



The Scottish Parliament
Pàrlamaid na h-Alba

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Bruce Crawford MSP
Convener, Devolution (Further Powers)
Committee

c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP

Tel: (0131) 348 5221

e-mail:

racce.committee@scottish.parliament.uk

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Dear Bruce

Crown Estate Draft MOU and Draft Transfer Scheme

The Rural Affairs, Climate Change and Environment Committee took evidence on the devolution of the Crown Estate in Scotland earlier this year¹ ². The Committee also considered clause 31 of the Scotland Bill 2015-16 (the Bill). Following this the Committee wrote to the Cabinet Secretary for Rural Affairs, Food and the Environment expressing a number of concerns. We have now considered the draft MoU and Transfer Scheme³ and our views in response to your letter of 19 November 2015⁴ are set out below.

¹ Scottish Parliament. *Official Report*, 27 May 2015

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9979>

² Scottish Parliament. *Official Report*, 17 June 2015.

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10025>

³ Letter from the Devolution (Further Powers) Committee, 19 November 2015
http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/20151119_Letter_to_RACCE_Cttee_on_Crown_Estate_transfer_scheme_WEB.pdf

⁴ Letter from the Devolution (Further Powers) Committee, 19 November 2015
http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/20151119_Letter_to_RACCE_Cttee_on_Crown_Estate_transfer_scheme_WEB.pdf

Scotland Bill treatment of Crown Estate

As we stated in previous correspondence the RACCE Committee considers that clause 31 of the Scotland Bill is unnecessarily complex. This complexity appears to be at odds with other reservations in the Bill and in the Scotland Act 1998. The Committee continues to support the removal of the reservation in the Scotland Act 1998 relating to the management of the Crown Estate to ensure clarity and simplicity and provide the Scottish Parliament with full legislative competence in relation to the management of Crown Estate assets in Scotland including the Scottish offshore zone.

The Committee has now seen the draft MoU and Transfer Scheme and we understand that these were prepared without consultation or input from Scottish Government officials. This is deeply concerning as we would have expected a collaborative approach to determine the content, detail and balance of these documents. This lack of dialogue between HM Treasury and the Scottish Government has been mirrored by a similar lack of dialogue between HM Treasury and the Scottish Parliament throughout the process of developing and drafting the Bill and related documents. Despite numerous attempts by this Committee to secure a meeting with UK Treasury Ministers on the Bill we were unfortunately unable to do so.

The Committee has significant concerns that as currently drafted the clause and related documents include carve outs for reserved issues and scope for UK Ministers to restrict devolution of the Crown Estate assets which will result in a constraining framework in a devolved area, limiting the way in which the Scottish Parliament will be able to exercise legislative competence with regard to altering the manner in which the Crown Estate assets are managed or by whom they are managed.

The Committee is also concerned about the balance between the statutory Transfer Scheme and the MoU and our strong preference is to see more of the substance in the MoU. Our key concerns in relation to the draft MOU and Transfer Scheme are outlined below.

Restrictions on what the Scottish Parliament may do in providing for further devolution of the management of the Scottish Crown Estate assets.

The Committee understands that permanent restrictions occur under Schedule 5 to the Scotland Act 1998, in section 90B of that Act (inserted by the Bill) and as a result of Schedule 4 of that Act protecting section 90B (and the Scheme made under that section) from modification. The requirements of section 90B(5) to (8) are reserved matters. These restrict the way in which the Scottish Crown Estate assets are managed (including assets subsequently acquired by the manager of the Scottish Crown Estate).

Schedule 4 of the Transfer Scheme contains a number of important restrictions on how the Scottish Crown Estate assets can be used. It appears that the conditions in the Transfer Scheme are intended to bind successors to the original transferee. These include significant protections for defence and national security, including the ability of the Secretary of State for Defence to require the grant or re-grant of rights in relation to assets within the Estate and to restrict the grant of rights to third parties where these are considered to affect defence operations or capabilities. The payments which can be required in respect of leases etc to petroleum pipeline operators or persons transmitting/distributing electricity are subject to the control of Treasury where they consider these to be “excessive”.

The Committee understands that any future scheme for devolving the management of the Scottish Crown Estate would be subject to these restrictions.

The Committee does not consider that these restrictions are appropriate in principle and is of the view that they are not consistent with proposals for the further devolution of the function of management of the Scottish Crown Estate assets.

In particular, the Committee questions the necessity to include the binding conditions and related level of detail in relation to the MOD and defence matters and questions whether these proposals provide parity for Scotland in relation to the management of the Crown Estate in the rest of the UK.

The Committee considers that there would be merit in the Devolution (Further Powers) Committee exploring with the Scottish Government how it sees the operation of the various rights conferred on the Secretary of State for Defence and the Treasury under the Scheme affecting the practical management of the assets.

The Crown Estate Act 1961 applies to the Scottish Crown Estate assets as modified by clause 34(7) of the Scotland Bill. The 1961 Act contains various restrictions on how Crown Estate assets are managed, including the duty to maintain and enhance the value of the assets and the return obtained from them “but with due regard to the requirements of good management”. The 1961 Act is not expressly protected from modification by Schedule 4. The Committee understands that the Scottish Parliament can modify the current requirements of the 1961 Act in the course of further devolution of the Scottish Crown Estate assets provided that in doing so it does not otherwise modify reserved matters.

While the Committee understands that the Scottish Parliament can modify the current requirements of the 1961 Act in the course of further devolution the Devolution (Further Powers) Committee may wish to confirm the Scottish Governments understanding of this and whether it considers it has sufficient discretion in its management of the Scottish Crown Estate assets.

