



PUBLIC PETITION NO.

PE01390

Name of petitioner

Neil Kay

Petition title

The governance of essential ferry services

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to support the setting up of an independent expert group to consider and recommend institutional and regulatory options for issues relating to the provision of competitively tendered Scottish ferry services under EC law.

Action taken to resolve issues of concern before submitting the petition

I have represented the issues documented in this petition on numerous occasions to the Scottish Parliament and to Scottish Ministers including in inquiries into ferry tendering in all three sessions of the Scottish Parliament starting in 2001. Some of the interchanges are documented in the background to the petition. None of this has resulted in satisfactory action undertaken by Parliament or the Scottish Executive/Government in my view which is why I felt I had to have recourse to petition in order to adequately express the nature of the problem and a possible way forward.

I have discussed both the principle of the independent expert group and the intention behind this petition as well as earlier drafts with my constituency MSP and two list MSPs for my region and have received encouragement and positive comments on both counts. Without prejudice to any comments they may make on this I believe that more than one MSP will support this petition as submitted here.

Petition background information

There are aspects of the institutional arrangements in Scotland that should be credited as excellent and positive contributions to the governance of ferry services, most notably Caledonian Maritime Assets Ltd (CMAL) whose role should be developed and strengthened. However, as I and others have argued since 2001, governance here should be based around an independent regulator supported by a dedicated statutory regulatory framework.

Permanent officials are not the appropriate group to deal adequately with the issues that are the subject of this petition. That statement can be supported by experience of five central areas here on which I have given invited evidence to the Scottish Parliament and where my advice conflicted with that of the officials.

(1) Public service contracts: The Scottish Executive argued in 2001 that the first

Northlink contract would be a model for the intended CalMac contract. The Reporters to the Transport Committee cited my objections to the effect that the Northlink contract was untested and unproven in practice; this was confirmed when the contract collapsed and had to be retendered. It was noted by a member of Transport Committee in May 2005 that my earlier evidence “has been borne out”.

(2) Operator of Last Resort: In 2001 the Parliament’s Transport Committee was advised by its Reporters that “given the lifeline nature of (CalMac) ferry services, it is seen that an operator of last resort could step in to deliver services immediately” and they noted that “the proposals have been criticised by Professor Neil Kay as failing to designate a guaranteed provider of last resort”. I later repeatedly pointed out the government’s approach could not create the necessary operator of last resort and this was confirmed by successive government’s failures to do so, with inevitable risks to the public interest. There is presently no designated operator of last resort for essential ferry services in Scotland.

(3) Independent Regulator: Earlier in June 2001, I and others advised the Transport Committee that the creation of an independent regulator was standard practice and necessary in cases where essential services such as the CalMac network were being subjected to competitive tendering and I have made that point repeatedly since. Finally, on 2 February 2011, the Cabinet Secretary for Finance and Sustainable Growth announced the Scottish Government was “taking the first steps towards examining the case for a statutory ferries regulator”— this nearly ten years after exactly such a case was made in detail by me and others to the Transport Committee and the government.

(4) Altmark: I gave invited evidence to the Scottish Parliament Transport Committee May 2005 where I produced a detailed proposal for an alternative to tendering CalMac based on the European Court’s Altmark Criteria. Without warning or consultation the then Scottish Executive dismissed my proposal and others just before the crucial final debate on whether or not to tender CalMac, commenting on my proposal; “the Altmark criteria are not applicable to ferry services which fall within the scope of the Maritime Cabotage Regulation”. Then in April 2008 the European Commission decided to launch an investigation into possible illegal state aid payments to CalMac and Northlink, stating the issue of whether or not there was a case here to be pursued was to be decided “in the light of the Altmark judgment” (para 102), which of course the then government had said was not relevant here.

(5) Public service obligations: My proposal for alternatives to tendering CalMac in 2005 was based on the need for clearly defined and specified public service obligations (PSOs), and indeed the first Scottish Executive (1999-2003) stated its intention to pursue PSOs which are necessary under the ECs 1992 Maritime Cabotage Regulation if compensation (subsidy) is to be awarded for ferry services on public service routes. In 2006 Scottish Ministers stated they would not apply clearly defined PSOs in such cases but would just rely on public service contracts (PSCs), I have repeatedly warned against the folly and risks of this approach, starting with a detailed letter in July 2006 to the then Minister of Transport. Then in the April 2008 investigation into possible illegal state aid payments to CalMac and Northlink the European Commission stated, inter alia, that it “doubts whether the public service obligations imposed on CalMac were clearly defined” - perhaps unsurprising given the government had decided not to impose any in the first place.

