

Scottish Affairs Committee

Inquiry looking at the Scotland Bill 2010

Response from Andy Wightman

18 January 2011

EXECUTIVE SUMMARY

1. The Scotland Bill provides the opportunity to improve the governance of Crown rights in Scotland by returning the administration of these rights to Scotland. My preferred option in order to do this is to amend the Crown Estate Act 1961 to the effect that it does not apply to Scotland.

INTRODUCTION

2. 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).
3. 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 Commissioners (CEC), and how the Bill could modernise and improve the administration of the important public rights that are currently managed by the CEC in Scotland under the Crown Estate Act 1961.

BACKGROUND

4. Crown property rights in Scotland comprise a wide range of property rights and interests (3). The property rights themselves are defined by Scotland's law of property. They are thus distinct and separate from those of the English Crown. Responsibility for the property rights themselves is devolved and it is within the competence of the Scottish Parliament to legislate to amend or abolish any of them (4).
5. Scottish Crown property rights are managed and administered by the Scottish Government, with the exception of the rights which make up the "Crown Estate", which have been administered by the CEC and its predecessors in London since the responsibility was transferred in 1832 (5) (See Fig 1).

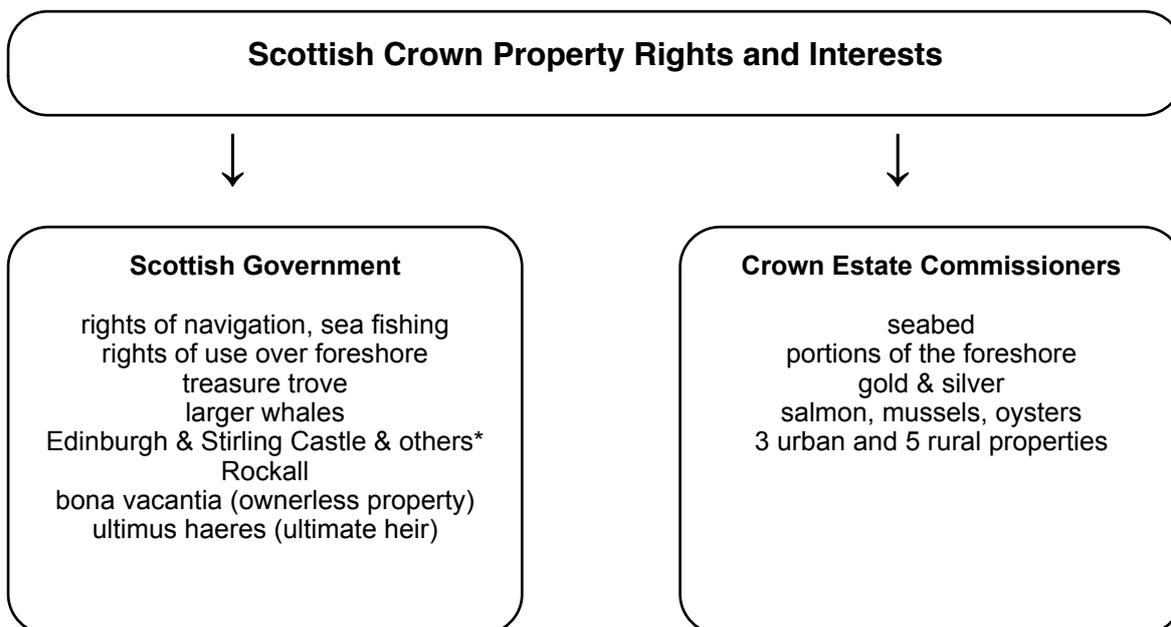


Fig 1. Administration of Scottish Crown Property Rights

* 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

6. Thus a key question over the future of the property rights that comprise the Crown Estate relates to the logic and desirability of the current distribution of authority over these rights and accountability for their stewardship. 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 property rights which make up the Crown Estate in Scotland 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).
7. Given the widespread concern there has been over this issue as 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 note the extremely timid and frankly rather ridiculous proposal contained in the Bill.
8. 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

9. 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 itself does little to advance this understanding by itself containing inaccuracies in relation to the nature of the Crown Estate and its administration.
10. The opening sentence "The Crown Estate manages The Queen's hereditary UK property assets which She holds as Monarch 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. It belongs to 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.
11. 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)
12. It further recommended that the appointment of a Scottish Crown Estate Commissioner should be made following formal consultation with Scottish Ministers (recommendation 5.9).
13. 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 the power of direction.

ISSUES

The Power of Direction

14. The power of direction exists to enable the Secretary of State for Scotland to direct the CEC over matters in Scotland. There is a serious question as to the wisdom of retaining this power with the Secretary of State who has never used it, 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.
15. The Scottish Government, by contrast, is deeply involved in the management of Crown property rights and, through Marine Scotland, has extensive powers over the marine environment. Other agencies such as harbour trusts and Scottish Natural Heritage have similar roles, skills and knowledge.
16. It appears far more sensible for the power of direction to be vested in Scottish Ministers. Such an arrangement would simply return Scotland to where it was prior to the establishment of the CEC in 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 (as they do, incidentally, with the Forestry Commissioners).

The Scottish Commissioner

17. If the CEC is to continue administering the Crown rights which make up 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.
18. 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 post holder with clear statutory duties to represent Scotland's interests, and provide that the post is filled by the First Minister of Scotland.

RECOMMENDATIONS

19. 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 between two separate bodies in two separate legal jurisdictions. There is nothing to be gained and many opportunities to be lost by having the CEC as a power broker and deal-maker over the development of marine renewable energy, the ability of harbours to plan their future and other matters within the competence of the Scottish Parliament.
20. The sensible thing to do with this anomalous position is to use this historic opportunity to bring the responsibility for the management and revenues of all 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.
21. The CEC's role in Scotland is both unnecessary and inappropriate, The Crown rights it administers account for only 4% of the value and 6% of the revenue of the estate across the UK. The Scottish Government has the capacity to take over the administration of these rights and thus the simplest, quickest and most straightforward means of achieving this is to remove the CEC from any responsibilities in Scotland.

I recommend therefore that the Committee considers 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.andywightman.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*. 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.andywightman.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 has 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*, CM 7973, pg. 11