



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DEVOLUTION (FURTHER POWERS) COMMITTEE

Thursday 19 November 2015

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DEVOLUTION (FURTHER POWERS) COMMITTEE
28th Meeting 2015, Session 4

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

COMMITTEE MEMBERS

*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)

*Linda Fabiani (East Kilbride) (SNP)

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

*Alex Johnstone (North East Scotland) (Con)

*Alison Johnstone (Lothian) (Green)

*Stewart Maxwell (West Scotland) (SNP)

*Mark McDonald (Aberdeen Donside) (SNP)

*Stuart McMillan (West Scotland) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Judith Morrison (Solicitor to the Scottish Parliament)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Devolution (Further Powers) Committee

Thursday 19 November 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Bruce Crawford): I welcome colleagues to the 28th meeting in 2015 of the Devolution (Further Powers) Committee. I remind everyone to either switch off their mobile phones or at least put them in a mode that will not interfere with us.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private item 3, which is consideration of correspondence?

Members *indicated agreement.*

Crown Estate (Transfer Scheme and Memorandum of Understanding)

10:00

The Convener: Agenda item 2 is consideration of correspondence that we have received from Her Majesty's Treasury on the devolution of the Crown estate. We need to consider the draft scheme and draft memorandum of understanding, which are very detailed technical documents that I think would benefit from more scrutiny.

I suggest that the committee follow two courses of action with regard to the documentation: first, that we ask Judith Morrison from the solicitor's office and the Scottish Parliament information centre in due course for an analysis of and observations on both documents, given their technical nature; and secondly, that we ask the Rural Affairs, Climate Change and Environment Committee, which is undertaking in-depth scrutiny of the Crown estate provisions, to come back to us with a view on the documents. It is up to this committee to make a response on them.

Does the committee agree with that general approach?

Members *indicated agreement.*

The Convener: What issues would members like Judith Morrison from the solicitor's office and Graeme Cook from SPICe to consider with regard to the memorandum of understanding and to come back to us with a more considered viewpoint on? I certainly want to put on record one particular issue that I think we need to look at. The thrust of the memorandum from the United Kingdom Government's perspective is, understandably, that nothing gets in the way of the defence of the realm. I entirely get that, and paragraphs 6 and 9 lay out quite clearly the responsibilities of the Scottish and UK Governments in that respect.

However, to ensure that the clarity of the document is underpinned as strongly as it can be, I think—and I would like the solicitors, in particular, to look at this—that we need to work out what matters will be the most significant and will have primacy in any such agreement, particularly if European regulations or directives are at play. Will such things stand above the memorandum and will we, regardless of what the memorandum says, have to take cognisance of them and other areas of law that might interplay here? That is critical to the memorandum's clarity, and it will ensure that the committee is clear about what it means when the two Governments finally sign it.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): I have a supplementary on a

practical point, convener. There is a special protection area off Cape Wrath that is both on land and in the sea and which is in the middle of a major bombing range. That is a European designation, and there could be a conflict between the interests of the Ministry of Defence, which, if it chooses to, can use the area for 110 days a year, and things such as the bird breeding and feeding season. There are other such areas. The point that the convener has raised is clear to me, and I simply wanted to highlight an example for members' benefit.

The Convener: I was not aware of that example, but it is helpful.

Tavish Scott (Shetland Islands) (LD): In light of our parliamentary debate on intergovernmental relations on Tuesday, it is probably worth recognising that we are at least seeing a draft of the documents and that it is an encouraging step in a direction that we have all been making some noise about to a lesser or greater extent.

I want to highlight two paragraphs in the draft MOU, the first of which is paragraph 20, which says:

"Both Governments commit to make the most efficient use possible of the seabed in Scotland".

I would be interested to hear the definition of the word "efficient" in that paragraph, and I would be grateful if that could be looked at. Of course, that is probably more of a policy question than a legal one.

The second one is paragraph 16, which begins:

"Should there be further devolution of the Scottish functions within Scotland".

To me, that is pretty weaselly language. Paragraph 33 of the Smith commission report, which I know rather well, is abundantly clear on what is going to happen to the islands in Scotland. I suggest that, as a policy question, the committee states to the UK that we are interested in words such as "may", "can" and "will" instead of "should". The one that I am going to get worked up about is the "should" in paragraph 16, which I think should be replaced by "when". I would like to leave it with our policy and legal advisers to politely ask both Governments why they are not committing themselves to what the Smith commission actually agreed in paragraph 33 of its report.

Rob Gibson: On that point, I think that it is up to the Scottish Government and Parliament to decide how they will do the management. The word "should" is used in paragraph 16 only because it will be up to us to decide how we do it. The Scottish Parliament is not opposed to that further devolution, as Tavish Scott has just suggested. The islands policy will lead to that devolution in various ways, so I do not think that the

memorandum of understanding actually impinges on the Parliament's commitment to do just that.

The Convener: We could get into a policy discussion today, but I am trying to make sure that we deal with the technical aspects of the MOU so that we have got it legally clear.

I think that Mark McDonald wants to raise an issue.