Had similar issues impacted on any other essential services such as water, gas and electricity, they could have been expected to invite national debate and controversies, but ferry services in Scotland are peripheral in terms of geographic, media and political focus, even compared to trams. The expensive multi-volume 2005 Scottish Executive ferries study completely failed to deal with the points discussed above, unsurprisingly perhaps since its detailed terms of reference would have been drafted by permanent officials, albeit approved by Scottish Ministers. On the Altmark and PSO issues, some commentators have noted that the European Commission investigation then took a relatively generous view of possible transgressions of state aid issues by the Scottish Government, perhaps fortunately for all concerned since any adverse judgment could have led to the forced return of subsidy, the probable bankruptcy of CalMac/Northlink,

and the cessation of essential ferry services in the north and west of Scotland for an indefinite period given the absence of any operator of last resort (Point 3 above). In passing we also note Points 4 and 5 above suggests Parliament's eventual agreement to tendering of CalMac was based on the wrong information.

While the Commission's eventual decision on possible state aid here may indeed have been a fortunate outcome and the least worst for the public interest given the situation that had been created by internal governmental advisers, it still does not leave behind a viable foundation for future policy.

The current Scottish Ferries Review is another example of an expensive and misdirected official-led exercise, albeit one approved by Scottish Ministers, searching for a direction and coherence that it can never find. It was signposted by the 2003-07 administration, carried through by the 2007-11 administration and will be left for the next administration to deal with. World wars have been fought and won in less time. The "Review" has been premised on the idea that "stakeholders" can help design the system. This puts the cart before the horse, you should first have independent experts design a workable system and only then involve "stakeholders" to help find weak spots in the design. But this review setup gives a few dominant voices and vested interests undue and disproportionate influence. No-one should be surprised if there are any future adverse effects from having invited the foxes to assist in the design of the chicken coup.

There is even less understanding now in the system about what should be done than there was in 2001. We now have different pricing and/or vessel provision schemes operating in the Northern Isles, Western Isles, GourockDunoon, and the rest of the CalMac network. We also have incoherent policies relating to Gourock Dunoon despite both routes there, including the unsubsidised route, being classifiable under EC guidelines as public service routes and so eligible for non-negotiable PSOs if the government wished, in the latter case as a PSO without compensation (subsidy) as on some Mediterranean ferry routes.

Developing a solution

The EC's Maritime Cabotage Regulation and associated Guidelines are brief and, apart from specifying the scope of issues such as PSOs, is incomplete when it comes to advising governments what they should and should not do.

This reflects the principle of subsidiarity established in EU law by the Treaty of Maastricht (1992). You do not ask the Commission how you should frame issues such as PSOs any more than a football team manager would think of asking a referee whether he should play 4-4-2 or 3-5-2.

Under subsidiarity it is for national EU governments or their devolved authorities to frame and apply the regulatory framework under which, inter alia, such issues as independent regulator; compliance with Altmark; setting and monitoring of PSOs; cherry picking; new vessels; route bundling; and operator of last resort are dealt with. Many of these issues are interrelated, e.g. route bundling has implications for operator of last resort. What is completely missing from the governance of ferry services in Scotland is a set of institutional guidelines embedded in a statutory rule book similar to other essential services.

What is needed is a process by which ways for dealing with these problems can be set up. If the problem is defined properly by Parliament as "the provision of competitively tendered essential ferry services under EC law" this problem could be considered by a small (not much more than 6 members) independent expert group in which the core would be experienced experts from regulated essential services (such as energy, postal services, telecoms) with input from experts in relevant EC law and ferry services. The terms of reference of the group would be to frame institutional and regulatory options for ferry services in Scotland, including issues cited in the previous paragraph here. I appreciate the normal procedure and default option would be for such a group to be set up by the Scottish Government but I would also hope to have an opportunity to argue to the Parliament and the Government that this might be better carried out by the group being set up and reporting to Parliament in the first instance.

All this is not a direct solution to past, present and future problems here, but may represent the best chance to develop and recommend a viable framework to deal with such problems

Unique web address

<http://www.scottish.parliament.uk/GettingInvolved/Petitions/PE01390>

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