

# Scottish Parliament Scotland Bill Committee

## Scotland Bill 2010

Response from Andy Wightman

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### INTRODUCTION

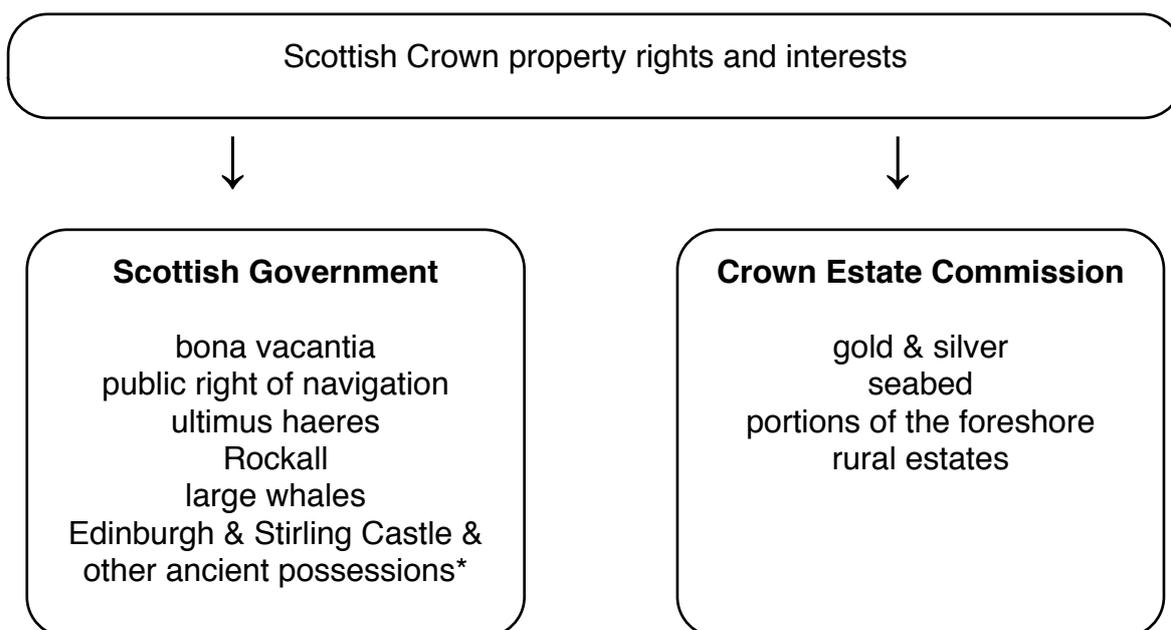
1. I am independent self-employed researcher on land rights in Scotland and elsewhere. I am the author of a recent book on land rights in Scotland, *The Poor Had No Lawyers* (1). In recent years I have taken a growing interest in the question of crown property rights in Scotland and how they are defined and administered. In 2010 I submitted written evidence to the House of Commons Treasury Committee's inquiry into the management of the Crown Estate (2).

In response to your call for written evidence on the Scotland Bill 2010, I would like to make some observations about Crown property rights, the proposals in the Bill relating to the Crown Estate Commission, and how the Bill could be improved to modernise and improve the administration of these important public rights.

### 2. BACKGROUND

Crown property rights in Scotland comprise a wide range of property rights and interests, some of which are of great antiquity (3).

3. The property rights themselves form part of Scotland's law of property. They are thus distinct and separate from those of the English Crown. The property rights themselves are devolved and are thus currently within the competence of the Scottish Parliament which could, for example, legislate to abolish any of them (4).
4. Scottish crown property rights are managed and administered by the Scottish Government with the exception of the "Crown Estate" which, since the 1830s has been administered by the bodies in London and is currently administered by the CEC under the Crown Estate Act 1961 (5) (See Fig 1).



**Fig 1. Administration of Scottish Crown Property Rights**

\* title to 26 ancient possessions was transferred from the Crown in Scotland to the Secretary of State for Scotland and subsequently Scottish Ministers in 1999

5. Thus a key question over the future of the Crown Estate relates to the logic and desirability of the current distribution of authority of Scotland's crown rights. In particular, given the extensive powers of the Scottish Parliament over, for example, the management of the marine environment through Marine Scotland in terms of planning and strategic management, does it any longer make sense for the property rights to be administered by a separate body in London. I submit to the Committee that it does not and that the powers of administration that were transferred south in 1832 should return to Scotland. This will mean that the Crown Estate can be administered and managed as part of an integrated and holistic approach to natural resource management and can deliver enhanced public benefits (for example, by providing trust ports and harbours with full control of the seabed within the harbour - something they currently lack).
6. Given the widespread interest there has been in this issue reflected in the publication in 2007 of the detailed and authoritative report by the Crown Estate Review Working Group (3) and in the report of the Treasury Committee in 2010 (2), it is disappointing to see the extremely timid and frankly rather ridiculous proposals contained in the Bill.
7. The Bill provides a rare opportunity to put the administration of Scotland's Crown property rights on a modern footing consistent with the principles of devolution, subsidiarity, sustainability and local control of resources.

