

## **COSLA Response**

### **Crown Estate: A Consultation on the Long Term Management of the Crown Estate in Scotland**

#### **Key messages**

- COSLA welcomes the commitment from Scottish Government to follow the principles of the Smith Commission in relation to the devolution of the Crown Estate in Scotland. COSLA considers that alignment with Scottish Government policies would be best achieved through devolution to local authorities. This would ensure transparency of democratically elected bodies being responsible for the Crown Estate in Scotland and will allow for local communities to have a greater say and input into how the Crown Estate is managed going forward and therefore enhance community empowerment.
- COSLA disputes the references to fragmentation being made in relation to further devolution beyond the Scottish Parliament. COSLA believes that onward devolution to local authorities will lead to greater community empowerment, transparency and de-centralisation, therefore devolution to the local level would actually avoid fragmentation. Local authorities deal with a number of complex and technical issues on a daily basis, and therefore it should be for interested local authorities to take on responsibility for the Crown Estate where they feel that this would be appropriate and of benefit to local communities.
- In relation to issues of finance and liabilities of the Crown Estate going forward COSLA is unable to take a specific view on all of the finance elements. At present there is insufficient information available for COSLA to be able to take a wholly informed view of what the liabilities and risks of further devolution would be. However, COSLA's preferred view is that there should be further devolution of the Crown Estate to local authorities. Additionally, if a pilot is to take place, this will be helpful in establishing the required information in terms of risks and liabilities, along with the experience of the interim body once established. COSLA also recognises that there may be the need to consider cross subsidy in relation to future devolution, and that this may hinge on the decision about whether the estate will continue as an estate or an estate(s) in land which has not yet been taken.
- In terms of the structure of the consultation, this makes it difficult to see how the distinction has been drawn between which questions should be open and which should be closed. This has influenced how COSLA has chosen to respond to the consultation.
- Many of the consultation questions could be answered in a number of ways depending upon whether they are specifically referring to terrestrial or marine assets, and again COSLA would question how such responses are to be analysed if the question is not clear as to the type of asset being referred to. For instance, in relation to question 4, responses to this question could theoretically be split between marine and land based assets.

In what follows where appropriate we have indicated where COSLA believes a closed answer to a question is appropriate. However, given concerns that we have with the overall structure of the consultation and the distinction between open and closed questions, text based responses have also been provided to answers where COSLA believe this was necessary regardless of whether the question was open or closed.

**Q1: Should the future approach be changed from the duty to manage the assets on a commercial basis?**

**YES**

**NO**

**Don't know**

**Q2: If YES, should there be a power to take account of wider socioeconomic or other benefits?**

**YES**

**NO**

**Don't know**

COSLA believe that the future approach to the Crown Estate in Scotland should be changed from the duty to manage the assets on a commercial basis, and that there should be the power to take account of wider socioeconomic or other benefits.

**Q3: If YES, which assets should be managed on a commercial basis and which should be managed differently? (Please provide details in the space below)**

COSLA believe that it should be considered on an individual and case by case basis whether assets should be managed on a commercial or other basis. This is particularly crucial when considering that assets do not have any value until something is done with them, such as the seabed or land that is not yet developed. Therefore, socioeconomic or community benefit also needs to consider the future use of potential assets if they are presently not profit making.

**Q4: Should the requirement on 'good management' be retained?**

**YES**

**NO**

**Don't know**

**Q5: Should the requirement on 'good management' be amended to take account of environmental implications in relation to the management functions?**

**YES**

**NO**

**Don't know**

**Q6: Should the existing Crown Estate portfolio in Scotland be preserved in its current form?**

**YES**

**NO**

**Don't know**

COSLA does not believe that the estate should be preserved in its current form, particularly given that there could be a division between marine and land based assets of varying values. The current portfolio has been accumulated and managed as a UK-wide portfolio, and it should be for the managers in Scotland to decide how the estate is maintained, particularly if

there is to be a widening out of the approach from a duty to manage the estate on a purely commercial basis.

**Q7: Should Scottish Ministers' approval be required for sizeable sales?**

**YES**   
**NO**   
**Don't know**

Yes, however COSLA would like to term sizeable defined, as this is not detailed in the consultation document. This would be required so that future managers were aware of the differentiation between sizeable and non-sizeable assets and whether approval of Scottish Ministers would be required for certain sales. COSLA consider that it may be appropriate for this to operate in a similar manner to energy consents at present, where developments above a certain scale require consent of Scottish Ministers.

