



# THE SMITH COMMISSION:

## DRAFT SCOTLAND CLAUSES



The UK Government published draft legislation on 22 January 2015 which aims to implement the recommendations of the Smith Commission for further devolution to Scotland. The Smith Commission was established by the UK Government on 19 September 2014 following the 'no' vote in Scotland's independence referendum and published its recommendations on 27 November 2014.

While the legislation contains some key aspects of the devolution proposals, other areas will require further detailed negotiations to take place between the Scottish and UK Governments and have not been included in the legislation. Alongside the draft legislation the UK Government has therefore published a summary of its approach to these other aspects.

We will keep you updated on the progress of the draft legislation through the UK Parliament.

### Air Passenger Duty and Aggregates Levy

As proposed by the Smith Commission, the draft legislation provides for the full devolution of all aspects of Air Passenger Duty as it applies to departures from Scottish airports. The draft legislation also devolves the taxation of the commercial exploitation of rock, gravel and sand in Scotland, known as the Aggregates Levy.

### Competition and consumer protection

The draft legislation delivers on the proposal that the Scottish Government should be given the right to require the Competition and Markets Authority to carry out a full second phase investigation in relation to a particular competition issue arising in Scotland. This would supplement the Scottish Government's existing power to request that a UK regulatory body carries out an initial market study and would replicate the power which is already available to UK Ministers.

In addition, the draft legislation expands the devolved

authority of the Scottish Parliament to cover consumer advocacy and advice (but not consumer protection, which will remain reserved) and this will include powers to investigate complaints of general relevance, to pursue complaints for vulnerable consumers, and to assist those facing disconnection, for example from their electricity supply (governed by the Consumers, Estate Agents and Redress Act 2007).

### Constitution and elections

The draft legislation establishes the permanence of the Scottish Parliament and the Scottish Government in the UK constitution, as recommended by the Smith Commission. The provisions also enshrine in law the current convention that requires the UK Parliament to seek the consent of the Scottish Parliament when it wishes to legislate in a devolved area. All powers over the number of MSPs and the number of constituencies for the Scottish Parliament are devolved but any



changes will require a two-thirds majority vote in the Scottish Parliament.

In addition, control over elections to the Scottish Parliament and local government elections in Scotland is devolved. This will include control over spending limits, election broadcasts and the voting age but would not include the regulation of political parties. Elections to the Scottish Parliament cannot be held on the same day as general elections to the UK Parliament, European Parliament or local government elections in Scotland.

### **Crown Estate**

Responsibility for management of the Crown Estate's assets in Scotland and the income from these assets will be devolved to the Scottish Ministers, although the draft legislation provides that any property or interests held by a limited partnership will be excluded. The Crown estate includes the seabed, urban assets, rural estates and mineral and fishing rights. The Scottish and UK administrations will collaborate on producing a Memorandum of Understanding to ensure national security and defence matters are protected, and that UK wide infrastructure is safeguarded after the Crown assets are transferred.

The transfer of responsibility for the Crown Estate may be of significance to Scotland's aquaculture industry. The leasing by the Crown Estate of seabed and foreshore rights to operate fish farms has largely worked in a collaborative manner. Recent Scottish Government proposals which would have required sites which have been fallowed (usually for operational but sometimes commercial reasons) to be yielded up were dropped. Any requirement to yield up sites not in current use would require separate primary legislation. All policy changes which would affect the economics of production should be carefully considered.

The further proposal in the initial Smith Commission paper for sub transfer of responsibility over the Crown Estate to local authorities may be welcomed in aquaculture production areas like Orkney and Shetland where there already exists a well settled regime for grant of works licences. It will therefore be interesting to observe whether this additional proposal is included in the final transfer of the Crown Estate.

### **Employment**

The draft legislation provides a mechanism for the potential future transfer of management and operative functions in respect of reserved tribunals to Scottish tribunals (except in respect of Special Immigration Appeals and Proscribed Organisations Appeals). The underlying substantive rights and duties would remain reserved to the UK Parliament, meaning there would be no general power to amend existing employment laws relating to discrimination or unfair dismissal. However, if the management function relating to the Scottish employment tribunal system were to be transferred, the current tribunal fee regime in Scotland could potentially be amended or abolished.

The Equality Act 2010 will remain reserved but the Scottish Parliament will be permitted to introduce gender quotas in respect of public bodies in Scotland. If quotas were to be introduced, it could represent a significant extension of the existing positive discrimination provisions in the Equality Act.

### **Energy and Renewables**

The draft legislation follows up on the Smith Commission proposals in respect of energy. The power to determine how supplier obligations in respect of energy efficiency and fuel poverty, such as the Warm Home Discount and the Energy Company Obligation, are implemented in Scotland will be devolved. This will be done by transferring executive competence to the Scottish Government (under the Gas Act 1986, Electricity Act 1989 and Energy Act 2010) empowering them to design and implement supplier obligations in Scotland. However, responsibility for setting the way the obligations are funded (the scale, costs and apportionment of the obligations as well as the obligated parties) will remain reserved.

