking about what the long-term framework for management of the Crown estate in Scotland should be, the Scottish ministers have wished to make it more explicit that wider factors—the economic, social and environmental benefits that can arise from decision making—can properly be taken into account. We expect that, through that more explicit ability, managers will be more encouraged and will be careful to take account of opportunities before final decisions are reached.

The Convener: I want to focus on the environmental wellbeing aspect, in particular. On the Crown Estate's role in leasing the sea bed for activities, my interpretation is that it currently performs that duty with a view to generating

income, but takes no account of the environmental impacts of, for example, salmon farming or offshore wind turbines. There has been contention about those on the east coast. How will that situation be different in the future? Will it be different at all?

David Mallon: The short answer to that is that we will have to wait to see how managers will use the new discretion. The existing decision making by managers of Crown Estate assets sits within the wider context of Government licensing of activities: a fair amount of environmental assessment already takes place before any activity can happen in the sea. A Crown Estate lease provides the ability for an actor to secure exclusive use of a space, but I think that, with the new duties, over time the spotlight will increasingly be placed on the environmental, social and wider economic consequences, rather than on the more narrow return that can be obtained from the lease by the Crown Estate.

09:45

The Convener: I welcome the addition of environmental wellbeing, but I am trying to understand what purpose it will serve and what difference it will make. At the moment, we rely on Marine Scotland, Scottish Natural Heritage and others to consider the environmental impacts of such activities. What specific duty would be placed on the Crown Estate?

David Mallon: We have to look at section 7 in the context of section 11, which is about transactions such as sales and leasing, which are market considerations that have, until now for the Crown Estate, focused on profit maximisation. Section 11 contains reforms that open the possibility of wider factors being taken into account. Section 7 can be viewed as showing that the Scottish ministers wish to see wider consideration of social, environmental and economic factors across the whole range of Crown Estate activity. Without section 7, transactions would rely only on section 11 rather than on the ethos of the organisation's whole operation.

The Convener: Do you envisage that the Crown Estate may in the future engage with other agencies to see whether there are environmental concerns—for example, before it enters in to an arrangement to allow a lease of sea bed?

David Mallon: To be fair to Crown Estate Scotland, I say that such discussion already happens. The decision making to which the convener referred is in the context of the national marine plan, which gives direction to all consenters, including Crown Estate Scotland or future managers of Crown Estate assets. Over and above that, it should provide even more

explicit requirements for a manager to look up front at the extent to which such wider factors—not just the return to the Scottish Crown Estate—should play out.

The Convener: Mike Palmer may wish to come in on that point. How do you see that interaction?

Mike Palmer (Marine Scotland): The extra duties and powers that will be placed on local managers are part of an overall balance that the Scottish ministers wish to develop in the management of the Scottish Crown estate. The ethos encourages greater and stronger local stewardship of assets and greater community empowerment. The Scottish ministers also wish to ensure that, alongside those, due consideration is given to the wider societal benefits that local managers should pursue and seek to achieve. The ethos that has been pursued by the Crown Estate Commissioners has been very commercial, up to now. The Scottish ministers seek to broaden that as part of a trade-off that includes local empowerment and letting some national management go to the local level.

John Scott (Ayr) (Con): Good morning. If the machine that has, in essence, produced yield on assets moves to the new ethos, there will be a loss of focus on that objective. Do you expect the change in direction to reduce the yield on assets? If so, how much of a reduction do you expect, given the tightness of the Scottish budget?

Mike Palmer: The bill includes a primary duty to increase the value of the assets.

John Scott: How will you measure value?

Mike Palmer: The bill refers to seeking to achieve “market value”—a clearly understood term that is defined in the commercial world, as a concept—except in certain circumstances, which are also defined in the bill. Local managers would have a primary duty to obtain market value and, thereby, to increase the value of the overall assets, so that focus is not being lost in any way. However, in the view of the Scottish ministers, a balance must be struck between that and social and environmental considerations, without sight being lost of either.

John Scott: I want to pin you down on this. Do you expect the yield from the assets to reduce as a result of the new focus?

Mike Palmer: Our expectation is that the yield from the Crown Estate's overall assets will rise, which will also benefit Scotland. The Scottish ministers' intentions are that, across all the elements—the economic, the environmental and the social spheres—benefit should accrue to Scotland from how Crown Estate assets in Scotland are managed. Ministers do not want to lose sight of that financial benefit, which goes

alongside the other benefits: they expect the overall yield to be protected and for it to rise.

The Convener: I presume that some of the overall yield will not go to the Scottish ministers, but to local authorities.

Mike Palmer: The commitment has been made that part of the yield from assets will go to local authorities.

Mark Ruskell (Mid Scotland and Fife) (Green): How will the new objectives on environmental and social wellbeing change the relationship with the regulators? For example, the Scottish Environment Protection Agency is undertaking a sectoral review of salmon farming and will introduce new regulations. My impression is that Crown Estate Scotland has been only loosely involved in that process. Do you see a different, perhaps tighter, relationship developing with the regulator?

David Mallon: I have lots of discussions with Crown Estate Scotland and with regulators. My sense is that a lot of dialogue takes place. A partnership approach is taken by the public sector in Scotland to many activities. New discussions might take place around the margins, but I think that the relationships already exist.