**Q8: Should the existing policy - the general presumption against selling the seabed - be maintained?**

**YES**   
**NO**   
**Don't know**

No, however COSLA wishes to highlight the issue with this being a closed question in that a definitive yes or no answer could be problematic.

It may be that at certain times local authorities would wish to acquire part of the seabed, on the assumption that local authorities would also have control of the revenue and management of the asset as per the Smith Commission recommendations. Given the assumption that management and net revenue will be coming to local authorities, the presumption against sale would be valid at this point.

Currently the Crown Estate does not appear to have a consistent policy in terms of selling the seabed, therefore this is a presumption only and not a precedent, as there are varying agreements across the country which have adopted various approaches, Lerwick Harbour being one of them. Likewise, in some instances it may be necessary to sell the seabed in order to prevent an asset being loss making, which would be in the wider public interest, and in line with wider socioeconomic or community benefit considerations.

The term presumption would also need to be defined, as would references to estate(s) in land which is currently misleading. For instance, if capital assets are to be reinvested in the estate, if this was done via a long lease the revenue would still come to local authorities.

**Q9: Do you have any other views on how the management of the Crown Estate in Scotland can ensure delivery of the duties in the Scotland Acts 1998 and 2016? (Please provide details in the space below)**

Further devolution to local authorities is the preferred view of COSLA.

**Q10: How can transparency on the sale and management of the Crown Estate assets be enhanced? (Please provide details in the space below)**

Further devolution to local authorities is the preferred view of COSLA.

**Q11: How can the devolution of the management of the Crown Estate contribute to community empowerment? (Please provide details in the space below)**

Further devolution to local authorities is the preferred view of COSLA. Given that the Interim body will not be subject to the Community Empowerment (Scotland) Act 2015, the Procurement Reform (Scotland) Act 2014 or the forthcoming socioeconomic duty within the Equality Act 2010 but local authorities are, this means that the only mechanism for achieving community empowerment is to devolve the Crown Estate in Scotland to local authorities.

**Q12: How can the devolution of the management of the Crown Estate contribute to land reform? (Please provide details in the space below)**

The linkage between land and marine assets is the continuation of that land reform process. Issues remain around ownership of the foreshore, and further detailed legal advice may be required in relation to this specific question.

**Q13: How can we further improve alignment with Scottish Ministers' objectives to deliver on the national outcomes? (Please provide details in the space below)**

Further alignment with Scottish Ministers objectives can be improved through greater community empowerment via devolution of the Crown Estate to local authorities.

**Q14: Do you have any views on the proposed application of the above principles to guide the long term framework for managing Crown Estate assets?**

YES   
NO   
Don't know

**Comment:**

Yes, COSLA has views on the principles being proposed to guide the long term framework for managing Crown Estate assets.

Local authorities must comply with the duty of Best Value placed upon them. This differs from Value for Money as mentioned in the principles contained in the consultation document and as currently applies to the NHS. As such the principles as currently drafted would pose a conflict for local authorities as potential future managers of the Crown Estate in being able to fulfil their statutory duty to provide Best Value. Furthermore, Best Value at the local authority level would be subject to scrutiny by Audit Scotland, and this would likewise apply to the Crown Estate once devolved to local authorities. Therefore, COSLA questions the reference to Value for Money which would be in conflict with local government's statutory duty to provide Best Value, and furthermore is not appropriate in relation to community empowerment.

COSLA is also concerned about the reference to Scotland as a whole within the proposed principles, which could be read in an anti-devolution context and potentially suggest a move away from favouring devolution to local authorities. Likewise, this seems at odds with a community empowerment approach, and it is crucial that funding is spent in local communities rather than being siphoned off beforehand. Albeit COSLA also recognises that potential managers do have a responsibility to consider the position as a whole to ensure that new revenue does not reduce because of inefficient management. However, this would be dealt with by local authorities as managers applying the principles of Best Value as they are statutorily obliged to do so in terms of making arrangements to secure continuous improvement in performance whilst maintaining an appropriate balance between quality and cost; and in making those arrangements and securing that balance; and having regard to economy, efficiency, effectiveness, the equal opportunities requirements, and to contribute to the achievement of sustainable development.

