

SUBMISSION BY HIGHLAND COUNCIL

Scotland Act 1998, Schedule 5, Part 1, Paragraph 3(2): Management of the Crown Estate

We note the remit of the Commission on Scottish Devolution and the call for submissions by 3 September on the nine topics listed by the Commission.

We would be very grateful if the Commission will include the above provision of the Scotland Act as part of the Commission's considerations under topic 4. We hope the Commission will then recommend that the above paragraph 3(2) is removed from the Act as a change that would readily fulfil the three criteria set out in the Commission's remit.

In support of that case and on behalf of this Council, the five other Council's covering the Highlands and Islands, COSLA and Highlands and Islands Enterprise, we submit a copy of the Crown Estate Review Working Group Report on "The Crown Estate in Scotland".¹

The report provides an authoritative account of the Crown Estate in Scotland and warrants detailed consideration. We were therefore pleased to note your call of 18 June for in-depth submissions, as the Report brings a new clarity to this important topic and, we believe, sets out a compelling case for reform in line with your Commission's remit.

You will note that this case is being presented to you by an alliance of public sector bodies. Also, in the attached Briefing Note about the CERWG Report, you will see that both Governments have endorsed the factual accuracy of the Report and confirmed their interest in the case for reform made in the Report. Although all political groupings within the Highland Council do not support the Calman Commission as it does not include independence as an option, we welcome every opportunity to raise this important issue and to make it public. Therefore, and without prejudice to the constitutional issues facing Scotland, we have also all signed this letter individually to reflect the consensus on this issue in this Council and more widely in Scotland.

We have cited the points on the paragraph above to emphasise that the issue which we are raising with the Commission is one of public administration and good governance, because we recognise that there is still often confusion about the nature of the Crown Estate.

We believe that the Commission is uniquely positioned to given independent and detailed consideration to the need to reform the management of the Crown Estate in Scotland. Please do not hesitate to contact us if there is further information which it might be helpful for us to provide on this topic.

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Drew Hendry, Highland Councillor, SNP
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Richard Durham, Highland Councillor, Independent
3 September 2008

¹ Available at: <http://www.highland.gov.uk/NR/rdonlyres/CC6C28FE-9D73-451E-8F61-3F8D035194C3/0/CERWGFfinalReport.pdf>

Briefing Note from Highland Council

Scotland Act 1998, Schedule 5, Part 1, Paragraph 2(3): The Management of the Crown Estate in Scotland

Introduction

1. This paper gives a brief introduction to Crown property rights, the Crown Estate Review Working Group (CERWG) Report and the relationship between the Report and the criteria for change identified in the Commission's remit.

Crown Property Rights

2. The Crown Estate consists of the Crown property rights and interests managed by the Crown Estate Commissioners (Crown Estate Act 1961).²
3. The Crown property rights and interests managed by the Crown Estate Commissioners (CEC) in Scotland as part of the UK wide Crown Estate are different and distinct from those in the rest of the UK as they are part of Scots property law.
4. The property rights and interests which make up the Crown Estate in Scotland are listed in Table 1 on page 19 of the CERWG Report. The CEC has confirmed the accuracy of the list to the Scottish Parliament's Rural Affairs and Environment Committee (Dec 2007).
5. Schedule 5 of the 1998 Act reserves the management of these Scottish Crown property rights and interests to the CEC (Part 1, paragraph 2(3)), while also making clear that the property rights and interests themselves are not reserved (Part 1, paragraph 3(1)).
6. A number of the Crown property rights and interests still managed by the CEC in Scotland have no equivalents elsewhere in the UK in English law, while other Crown property rights and interests in Scotland which do not form part of the Crown Estate are already managed by the Scottish Government.

The CERWG Report

7. The group of public bodies responsible for the CERWG report strongly recommend in the Foreword to the Report that there should be a "review to ensure that the Crown property rights and interests which make up the Crown Estate in Scotland contribute more fully to the delivery of Scottish Government policies and the well-being of the people of Scotland."
8. The Report was first submitted to the Secretary of State for Scotland and Scottish Ministers in February 2007, shortly before the Scottish parliamentary and local elections. The CERWG partners re-endorsed the Report and re-submitted it to the Secretary of State and the Scottish Government in September 2007.

² There is often confusion between the Crown Estate as an estate in land under the 1961 Act and the CEC as the organisation that administers the Estate because the CEC brands itself as The Crown Estate (capital T in "the").