Mark Ruskell: My point is that we have not seen Crown Estate Scotland embedded in some processes—in particular, those on regulatory reform. Do you expect that to change? Is Crown Estate Scotland's current level of engagement—with, for example, SEPA, on salmon farming—adequate, or do you expect that engagement will increase as a result of the new objectives?

David Mallon: As I have said, Crown Estate Scotland is already involved in a lot of initiatives. Engagement could increase. People understand that Crown Estate Scotland is an interim manager, so they might be involved directly in discussions.

The change that we can anticipate through implementation of the bill is that there would be more managers and that more one-to-one discussions could be had with the regulators. As Mike Palmer said, there is a wish to balance local discretion with a national framework. We see the strategic plan as a means by which strategic intentions can be outlined, and by which regulators can efficiently have that dialogue with managers of Crown Estate assets in Scotland. Over and above that, there may be specific initiatives in which managers could get involved.

We have to wait and see. It is difficult: there is no blueprint of what the future will look like because there is not yet full knowledge about local ambitions for management of Crown Estate assets. Everyone would like to see managers of Scottish Crown Estate assets being involved in

those types of discussions. We are starting from a good foundation; the question is how much more will be needed as the changes play out.

Alex Rowley (Mid Scotland and Fife) (Lab): A point was made about the new discretion in relation to social good and environmental good. Where will the final decisions on social good and environmental good be made? The convener gave the example of salmon farming. If Shetland Islands Council, for example, has control over waters, and decides on environmental grounds not to accept an application for a salmon farm, will that be the final decision or could the operator lobby the Scottish ministers? Where will the power lie? Will it be devolved to local managers or will there be a process by which their decisions could be overruled?

David Mallon: The power will lie with the managers of assets, who must have regard to the duty and can use discretion. They will have to be able to defend their decisions. The decisions will not be taken in isolation, but will sit within the wider context of Scotland's regulatory framework, including the framework that governs the environmental context for decision making—the national marine plan, in the example that Alex Rowley used. There will also be the strategic plan, which is provided for in the bill, for the wider and longer-term approach to management of assets. That should set the context for managers, who must have regard to the strategic plan. There will be local discretion—but within a decision-making context that is provided for in the wider regulatory framework, and in policies and legislation other than the bill.

Mike Palmer: On where power will lie, the bill is drafted in such a way as to give ministers the discretion to decide case by case whether a transfer should be made to a local manager. There will be a very careful process of consultation and scrutiny of people's proposals on how they wish to manage an asset. That process will be undertaken before any decision to transfer to a local manager. There will be checks and balances to ensure that, case by case, considered decisions are taken by the Scottish ministers before a transfer.

The Convener: I want to go back to Mike Palmer's answer to John Scott about what is envisaged in terms of income generation. In the financial memorandum, there is speculation on the range of possible financial costs to the Scottish Government. It suggests that there is potential—I stress "potential"—for a drop in income from local authority ports and from non-operational ports and jetties. It speculates that the range would be "zero to medium", which over a five-year period could be anywhere between £2 million and £10 million. There appears to be anticipation of the possibility of a drop in revenue from one aspect of current

income. Given that, do you still hold to the view that, overall, there will be an increase in income?

10:00

Mike Palmer: I think that the Scottish ministers envisage that there is a substantial opportunity for the overall value of the estate to rise. Some elements of the estate might not be expected to return as much in the short or medium terms as other elements, but there are other opportunities—offshore in the marine environment, for example—about which it is felt that the likelihood is quite high that revenues from the estate will increase quite significantly. Clearly we cannot guarantee that or know exactly what will pan out in the future, but those are the current indications.

The Convener: One obvious opportunity is offshore wind, but that depends on the United Kingdom Government's attitude to financial support. John Scott wants to come in.

John Scott: I am intrigued by the concept that income will fall in some areas and that, as a result, other areas will have to work harder and provide more income. Would you care to be more specific about that? Are we talking about rents from properties—farm rents, or whatever? In which areas is income expected to rise, given that income from other areas is expected to fall?

Mike Palmer: I will defer to David Mallon on the detail—

John Scott: I think that you should answer the question, given that you made the statement.

Mike Palmer: I guess that it is almost a statement of fact that some assets might in any one year be expected to deliver more revenue than others. It is not possible to predict that with total accuracy from one year to the next, and it is often dependent on the wider economic context within which one is managing the estate.

John Scott: Forgive me for asking such a blunt question, but do you have a business plan for developing the project?

Mike Palmer: Yes. The current national manager, Crown Estate Scotland (Interim Management), has a business plan and a forward strategy for managing the estate. Clearly, as we move towards the legislation and into a period when there will be the potential to transfer down to a local level, the overall dynamic of the management of the assets will change, and we will be looking at individual business plans and strategies drawn up by local managers. At the moment, however, a national planning regime is in place.