Paragraph 3(3)(a) of Schedule 5 reserves the revenues from the Scottish Crown Estate assets as hereditary revenues of the Crown. We understand that when further devolving management of these assets the Scottish Parliament cannot

alter their status as Crown revenues or alter the requirement that these are to be paid into the Scottish Consolidated Fund (SCF). The Committee considers that it may be the case that the competence of the Parliament to make provision for the treatment of monies in the SCF through the budget act may permit the Scottish Parliament to agree to such monies being rerouted directly to alternative recipients, again subject to any limitation on the Parliament's competence.

The Committee considers it is vital that the Scottish Parliament has the power to legislate on revenue arrangements in relation to the Scottish Crown Estate assets. The Devolution (Further Powers) Committee may wish to raise this with the Scottish Government to explore the scope to amend the Bill to provide the Scottish Parliament with the power to alter their status as Crown revenues or alter the requirement that these are paid into the SCF. If the Bill remains as currently drafted the Committee may wish to ask whether the Scottish Government is content that there are practical arrangements which may be made through budget provision or an alternative route with regard to the revenues from the Scottish Crown Estate assets which will not impede the further devolution of management of the Scottish Crown Estate assets.

Interaction of proposed rights with EU law

The Transfer Scheme creates a new separate mechanism under which the Secretary of State can acquire rights from the Scottish Ministers (or other managers of the Scottish Crown Estate assets). Where the Secretary of State is seeking to restrict or prevent the grant of a right to a third party the Scheme requires the Scottish Ministers or a manager of the assets to comply with a direction from the Secretary of State. The Committee understands that these will be enforceable by the Secretary of State against the Scottish Ministers or other manager. However, where compliance with such a direction would be incompatible with EU law then it would be unlawful for the Scottish Ministers to comply and it would be beyond their competence to do so.

The Committee considers that the Devolution (Further Powers) Committee may wish to explore with the Scottish Government whether it considers that the arrangements under the transfer Scheme are consistent with its need to fully discharge its obligations with regard to the implementation of EU environmental law as regards Scotland.

Application of rights where there may be disagreement

The rights of the Secretary of State under the Transfer Scheme apply where he or she cannot reach agreement with the Scottish Ministers/manager. At present the respective interests of the Scottish Ministers and the Secretary of State for defence in discharging his or her role in relation to national security operate against the background of a concordat. This concordat provides a framework for joint working and the resolution of disputes. It appears to the Committee that the MoU which accompanies the Transfer Scheme is intended to fulfil a similar function with regard to the relative interests of the manager of the Scottish Crown

Estate assets and the Secretary of State. The Committee presumes that the intention is that issues arising with regard to matters of national security or defence will normally be resolved through mutual agreement as at present under the Concordat.

However, the Transfer Scheme goes further in creating legal mechanisms for giving effect to rights in the event that these cannot be resolved through the MoU and by mutual agreement. The Scheme confers rights on the Secretary of State which are enforceable against the Scottish Ministers/manager and third parties but does not appear to confer any rights on the Scottish Ministers/manager through which they can ensure that their interests are given full consideration. As currently drafted there is no opportunity for reference to a referee or arbiter in the event of a dispute, save with regard to the determination of fair market value – which the Secretary of State must pay for the grant of any rights. No compensation appears to be payable where the Secretary of State prevents the grant of rights to a third party.

There may be merit in the Devolution (Further Powers) Committee exploring with the Scottish Government whether it is content with the inclusion of legal mechanisms in the Transfer Scheme giving effect to rights where there is no resolution and whether there is a need for reference to a referee or arbiter in the event of a dispute.

The Committee also considers that it may be useful to clarify that the rights conferred on the Secretary of State under Schedule 4 of the Transfer Scheme can only be claimed against rights in property which are part of the Scottish Crown Estate assets. If the Scheme is drafted more broadly the Devolution (Further Powers) Committee may wish to explore what the basis for this is under section 90B

Other Issues

There are a number of other issues which the Devolution (Further Powers) Committee may wish to explore with the Scottish Government including the treatment of and reference to assets and liabilities and the treatment of the tax status of the new manager.

The Committee remains concerned that the land held under the Limited Partnership (Fort Kinnaird) is effectively excluded from the transfer by the Bill, as are the related revenues. Our view is that even if the asset is not wholly owned by the Crown Estate, the Crown Estate interest could be transferred to Scottish Ministers or the equivalent value of the economic asset could be transferred.

The Committee questions the value of seeking to list all Scottish Crown Estate assets (as set out in Schedule 1 of the Transfer Scheme) which appears to the Committee to risk being incomplete. In our view a more effective approach would be to avoid seeking to list all assets and include a broad definition that would cover all Scottish assets (all property, rights and

interests in land in Scotland) which are held by the Commissioners on behalf of the Crown. It also appears to us that consideration should be given to the treatment of liabilities and if a listing of assets is to remain, that should include further information on those assets, be a complete listing of all assets held and should also incorporate similar detail and level of information, including a full listing of liabilities.

The Committee questions the requirement to be explicit that there would be no detriment to the tax status of the new manager, as presently the Crown Estate does not pay corporation or capital gains tax and recommends that the Devolution (Further Powers) Committee confirm the Scottish Governments understanding and view on this issue.

Thank you once again for offering the RACCE Committee an opportunity to provide views to you on the draft MoU and Transfer Scheme and we look forward with great interest to the outcome of your discussions with the Scottish and UK Governments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rob Gibson', with a stylized flourish at the end.

Rob Gibson
Convener.