



The Scottish Parliament
Pàrlamaid na h-Alba

Devolution (Further Powers) Committee

c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
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14 September, 2015

Dear Secretary of State,

Re. Proposed amendments to the Scotland Bill

As you will be aware, the Committee met during September to consider the current state of the Scotland Bill and to take evidence in key areas. This follows our informal discussions at our Business Planning Day in late August, attended by officials from both governments, for which we are grateful. We also welcome your [letter](#) (of 26 August) to us following your previous appearance at the Committee in June and we are studying its contents carefully.

The Committee has previously stated its view on how the Scotland Bill can be improved to bring it in line with what we believe to be the spirit and substance of the recommendations of the all-party Smith Commission. Our recommendations were set out in a unanimously agreed [Interim Report](#) - *New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals* - in May 2015.

At our Business Planning Day and at our meetings in September, we have carefully assessed whether the Scotland Bill has been amended since its introduction in May 2015 to bring it in line with the recommendations in our Interim Report.

At this stage, some welcome progress is being made but, for a majority of areas we have looked at, the Bill has not yet been sufficiently amended to meet all of the recommendations upon which we are all agreed in order to fully implement the Smith Agreement. This letter therefore sets out our views (see Appendix) on how the Bill can fulfil the recommendations made in our report at the final revising stage in the House of Commons (Report Stage), which we understand will follow shortly. Report Stage is, of course, effectively the final opportunity for the Bill to be amended in the House of Commons before it begins its passage in the House of Lords.

We note your comments in the House of Commons on 15 July that it was your “intention to make substantive amendments in the House of Commons when the Bill comes back on Report” and that you will share amendments with the Committee (*Hansard*, 15 July, c877). We are hopeful, therefore, that you will find this letter helpful and make the necessary arrangements to improve the Bill along the lines we suggest and to inform us of the changes you intend to make. We may write to you later about other provisions in the Bill that we have not previously commented on.

The Committee will continue to keep the progress of the Bill under review as it completes its final stages in both Houses of the UK Parliament and may issue comment along the way. The Committee will of course in due course produce its final report on the Scotland Bill towards the end of that process, complete with a recommendation to the Scottish Parliament on whether it should give its legislative consent.

Finally, although more of a non-legislative nature, the Committee looks forward to engaging with you and your colleagues, and the Scottish Government, on the details of the proposed Fiscal Framework and wider inter-governmental arrangements. You will recall that all of the Committee agreed that the Scottish Government should report to the Scottish Parliament and relevant committees on the progress of these discussions on these plans and that the Parliament, and in particular this Committee, should have time to scrutinise any proposals the Scottish and UK Government make in this sphere before any final agreement is reached.

Since your last appearance before the Committee, we have taken further evidence which has stressed the central importance of the Fiscal Framework and the need for both governments to reach agreement on the detailed arrangements it will contain

The Committee looks forward to your continued engagement with us and a further opportunity to hear from you before the Bill completes its final stages in the UK Parliament.

Yours sincerely,

Bruce Crawford MSP
Convener

cc. Members of the Committee

Clause 1 – permanency of the Scottish Parliament and Scottish Government

As per our Interim Report:

- the words “is recognised” should be removed; and
- an amendment should be lodged to require a referendum of the Scottish electorate to be held if the issue of permanency was in question, with majorities also being required in any vote in the Scottish Parliament and the UK Parliament

These amendments have not yet been made to the Scotland Bill as at the close of Committee Stage in July 2015. This issue wasn’t covered in your letter to us of 26 August so our views remain as per our Interim Report.

Clause 2 – Sewel Convention

As per our Interim Report:

- the words “but it is recognised” and “normally” have the potential to weaken the intention of the Smith Commission’s recommendation in this area and should be removed; and
- the current clause 2, whilst placing the purpose of the Sewel Convention in statute, does not incorporate in legislation the process for consultation and consent where Westminster plans to legislate in a devolved area.

These amendments have not yet been made to the Scotland Bill as at the close of Committee Stage in July 2015. This issue wasn’t covered in your letter to us of 26 August so our views remain as per our Interim Report.