David Mallon: I think that Mike Palmer was looking at both dimensions: first, the more narrow

return to the Crown Estate Scotland from a transaction; and, secondly, what might be called a national accounting framework. As far as a manager's duties are concerned, the default would be a commercial approach unless they could demonstrate that it was expected that wider benefits would accrue. Where those benefits would accrue, it would be tolerable in a national sense to experience a reduction in that income. Even though the fiscal framework and accounting might result in an overall reduction to the Scottish block, the reduction in the revenue or capital obtained would be expected to be accompanied by wider benefits accruing to Scotland as a whole. As a whole, therefore, the position should be neutral, at least, or favourable.

I should also add that the scenarios contained in the financial memorandum range from no change—which could be how managers choose to run and manage the assets—to a maximum position of no charge and zero revenue equivalent to what is obtained at present.

The truth probably lies somewhere in between, but until managers have the ability to follow their own local priorities, in that national context, precise changes in the existing income level will be quite difficult to predict.

John Scott: Have projections been made, or not?

David Mallon: Through our work on the business and regulatory impact assessment for the consultation paper and, building on that, through the financial memorandum, we have looked at the potential consequences over the next five years and at the various scenarios. Underlying that are some assumptions and quite a lot of work that we have done with our finance colleagues, our economists and stakeholders.

John Scott: Thank you very much.

The Convener: Donald Cameron has a question.

Donald Cameron (Highlands and Islands) (Con): I refer the committee to my entry in the register of members' interests, in that I am a landowner.

I want to be clear about this. When we talk about management of an asset, to what extent does revenue accrue to the manager and to what extent does it remain with the Crown Estate?

David Mallon: I will try to cover that point, although I ask my fellow witnesses to add to my comments if I miss anything. The manager is responsible for the management of that asset and will receive the gross revenue that is generated from it. The costs associated with management of the asset will be paid from that gross revenue by the manager. If there is a surplus at the end of the

year, it is required to be paid into the Scottish consolidated fund.

Donald Cameron: Let me give a hypothetical situation of a wind farm on one of the Crown Estate's estates and perhaps both the local community council and the local authority want to be the manager, and a significant net income is involved. How would that situation be resolved? Does the bill put in place a framework for the resolution of such disputes?

David Mallon: Correct me if I am wrong, but I think that the dispute that you mention relates to who should be the manager—the community or the local authority. In such a situation it is not impossible to foresee some difference of opinion. The Scottish ministers hope that, through following due process for the implementation of the bill, such issues might be resolved at an early stage. As part of the implementation plan, rather than just awaiting ad hoc proposals from individual organisations, the Scottish ministers are contemplating the value of a phased approach and a process that might involve seeking views from communities and local authorities over and above those that, to date, have expressed views on their ambitions to manage assets. A considered view might then be taken as to who, in any one circumstance, is best placed to take on management responsibility. Once that issue is decided, there will be duties that will apply to managers, relating to, for example, the production of a management plan to outline intentions on how assets will be managed, proposed sales and so on. At a practical level, I expect a manager to receive a lot of contributions on what should be in the plan, so that there is, at a second level, the ability to manage potential differences in opinion among parties.

The Convener: Thank you. Let us move on. Kate Forbes has a question.

Kate Forbes (Skye, Lochaber and Badenoch) (SNP): I will continue with the theme of revenue generation. In 2015, the First Minister stated that coastal and island communities

“will benefit from 100 per cent of the net revenue generated in their area from activities within 12 miles of the shore”.

You may have touched on this earlier, but what is the current thinking on arrangements for distribution to coastal and island councils of net revenue from marine assets out to 12 nautical miles?

David Mallon: We are in discussion with the Convention of Scottish Local Authorities about the mechanics of implementing that commitment. The starting point is that, as we speak, and although the devolution of the management has been secured, we do not yet have a set of audited accounts for Scotland, let alone for the assets at a

more local level. That set of accounts will be available only at the end of this financial year. Once it is produced and finalised by Crown Estate Scotland and audited by the Auditor General, that will provide the reference point for what the net revenue is. In our discussions with COSLA, we have been looking at a way in which there can be an allocation to individual local authorities based on that amount, probably on an interim basis, given that that will be the first set of accounts.

Kate Forbes: Presumably, based on your earlier answer to Donald Cameron, that revenue would go directly to coastal and island councils only if the local authority was the manager.

David Mallon: Not in the initial phase, because Crown Estate Scotland has been the manager for the past year. In a broader sense, that commitment recognised the point that has been made that some benefit should accrue from the presence of those activities taking place on assets adjacent to the population concerned. Ministers have so far sought to draw a distinction between management and revenue, so that we do not have to wait until the question of management is settled before local communities can benefit from the revenue that has been generated.

Kate Forbes: Is it the case that, irrespective of who is the manager, coastal councils will benefit from 100 per cent of the net revenue?

David Mallon: Yes, in a sense, but I would like to rephrase that slightly, if that is all right. Irrespective of who is the manager, we want coastal communities to benefit, and the interim arrangements would go through the local authorities. As management changes and we perhaps have a mix of community organisations and local authorities, the unanswered question is whether it is correct that local authorities should be the only beneficiaries of that income as the whole system develops, or whether there is a need to reappraise the way in which the money ultimately reaches a community.

Kate Forbes: Where there are councils—Highland Council, for example—that have some islands but a lot of area that is landlocked, would the net revenue go directly to the council, and would there be any stipulation that it is to return to communities that are actually on the coast?

