Devolution (Further Powers) Committee

Implementing the Smith Agreement - The UK Government’s Draft Legislative Clauses

Introduction

In this submission, I confine my evidence to the draft clauses implementing the Smith Commission’s energy-related recommendations.

Clause 23: the Crown Estate

Clause 23 implements the recommendation in paragraph 32 of the Smith Commission report to transfer “[r]esponsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets” to the Scottish Parliament. It does so in two ways. First, it introduces a new section 90B into the Scotland Act 1998, which empowers the Treasury (with the agreement of the Scottish Ministers) to “make a scheme transferring ... all the existing Scottish functions of the Crown Estate Commissioners ... to the Scottish Ministers or a person nominated by the Scottish Ministers”. Secondly, it amends Schedule 5 Part 1, paragraph 2(3) of the Scotland Act to restrict the current reservation of the Crown Estate to mean “the property, rights and interests under the management of the Crown Estate Commissioners”. This will empower the Scottish Parliament to legislate in respect of the management of the transferred assets and the Scottish Ministers to perform associated executive functions. It also means that the transferred assets will no longer accurately be referred to as part of the Crown Estate. It is not clear what alternative term should be used (if indeed it is appropriate for them to have any kind of collective designation) – that will be a matter for the Scottish Ministers and Scottish Parliament to determine.

As others have noted, this is a more complex way of transferring responsibility for the Crown Estate in Scotland than is strictly necessary. All that would have been required would have been to delete paragraph 2(3) from Schedule 5, Part 1: this would have automatically given the Scottish Ministers and Scottish Parliament control over the Crown Estate assets in Scotland along with other “functions exercisable by any person acting on behalf of the Crown” (paragraph 2(1)(b)).

There appear to be two reasons for adopting the transfer scheme model. First, the Command Paper states in paragraph 5.5.2 that “[i]t will remain possible for the Crown Estate to make investments in Scotland and the management of any such investment by the Crown Estate in property in Scotland after the transfer will remain a reserved matter.” There is no explanation why it is necessary or appropriate to retain this power.

Secondly, in making the scheme, the Treasury is required to make such provision as it considers necessary or expedient in the interests of defence or national security, in connection with access to land for telecommunications purposes, to ensure there is no conflict with the exploitation of oil and gas resources, and to ensure protection for consumers in relation to electricity infrastructure (s90B(6)). These are reasonable objectives. However, it is not clear why the device of a transfer scheme is necessary in order to secure them, rather than simply making the transfer to the Scottish Parliament and Scottish Ministers conditional on not prejudicing these objectives. As with other aspects of the draft clauses, there seems to be a desire to ensure very detailed control by the UK government over matters which impinge upon reserved responsibilities. This is incompatible with the stated intention to create an “enduring” constitutional settlement. It also smacks of distrust of the Scottish Ministers, and the machinery for inter-governmental negotiation, to ensure that a reasonable balance is struck between reserved and devolved interests. Indeed, since the Command Paper (and the Smith Commission) states that there is to be a Memorandum of Understanding
between the two governments to ensure protection of national interests and critical national infrastructure, it is not clear why additional provision is required in the transfer scheme itself.

There are a number of other objections to the transfer scheme model and to the clause as currently drafted:

- Given the likely complexity of the transfer scheme, it will be essential to ensure that it is subjected to adequate Parliamentary scrutiny. As currently drafted, new section 90B(14) states that the scheme is to be made by statutory instrument. However, no parliamentary procedure is specified. The procedural requirements for statutory instruments made under the Scotland Act are governed by Schedule 7 to that Act. An amendment to Schedule 7 is therefore required to specify which of the various procedures listed therein are to apply to new section 90B. At present, that consequential amendment is missing from the draft clauses. As a matter of principle, it seems that the appropriate procedure would be type A–i.e., the statutory instrument should be approved by resolution of both Houses of the UK Parliament and by the Scottish Parliament–as this is the procedure required for equivalent transfers of legislative power and executive functions under sections 30 and 63. (The transfer scheme also includes Henry VIII powers–see section 90B(11)(b)–so again a high level of scrutiny would be appropriate.)

- As currently drafted, new section 90B(1) states that the Treasury “may” make a transfer scheme on a date to be specified in the transfer scheme itself. This language does not seem to be consistent with the intention of the Smith Commission that Crown Estate functions in Scotland will be transferred. “Shall” would seem to be more appropriate than “may”.

- In new section 90B(6), it states that the Treasury must make such provision as it considers “necessary or expedient” in relation to the matters listed above. It seems to me that the inclusion of provisions that are merely expedient rather than necessary gives the Treasury too much power to impose conditions on the use of transferred assets. While the Scottish Ministers must consent to scheme, the effectiveness of their power to refuse to consent is undermined by the absence of any obligation on the Treasury to make the transfer scheme.