**Q15: Which of the three proposed options for managing Crown Estate assets in Scotland do you prefer?**

- Option 1 (national)**
- Option 2 (local)**
- Option 3 (hybrid)**
- Don't know**
- OTHER**

**Q17: Should a geographic or a functional approach guide the reform of the management of the Crown Estate in Scotland?**

- Geographic**
- Functional**
- Don't know**
- Other**  **Please Specify:**

Once devolved to local government this should be left to local authorities to decide upon. The answer to this question could easily differ depending upon whether it is referring to marine or territorial assets for instance a geographic approach would be more appropriate in order to fit with marine planning.

**Q18: Do you have a preference for management on a geographic basis being led by either local authorities or communities?**

- Local authorities**
- Communities**
- Don't know**

Yes, and COSLA would challenge the differentiation between local authorities and communities given that local authorities represent communities, and would be the obvious route for engagement with communities, and handling particular requests and discussions with communities about onward devolution beyond local authority level. As such COSLA would challenge the differentiation made between local authorities and communities, and would highlight again the Smith Commission recommendations in terms of onward devolution to local authorities, who represent communities, as opposed to direct to communities. COSLA expects that subsidiarity arrangement will apply to discussions about where competencies are managed including in relation to the Crown Estate.

**Q19: Should Scottish Ministers have the power to hand responsibility for management of the estate, or parts of it, to a particular person or persons?**

**YES**   
**NO**   
**Don't know**

Yes, to local authorities.

**Q20: Should Scottish Ministers have a power to vary management arrangements held by other parties over time?**

**YES**   
**NO**   
**Don't know**

This is a somewhat leading question. Should Scottish Ministers be able to intervene and be a safeguarder if managers refuse to do certain things even if this is devolved to other statutory bodies like local authorities? This will ultimately depend upon the overall national framework proposed for the Crown Estate in Scotland and whether this will function in a similar way to terrestrial planning, the National Planning Framework and locality planning. There is an inherent conflict within this question and how it could be answered. For instance, would this impinge upon the duties of managers in Scotland, if there is in effect a power of veto to revoke agreed management arrangements, or is it a safeguard to protect the interests of the estate overall? This is not a clear cut question that can be answered with a simply yes or no answer and COSLA would question why it has been posed in this manner.

**Q21: Should Scottish Ministers have the power to extinguish rights currently held in the Crown Estate where management of the asset can be adequately covered by other legislation?**

**YES**   
**NO**

COSLA considers that this is a strange question to be posed, and considers that detailed legal advice should be sought in relation to this specific question.

The consultation document simply states that Scottish Ministers are considering whether they should have the power to extinguish right currently held in the Crown Estate where management of the asset can be adequately covered by other legislation. This would provide for simplification of the legal frameworks for managing activities, where appropriate.

COSLA considers that this suggestion requires much further detailed consideration in terms of how such rights would be extinguished and details provided of the other legislation which could cover management of the asset, as at present there is insufficient information to answer this question definitively.

**Q22: Do you have any views on which assets should be managed at the (i) national level (ii) by local authorities or (iii) by communities? (Please provide details in the space below)**

Yes, COSLA has views in terms of the assets to be managed at the various levels.

Overall local authorities are proven to be sound in terms of managing assets in the public interest and via democratically representatives, and therefore local authorities are best placed to act in the interest of communities.

COSLA considers that local authorities should manage planning for marine out to 12nm; leasing for marine and tidal, seabed rights, offshore wind, moorings, aquaculture, and offshore shipment. Local authorities are well placed to manage these assets, particularly via the one stop shop model being proposed as a pilot in the Island Authorities, and this would manage the apparent conflict that industry appear to see with these issues.

COSLA also considers that there should be a presumption that any issues not listed on p33 of the consultation document should be managed by local authorities, as local authorities are the route to further devolution to communities.

COSLA are not comfortable, and do not think that it would be appropriate or sensible for communities to potentially manage leasing for wave and tidal given the scale of potential development. However, this could potentially be kept under review as wave and tidal technology matures.