Mark McDonald (Aberdeen Donside) (SNP): The memorandum of understanding makes several references to "UK-wide critical national infrastructure", but there does not seem to be a definition of what is captured by the term "critical national infrastructure". I rather suspect that it is self-explanatory, but it would be helpful if what it means could be outlined at the outset, possibly in one of the annexes.

The Convener: Having said that we should not get into a policy discussion, I point out that paragraph 12 says:

"The Scottish Government will undertake the Scottish functions, and manage the Scottish assets, in such a way that is not to the detriment of UK-wide critical national infrastructure."

However, there is no quid pro quo there in terms of the Scottish critical national infrastructure. For instance, if one side of the Forth was Crown estate land and we could not have built the new Forth crossing, would that be an issue that we would need to concern ourselves with? I present that as an example of a potential problem.

Mark McDonald: The point is important because, if we have the provision on critical national infrastructure, we could end up in a bind and go back and forth on whether we accept that something is critical national infrastructure.

The Convener: Exactly.

Mark McDonald: I suspect that that would not happen, but there are probably ways of removing the potential for it.

The Convener: That is a fair point.

Alison Johnstone (Lothian) (Green): On the reference in paragraph 16 to

"further devolution of the Scottish functions",

we have not been given competence to legislate on any revenues. For example, if people invested in a new harbour on Crown estate land and those investors were expecting a return, I understand that the return would go into the Scottish consolidated fund. Can we have some clarity about that? Would the fact that we have not got competence to legislate over where the revenues would go stymie investment in such an opportunity?

The Convener: Okay. Are there any other questions?

Stewart Maxwell (West Scotland) (SNP): I have a couple of points. First, the point that you made about paragraph 12 of the MOU, convener, is equally applicable to paragraph 13. My general point is that I think that the questions that we want answers on and clarity about—I certainly do—are about overlap or where the two Crown estates or Governments meet. The difficulties will occur at all the points where they bump into each other and overlap, whether it be on issues with the MOD or others.

I know that this is a very general point to make to the solicitor and SPICe, but the issues will be any points where there are connections, overlap or responsibilities affecting each other. Generally speaking, the MOU is reasonably clear, but the issue is what lies behind some of the words in some of the paragraphs.

The Convener: Yes. If two people—one from the UK Government and one from the Scottish Government—want to park in future at 39 to 41 George Street, is there a conflict?

Stewart Maxwell: There might well be.

The Convener: That is one of the properties that will be transferred to the Scottish Government. I say that in jest, but I take your point, Stewart.

Are there any other issues?

Linda Fabiani (East Kilbride) (SNP): Just as a supplementary to that point, we should remember the discussion that we had about what we called at the time Crown estate mark II—the ability of those parts of the Crown estate that are not under the jurisdiction of Scotland to carry on with other commercial activities, which could create a conflict with Scottish infrastructure. That goes back to your original point about that, convener. There should be something in the document that reflects that. Again, that may be part of an annex.

Tavish Scott: That is a strong point. I had clean forgotten about that, but we made quite a lot of it in earlier meetings of the committee. As Linda Fabiani says, surely the MOU should make passing reference to what may become a new Crown estate, or Crown estate mark II, in future.

The Convener: That is a good point.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): In his response to the draft statutory instrument, Andy Wightman makes political points, which I will not read out. He also says that the instrument is

“riddled with inaccuracies and errors”.

I do not know what that is referring to or whether we need to consider the points that Andy Wightman makes in his submission—perhaps the lawyers will pick them up anyway.

The Convener: One issue in the draft instrument struck me as strange. While schedule 1 lays out all of the Scottish assets that the Crown Estate tells us that it currently owns, there does not seem to be any catch-all phrase to describe all the assets of the Crown estate in Scotland in a general sense, in case anything has escaped. I do not know how that could be phrased in a technical legal manner. That seems to me to be a weakness in the draft instrument. Perhaps that is what Mr Wightman was referring to.

Alison Johnstone: Can I pick up on a couple of inconsistencies, which may well be picked up by the lawyers? Under “Scottish assets” on page 2 of the draft instrument, it says:

“Schedule 1 (Scottish assets) specifies the property, rights and interests”.

However, schedule 1, on the Scottish assets, says:

“with the exception of paragraph 17, any reference to property, rights and land”.

Why does it not say “interests”, because property is part of that?

The Convener: You are asking what that means.

Alison Johnstone: The counties might also be worth a second look, because there seems to be a bit of inconsistency there, too. For example, I am not sure that there is a “County of Dumfries and Galloway”, and why is Stirling not called “the County of Stirling”? I know that those are probably minor points that will be picked up in due course.

The Convener: Judith Morrison is scribbling furiously, taking notes of all these points. I do not expect you to answer all of our questions now, but is there anything in particular that you would like to reflect on?

Judith Morrison (Solicitor to the Scottish Parliament): No. The committee’s questions are clear. We will take them away and come back to you.

The Convener: If we are content with that, we will move into private. I say sorry to the one member of the public who has come to our proceedings.

10:13

Meeting continued in private until 10:20.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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