Furthermore, there are aspects of the ‘Sewel Convention’, as set out in Devolution Guidance Note 10 (DGN10), that have not been fully incorporated into the Scotland Bill so far and we are considering this issue further. For example, the wording of Clause 2 refers to “devolved matters” but not explicitly to the “legislative competence of the Scottish Parliament” or to “devolved competence” of Scottish Ministers” which are aspects of the Convention dealt with in DGN10. We have advice that the term “devolved matters” is not used elsewhere in the Scotland Act and that its meaning is therefore unclear. At this stage, we ask you for a view on why legislative competence and devolved competence are not referred to in Clause 2 and whether you would be amenable to the inclusion of a definition or explanation of “devolved matters” in the Bill that incorporates all three strands of the Sewel Convention as set out in DGN10?”

Clause 11 – Scope to modify the Scotland Act

This is not an area the Committee has looked at previously when agreeing our Interim Report. This is an area on which we may provide further information to you.

Clause 15 – assignment of VAT

The Committee is not clear on whether we can expect certain aspects relating to the calculations on assigning VAT to be in the Bill. If this is the case, we suggest that

the Bill be amended so that the Scottish budget is able to reap the rewards of any economic stimulus that yields higher VAT revenues and vice-versa. This may, however, be an issue covered in the fiscal framework, although the same principle stated above would apply. In any case, we look forward to more details on VAT assignment will work in practice.

Borrowing

The Committee is not clear on the extent of the borrowing powers to be proposed as part of this process and whether any amendments to the Bill will be required. If this is the case, we suggest that the Bill be amended so that a prudential regime is created which gives the Scottish Government more flexibility - within an overall framework that is governed by sound principles of affordability and sustainability - to borrow both for short-term revenue requirements as well as longer-term capital investment purposes. Furthermore, a future Scottish Government should be able to retain any underspend so as to better manage volatility. This may, however, be an issue covered in the fiscal framework, although the same principle stated above would apply.

Clause 19 - Disability, industrial injuries and carer's benefits

In our Interim Report we said that:

- the current definition of carer in the Bill appears overly restrictive and could limit the policy discretion of future Scottish administrations in this area. The Committee recommended that the clause should be re-drafted to ensure that the future Scottish administrations are able to define what constitutes a carer; and
- the definition of disability contained in the Bill is overly restrictive and would not provide a future Scottish Government with the power to develop its own approach to disability benefits in the future. Accordingly, the Committee recommended that the definition of disability used in the Equality Act 2010 is also used in clause 19.

These amendments have not yet been made to the Scotland Bill as at the close of Committee Stage in July 2015.

However, we note the comments you made in your letter of August 2015 on these matters. We will consider these carefully and whether this affects the recommendations we have made previously. At this stage, we do not wish the Bill to reduce the policy flexibility of a future Scottish Parliament to make changes to how it provides social security to Carers and people with disabilities in Scotland. If the Scottish Parliament chooses to adopt different principles and eligibility criteria in these areas, then we do not wish the Scotland Bill to prevent that approach. For example, your letter seems to imply that, for example in the case of extending Carer's benefits to those under 16 years of age, this should be ruled out because that is not what the rest of the UK does. However, if this benefit is being fully devolved, then it should be for a future Scottish Parliament to decide its approach and, as you state in your letter, "to decide the detail of to whom Carer's benefits are paid, how much they are paid and what the eligibility criteria should be".

Clause 21 - Discretionary payments: top-up of reserved benefits

We consider that the drafting of the provision relating to the ability of a future Scottish Government to introduce top-up benefits to reserved benefits has been improved at this stage of the Bill's passage.

We will further consider the comments made in your letter dated August 2015 on this matter.

Clause 23 – New benefits in devolved areas

As per our Interim Report, this Committee reaffirms the agreement in the Smith Commission report that the Scottish Parliament should have the power to create new benefits in areas of devolved *responsibility* and also new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from the DWP, whilst recognising that there will be a need for the Scottish Government to provide the DWP with early notification of its intentions because of the potential for overlap with the administrative responsibilities of the UK Government in welfare matters.

We welcome the comments in your most recent letter to us that “if the area is one of devolved responsibility then the Scottish Parliament has full legislative competence to enact legislation in that area (as long as this does not also relate to a reserved matter) including the provision of new benefits should it wish to do so”. We will study this statement carefully and take further evidence as we now consider that this offers some *potential* to move the discussion forward on this important provision.

However, we also note the fourth paragraph in this section of your letter which states:

“It would in effect give the Scottish Parliament competence to legislate to create any benefit in any area other than one that is for the same purpose as a reserved benefit in existence on the 28 May 2015. As such it would fundamentally undermine the social security reservation in a way that would limit the freedom of the UK Parliament to introduce new welfare benefits or making changes to existing reserved benefits in the future. This is clearly not what the Smith Commission intended or agreed.”