- The requirement in new section 90B(6)(d) to include provisions “for securing consistency, in the interests of consumers” in relation to electricity infrastructure is justified in paragraph 5.5.10 as being necessary to ensure “that consumers across GB should be protected from any excessive rents for energy infrastructure.” This is a valid concern, but it is one which applies equally to energy infrastructure for which the Crown Estate currently charges rents and for which it will continue to charge rents if situated outwith Scotland or Scottish waters. Indeed, given the Crown Estate’s purely commercial objectives, it is not clear why this is not perceived to be a risk at the moment. The proposed inequality of treatment again smacks of distrust of the Scottish Ministers to act in a responsible manner.

Clause 31: Onshore Oil and Gas Extraction

Clause 31 appears to be technically effective to implement the Smith Commission’s recommendations that onshore oil and gas extraction should be devolved to the Scottish Parliament. It does two things:

1. It amends the Petroleum Act 1998 to provide that the function of issuing licences in the newly-defined “Scottish onshore area” is transferred from the Secretary of State to the Scottish Ministers, and empowers the Scottish Ministers to make regulations on model
licence clauses with the exception, *inter alia*, of clauses on royalty payments. This reflects the policy intention that oil and gas taxation should continue to be reserved.

2. It confers legislative competence on the Scottish Parliament in respect of onshore oil and gas licensing (other than royalty payments) and access to onshore oil and gas resources by adding an exception to the general reservation of oil and gas in Schedule 5, Part 2, Head D2 of the Scotland Act.

As far as I can see, there are no technical deficiencies with Clause 31. However, the problem is with the policy objective it seeks to implement. For one thing, the rationale for distinguishing between onshore and offshore oil and gas licensing is unclear. No rationale is offered in either the Smith Commission report or in the Command Paper. My assumption is that the distinction which is sought to be made is between existing, conventional oil and gas extraction (which is all offshore) and new, unconventional oil and gas extraction (which is likely to be onshore). The concern is that the distinction could become incoherent, if for instance it turns out that there are unconventional oil and gas reserves which straddle onshore and offshore areas. At present it does not appear that there are any such reserves, but the full extent of potential unconventional oil and gas reserves is not yet known.

A related difficulty is that the clause does not cover all forms of unconventional gas production. For instance, there has been some concern recently about proposed underground coal gasification in the Firth of Forth (which falls within the Scottish onshore area as defined in clause 31). This appears to raise some of the same environmental concerns as coal bed methane and shale gas production. However, it is currently licensed by the Coal Authority under the Coal Industry Act 1994 rather than by DECC under the Petroleum Act and it is not therefore included in the devolution of powers effected by clause 31.

**Clauses 38 and 39: Fuel Poverty Support Schemes and Energy Company Obligations**

Clauses 38 and 39 implement the Smith Commission’s recommendation that the Scottish Ministers should have powers to determine how supplier obligations in relation to fuel poverty and energy efficiency are designed and implemented in Scotland. This is, however, executive devolution only, and responsibility for the way the money is raised is to remain reserved. The clauses therefore achieve the objective by amending the relevant provisions in the Energy Act 2010, the Gas Act 1986 and the Electricity Act 1989.

The extent of the power actually devolved as a result of these amendments appears to be fairly minimal. The Scottish Ministers will have no right even to be consulted over the basic design of these schemes; merely to fill in some of the detail as it relates to their implementation in Scotland. Moreover, the exercise of the limited powers they will have is to be subject to the agreement of the Secretary of State (with no requirement that such agreement is not to be unreasonably withheld). There is also the possibility of devolved powers being overridden, since the Secretary of State may continue to make his/her own schemes for Scotland without the consent of the Scottish Ministers in specified circumstances. These circumstances are where obligations imposed by the Scottish Ministers would cause detriment to the United Kingdom, or adversely affect the ability of the United Kingdom to comply with international climate change or energy efficiency obligations (and the Scottish Ministers have failed to comply with a request to modify the obligations).

Once again, the approach to devolution appears to be grudging and to evince a lack of trust in the Scottish Ministers. Moreover, as regards compliance with international obligations, the override powers appear to be unnecessary, as the UK Government already has powers under section 58 of
the Scotland Act to veto or direct action by the Scottish Ministers where necessary to comply with international obligations.

Finally, and in contrast to the position in relation to renewable electricity incentive schemes under clause 40 discussed below, there is no guarantee that the Scottish Ministers will continue to have any role in relation to any fuel poverty or energy efficiency schemes that may in future replace the current legislative provisions. This is not a merely academic concern. For instance, the Energy Company Obligations to which clause 39 relate are the fourth set of energy efficiency obligations which have applied to gas and electricity suppliers since privatisation and are themselves only due to last until 2017.