Again this question may have been better framed in terms of a split between territorial and marine assets. However, in terms of territorial assets and in particular the rural estates, and other urban properties COSLA would argue that it is for the individual local authorities concerned to take a view on whether it would be appropriate for them to take on management responsibility for particular assets. For instance, consideration would have to be given to whether this would be in the public interest, or where they have a statutory interest, or whether this would help prevent the asset from being loss making. However, there may be issues with some assets around leasing to support tenants, as concerns could escalate. Nevertheless, COSLA would reiterate the fact that local authorities are proven to be sound at managing assets in the public interest and via democratically representatives, and therefore local authorities are best placed to act in the interest of communities.

**Q23: Should local authorities or communities be expected to make a case for further devolution?**

**YES**   
**NO**   
**Don't know**

COSLA does not believe that local authorities should be expected to make a case for further devolution given that this is in line with the Smith Commission and the Community Empowerment (Scotland) Act 2015, and also given that devolution to local authorities will ultimately provide for enhanced democratic accountability and legitimacy for the Crown Estate in Scotland.

COSLA would also question the language in this question, as the preceding text in the consultation document refers to a business case, whereas the question simply refers to a case. Making a business case differs and if a literal interpretation is applied, this would require demonstration of economic and social benefits.

**Q24: If YES, should they demonstrate the capability to ensure appropriate management, to maintain service delivery and to deliver increased benefits?**

YES   
NO   
Don't know

**Q25: Replicating functions in each area is likely to lead to fragmentation of the estate which would pose significant risk to realisation of new revenue – how can these risks be avoided? (Please provide details in the space below)**

COSLA would question the term fragmentation being used here, as it is the wrong term to use. It is in fact devolution, de-centralisation and community empowerment that will occur, and these are positive developments for the Crown Estate in Scotland. COSLA also do not agree that devolution to local authorities poses a risk to revenue for either marine or terrestrial assets.

**Q26: Should shared services be a requirement of devolution to the local level of decision-making on property, rights and interests of the Crown Estate? (Please provide details in the space below)**

COSLA do not believe that shared services should be a prescribed requirement of devolution to local authorities. Collaboration will work in some instances; however, this should not be prescribed by Scottish Government. Indeed, recent consultations (planning) and programmes of work (enterprise and skills review) are looking to grow collaboration organically rather than prescribe how they should operate. COSLA supports this approach and believes it could also apply to the Crown Estate.

COSLA would also emphasise the positive encouragement that local authorities have already committed to in relation to new lines of income from salmon farming and the mussel industry.

In terms of collaboration going forward and the cost to sustain the administration of the estate, COSLA would argue that leasing under existing arrangements could continue if a pilot in the Island Authorities goes ahead.

**Q27: What are the opportunities, if any, of further devolution? (Please provide details in the space below)**

COSLA considers that the opportunities of further devolution are:

- Community empowerment
- Local decision making
- Integration of planning, leasing, consenting, licencing, and regulation
- Increased economic activity and net revenue

**Q28: What are the challenges, if any, of further devolution? (Please provide details in the space below)**

COSLA recognise that further devolution is not without challenge, however we would emphasise that it is for the local authorities concerned that want and have the capacity to support further devolution to ultimately take that decision.

COSLA would also highlight the level of expertise contained within the Crown Estate at present, could potentially be more than some local authorities have individually. Therefore, work needs to be undertaken to ensure expertise is retained following the transfer and further devolution.

COSLA believes that further information in terms of liabilities is required in order that local authorities are aware of what responsibilities and liabilities they would be taking on upon further devolution. Local authorities have a wealth of transferable skills, however further information is required and it is not appropriate for the UK Crown Estate at present to continue to decline share such information. At present it is very hard to challenge assumptions, when local authorities are not sighted on specific details in terms of liabilities.

Finally, COSLA would highlight the issue of Crown immunity and that upon devolution obligations could fall on local authorities.

**Q29: Is there a need for strategic planning and a long term investment strategy, in order to co-ordinate work to enhance the value of the estate?**

**YES**   
**NO**   
**Don't know**

COSLA considers that marine planning needs acknowledgement on a national basis and that it would be in the national interest if projects of a certain size were to require approval from Scottish Ministers.

**Q30: Do you have any views on the value of a national framework to guide local decision-making? (Please provide details in the space below)**

See previous answer.