The Smith Commission's report simply states that “The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility, in line with the funding principles set out in paragraph 95 [of the Commission's Report]”. One interpretation of your letter is that the Scottish Parliament would be prevented from introducing a new benefit in a devolved area if it would prevent the UK Government from taking forward a hitherto unspecified plan to introduce a new benefit of its own. Our view is that the Smith Commission's report contains no such limitations on the policy flexibility of a future Scottish Parliament.

Clause 22 – discretionary housing payments

We are unclear if the current wording of the Bill gives the Scottish Parliament the power to remove the under-occupancy charge/‘bedroom tax’. The Committee considers that it is essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of discretionary housing

payments. As per our Interim Report, the wording of the Bill needs to make it clear that this is the case.

We note the comments you make on this matter in your letter to us and will consider these carefully to see if these clarify the situation in any way.

Clause 23 - Winter fuel payments

We were unclear if the current wording of the Bill restricts access to the Scottish Welfare Fund as a consequence of the draft clause provisions in relation to discretionary payments. The Committee had agreed that the Scotland Office should consider ensuring that the drafting makes it clear that this is not the case.

We note the comments in your letter in this area, which appear to be helpful, and we will study these carefully.

Clause 26 – Employment support

The Committee previously considered that this clause as currently drafted does not fully implement the Smith Commission recommendations. The Committee considered that the Smith Commission intended that all employment programmes currently contracted by DWP should be devolved. Therefore, the Committee recommended that the Bill should be amended to:

- remove any restriction on the type of person receiving support or in regard to the length of unemployment any person has experienced; and
- include the devolution of the Access to Work Programme.

These amendments have not yet been made to the Scotland Bill as at the close of Committee Stage in July 2015.

We note the comments in your letter of August 2015 on this matter. In this you state that “the Scottish Parliament can only provide employment support for claimants who are at risk of long-term unemployment where the assistance lasts at least a year, or for those with disabilities that are likely to need greater support”.

As such, it would appear that you are not at this stage willing to make the amendments we have called for in our previous report and remove the restrictions outlined above. We note that the report of the Smith Commission placed no such restrictions on the policy flexibility of a future Scottish Parliament, stating simply that “The Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP (which are presently delivered mainly, but not exclusively, through the Work Programme and Work Choice) on expiry of the current commercial arrangements. The Scottish Parliament will have the power to decide how it operates these core employment support services”.

‘Consent provisions’ in the welfare clauses

We continue to encourage both governments to reach an amicable solution to these areas of the Bill so that the Scottish Government is required to inform the UK Government of its intentions but does not necessarily need to seek its approval. We note the comments in your most recent letter to us and agree that the Bill will create a shared space, with some responsibilities being devolved and others remaining

reserved, in the area of welfare. This is why we continue to urge that both governments find mutually acceptable language for these provisions and to draw up an agreed process for effective inter-governmental relations on these matters.

Clause 31 – Crown Estate

In its Interim Report, the Committee made a series of suggestions where the Bill and associated policy intentions needed to be improved. At this stage, the Committee continues to recommend the following amendment to the Bill:

- the word “may” in draft clause 31 should be replaced with “shall”.

This amendment has not yet been made to the Scotland Bill as at the close of Committee Stage in July 2015.

We are not clear if the remainder of our recommendations require amendments to the Bill. If that is the case, then the Bill should be amended as follows:

- to provide clarity on the situation in Scotland post-devolution and the competition and confusion that may arise from the creation of ‘two Crown Estates’;
- at the very least, there should be an obligation placed on the non-devolved Crown Estate to consider the option of shared investments with the devolved Crown Estate in Scotland with a fair allocation of revenues; and
- The Crown Estate and HM Treasury should find a means of ensuring that a full share of the Crown Estate’s revenues from Fort Kinnaird accrue to Scotland, and that Scotland should receive its fair share from any such investment vehicles operating within Scotland in the future.

We note the comments you make in your letter to us of August 2015 on the Crown Estate and Fort Kinnaird in particular. We will consider these carefully.

At this stage, on Fort Kinnaird, we note the complicated contractual structure for this Scotland-based asset which makes alterations a challenge. We may choose to recommend an alternative solution whereby the Scottish budget can be compensated for the appropriate share of the revenues that the Crown Estate would have generated from this economic asset located in Edinburgh.