David Mallon: Another strand to the dialogue with COSLA concerns the extent to which it will be an allocation without any description of what its purpose is, or whether there will be some guidance on how it should be used. Sometimes there is ring fencing around local authority funding. It is unlikely that ring fencing will be the favoured option, but dialogue is happening and there may be some communication by ministers when the award is given as to the overall purpose of that

money. Those discussions have not yet concluded.

Mark Ruskell: What motivation will there be for organisations to become managers, given that 91 per cent of the revenue will go to the Scottish consolidated fund, although there will obviously be different arrangements for local authorities? To pick up on Donald Cameron's example of a community wanting to become the manager of a wind farm, there would be some profit there, but most of the revenue profit would go elsewhere. How will the arrangements that you are setting out in the bill affect that motivation, when managers are not able to invest their full profits back into the assets?

10:15

David Mallon: The finances are an interesting and complex set of issues to work through. You are referring to the 9 per cent that the existing manager can at present retain for reinvestment in the estate. Even if the figure remains at 9 per cent—with the ability to vary that in future—although 91 per cent will go into the Scottish consolidated fund, as is the case for Crown Estate Scotland, that amount for reinvestment would not be an insignificant sum for a local community that was managing an asset that is perhaps underutilised at present. Although there is a focus on national management, a community might have ideas on how a local asset could be managed differently but might not have the ability to do that. Even 9 per cent could be a game changer if it is directed at that specific activity rather than across the estate.

Over and above that, in my dialogue with stakeholders and in the stakeholder advisory group, which is convened by the cabinet secretary, and through the consultation responses, the theme of local control has been, I would say, stronger than that of revenue. Also, as I just said in relation to the question on revenue, there is potentially the ability to go beyond the 9 per cent that can be retained before money is paid into the Scottish consolidated fund, through decision making on what happens once the money reaches the consolidated fund. As a starting point, the issue is as much about control as it is about the revenue that can be generated. However, the revenue may not be insignificant, even at 9 per cent, although it could be more.

Mark Ruskell: I hear that but, in managing a wind farm, for example, there is a huge amount of sweat equity involved. How was that 9 per cent figure arrived at?

David Mallon: That is a carryover and a continuation of the long-standing arrangements that the Crown Estate Commissioners agreed with

the Treasury. Through discussion with Crown Estate Scotland (Interim Management), that was thought to be the appropriate requirement moving forward. The bill will enable that 9 per cent to be varied, primarily depending on need for reinvestment, such as capital investment, in the estate.

Mark Ruskell: So it is an historical figure.

David Mallon: Yes.

Mark Ruskell: It does not reflect the new arrangements, in which there will be a more diverse base of managers.

David Mallon: That is correct, but the bill provides the ability to take account of the requirements of an individual manager.

Finlay Carson (Galloway and West Dumfries) (Con): My primary question about the 9 per cent figure has been answered. There is potential for multiple managers to be identified across Scotland. We have a lot of coastal councils. What process will there be for deciding who the most appropriate manager is? Even in my constituency of Galloway and West Dumfries, we could have the local authority as well as multiple community organisations wanting to take over harbours or have a share in the community benefit that could be derived from managing wind turbines in their patch. How will that process play out? Will there be a bidding process?

How will you address the potential for conflicts of interest, given that local authorities will potentially take 100 per cent of the income generated but will also be the planning authority or the authority that looks after environmental health?

David Mallon: To take the last point first, in other settings, local authorities have to manage those conflicts of interest, and they have experience of putting in place systems that are designed to avoid such conflicts coming into play.

On how a manager will be decided, as I said, one option would be for the Scottish ministers just to await proposals or requests from individual parties, with the expectation that there could be a variety of proposals for the same asset. Another option, as I mentioned earlier, is for ministers to attach a process to that.

The Scottish ministers' view is that, whoever becomes a manager, it would have to be as a result of an inclusive process, in which the existing manager and others who will be doing business with the new manager are involved and consulted, and come to a view on an appropriate arrangement. As I said, ministers are contemplating having a process whereby parties can make a request, which would have to demonstrate that a proposal is of benefit and that the required capability exists. In the consultation

that the Scottish ministers conducted last year, I think that 86 per cent of respondents to the question said that councils or community organisations should demonstrate their capability.

Proposals that come forward will need to be looked at carefully to ensure that the arrangements are appropriate. Even if the council or community organisation has a good stake, good knowledge and, in principle, a good reason to take on management of an asset, there is a need for a smooth transition through any change and for a service to continue to be delivered to tenants, industry bodies and companies that depend on that service.

Finlay Carson: At the moment, it could be said that the Crown Estate wind farms are all managed by one or two people; there is one person who looks after the coastal areas. Following this bill, there could be multiple managers. Would the income generated by the whole of Scotland be reduced because there would be far more management involved than there is at the moment?

David Mallon: I will try to answer the different strands to that question. There will need to be a final decision on whether it is appropriate to devolve that particular activity further. Even if it is—which is a fairly open question, as no final decision has been taken—and there is more than one manager, the bill provides for a strategic plan for the management of the assets, and therefore a strategic overview. There is also the national marine plan.

