

Scottish Parliament Devolution (Further Powers) Committee Implementing the Smith Agreement

Written Evidence from Andy Wightman

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INTRODUCTION

I am writer and researcher on land rights and governance in Scotland and have written extensively on the topic of land governance. I am currently a Specialist Adviser to the House of Commons Scottish Affairs Committee and a member of the Commission on Local Tax Reform. Previously I submitted evidence to the Treasury Committee, the Scottish Affairs Committee and the Scotland Bill Committee about the Crown Estate.

Debate over the the administration and management of the Crown Estate in Scotland has been underway for around three decades and a succession of reports and inquiries (Crown Estate Review Working Group, Treasury Select Committee & Scottish Affairs Select Committee) have all highlighted the need for change in the governance of the Crown Estate in Scotland.

PROPOSALS

I welcome the Smith Commission's recommendation in paragraph 32.

"Responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from those assets will be transferred to the Scottish Parliament."

I welcome too, the response of the Crown Estate Commissioners in a press statement on 27 November 2014 in which they noted the Smith Commission recommendations including the above.

Many people and organisations have been arguing for the repatriation to Scotland of the administration and revenues of the Crown property, rights and interests that currently make up the Crown Estate in Scotland. Scotland's crown property rights are distinct from those of the rest of the UK since they are governed by Scots law. The administration of these rights and their revenues was conducted in Scotland until the 1830s and returning the administration of this portfolio of public property to Scotland thus makes eminent sense. Scotland already administers some Scottish Crown property rights that do not form part of the Crown Estate (e.g. bona vacantia, ultimis haeres and treasure trove).

TERMINOLOGY

Discussions around the Crown Estate are sometimes confused by the lack of clarity over the terms used. The Crown Estate is defined in section 1(1) of the Crown Estate Act 1961 as 'the property, rights and interests' managed by the Crown Estate Commissioners (CEC) on behalf of the Crown. In other words the Crown Estate consists of land and property interests (seabed, foreshore etc.). The property which makes up the Crown Estate is owned by the Crown (the landowner) and is administered and managed by the Crown Estate Commissioners (a statutory corporation).

Following devolution, the Crown will remain the owner of the Crown property, rights and interests that currently make up the Crown Estate in Scotland (though it will of course be competent for whoever administers these rights following devolution to lease or transfer any land or property to third parties), but the Scottish Parliament will be responsible for

their administration and the revenues. The key change is that there will (or should) be no role for the CEC in administering these Crown property, rights and interests and thus there **will no longer be** a Crown Estate in Scotland - that being the name given in the Crown Estates Act 1961 to the property, rights and interests managed by the CEC - an act that will, after devolution, have no force in Scotland.

COMMAND PAPER

The recommendations of the Smith Commission are clearly laid out in paragraphs 32-35 of the Smith Commission report.

The Command Paper of January 2015, however, does not implement these recommendations in three important areas.

Legislative Proposal

The proposal in the Command Paper is for a “scheme” of devolution. This is justified in paragraph 5.5.4 of the Command Paper, none of whose reasoning I agree with.

The devolution of responsibility for the administration and management of the Crown Estate “will be transferred to the Scottish Parliament” says the Smith Commission paragraph 32. Yet the proposed means by which this is to be done is opaque, complex and unnecessary. In order to implement the Smith recommendations, all that is required are a few straightforward legislative amendments as follows.

1. Repeal of section 2(3) and 3(3)(a) of Schedule 5 of the Scotland Act 1998
2. Repeal of section 18 of the Scotland Act 2012
3. Repeal of section 1(4) of the Crown Estate Act 1961 (the power of direction by the Secretary of State for Scotland).
4. Amendment of the Crown Estate Act 1961 to the effect that the Act does not apply to Scotland.
5. Provision in the new Scotland Act that all statutory responsibilities previously exercised by the CEC in the past are henceforth to be exercised by Scottish Ministers.

There may be a few more consequential amendments but the above provides the key legislative reforms necessary to end the role of the CEC in Scotland and implement paragraph 32 of the Smith Commission.

I see no merit in the proposed “scheme” which seems to me to be a wholly unnecessary device that has the potential to confuse matters and contradict the core Smith recommendation.

Furthermore, the thinking in the Command paper is unclear and potentially muddled. Paragraph 5.5.8 implies that legislative competence will be transferred by the “scheme” but paragraph 5.5.11 talks about an intent to transfer competence before the “scheme”.

I confess I do not understand what is meant by 5.5.11. I presume it means that an appropriate legal framework for administering and managing the Crown property, rights and interests that make up the Crown Estate needs to be in place in Scotland before the role of the CEC ends. It is not clear to me why this should be the case. Adequate

preparations within the Scottish Government (and, for example, Marine Scotland), can be made prior to devolution but these are essentially of an administrative nature. Legislative proposal 5. above makes clear who is responsible for the immediate exercise of the statutory responsibilities previously carried out by the CEC.

As matters stand in the Command Paper, this is a recipe for confusion, conflict and chaos.

Crown Estate Commissioners in Scotland

The Command Paper makes clear that the CEC will continue to be able to invest in Scotland and acquire land and property (Part 4, section 90B (2) in the Command Paper legislative clauses). These investments would be administered and managed by the CEC.

This contradicts the Smith proposal which is to devolve the administration and management of the Crown property rights currently managed by the CEC. Any future property acquisition by the CEC in Scotland would be owned by the Crown in Scots law in a situation where the responsibility for the administration and revenues of these property rights has been devolved.

We could then find ourselves in a situation where there would appear to be, in effect, two "Crown Estates" in Scotland - one administered by the CEC in London and one administered under whatever arrangements are enacted by the Scottish Parliament.

This is unworkable. One cannot devolve authority over the Crown property, rights and interests that make up the Crown Estate in Scotland and then, in the same breath, provide for the conditions in which a new "Crown Estate" in Scotland can be built up by the CEC, administered under the arrangements that prevailed prior to the devolution of that selfsame Crown Estate. This would make bad law and is unnecessary.

Devolution v. decentralisation

There is no disagreement among any of the political parties in Scotland that, following devolution of the administration and management of the Crown property, rights and interests that currently make up the Crown Estate in Scotland, there should be developed a framework for decentralisation. This is evident in paragraph 33 of the Smith Commission report. This might involve, for example, local authorities being given the responsibility for managing foreshore owned by the Crown or port authorities being granted, under specified conditions, outright ownership of the seabed within and surrounding the port or harbour.

Such decisions are properly decisions for the Scottish Parliament following due debate and consideration of the options. Thus, the role of the CEC in Scotland should be ended by means of the straightforward legislative amendments outlined previously. Then, following the assumption of legislative competence, the Scottish Parliament be free to make such provisions as it deems appropriate and necessary for the ongoing administration and management of the Crown property, rights and interests that currently make up the Crown Estate in Scotland.