Finally, following evidence taken at our Committee meeting on 10 September, we seek clarification on a number of matters not previously raised with you in relation to the Crown Estate:

- We would be grateful if you could explain in more detail what is meant by the phrase ‘estate in land’ in Clause 31(10) as this is not a term of art in Scots law and whether this phrase has any relevance. You may wish to refer to the evidence we took on 10 September and from Professor Aileen McHarg’s written submission for a further elaboration of this matter.
- We also note the wording of Clause 31, which seeks to clarify the power of the Scottish Parliament and the Scottish Ministers to legislate to alter the management of the transferred Crown Estate assets. Evidence we heard on 10 September suggested that the clause imposes restrictions on that legislative freedom which are not the case in the rest of the UK. For example, whether the Scottish Government is prevented from being able to direct the

Crown Estate to increase its revenues from the offshore energy sector in a way that the Crown Estate that remains in the rest of the UK is not.

Clause 33 - Tribunals

In our Interim report, we said consideration should be given to the amendments suggested by the Law Society of Scotland relating to this clause. We will study the comments you made in your letter of August 2015 carefully in this respect to see if it meets the concerns of the Law Society.

Payday loan shops

As per our Interim report, consideration should be given to including the devolution of powers over licensing and regulation not just planning.

Clause 45 - Gaming machines on licensed betting premises

As per our Interim report, consideration should be given to:

- amending the clause to include the ability to limit the number of gaming machines in both existing and new betting premises.

Gender quotas

We have noted the comments made in your letter of August 2015. However, we still remain unclear if the Scottish Parliament will have the power suggested, especially so in light of evidence we took at our meeting on 3 September.

The original draft clause was designed to achieve its purpose by narrowing the scope of the general reservation of Equal Opportunities. That was to be done by introducing new 'exceptions' to the general reservation.

One such exception was "Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010". This was the provision which was understood to be intended to allow the introduction of gender quotas for Scottish public authorities.

It was not absolutely clear to us at the time of our consideration of the draft clauses whether, if the current effect of the Equality Act 2010 is that gender quotas would be unlawful, this new exception would empower the Scottish Parliament to impose gender quotas. That is because of the expression "except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010".

Clause 32 of the Scotland Bill is quite different from the originally published clause 24. In particular, it removes from the scope of the current Reservation of equal opportunities various matters relating to equalities issues, thereby putting them within the scope of the Scottish Parliament's powers.

It makes clear (as had not been previously clear) that the Scottish Parliament may not modify the Equality Act 2006 or the Equality Act 2010 but may supplement and add to the requirements of either the 2006 Act or the 2010 Act.

It provides that the Reservation does not prevent the Scottish Parliament from legislating to impose a requirement to take action that is not prohibited by the 2006 Act or the 2010 Act.

However, the corollary appears to be that the Scottish Parliament will remain disabled from enacting any legislation which contains provisions imposing a requirement that is prohibited by either the 2006 Act or the 2010 Act.

Whether clause 32 will enable the Scottish Parliament to impose gender quotas in relation to Scottish public authorities depends, therefore, on whether such a requirement is prohibited by either the 2006 Act or the 2010 Act.

Advice we have received so far is that it is widely accepted that the imposition of gender quotas by public authorities is not permitted by the 2010 Act.

At this stage, we consider that a more direct way to give effect to the Smith Commission proposals would be to make it clear on the face of the Scotland Bill that the Scottish Parliament does have the positive power to impose gender quotas rather than to peril the point on possibly competing interpretations of what is or is not prohibited by the Equality Acts.

Inter-governmental relations (IGR)

The Committee reaffirms its recommendation in its Interim Report that the Bill be amended so that the general principles underpinning the operation of inter-governmental relations appear in statute, and that the general principles underpinning the structures which will be put in place for dispute resolution should also be placed in statute. We note the contents of your letter of August 2015 on the issue of IGR more generally, and dispute resolution procedures in particular. At this stage, it is not clear if you yet agree that the general principles of IGR and the structures which will need to be put in place for dispute resolution will be placed in statute.

Other provisions

There are a number of other provisions in the Bill and clauses on which we have yet to state a definitive view, for example, relating to energy matters or referral to the Competition and Markets Authority. This should not be read at this stage that we necessarily agree with the current drafting. We will cover our views on these matters in any future report should there be need to suggest improvements to the Bill.