**Q31: Should there be consistent charging approaches between areas to avoid competition between different parts of Scotland?**

**YES**   
**NO**   
**Don't know**

COSLA considers that if there were to be a consistent approach to charging that this should be negotiated and agreed with local government. It may be that a consistent approach to valuation but not control of price/cost may be more appropriate as per the approach in terms of the right to buy legislation. This would ensure there was not exploitation of local authorities by developers. COSLA would also highlight that a different approach may be necessary for buildings, coastal and marine assets.

**Q32: Are there any other issues that should be covered by a national framework for management of Crown Estate assets in Scotland? (Please provide details in the space below)**

COSLA would argue that there should be the ability to buy back any asset at the same cost it was sold for, similar to the Community Empowerment Act (Scotland) 2015 provisions to buy back assets.

**Q33: Should the future arrangements in Orkney, Shetland and the Western Isles be considered first?**

**YES**

**NO**

**Don't know**

Yes, however COSLA object to the phrasing of this question. It should be phrased as to whether a pilot should take place in these areas in the first instance.

**Q34: Is a phased approach needed to introduce reforms to the management of Crown Estate assets across Scotland?**

**YES**

**NO**

**Don't know**

A pilot is one way of doing this in terms of implementing a phased approach and Scottish Government have already indicated that a phased approach will be adopted. COSLA believes that the intervening period of 3 years being indicated by Scottish Government, between the initial transfer to the Scottish Parliament and onward devolution to local authorities is a useful time to run a pilot. Thereafter a phased approach would begin to take effect after a pilot has taken place. Legislation is not necessary for a pilot to take place as Our Islands Our Futures have intimated to Scottish Government some time ago, and a pilot can in fact help inform the legislation for the longer term management arrangements.

**Q35: Is there value in a pilot scheme prior to implementing reforms?**

**YES**

**NO**

**Don't know**

Yes- see previous answer.

**Q36: How can people influence decisions in relation to the management of the Crown Estate assets? (Please provide details in the space below)**

People can influence the decisions in relation to the management of the Crown Estate assets through the democratic process of local authorities once it is devolved, and via the right to seek to participate in the Community Empowerment (Scotland) Act 2015.

COSLA would question how the interim arrangements are going to involve communities when this body is not subject to the Community Empowerment (Scotland) Act 2015.

**Q37: How should the long term governance arrangements differ from the interim arrangements? (Please provide details in the space below)**

The pilot should inform the long term governance arrangements, as the Smith Commission was clear that there should be further devolution to local authorities. It would not be appropriate to simply allow the continuation of interim position because this would be the most straightforward position, as it would not fulfil the Smith Commission recommendations. It would also miss an opportunity to increase community involvement in the management of the Crown Estate in Scotland if the interim arrangements were to simply continue rather than onward devolution to local authorities taking place.

**Q38: Should the future framework include flexibility for Scottish Ministers to vary the proportion of revenue retained by the manager?**

- YES   
NO   
Don't know

Scottish Government have made various statements in relation to further devolution of the Crown Estate revenues to local authorities. For instance, the Lerwick declaration outlined that revenues from the Crown Estate should go to local authorities and that the lack of transparency of Crown Estate Commissioners should be removed.

Additionally, the Scottish Government is committed to in *Scotland's Future* to ensuring the island communities benefit by receiving more than 50 per cent of Crown Estate seabed leasing revenues. Likewise, Scottish Government have stated in *Empowering Scotland's Island Communities* that: *"The marine assets of island communities are key to their future and the wealth that is generated should be reinvested to safeguard that future. The Scottish Government will therefore ensure that 100 per cent of the net income from the islands seabed is passed to island communities."*

COSLA would also argue that the totality of the revenue going to local authorities would reflect the greater management burden. If this were to be top sliced in any form this would leave local authorities with a greater burden. COSLA would also argue that the coastal communities fund could be dealt with on a local basis.

COSLA considers the question to be badly phrased, as it could be answered No as there should be 100% devolution of revenue to local areas. However, it could also be a Yes dependent upon the asset and who is the manager. The argument would be that the management fee should go to the manager, and COSLA believe that the manager should be local authorities.

**Q39: Should the arrangement where the capital value of one part of the estate can be used to enhance opportunities elsewhere in the estate be continued?**

- YES   
NO   
Don't know

COSLA understands that a decision has not yet been taken as to whether the estate will continue as either an estate or an estate(s) in land and this impacts on the ability to respond to this question.