As outlined in the financial memorandum, there is the possibility that there could be increased costs associated with administration. However, there could be increased opportunities such as new revenue from a manager managing assets commercially that have not been managed commercially before. There is the possibility of increased costs—primarily one-off changes—such as some additional administration costs and some additional transaction costs for operators in the industry that have to deal with more than the one or two people whom they deal with at present. We hope that those transaction costs would be reduced based on the ability of the industry to engage primarily at the strategic-plan level.

Finlay Carson: Do you foresee a situation in which, if the income generated is not greater, one manager would be retained for all the wind farm interests that the Crown Estate has at the moment, and that management of wind farms would not be devolved to local authorities or community group organisations?

David Mallon: It is not possible to rule out that ministers might have concerns about the costs involved. There might be other ways in which the

end could be achieved, such as some form of local decision making through support, administration or involvement by the local community. Ministers want the bill to make it possible to change who manages the assets at present, through the two processes that exist. The Smith commission recommended that further devolution opportunities should be considered. Ministers want the bill to enable that process to happen, but also for the bill to be a tailored approach to local circumstances, which takes account of the wider asset base as well.

John Scott: Forgive me for this question; I probably have not read enough on the subject. If 100 per cent of the net income from fish farming or wind farms is to be given to local authorities or community bodies, will the same amount be deducted from councils' overall annual budget settlements from the Scottish Government, or will those net incomes be in addition to councils' annual settlements? That might be a binary question; forgive me for not knowing the answer.

David Mallon: At present, the intention is not to deduct an equivalent amount from general local government budgets, but I think that we will have to—

John Scott: It will be in addition, then.

David Mallon: It will be in addition. That is the current proposal, but no final decision has been made.

The Convener: Does not that potentially create a conflict of interest for a local authority when it comes to make a decision about consent for, say, a salmon farm? The local authority must weigh up the environmental impacts, for example, but its decision could generate income for it.

David Mallon: I see the link as quite indirect, given the mechanics of the Scotland Act 2016, which requires the revenue to be paid into the Scottish consolidated fund. The discussions about how allocations are made to local authorities will probably, in the absence of our being able to pinpoint how much each asset is making, naturally mean—although the system is not designed in this way—that the decision on a particular asset for a particular purpose will be a few steps removed from the issue of how much is received at the end of the financial year.

The Convener: My point is about the principle.

Mike Palmer: If I might refer to something that David Mallon said earlier, we are conscious that local authorities already have to make a wide range of decisions that potentially draw them into conflicts of interest. Local authorities have rigorous governance arrangements in place to ensure that there are checks and balances in the internal systems that they run, so that their decisions are

proper, objective and not unduly coloured by conflicts of interest. We expect the local governance arrangements in local authorities to be rigorous enough to enable authorities to make the decisions that we are talking about.

The Convener: I am not suggesting that local authorities would necessarily act in a certain way. However, they could be open to allegations about conflict of interest from people who oppose projects. I am thinking about how we safeguard local authorities from allegations or accusations in that regard.

Mike Palmer: Indeed. I think that the Scottish ministers recognise that. It is worth repeating David Mallon's point about the indirect way in which the money will flow and the methodology that we envisage using for redistributing the money—we do not envisage it being tied to individual income that is received from, say, a fish farm. I think that that will create sufficient distance to reassure detractors that there is no perceived conflict of interest.

The Convener: We will explore the issue more as we go through the evidence-gathering process.

Alex Rowley: We have mentioned the potential for increased administration costs. In relation to the proposed reporting arrangements, the bill provides for the setting up of a new Scottish public body and for mechanisms such as the preparation of a strategic plan, which will be laid before the Parliament, and the preparation—by managers of assets—of annual reports and management plans, which will also be laid before the Parliament. The bill also provides for a framework to transfer and delegate management to a number of different types of manager.

With all that, is there not potential for establishing what could become a complex set of management arrangements? In terms of the reporting requirements for ministers, Crown Estate Scotland and asset managers, is there a balance between the level of bureaucracy and the ability to innovate with new ideas and developments? After all, what is this all about and what change will it bring? I assume that that ability is behind the thinking for making the devolution changes, so is there a balance between allowing local managers to innovate and keeping control of the estate as a whole?

10:30

David Mallon: There is, very much so. There is a balance to be struck between local discretion and accountability, and, along with accountability, consistency around Scotland where there is value in having consistency. The bill's provisions seek to ensure that there is a balanced approach.

When it comes to the costs, ministers view it necessary that a set of accounts is produced for transparency and accountability purposes. That is also because the assets remain under the ownership of the Crown, and decisions on how to obtain revenue from the assets could potentially have an impact on the overall Scottish block. From those perspectives, it was thought important to have that accounting framework. On the cost, Crown Estate Scotland (Interim Management) is required at present to produce accounts and a plan, and we see the cost as being broadly equivalent to that.

There is the possibility of some increased costs as a result of the change in management process. Ministers have overseen the process by which the new interim body was established; it involved the establishment of a new set of systems, staff transfers and so on, and that experience will assist when it comes to making further change in a way that is sensitive and takes account of staff welfare.

