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Bruce Crawford MSP
Convener
Devolution (Further Powers) Committee
c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP

26 August 2015

Dear Bruce,

Thank you for your letter of 29 June. It was my pleasure to appear before your Committee. I value the constructive relationship between the UK Government and the Scottish Parliament and particularly the Devolution (Further Powers) Committee.

During my appearance on 25 June I committed to respond to some specific points raised by Members of the Committee. I have attached these to this letter. I am confident that the Bill reflects the Smith Commission Agreement, and I am also glad that both Governments are in agreement on a number of elements of the Bill ranging from the important taxation measures to the clauses on rail franchising, offshore renewable energy installations, the British Transport Police and provisions relating to the accountability of various bodies to the Scottish Parliament.

Since I last appeared before your Committee there has been strong cooperative working at both Ministerial and official level on the Scotland Bill, its implementation and the range of wider issues in the Smith Agreement. The breadth and depth of the inter-governmental work which is currently underway is positive and I hope this will continue as we work to deliver the Smith Commission Agreement. This work is, of course, in addition to the significant work-streams underway in relation to improving the mechanics of inter-governmental relations; and on agreeing an appropriate fiscal framework to underpin the landmark fiscal devolution set out in the Bill.

As I have said to the UK Parliament, I am reflecting on the amendments tabled at Committee stage of the Bill and the points made in the wider debate, ahead of the Bill's return to the Commons for Report stage. The work of your Committee is an important strand of that.

I look forward to continuing the engagement with the Committee as the Bill proceeds.

**Rt Hon DAVID MUNDELL MP
SECRETARY OF STATE FOR SCOTLAND**

Consent provisions

As I made clear during the Committee stages of the debate I am not persuaded that the consent provisions in the Bill constitute a 'veto' that prevents Scottish Ministers making the changes to policy that they will be empowered to make under the legislation. Provisions in the Bill reflect the division of responsibilities between the two Governments envisaged by the Smith Commission Agreement. This is particularly important in areas where the Bill will create a shared space, with some responsibilities being devolved and others remaining reserved. There are practical issues that may arise as the powers are exercised that mean it is sensible to include consent provisions in the Bill. During Bill debates, UK Government Ministers have highlighted the importance of good working between the two Governments. This will be central to the successful implementation of the Smith Commission Agreement and I believe it is incumbent on us to work in this way for people in Scotland.

Intergovernmental relations

Your committee asked about intergovernmental relations structures to deliver the Smith Commission Agreement. The UK Government has a track record of delivering change, as evidenced by the implementation of provisions in the Scotland Act 2012. In relation to the Scotland Bill this may largely depend on what the Scottish Government choose to do with the powers. I am sure your Committee will be interested to find out more about the plans the Scottish Government has for these.

On revisions to the Memorandum of Understanding (MoU). Ministers of all four administrations reaffirmed the importance they each attached to effective inter-governmental relations at the Plenary meeting of the Joint Ministerial Committee (JMC) in December 2014, and tasked officials with reviewing the MoU. Officials from the four administrations first met in Edinburgh on Friday 27 February 2015 to begin work on reviewing the existing inter-governmental machinery, including the MoU and the JMC structures. The meeting was the beginning of a process at official level to develop recommendations that can be provided to Ministers at a future Joint Ministerial Committee. Since February a joint process has been ongoing and further official level meetings involving all four administrations are planned. Any changes that are considered will of course be subject to approval by the JMC Plenary.

In relation to your comments on the dispute resolution procedure it is important to note that there have only been four disputes recorded throughout the history of the JMC. The UK Government believes that this demonstrates the success of the principle of dispute avoidance above which the current dispute resolution process sits. Of course, I expect considerations about dispute resolution procedures to form part of discussions about revisions to the MoU.

Fiscal framework and borrowing

The UK Government is currently in discussions with the Scottish Government on a new Fiscal Framework to deliver the Smith Commission Agreement and accompany the powers in the Scotland Bill. I do not consider it would be appropriate for me to comment on those discussions, nor speculate on the outcome, at this particular time.

Welfare

The welfare provisions in the Bill fully deliver the Smith Commission Agreement. The power to top-up reserved benefits was a significant addition to the Bill at Introduction and will give the Scottish Government the freedom to decide whether to give extra money to reserved benefit recipients in Scotland. I thought it would also be helpful if I set out the clauses identified by your committee and your letter, specifically clauses 19-22 and clause 26 of the Scotland Bill, in more detail below.

There is no power in the Bill to create new benefits in areas of devolved responsibility because the UK Government believes the Scottish Parliament already has this power. By definition, 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. However, as I indicated to the House of Commons at the Bill's Committee stage, my officials have continued to discuss this with officials from the Scottish Government.

You also asked about alternative clauses that had been drafted by the Scottish Government in relation to welfare, in particular the new clause in relation to welfare. Amendments to this effect were tabled at Commons Committee. The Government rejected this amendment because it would not provide a new power to create benefits in areas of devolved responsibility; rather, it would devolve further areas of responsibility to the Scottish Parliament beyond that agreed by all of Scotland's main political parties in the Smith Commission.

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.