Clause 40: Renewable Electricity Incentive Schemes: Consultation

The Smith Commission recommended that there should be a formal consultative role for the Scottish Government and the Scottish Parliament in designing renewables incentives (paragraph 41). Clause 40 partially implements this recommendation by introducing a new section 90C into the Scotland Act.

The policy aim, according to the Command Paper, is to establish a broad duty on the Secretary of State to consult the Scottish Government on the design of new incentives to support renewable electricity generation or the re-design of the existing schemes (paragraph 8.4.3). The clause attempts to achieve that by inserting the consultation requirement into the Scotland Act, rather than tying it to the particular legislation in which renewables incentive schemes are contained. Nevertheless, there is an unnecessary ambiguity in the clause as it is currently drafted. While section 90C(3) gives a general definition of a renewable electricity incentive scheme, it then states that this includes the three existing schemes (contracts for differences, the renewables obligations and micro-generation feed-in tariffs). It is unclear whether these are intended merely to be examples of the kinds of schemes that are covered by the general definition, or rather an exhaustive list. Only the former would give effect to the policy intention, and the ambiguity could easily be removed by introducing a standard form of words at the end of the general definition, such as “without prejudice to the generality of the foregoing, this includes …”.

A more fundamental problem with the clause as currently drafted is that it applies only to the Scottish Ministers and it therefore does not fulfil the Smith Commission’s intention that both the Scottish Ministers and the Scottish Parliament should be consulted. The Command Paper states (at paragraph 5.4.2) simply that “The UK Government will work with the Scottish Parliament and Scottish Government to devise a proportionate and workable method of consulting the Scottish Parliament.” It might be questioned whether it is really necessary for the Scottish Parliament to be consulted over renewable incentives. However, if this was the Smith Commission’s intention, then it seems to be inappropriate to omit it from the draft clauses. A requirement for Parliamentary consultation is an important constitutional obligation which should not be left to chance, and it is not clear why it would be unduly difficult to specify this obligation in legislation.

A final issue, alluded to above, is that it is not clear why, as a matter of principle, there should be a difference of treatment as regards consultation obligations in relation to renewables incentives, on the one hand, and fuel poverty and energy efficiency schemes, on the other. If the Scottish Ministers have a legitimate interest in being consulted over the design of renewables incentives, the same applies to fuel poverty and energy efficiency schemes. The consultation obligation ought therefore to be extended to include them as well.
Clauses 42 and 44: Gas and Electricity Markets Authority

Clauses 42 and 44 implement a range of recommendations from the Smith Commission which seek to give the devolved institutions a degree of formal influence over the energy regulator, Ofgem. Clause 42 amends the Utilities Act 2000 to require the regulator to send a copy of its annual report and accounts to the Scottish Ministers, who are in turn required to lay them before the Scottish Parliament. Clause 44 amends the Scotland Act to enable the Parliament to compel Ofgem to appear before its committees and to produce documents, notwithstanding that its functions relate to reserved matters.

These provisions are important insofar as they formally recognise for the first time that the devolved institutions have legitimate interest in the operation of the regulatory regime. In practical terms, though, they are unlikely to have much impact. The Scottish Government and MSPs already have access to Ofgem’s annual report and account, and the regulator already appears before Holyrood committees when requested to do so. In the absence of any power to compel Ofgem to take action to fulfil Scottish policy objectives, the devolved institutions’ influence over the regulator is likely to remain limited.

In addition, the clauses once again do not fully implement the Smith Commission’s recommendations. The report recommended that the Scottish Government and Scottish Parliament be given “a formal consultative role … in designing … the strategic priorities set out in the Energy Strategy and Policy Statement to which Ofgem must have due regard.” Since the Scottish Government is already a statutory consultee under the Energy Act 2013, no legislative action was required. Again, however, no action has been taken to implement the requirement to consult the Parliament. This is a more serious omission than in relation to the design of renewables incentives. The Strategy and Policy Statement is the main method by which the UK Government is attempting to ensure that regulatory decision-making is aligned with public policy objectives and, reflecting its importance, the Statement will require to be approved by resolution of both Houses of the UK Parliament before it comes into effect. If the aim is to ensure that the Statement also reflects Scottish policy objectives, then it is entirely appropriate that the Parliament should have a formal role in its formulation. Again, it is not appropriate that this should be left to chance, and it does not appear to be unduly difficult to specify such an obligation in legislation. What is required is something similar to the Scrutiny Reserve which allows time for consultation of national Parliaments before European Union legislation is agreed.

In order to further secure effective Scottish influence over the energy regulator there is a strong case, at a minimum, for amending the Utilities Act in order to require the Secretary of State to consult the Scottish Ministers before appointing members of Ofgem’s governing Authority. For consistency with the Smith Commission’s recommendation in relation to the Office of Communications, implemented in Clause 43, it is also worth considering whether the Scottish Ministers should be given the power to appoint a specific member of the Authority.

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