We are probably in a different scenario from that recent change, in that the way in which the devolution was done resulted in the need for the Scottish ministers, Crown Estate Scotland and Crown Estate Commissioners to establish brand new systems, because there was no willingness for shared services on a wider United Kingdom basis. Those systems were created and they have been designed to run the assets in Scotland. Therefore, further change at an operational level could be expected to require adaptation of the systems rather than brand new systems or, in the case of, say, a local authority, the adaptation of its own system. The costs are likely to be significantly lower than the initial costs of setting up Crown Estate Scotland (Interim Management).

John Scott: I want to discuss the difference between the transfer of powers under section 3 and the delegation of powers under sections 4 and 5. What is the rationale for the two different means of devolving management powers?

David Mallon: Ministers' basic approach is to have more than one tool in the toolbox—it is horses for courses. The transfer process would result in a permanent change, whereas the delegation process is required to have a timescale that could be quite long term, although there is the ability to complete the process on a shorter-term basis.

More fundamentally, the result of a transfer would be the end of Crown Estate Scotland's involvement in the direct management of the asset whereas, with a delegation, there would still be a relationship between Crown Estate Scotland and the new manager. We view the second result, in which there is the ability to have that relationship, as potentially more attractive to some local managers. It could involve Crown Estate Scotland

providing such things as staff support, other infrastructure or guidance. The main on-the-ground difference between the two processes for further devolution is that delegation would enable Crown Estate Scotland to be one step removed from direct involvement.

John Scott: Thank you. Can you give me examples of circumstances in which you might expect each process to be used? What happens if a transfer goes wrong, such as if a body ceases to exist—if, having had assets transferred to it, it goes bankrupt, for example? What would be the fall-back position in those circumstances?

David Mallon: The provisions in the bill make it possible for a community organisation to take on the management of one or more assets on an area basis or a community-of-interest basis. Because of that possibility, the bill could lead to one of the few instances of a non-public organisation managing a public asset. The fact is that it is, unfortunately, more likely that a private company or a community organisation in the third sector will cease to exist. Therefore, the bill's provisions not only enable a transfer to community organisations but allow for the arrangements that should apply on an organisation's ceasing to exist to be specified in the transfer order.

For a delegation to that type of organisation to be made, ministers would first direct the existing manager to delegate the management. There would then be a requirement for the existing manager and the future delegate to strike a delegation agreement. There would be the ability through that delegation agreement to specify what would happen should the organisation that is taking on the delegated management cease to exist, including what should happen to the management of the asset in the future.

Also—importantly in the case of delegation—until that unfortunate scenario occurred, Crown Estate Scotland would be involved in some way, shape or form. Therefore, it would be able to readily take on again the direct management of the delegated asset.

John Scott: I am more interested in the transfer than in the delegation. I presume that the transfer is an arm's-length agreement and that, once an asset is transferred to another body—whatever that body is—it is gone. What happens then?

David Mallon: In the bill, there are provisions that enable the specification of what will happen once the organisation ceases to exist. Over and above that, there is the ability, in theory, for another transfer to another body to take place through another Scottish statutory instrument.

The Convener: I would like to clarify something. I would guess that it is just part of a belt-and-braces approach to cover any eventuality, but for

both transfer and delegation there is a reference in the bill to

“another Scottish public authority”,

meaning something other than a local authority. If I am right in interpreting that as belt and braces, that is fine. If not, do you have any thoughts on what other Scottish public authorities might take on the management of assets?

David Mallon: I hasten to add that the Scottish ministers currently have no plans for that. However, ministers consulted last year on a long-term framework for the management of Crown Estate assets. When formulating the bill proposals, we wanted to think beyond the first phase of any transfers or delegations and to consider what might be appropriate in the future as far as the landscape for delivery is concerned.

It is difficult to say where such possibilities might emerge. However, what you suggest is probably more readily a good proposition where there is alignment between an organisation's existing functions and the area of activity or the economic sector in which the manager of a Crown Estate asset is currently involved. One way of looking at it, therefore, is as providing the potential for greater alignment between the functions of existing bodies and the related leasing function that Crown Estate Scotland operates.

The Convener: John Scott has another question to ask before I bring in Mark Ruskell.

John Scott: This will be my final question, convener. What are the opportunities for public and parliamentary scrutiny of decisions to transfer or delegate powers?

David Mallon: The transfer of powers would happen through a Scottish statutory instrument, which would be subject to parliamentary scrutiny. Obviously such an order would be published and agreed thereafter.

Delegation would take place through a direction to the existing manager, which would be published. The bill does not require the delegation agreement to be published, because the detail is likely to include commercially sensitive information or other information that it would not be appropriate to publish. However, over and above the requirements of the bill's provisions, ministers' policy is to have transparency, openness and accountability, and the content of the delegation agreement could therefore be published in some way, shape or form.

I should also point out that, for any transfer, ministers will be required by the bill to consult the existing manager, the future manager and anyone else whom they consider appropriate. Moreover, any delegation will require the agreement of the delegate.

John Scott: You have said that a transfer will happen through an SSI. Given that the transfer of some assets might be quite significant, will such an instrument be subject to affirmative or negative procedure?

David Mallon: The proposal is for any transfer order that seeks to amend primary legislation to be subject to affirmative procedure; if that is not the case, it will be subject to negative procedure.