Clause 19 – carer's benefits

Clause 19 of the Bill allows the Scottish Parliament to decide the detail of to whom Carer's benefits are paid, how much they are paid and what the eligibility criteria should be. The parameters around the definition of a relevant carer reflect long-standing principles about the purpose of Carer's benefits and how people are supported in different circumstances. For example, Clause 19 picks up some of the main features of the current Carer's Allowance in terms of the care for a disabled person being "regular and substantial" and the carer not being in full-time education, aged under 16 or in gainful employment. Taken together with existing devolved powers in areas like social care, the clause ensures the Scottish Government and Parliament will have legislative competence to set out the way in which support is provided for carers.

There are a number of considerations I would like to point out in relation to the suggestion of extending the legislative competence of the Scottish Parliament further in this area.

- First, those under 16 are not normally supported by the benefit system. Rather they are supported by parents, guardians or local authorities/councils. This is a long-standing principle of the social security system.

- Secondly, the current Carer's Allowance is designed as a form of compensation for those who can do no work or only limited work because of the time they dedicate to their caring duties. Therefore, there needs to be a threshold to judge whether the claimant is in employment or not. The gainful employment provision is a means of doing so.
- Thirdly, those in full time education are not normally supported by the benefit system. Rather they are supported by the educational maintenance system through its system of loans and grants.

Clause 20 – Benefits for maternity, funeral and heating expenses

Clause 20 gives the Scottish Parliament legislative competence in relation to support currently provided by a number of reserved benefits – namely Sure Start Maternity Grants, Funeral Payments, Cold Weather Payments and Winter Fuel Payments - as set out in paragraph 49(2) of the Smith Commission Agreement.

As with our approach to disability and carer's benefits, the clause does not simply devolve the existing benefits themselves but rather the subject matter of the benefits. This gives the Scottish Parliament wide-ranging powers to make their own provision for the areas currently covered by these benefits. I believe the current approach fully meets the Smith Commission Agreement and devolves the subject matter of the Regulated Social Fund in a way which enables the Scottish Parliament to legislate for their own provision.

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

The top-up clause in the Bill gives the Scottish Government wide powers to make payments to people entitled to a reserved benefit and can be made for whatever reason the Scottish Parliament legislate for. Top-ups can be paid on an individual, case by case basis or to provide on-going entitlement to specific group or all benefit claimants if the Scottish Government wished to fund such supplementary payments.

A person who is sanctioned can receive a top-up payment where there is a need that is immediate and arises from an exceptional event or exceptional circumstances not related to the reduction, but it cannot be used solely to offset a benefit reductions as a result of a sanction or any other reduction in a reserved benefit as a result of an individual's conduct. This is not an additional restriction for those who are sanctioned but a mechanism to ensure the sanctions and conditionality policy, which remains reserved to the UK Government under the Smith Commission Agreement, is not undermined.

Conditionality and the sanctions system is an integral driver of claimant behaviour across the whole claimant journey, and as such has clear impacts on the rate at which claimants flow-off out-of-work benefits (which are remaining reserved) and return to work. It would undermine the system in place that ensures claimants comply with reasonable requirements if a person in Scotland who had failed to take up a job or training opportunity (and as a consequence has had their reserved benefit reduced) could simply have that short-fall made up by the Scottish Government.

The same reasoning applies for a person who has failed to report a change of circumstance that materially affects their benefit entitlement and, as a consequence, is having the overpayment deducted from their benefit payments. It

would simply not be right if they could look to the Scottish Government to off-set the overpayment recovery with a top-up.

Clause 22: (DHPs), Clause 23 (discretionary payments) to remove restrictions.

Clauses 22 and 23, along with clause 21, deliver our commitment to enable the Scottish Parliament to introduce discretionary payments to help address the needs of the people of Scotland and top-up reserved benefits. Clause 22 covers discretionary housing payments (DHPs) and clause 23 covers discretionary payments to give financial or other assistance to individuals in order to meet a short-term need, which is required to be met to avoid a risk to their well-being. Discretionary payments under clause 23 can be paid to people who are not entitled to a reserved benefit and as is the case now, under this clause the Scottish Parliament will be able to continue to make provision for occasional payments to help vulnerable people needing to establish or maintain a settled home. DHPs or short-term discretionary payments cannot be paid solely to off-set a reduction in a reserved benefit, for example because of work-related sanction, for the same reasons I have set out above in relation top-ups under clause 21.

Clause 23 provides the Scottish Parliament with the competence to legislate for short-term needs. Other amendments tabled would have removed “short-term” from exception 7 and exception 8, so that that any discretionary payments or other assistance under clause 23 could be “regular” or “long-term”. This would be at odds with the overall purpose of this clause in helping to avoid a risk to a person’s well-being because of a short-term need or to assist vulnerable people establish or maintain a settled home.

Clause 26 - Employment Support

Clause 26 does not differentiate between contracted and non-contracted support. Instead it sets out the “space” in which the Scottish Government will be able to create new support and does this by giving statements around the functions that are discharged by the Secretary of State or by a party acting on behalf of the Secretary of State. I therefore believe that clause 26 delivers a substantial transfer of powers to the Scottish Parliament and delivers on the Smith Commission Agreement.