The devolution of the management of the Crown Estate's assets (notably its seabed and foreshore assets and its mineral and fishing rights) has potentially significant implications for the offshore energy industry, particularly oil & gas and offshore renewables. The UK Government's summary envisages that the Scottish and UK Governments will enter into a Memorandum of Understanding to ensure that such devolution is not detrimental to UK-wide critical national infrastructure relating to such matters.



The transfer of Crown Estate responsibilities will cover any revenues and liabilities arising from those assets, including responsibility for ensuring the decommissioning of offshore renewable energy installations in Scottish waters under the Energy Act 2004 and declaring safety zones in Scottish waters and the Scottish Renewable Energy Zone. It is also recognised that, in view of possible future changes to the charging regime for offshore pipeline or for electricity network rentals, provision is needed to provide safeguards for the principle that taxation of oil and gas receipts should remain reserved, and that consumers across GB should be protected from any excessive rents for energy infrastructure.

The new power of the Scottish Government to refer particular markets to the Competition and Markets Authority (CMA) for an in-depth investigation is confirmed in the draft legislation. Interestingly, this is a power which the Scottish Government has recently signalled it would be prepared to use if its concerns about electricity and gas markets are not resolved by the current CMA investigation into the sector.

Finally, the UK Government will work with the Scottish Government to devise a proportionate and workable method of consulting the Scottish Parliament in relation to the Energy Strategy and Policy Statement to which OFGEM must have due regard. OFGEM will also lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament.

### **Income Tax**

The Smith Commission proposals include a marked extension of the taxation powers already available to the Scottish Parliament. In future the Scottish Parliament will enjoy power, not only to vary income tax rates but also increased flexibility in respect of the various income tax rates that will apply to non-savings and non-dividend income and the thresholds that will relate to the relevant Scottish income tax rates.

Scottish Taxpayers will continue to pay the main UK rates of income tax on savings and dividend income and the personal allowance will continue to be set by the UK Government. As has been shown through the setting of the rates of tax to apply on residential

property transactions under the new Land and Buildings Transaction Tax, the Scottish Government is willing to depart from the rates of tax that apply in the rest of the UK. This may mean that the affairs of Scottish Taxpayers could become increasingly complicated as they may be faced with having to apply different tax rates and thresholds to different elements of their income. In addition, depending on the rates set, there could be a move by some taxpayers to alter their lifestyle so as to become resident either within, or outwith, Scotland.

### **Oil and Gas**

The draft legislation implements the recommendations of the Smith Commission regarding oil and gas. Accordingly, the current onshore oil and gas licensing regime for Scotland (under the Petroleum Act 1998) is to be devolved from the Department of Energy & Climate Change (DECC) to Scottish Ministers although the DECC will retain the right to determine the level of consideration (royalties) payable for onshore licences.

In addition, the draft legislation provides for the transfer to the Scottish Parliament of legislative competence for the licensing of Scottish onshore oil and gas exploration and extraction – albeit again with the level of consideration (royalties) for onshore licences remaining a reserved matter. Consistent with the recent exclusion of Scotland from the underground access rights provisions of the UK Infrastructure Bill (currently under Parliamentary consideration), the draft legislation also confers legislative competence on the Scottish Parliament in relation to access rights for onshore oil and gas. Accordingly, if implemented, the draft legislation will devolve all aspects of onshore oil and gas licensing in Scotland (other than the level of royalties payable for a licence, which will remain reserved).

Licensing for offshore oil and gas extraction will remain reserved.

### **Telecommunications, postal services and broadcasting**

The Smith Commission recommended that a formal consultative role should be provided to the Scottish Government and the Scottish Parliament in setting the strategic priorities for OFCOM in respect of its activities in Scotland. It is proposed that this will be done by way



of a Memorandum of Understanding.

The draft legislation also permits the Scottish Government to appoint a member to the board of OFCOM to represent the interests of Scotland, subject to consultation with the UK Government.

The proposal to allow the Scottish Parliament and Scottish Government to play a formal consultative role in the review of the BBC's Charter will also be implemented by way of a Memorandum of Understanding rather than legislation. This is expected to be done in time for the BBC's next review due later this year.

### Transport

The current restriction on public sector operators bidding for rail franchises for passenger rail services which start and end in Scotland is removed under the draft legislation. This will open the door to public sector entities and consortiums bidding for these rail franchises.

### VAT

In line with the Smith Commission proposals, receipts from the first ten per cent of VAT raised in Scotland will be assigned to the Scottish Government's budget with an appropriate reduction in the block grant. The draft legislation also proposes to go beyond the

recommendations of the Smith Commission in providing that the first 2.5 per cent of the five per cent reduced rate of VAT attributable to Scotland shall be assigned to the Scottish Government's budget.

Control over setting VAT rates and managing VAT will remain at a UK level, as required by EU law.

For further information or advice on any of the issues discussed in this briefing note, please get in touch with your usual Shepherd and Wedderburn contact.

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