John Scott: However, in the interests of the openness and transparency that you have already referred to, would it not be better in most cases for the instrument to be affirmative?

David Mallon: The provisions in the bill sit alongside what is likely to be a lot of dialogue that will take place prior to the laying of an order, including discussions with the existing manager, the proposed new manager and other interests. I envisage a lot of that activity taking place before ministers are satisfied that the order is ready to be laid.

John Scott: I see. Thank you.

Mark Ruskell: Why does the bill not contain an automatic presumption that local authorities will be the managers of the foreshore and sea bed?

David Mallon: Ministers have taken a view that a one-size-fits-all approach is not appropriate for such a diverse range of assets. The consultation outlined three options: first, the traditional do-nothing scenario, in which everything would still be managed at the national level; secondly, the devolution of all assets to a local level, either to local authorities or to community organisations; and, thirdly, a case-by-case consideration of the appropriate level for managing individual assets. Although there was no overriding expression of support for any one of those options, the most favoured option was the case-by-case approach. Because of the complexity and variety of assets and the different views that exist on the matter, ministers have carried that approach into their proposals, to enable more than one outcome.

In addition, so far, not all local authorities have said that they want to take on the management of the assets. Ministers did not want to impose the change, especially as some of the assets may have significant liabilities. At present, we do not have a full set of accounts for the entire estate, let alone for individual assets. Only at the end of this year will we have a year of accounts for the Scottish assets.

10:45

Mike Palmer: We are also aware that, in some areas where local authorities have expressed an interest in taking over management, community organisations have also expressed an interest. It is

important to take into account that, as well as local authorities, other types of organisations are interested in taking over management. That is another reason for making decisions on a case-by-case basis.

It may be worth making the committee aware that arrangements are being developed to pilot local management of assets so that we can test-bed the process of transferring management to a local level. Those arrangements are being developed by Crown Estate Scotland (Interim Management).

Angus MacDonald (Falkirk East) (SNP): Picking up on that point, can you tell the committee what progress there has been on the development of pilot schemes for the devolution of assets to the island authorities? Can you give an indication of the timing of that and of any support that may be required by the local authorities?

I refer members to my interests in non-domestic property in the Outer Hebrides.

David Mallon: Crown Estate Scotland (Interim Management) was requested by the Scottish ministers to continue dialogue with the islands councils about the proposal for pilots of local management in the island areas. Those discussions have continued between Crown Estate Scotland (Interim Management) and the local authorities.

Another strand of thinking that Crown Estate Scotland (Interim Management) has been developing involves the possibility of pilots in other areas. The board of Crown Estate Scotland (Interim Management) has been considering how best to take forward the issue of pilots. It is finalising its thinking and is in dialogue with COSLA and the islands councils about making an announcement on the best way forward in the near future.

Donald Cameron: "In the near future" is an interesting phrase. Discussions that I had with one islands authority indicated that it is very keen to pilot a scheme. I hope you understand that there is not impatience but enthusiasm for pilot schemes and know that the island authorities want to start as quickly as possible.

David Mallon: Another sign of Crown Estate Scotland (Interim Management)'s serious intent to take forward pilot proposals is that, in the autumn, it appointed an independent contractor to develop advice and a programme of work for how it could do that.

I know that "in the near future" is not as specific a timetable as you would like, but it is important that Crown Estate Scotland (Interim Management) makes the announcement, and I do not think that it will be too long in coming.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I have a brief point about the definition of “community organisation” that is used in the bill. First, and most obviously, why is it different from the definition of community bodies that appears to fit in other legislation? Why have a different definition?

David Mallon: What is being contemplated here is different from what is in other legislation, but the bill is modelled on existing legislation in terms of the characteristics and criteria. The value of not exactly mirroring what is in other legislation is that this situation is different and ministers think that it is very important to make it possible for community organisations to take on the management of assets. A third sector community organisation would need to consider carefully whether its constitution and so on will tolerate it becoming the manager of an asset on behalf of the Crown. Other legislation mentions specifically Scottish charitable incorporated organisations or community benefit societies, and the judgment was made that such mentions could imply that it would be automatically possible for any such organisation to take on management. In fact, very careful case-by-case consideration will be required.

Stewart Stevenson: Existing community bodies take ownership, in essence, of assets on a permanent basis, such as Machrihanish airbase. Such a situation is clearly different from being a manager of someone else’s asset. Some bodies are hybrid and own assets as well as managing other people’s assets—I think that Stòras Uibhist is one example. Have you looked at the crossover between existing models and reached any conclusions on what works well and, perhaps in some cases, less well? Community bodies, in particular, have sometimes had local issues to do with definitions of geography. For example, the Ulva buyout depended on the consent of people on the mainland, because the definition is based on postcodes. Have you learned from those difficulties and deliberately come up with different things because of that knowledge?

David Mallon: We have certainly learned from wider experience. The proposed definitions are the product of substantial discussion with policy leads in community empowerment and land reform about what is appropriate for this setting. The conclusions that have been reached so far are about a complex area: Stòras Uibhist has a mix of functions; some charitable and community organisations are a mix of a SCIO and a community benefit society, while some organisations are one or the other; the provisions also make it possible for a private organisation to take on management. The two types of charitable organisation will need to think through the complexities carefully in the context of the asset

that they are interested in taking on and the way in which the management would operate, so that they can best ensure that what they want to see happen will not risk their status or existence.