### **STRENGTHENING SCOTLAND'S FUTURE**

8. The White Paper, *Strengthening Scotland's Future* asserts that it is important that "the Crown Estate's work is properly understood in Scotland" (6) Unfortunately, the White Paper does little to advance this understanding by itself containing inaccuracies in relation to the nature of the Crown Estate and its administration.
9. The opening sentence "The Crown Estate manages The Queen's hereditary UK property assets which She holds as Monrch including certain properties in Scotland" is, for example, factually incorrect. There is no such body as "The Crown Estate" (there is the CEC which administers the Crown Estate). The Crown Estate is not the Queen's hereditary property assets as Monarch or in any other capacity. It belongs to the the Crown in Scotland (which is *represented* by the Monarch). This is not semantics. It means that Crown land is public land which is moreover within the legislative competence of the Scottish Parliament. The Queen has nothing to do with it (although prior to 1760, the Monarch received the revenues from the Crown Estate, it was never owned by the Monarch).
10. The Calman Commission recommended that The Secretary of State should, in consultation with Scottish Ministers, more actively exercise his or her powers of direction under the Crown Estate Act 1961 and, having consulted Scottish Ministers, should give consideration to whether such direction is required immediately (recommendation 5.8)
11. It further recommended that the appointment of a Scottish Crown Estate Commissioner should be made following formal consultation with Scottish Ministers (recommendation 5.9).
12. Clause 18 of the Scotland Bill proposes that there be a Scottish Commissioner appointed by the Chancellor of the Exchequer in London. There is no proposal on the question of powers of direction.

### **ISSUES**

#### **The Power of Direction**

13. The power of direction exists to enable the Secretary of State to direct the CEC over matters in Scotland. The power has never been used. If it is to be retained, then there is a serious question as to the wisdom of retaining it with the Secretary of State for Scotland who has little to do with the day to day governance of crown rights and has very limited staff capacity to take a view on how such a power should be deployed and to what end over the scale and range of the CEC's operations in Scotland.
14. The Scottish Government, by contrast has a fully staffed Environment Directorate within which Marine Scotland has extensive powers over the marine environment. Other agencies such as port authorities and Scottish Natural Heritage have similar skills and knowledge.
15. If there is to be a power of direction, the it appears far more sensible for this to be vested in Scottish Ministers. Such an arrangement would simply return Scotland to where it was prior to 1956 when the Commissioner of Crown Lands for Scotland was an elected Scottish politician in the person of the Secretary of State for Scotland. Post devolution, however, Scottish Ministers are best placed to discharge this function.

### **The Scottish Commissioner**

16. If the CEC is to continue administering the Crown Estate in Scotland, then adequate representation of Scotland's interests is desirable on the CEC. Clause 18 of the Bill states that Scottish Ministers should be consulted on the person that the Chancellor of the Exchequer proposes to recommend to Her Majesty and that this must be a person "who knows about conditions in Scotland as they relate to the functions of the Commissioners". This is a lamentable and scarcely credible proposal if the intent of the Bill is to "further empower the Scottish Parliament" (7). Moreover, there is no requirement to represent the interests of Scotland or of the Scottish Parliament. It means that the "Scottish Crown Estate Commissioner" (who will be appointed by the Chancellor of the Exchequer) will wield more power over the public lands comprising the Crown lands of Scotland than the democratically-elected First Minister of Scotland and than the Scottish Parliament who have legislative jurisdiction over them.
17. This particular proposal is deeply flawed. If there is to be a "Scottish Commissioner", at least let them be called the "Commissioner for Scotland", provide the postholder with clear statutory duties to represent Scotland's interests, and provide that that post is filled by the First Minister of Scotland.

### **RECOMMENDATIONS**

18. For decades there has been discontent over the unaccountable and distant powers of the CEC over Scotland's Crown lands. A decade into the Scottish Parliament there is no conceivable logic in continuing with an arrangement that splits the administration of Scotland's crown rights into two separate bodies, that places the CEC as a power broker and deal-maker over the development of marine renewable energy and the ability of ports and harbours to plan their future.
19. The sensible thing to do with this historic opportunity is to bring all of the duties, functions, rights and powers over Scotland's crown property rights together in one place in Scotland under the full jurisdiction of the Scottish Parliament. Further discussion can then take place about what part of the Scottish Government and/or local government should administer the various rights.
20. ***I recommend therefore that the Committee recommends dispensing with the current Clause 18 in the Scotland Bill and replacing it with the following***

***The Crown Estate Act 1961 is amended as follows. After Section 1(7) insert***

***"Section 1(8) This Act does not apply to Scotland"***

### **REFERENCES**

- (1) *The Poor Had No Lawyers*, Birlinn, Edinburgh 2010
- (2) The management of the Crown Estate, House of Commons Treasury Committee, 2010 HC 325-1. Links to the Treasury Committee Report and Evidence can be found at [www.andywrightman.com/wordpress/?p=60](http://www.andywrightman.com/wordpress/?p=60). The section on Scotland is at pg 48 of the Report and my own response is at pg Ev 37 of Volume II
- (3) See *The Crown Estate in Scotland - New Opportunities for Public Benefits*. Highland Report of the Crown Estate Review Working Group, Highland Council, 2007 for a full and detailed analysis of the Crown Estate in Scotland. Available at [www.andywrightman.com/docs/CERWG-FinalReport12.06.pdf](http://www.andywrightman.com/docs/CERWG-FinalReport12.06.pdf)
- (4) Scotland Act 1998, Schedule 5, section 3(1)
- (5) The Crown Estate is not the name of the organisation responsible for administering the Crown Estate though the CEC had unilaterally branded itself as such. Instead, the Crown Estate is defined in Clause 1(1) of the Crown Estate Act 1961 thus, "the property, rights and interests under the management of the Commissioners shall continue to be known as the Crown Estate". See also footnote 1, pg 5 of Treasury Committee Report.
- (6) *Strengthening Scotland's Future*, CM 7973, pg 63.
- (7) *Strengthening Scotland's Future*, pg. 11