COSLA recognises that there will be the need to think about cross subsidy in terms of future devolution. COSLA also considers that in terms of future projects that there could be the possibility of offering rent free periods, however if there was no re-distribution of funds, this could only be funded by reserves.

However, COSLA would also like further detail in terms of who would be the underwriter in terms of for instance potential environmental damage. Thus far Scottish Government's response to this question has been ambivalent.

**Q40: Should the current duty of maintaining the value of the estate and the return obtained from it be continued or amended for the investment of capital proceeds?**

- Continue**   
**Amend**   
**Don't know**

Yes, it should continue as this is important for the future investment and income generation, but with the ability to vary for exceptional circumstances

**Q41: Should capital proceeds from a sale in one area be invested in the same area, or should there be discretion to invest anywhere in Scotland?**

- Invest in same area**   
**Discretion to invest anywhere**   
**Don't know**

**Q42: Should it be possible for the capital or maintenance requirements for an individual asset to be funded from another part of the estate, even if management of the assets are devolved to the local level?**

- YES**   
**NO**   
**Don't know**

Unsure, this links back to question 39 in terms of flexibility.

**Q43: Should funding of strategic activities from Crown Estate resources continue?**

- YES**   
**NO**   
**Don't know**

Yes, COSLA agrees that funding of strategic activities should continue in order to help maximise the value from Crown Estate Assets. However, we would question how this will be funded, and whether this function should be carried out by national development agencies or by Marine Scotland.

**Q44: If YES, should these strategic activities be managed at the national level?**

- YES**   
**NO**

**Don't know**

Yes, as this will help ensure that these activities are managed appropriately.

Yes, however COSLA would question who should pay for this? Should it come from Crown Estate funds, or should it be Marine Scotland in order to prevent revenue being taken away from the Crown Estate.

**Q45: Should the person taking on the responsibility for management of an asset normally take on the responsibility for managing the associated liabilities?**

**YES**

**NO**

**Don't know**

Yes, but who is funder of last resort for larger development? Negotiation around these issues needs to be developed in terms of the funder of last resort, and exposure to risk. If this does not happen this could paralyse development for larger projects.

**Q46: Should the liabilities for land restoration and residual liabilities after decommissioning of marine infrastructure be managed:**

**Locally**

**Nationally**

**Don't know**

COSLA considers that this should be managed locally but funding held centrally. COSLA again asks for instance if the Crown Estate lease an asset how things would be bonded for, and will Scottish Government be the funder of last resort?

In terms of onshore wind an insurance fund is needed, and therefore full disclosure around liabilities is of crucial importance.

**Q47: Should the costs associated with management of liabilities be included in the overheads for estate management?**

**YES**

**NO**

**Don't know**

If this were to be included, there would be very little or nothing left. There is an issue of scale here, so the answer would be yes but caveated. There should be an insurance fund to share risk, and clarity in terms of the fundamental funder of last resort, and worse case scenarios. Would strategic assets be handled any differently?

COSLA would like to highlight the example of the Total oil plant in Shetland where liabilities were huge in terms of potential environmental impact. Scottish Government were involved in developing imaginative ideas about spreading risk and the local authority was held harmless as a re-evaluation of risk was written in and the developer picked up liability. Could a similar approach be adopted for the Crown Estate?

**Q48: Do you have any other views on the devolution of the management or revenue of the Crown Estate? (Please provide details in the space below)**

The scheme put in place for management needs to be clear about how the responsibilities for the income, expenditure, and liabilities associated with the assets are to be treated.

**Q49: Please tell us about any potential costs or savings that may occur as a result of the proposals, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible. (Please provide details in the space below)**

**Q50: Please tell us about any potential impacts, either positive or negative, you feel any of the proposals contained in this consultation may have on the environment. Please be as specific as possible. (Please provide details in the space below)**

**Q51: Are there any likely impacts the proposals contained in this consultation may have on particular groups of people, with reference to the 'protected characteristics' listed above? Please be as specific as possible. (Please provide details in the space below)**

**Q52: Please tell us about any potential impacts upon the privacy of individuals that may arise as a result of any of the proposals contained in this consultation. Please be as specific as possible. (Please provide details in the space below)**