9. In November 2007, the Scotland Office Minister David Cairns confirmed his interest in the report and in investigating the case for reform set out. Since, Environment Minister Michael Russell has also confirmed the Government's interest in the report and in exploring opportunities for reform.
10. Both Governments reported that, following the first appearance of the CEC in the Scottish Parliament in October 2007, they were watching to see how the CEC improved its performance when the CEC re-appears before the Rural Affairs and Environment Committee in autumn 2008. Ministers may then consider further measures.
11. The CERWG Report shows the extraordinary lack of accountability and benefits in Scotland from the CEC's operations in Scotland and also describes the other negative consequences of the approaches adopted by the CEC in Scotland.
12. The Report identified the three main levels at which accountability and benefits could be improved, firstly, within the existing arrangements; secondly, by partial devolution or thirdly, by full devolution to return the administration of these Crown rights to Scotland.³
13. In considering partial devolution, the Report shows the strong historical links and similarities between the CEC and Forestry Commission (FC) and highlights the contrast in their responses to devolution. In 2002, the CEC, for the first time in its history, stopped treating Scotland as a distinct unit of the Crown Estate and stopped reporting separately on Scotland in its Annual Reports.
14. The Report also points out with regard to partial devolution that the distinct nature of the different Crown property rights that the CEC manage in Scotland, means that the administration of individual rights could be devolved separately to Scotland without the need to transfer responsibility for all the Crown rights which currently make up the Crown Estate in Scotland.
15. Amongst other options identified in the Report for partial devolution, is the devolution of the responsibilities of the Secretary of State for Scotland in the Crown Estate Act 1961 to Scottish Ministers including the power of direction over the CEC's operations in Scotland under Section 1(4) of that Act.⁴
16. However, the Report also demonstrates that starting to make significant improvements in the accountability and benefits of the CEC's operations in Scotland, increases the logic of further improvements and creates a compelling case for full devolution if an appropriate legislative opportunity arises.
17. Full devolution could be achieved by removing paragraph 2(3) from Part 1 of Schedule 5 without the apparent need for consequential amendments elsewhere in the 1998 Act.

Commission Criteria

³ The administration of these Scottish Crown property rights was first transferred from Edinburgh to London in 1832 as part of wider administrative changes. For the last 50 years, Scotland has been the only territory involved in those changes where the administrative responsibility has not been transferred back (e.g. CERWG Report p.98)

⁴ Until 1956, when the Commissioners of Crown Lands were replaced by the CEC as a Board modelled on the Forestry Commission, the Secretary of State for Scotland was the Commissioner of Crown Lands with responsibility for Scotland.

18. The CERWG Report has the sub-title “New Opportunities for Public Benefits” and contains a wide range of evidence that the people of Scotland would be better served if responsibility for the administration of the Crown property rights and interests which make up the Crown Estate in Scotland, was transferred to the Scottish Parliament.
19. The Report shows that, while the CEC could make major improvements, there will continue to be major alignment issues. This is particularly the case in the marine environment and very topical with the Scottish Government currently consulting on Scotland’s first Marine Bill to achieve an integrated and sustainable system of marine management in Scottish Waters.
20. The CERWG Report describes a range of marine issues that illustrate the contrast between the CEC’s approach and policy requirements in Scotland. The regulation of Scotland’s territorial sea area is very largely devolved apart from the CEC’s administration of the seabed, which cuts across an integrated marine management system in Scotland, separates the costs of regulation from the public income charged by the CEC for use of the seabed and creates an un-necessary extra layer of administration.
21. At a more general level, the mis-match between the CEC’s focus on earning over 75% of its gross revenue from urban property investment very largely concentrated in London, and the CEC’s responsibilities for the management of the foreshore and seabed around the Highlands and Islands as a socially and economically fragile region.
22. The devolution of the CEC’s responsibilities in Scotland would involve relatively small financial considerations. The CERWG Report shows that Scotland only accounts for 5% of the CEC’s revenue in any year. The CEC’s gross revenue in Scotland in 2007-08 was £11.4 m. This amount is less than the percentage increase in the CEC’s total revenue in most years including 2007-08.
23. Each year, over 80% of the CEC’s gross revenue in Scotland is paid to the Treasury as revenue surplus (£10.3 m in 2007-08). However, as cited in the CERWG Report⁵ and repeated since, the CEC has itself argued that devolving its responsibilities in Scotland would save the Treasury money because of the workings of the Barnett Formula.
24. Thus, giving Scotland responsibility for the administration and revenues of the Scottish Crown rights still forming part of the Crown Estate, would enable the Scottish Parliament to both serve the people of Scotland better and be more financially accountable.
25. This issue also has particular relevance for continuing to secure the position of Scotland in the UK. The Crown Estate’s name and the widespread lack of understanding about the Estate can make the topic appear of greater constitutional significance than is the case.
26. The CERWG Report clarifies the more straightforward nature of the topic and shows that this issue in Scotland is about the administration of the property rights involved rather than their ownership.

⁵ For example, on page 86.

27. The Scottish Parliament and Government have a direct interest in these property rights and notwithstanding the CEC's operations in Scotland being reserved, have the scope as explained in the CERWG Report to influence the management of the Crown Estate in Scotland through policy guidance, statutory regulation and property law reform.
28. Now that the position with the Crown Estate in Scotland has been set out in the CERWG Report, awareness of the issues involved is growing. It might be considered that the UK is best served by devolving the administration of the property rights involved as a matter of good governance which can bring real benefits.