Stewart Stevenson: My final question is about mainly the risks and maybe the opportunities. A community organisation would be a manager on behalf of the Crown Estate. If the community organisation fails, would its liabilities stay in the organisation or would they pass back to the Crown Estate?

David Mallon: The transfer or delegation would be implemented in such a way as to ensure that the asset would come back to the Crown Estate.

Stewart Stevenson: My question was broader. It is clear that the asset that the community body had managed would remain with the Crown Estate. If, for example, the community body concluded that the best way to discharge its responsibilities would be to enter into a contract to manage some aspects of its responsibilities with a third party that then failed, I can see liabilities being created that would have to either stay with the now-failed community organisation or pass back to the Crown Estate. Are we clear about the legal issues that might cause an organisation to fail and who would end up with the liabilities in that category?

David Mallon: A substantial amount of thinking has been done on liabilities. The transfer order or the delegation agreement would make provision for the management of liabilities and a requirement for the manager to keep separate accounts for the management of the Crown asset and the management of any other activities. Therefore, it should be possible to discern the liabilities associated with the management of the Crown asset, which will be helpful to an extent in the scenario that you have painted. However, I do not think that that will be an easy scenario to work through; it never is.

There is also the question of what a liability is. Largely speaking, it is a cost. It could be an historical cost or a future cost.

Thinking through all those aspects has taken up a substantial amount of time to date, and they will have to be properly reflected in the mechanism or vehicle for effecting a transfer so that we can minimise the negative scenarios.

Stewart Stevenson: I am hearing that the community organisation would be allowed to take on a contingent liability or a liability that could pass to the Crown Estate only if the Crown Estate had given permission in the first instance for that possibility to exist.

David Mallon: In practice, that is probably right. It is difficult to make a general statement about

such a complex area, but there is an expectation. I go back to the prior question about what the benefit to a community organisation from managing an asset is. I think that it is encapsulated by the idea of having control and some financial benefit for reinvestment in the estate to benefit the community. However, if that is the extent of the benefit, ministers are keen to be careful not to overburden the manager with liabilities that would sit with it if it no longer existed. It is all managed as a Crown asset, so it is about how we can recognise what a Crown liability is and ensure that it is treated separately, as it should be, from the manager's other activities.

The Convener: I want to raise an issue before we come to Richard Lyle's final question. There is considerable experience in the Crown Estate of creating local management agreements. How much of an asset will that be in coming to arrangements? The experience among staff of guiding organisations and determining the appropriateness of arrangements might help us to avoid the scenarios that Mr Stevenson has identified.

David Mallon: A lot of experience exists, and I think that the intention is to ensure that that experience is not lost and that it can be accessed and used to think through those issues.

Richard Lyle (Uddingston and Bellshill) (SNP): Good morning. At stage 2 of the Forestry and Land Management (Scotland) Bill recently, I was successful with amendments to remove sections 18 to 20 of that bill, which might have caused confusion and additional complexity for groups that seek to get involved in land management. The Cabinet Secretary for Rural Economy and Connectivity agreed with those proposals and supported them. What help will you give to groups to realise their potential and their ideas? I want groups to get access and to be part of the new idea. What will you give them? Will you pay for start-up costs or allow them to access revenue streams immediately if they come up with ideas that you guys or girls support?

David Mallon: There are three ways in which that capacity can be built, the first of which involves looking to increase awareness and knowledge of what the assets are and how they are managed so that there is an understanding of what is involved, what could potentially be taken on and whether, in the group's view, it is appropriate for it to seek to take an asset on.

Secondly, we will I hope benefit from experience as pilot proposals are developed and begin to be implemented. The experience on the ground of running the pilots will help in considering the future use of the powers for ministers in the bill, not only in the pilot areas but potentially in other areas.

Thirdly, the bill includes powers for ministers or Crown Estate Scotland to provide support costs for the transition of an organisation to being a manager or for that matter a delegate.

11:00

Richard Lyle: So I am right in thinking that you will empower groups and will be prepared to look at any legal proposals that will increase assets or encourage community groups in local areas.

David Mallon: Yes. Any reasonable request will need to be properly assessed and a decision will have to be taken. The Cabinet Secretary for Environment, Climate Change and Land Reform has made it clear that she is interested in community organisations that wish to take on management of one or more of the assets. We are in discussion with Community Land Scotland and other organisations about how we can disseminate information on what the bill enables and how organisations can express an interest. The pilots and, I hope, the parliamentary scrutiny process will be important in raising the profile of this set of issues.

The Convener: Thank you, gentlemen. This has been a useful scene setter for the work that we are about to undertake.

At the committee's next meeting, on 27 February, we will take evidence from Paul Wheelhouse on the Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451). We will also consider our draft report to the Rural Economy and Connectivity Committee on our inquiry into the environmental impacts of salmon farming and consider our approach to future work on the marine environment.

As agreed earlier, we will now move into private session. I ask for the public gallery to be cleared, as the public part of the meeting is now concluded.

11:02

Meeting continued in private until 12:56.

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