

Written submission from Andy Wightman
The Smith Commission, the Scotland Bill and the Crown Estate
Evidence to Rural Affairs, Climate Change and Environment Committee
Andy Wightman, 12 June 2015

Introduction

The Smith Commission agreed that responsibility for the management and revenues of the Crown Estate in Scotland should be devolved to the Scottish Parliament. (1)

This Agreement reflected the widespread consensus in Scotland that the management of the Crown Estate should be devolved. There have been several inquiries into this topic over the last ten years, from the Crown Estate Review Working Group (2007) to Westminster's Scottish Affairs Committee (2012), which also recommended the devolution of the Crown Estate in Scotland.

The Smith Commission also agreed, like the Scottish Affairs Committee before it, that devolution should be followed by further decentralisation to local authorities, communities and others, of responsibilities for the various Crown property, rights and interests that make up the Crown Estate in Scotland. Both the Scottish Affairs Committee and the Smith Commission were clear, however, that this decentralisation was to take place after the devolution of the management of the Crown Estate to the Scottish Parliament. (2)

The Scotland Bill was published on the 28th May by the UK Government and is now on its hurried passage through the UK Parliament. It is intended to implement the Smith Commission Agreement. Clause 31 of the Bill that deals with the Crown Estate, however, completely fails to do this and needs to be re-drafted.

But, first, some background.

The Crown Estate

The Crown Estate is the name given in the Crown Estate Act 1961 to the various Crown property, rights and interests that are managed by the Crown Estate Commissioners (CEC). The CEC is a statutory corporation first constituted by the Crown Estate Act 1956 and now operating under the 1961 Act. The CEC transfers its net surplus revenue or 'profit' each year to the UK Consolidated Fund for use in public expenditure. (3)

The CEC is thus the manager of property rights that belong to the Crown. However, there can often be confusion between the manager and the property, because the CEC has branded itself for its corporate identity as 'The Crown Estate'. The Treasury Committee also felt it necessary to emphasise in its report on the Crown Estate, that "the CEC are a public body charged with managing public resources for public benefit". (4)

The Crown property, rights and interests that make up the Crown Estate in Scotland are legally and constitutionally distinct from those in the rest of the UK, because they

are owned by the Crown in Scotland and defined in Scots law. Scotland's Crown property rights are of ancient origin and continued to be administered with their revenues in Scotland following the Union of Crowns in 1603 and the Treaty of Union in 1707. Some of these Crown rights continue to be managed in Scotland by the Scottish Government and Crown Office. However, the administration and revenues of many of Scotland's Crown property rights were transferred from Edinburgh to a government department in London in the 1830s. That department and its successors, were the predecessors of the current CEC.

The Crown property rights managed by the CEC in Scotland include Scotland's territorial seabed and Crown rights over the Scotland's continental shelf zone (see map above), around half of Scotland's foreshore, the right to mine gold, salmon fishings, four rural estates and two urban properties. The Crown Estate in Scotland only accounts for around 3-4% of the value of the UK wide Crown Estate and revenue produced by it. The CEC's annual 'profit' from its operations in Scotland, has been around £5m in recent years. (5)

The Scotland Act 1998 devolved legislative competence over Scots property law, including Crown property rights, to the Scottish Parliament. The first Scottish Parliament, for example, used this legislative authority to abolish the Crown's ultimate ownership of land in Scotland under feudal tenure. Implementing the Smith Agreement would complete the devolution process started in 1999 and bring the rights and the management together under the legislative competence of the Scottish Parliament.

However, the reservation of the management of the Crown Estate in the Scotland Act precludes the Scottish Parliament from being able to legislate over the rights managed by the CEC and also means that the CEC is not accountable to either the Scottish Parliament and Government for its operations in Scotland.

The Scotland Bill

The Smith Agreement to devolve the management and revenues of the Crown's property rights should be straightforward to implement in legislation.

The two main requirements are to amend the Scotland Act 1998, Schedule 5 Part 1 by;

1. removing clause 2(3) that reserves the management of the Crown Estate in Scotland

and,

2. removing clause 3(3)(a) that reserves the revenue from the Crown Estate in Scotland.

Removing these two reservations would mean that responsibility for managing the Crown property rights that currently make up the Crown Estate in Scotland, automatically falls to the Scottish Parliament.

Appropriate legislation also needs to cover some consequential amendments to other legislation, in particular to the Crown Estate Act 1961 to reflect that it would no longer apply in Scotland. In addition, the legislation requires some procedural provisions dealing with the transfer date and process.