This clause creates clear lines of accountability between those claimants that Scottish Ministers are able to create employment programmes for and those claimants that will continue to be supported through Jobcentre Plus. In particular, it makes it clear 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. Help for long-term unemployed and disabled people currently makes up 95% of DWP’s budget for centrally contracted employment support delivered through providers. It therefore draws a line between such schemes and the core functions of Jobcentre Plus. This enables the smooth delivery of an integrated benefit system, and will result in a better service for claimants.

Crown Estate

The Scotland Bill confers upon the Scottish Parliament power to make legislative arrangements in relation to the management of transferred functions either before or after the transfer. As an interim measure only, the Scotland Bill provides for a modified version of the Crown Estate Act to apply to the new managers until such

time as the Scottish Government and Scottish Parliament have put their own legislative arrangements in place.

The Scotland Bill does place an obligation upon the Scottish Ministers, or other new managers of the transferred functions, which replicates the obligation upon the Crown Estate Commissioners in the Crown Estate Act, to maintain an estate in land. This has been included to ensure that the property owned by the Crown is maintained for the future. How the assets are managed after the transfer is for the Scottish Government and the Scottish Parliament to determine. The Scottish Government may make changes to the pool of assets that make up the estate under its management. It will be open to the Scottish Government or another manager to sell some assets and reinvest the proceeds bringing new assets into the estate. But an estate in land in the ownership of the Crown must be retained for the future.

The UK Government has considered the nature of the Crown Estate Commissioners' holdings in Fort Kinnaird and concluded that Fort Kinnaird does not fall within the scope of the Smith Commission Agreement because of its legal ownership structure. Any forced reconfiguration would breach existing contractual arrangements and jeopardise the ability of the Crown Estate Commissioners to meet their statutory obligations and to generate revenues which are returned to the UK Consolidated Fund for the benefit of the UK as a whole.

An English Limited Partnership (ELP) does not have a separate legal personality; in contrast to a Scottish Limited Partnership. In this instance, two limited companies, both registered in England and Wales, are the legal owners of the underlying properties (which are located in England and Scotland) and hold them on trust for the ELP. The partners of the ELP are the Crown Estate Commissioners and Hercules Unit Trust – each of which controls 50% of the ELP and owns (via a wider corporate structure) indirect 50% interests in the two limited companies. Under the contractual and operational arrangements that govern the ELP, neither the Commissioners nor Hercules may unilaterally deal with the underlying English or Scottish property assets. This ELP was constituted in 2007. The structure of the ELP and the use of corporate entities within the wider arrangements are standard for joint venture investment vehicles of this type – and are commonly used in the property investment market.

The Scotland Bill makes provision for the revenues from the Scottish assets to be paid into the Scottish Consolidated Fund after the transfer scheme comes into force. Removing entirely the reservation for hereditary revenues in para 3(3)(a) of Schedule 5 to the Scotland Act 1998 is likely to have unintended consequences, impacting on revenues other than those from the Scottish assets. The Scottish Government will be able to direct revenues that have been received from the Scottish assets, from the Scottish Consolidated Fund, to bodies such as local authorities and harbour trusts.

Gender quotas

The Smith Commission Agreement was clear that Scottish Ministers and Scottish Parliament should have competence for socio-economic inequality and duties that attach to that. The Smith Commission agreed that the 2010 Equality Act should remain reserved, and the subject matter of the 2006 Equality Act falls within the scope of the equal opportunities reservation. That is why the clause is clear on this point. The clause provides a framework within which the Scottish Parliament can introduce additional equal opportunities measures, including gender quotas.

Tribunals

Clause 33 of the Scotland Bill provides a mechanism for enabling responsibility for functions relating to a reserved tribunal to be able to be transferred to a Scottish tribunal in a managed and structured way. This reflects the unique circumstances that will apply following such a transfer given that the substantive law and underlying rights and duties will remain reserved.

As such, any transfer will need to be undertaken in such a way as to ensure the continuing effective delivery of the overarching national policy in reserved areas. The UK Government retains a necessary interest in, and responsibility for, ensuring that tribunal users can access necessary services in a consistent way. The approach in this clause is consistent with the Smith Commission Agreement and is required to give proper effect to the Agreement. Clause 33 provides for the reserved functions to be transferred to be set out in an Order in Council. The Order in Council will require approval from both the UK Parliament and the Scottish Parliament. Once the Order in Council is approved the Scottish Parliament can legislate to transfer responsibility for dealing with those matters in relation to Scottish cases to a Scottish tribunal.

Competition and Markets Authority

The Smith Commission Agreement was clear that Scottish Ministers should be able to make a reference to the Competition and Market's Authority (CMA) and the provision in the Scotland Bill delivers this. The CMA is funded by the UK Government therefore it is appropriate that, just like UK Ministers, Scottish Ministers will be required to involve the Secretary of State in any decision to require the CMA to undertake an investigation. A market investigation is a significant undertaking by the CMA, and the impact of business uncertainty and possible remedies have the potential to spread across the whole UK. This is consistent with the Smith Commission Agreement.