Unfortunately, clause 31 in the Scotland Bill manifestly does not implement the Smith Agreement. The clause does not devolve the responsibility for the management of the Crown Estate in Scotland to the Scottish Parliament. Instead, the clause **delegates** existing functions of the CEC as a statutory corporation to Scottish Ministers or others transferees through a Treasury 'scheme'.

The current clause 31 attempts to enable the CEC to continue to operate in Scotland and to bind those to whom functions are transferred to the restrictive terms of the Crown Estate Act 1961 under which the CEC operates. The clause's provisions to try to achieve this are, as others have commented, complex and unclear. (6) They are a recipe for confusion and legal anomalies. They do not devolve legislative responsibility over the Crown property rights and revenues involved in Scotland to the Scottish Parliament and will frustrate the widespread consensus for the further decentralisation of these within Scotland. (7)

Re-framing Clause 31

The Smith Agreement to devolve responsibility over the Crown Estate in Scotland reflects the longstanding agreement in Scotland over this matter and it should be straightforward to implement through the Scotland Bill. Why then does the existing clause 31 fail to do this? This blog argues that this current state of affairs has arisen because of the degree of influence that the CEC has had on the nature of clause 31. The sequence of Committee inquiries and reports into the operations of the CEC shows how CEC corporate policies have been aimed at maintaining it as a UK organisation.

In 1998, the CEC declined to participate in the devolution process in the way that the Forestry Commissioners did (and have continued to do). The starkest example, however, was in 2001/02 when, against the flow of devolution, the CEC ended its management of the Crown Estate in Scotland as a separate management unit with its own manager and financial accounts, so that the CEC could assimilate its operations in Scotland into those in the rest of the UK. (8) The current clause 31 with its stretching and twisting of the Crown Estate Act 1961, can be seen as the CEC's latest move to try to retain the Crown Estate as a UK wide estate.

Furthermore, it is distressing to note the continuing mis-understanding of what exactly the Smith Commission agreed. For example, a briefing issued by the Scottish Parliament, claims that it is the "powers of the Crown Estate Commissioners [which are set out in the 1961 Act] which would be transferred to Scottish Ministers." (9)

This is wrong.

The Smith Agreement patently does not say this. It says that responsibility for management will be devolved to the Scottish Parliament. That is an entirely different

matter from a mere delegation of functions to be exercised within the framework of continuing reserved powers.

The Scottish Government's initial response to the Scotland Bill recognises the need to re-frame clause 31, so that the clause removes the reservations in the Scotland Act 1998 over the management and revenues of the Crown property rights in Scotland forming part of the Crown Estate. (10) The terms of the Scottish Government's proposed alternative clause 31 still suffers from some other weaknesses. However, it is to be hoped that all the parties involved in the Smith Commission will recognise that the issues over clause 31 are not party political.

Solving this problem is a simple matter of re-framing the clause in a competent was so as to implement the Smith Agreement in as straightforward a manner as possible.

NOTES

1. Smith Commission Report page 16
2. See, for example, Lord Smith's evidence to Scottish Affairs Committee 3 December 2014. Q137-Q140
3. Section 1(2) Civil List Act 1952
4. House of Commons Treasury Committee Report, 2010 para 10
5. Scottish Affairs Committee Report para 39
6. See Devolution (Further Powers) Committee report
7. For example, the Bill amends the Civil List Act 1952 to obligate the payment of all Crown revenues to the Scottish Consolidated Fund. Decentralisation to, for example, to harbour trusts will be constrained by a continuing legal obligation to hand over all revenues to the Scottish Government.
8. Scottish Affairs Committee Report para 21
9. See SPICE/Clerks/Legal Devolution (Further Powers) Committee Analysis Paper on the Scotland Bill. page 15
www.andyweightman.com/docs/SPICE_Comparative_analysis_paper_FINAL.pdf

"Provision has been made to amend the Crown Estate Act 1961 to reflect the new role for Scottish Ministers (SMs), but to retain the requirement to manage and improve etc the property, rights and interests being transferred subject to the remaining provisions of the Crown Estate Act 1961. This reflects the Smith Commission recommendation that it would be the powers of the Crown Estate Commissioners [which are set out in the 1961 Act] which would be transferred to Scottish Ministers."

10. See Scottish Government Response to the Interim Report from the Devolution (Further Powers) Committee on the Smith Commission and the UK Government's proposals, pages 12-13 and 43.

www.andyweightman.com/docs/SG_Response_devocctee.pdf