PE1637/L

Minister for Energy, Connectivity and the Islands submission of 11 December 2020

Thank you for the correspondence from the Clerk to the Public Petitions Committee on 20 November 2020 seeking additional written evidence relating to petition PE1637.

The petition summary is: Calling on the Scottish Parliament to urge the Scottish Government to ensure that environmental legislation in Scotland is sufficient to prevent ship-to-ship transfers of crude oil in environmentally sensitive locations, such as the Inner Moray Firth, and to enhance the accountability of trust port boards to their stakeholders.

On 12 November 2020 the Committee met and considered the evidence and a number of commitments were made by me and my officials to provide additional written evidence to the Committee.

One question was on the remit of trust ports and how the Scottish Government is involved in the process of resolving conflicts with stakeholders. There are three port ownership models in Scotland: trust ports, privately run ports and local authority owned ports. Similar to privately owned ports, trust ports are fully commercial operations that receive no 'trust' tax benefits and are not owned by local stakeholders or the Scottish Government. The term trust is reflective of the desire that these ports are operated in a successful commercial way for the benefit of the existing stakeholders and the local, regional and national economies and in the interests of future stakeholders and prosperity. The trust port model ensures all profits raised by the port are reinvested in the port infrastructure. Trust ports use any profits generated to support the long term viability of the port and thus for the benefit of the whole community of stakeholders. Privately run ports are free to utilise profits in a way that suits them but they would require to provide a dividend for shareholders.

Other than the difference in profit distribution, all ports in Scotland have the same regulations to follow. All ports are obliged to act in accordance with their local legislation and other relevant law, whether they are trusts, private or local authority owned. All ports are empowered by harbour orders made by Scottish Ministers and required to operate only within the powers and duties conferred upon them by statute. These orders are subject to public consultation.

As I explained at the Committee meeting, trust ports should do all they can to comply with the Modern Trust Ports for Scotland guidance. Scottish Ministers acknowledge though that not all trust ports will be in a position to comply with every provision of the guidance. In some cases the size and nature of the trust port's operation may mean that a particular stipulation cannot easily be applied, or that compliance would be excessively burdensome and disproportionate. Trust port boards should exercise their own judgement as to the essential elements for their operations and may seek clarification on the guidance as necessary from Scottish Government officials.

There is little difference between the duties of a trust port board member and those of the members of a private company port's board. Company port boards are accountable to their shareholders, the trust ports to their stakeholders. Both have a clear and unambiguous duty to these groups and are accountable to the general public for the way in which they exercise the statutory powers and duties devolved onto them by Parliament. Trust board

members should act independently and in good faith in the best interests of the trust port and all its stakeholders, including responding appropriately to complaints from stakeholders and having a duty of care to the trust port and its current and future stakeholders.

The guidance notes that interested parties who believe a trust port is acting in breach of the principles of the trust port should raise the matter with the port in the first instance. The trust port should provide a written response within a reasonable timescale. This should explain whether they consider the complaint justified and set out the remedial action they intend to take. If the complainant does not believe the response they have received from the trust port is reasonable in addressing the grounds of his or her concern, the matter can be reported to Scottish Ministers who may assist in resolving any dispute in a role as "honest broker". This should not however be considered to represent an escalation of the complaint and Ministers have no locus in regulating the commercial decisions or activities of a trust port. Nor do they become involved in 'good neighbour' disputes as these are matters for the board to resolve. As mentioned at the Committee meeting, complaints about noise from a port or harbour should be directed through the established channels at the relevant local authority who have a responsibility to investigate noise complaints from all businesses.

Ministers' role as "honest broker" is limited to working with the port and stakeholders to resolve conflicts and ensure the board does not take decisions in an arbitrary unaccountable manner which is inconsistent with the spirit of the guidance. An example of where Scottish Ministers' role could be applied is if there was a complaint from a stakeholder of a perceived unreasonable increase in port fees, or if a stakeholder believed they were being treated unreasonably compared to other businesses on access to the port, with no explanation from the port.

The Convenor asked when the Scottish Government had written to trust ports to remind them of the guidance and their responsibilities. Transport Scotland officials meet with the majority of Scottish ports 3 times per annum at the British Ports Association's Scottish Ports Group Committee meetings, along with fortnightly meetings with some of the main ports, and are in regular correspondence with individual ports on a wide range of issues. Trust ports are well aware of the guidance, and their need to adhere to the principles of it. Officials and Ministers regularly emphasise the need for all model of ports, not just trust ports, to continue to engage with their local communities through formal and informal consultation processes and community engagement and the Harbour Order process is built around this principle.

At the Committee meeting there was discussion about the number of complaints received regarding trust ports, and Port of Cromarty Firth (PoCF) in particular, and what evidence there was to demonstrate confidence that trust ports are operating with reference to the guidance. I think it has to be considered firstly that any industrial activity has the potential to create some negative impacts for local communities as well as the positive benefits of supporting local employment and businesses in the catchment area. This applies to airports as it does ports as well as a variety of other businesses. The key is to ensure that the negative impacts do not breach noise and environmental standards and that adequate protocol is in place to ensure that communities have the ability to voice complaints and concerns with confidence that these will be taken seriously and with the ability to seek redress as appropriate.

I intimated at the Committee meeting that Transport Scotland has received 5 complaints about trust ports in Scotland across the last 12 months, of which 2 relate to PoCF. A number of other complaints were highlighted at the Committee and it is likely that these will have been directed to the port or to the local authority (with responsibility for noise or traffic congestion). Highland Council have confirmed they directly received 26 noise complaints from 16 different stakeholders in 2020.

My officials also contacted PoCF and the table below shows the recorded noise complaint events which the Port has directly received this year. These have been recorded against 6 main events linked to rig/vessel activity. The total number of individuals complaining is 9 - four people from Cromarty (accounting for 18 complaints) and five people from Invergordon (accounting for five complaints). As context, while not diminishing the importance of the complaints to those complainants, it is important to note that of the 18,000 residents living around the Cromarty Firth, the individuals' complaints account for 0.05% of the community population.

Noise Complaint Event Numbers	Noise Complaint Event / Source	Number of Complainants	Number of complaints recorded against same event	Location of Complainant
1	Maersk Resilient	3 Stakeholders	3 Complaints	Invergordon
2	Paul B Lloyd Junior	4 Stakeholders	12 Complaints	Cromarty
3	Transocean Leader	2 Stakeholders	3 Complaints	Cromarty
4	Noble Sam Hartley	2 Stakeholders	2 Complaints	Invergordon
5	AHTV GH Endurance / EnQuest Producer	2 Stakeholders	2 Complaints	Cromarty
6	Global Energy Group / Moray East Offshore Windfarm	1 Stakeholder	1 Complaints	Cromarty

We expect that all complaints made to ports in Scotland are given due consideration by the port and resolved where that is a reasonable outcome. From the number of complaints made, the guidance would appear to be serving the purpose for which it was intended and protocols put in place by ports are generally robust enough to deal with complaints made.

There were also specific questions regarding recent funding grants awarded to PoCF and what conditions and frameworks were put in place with the funding. One question was whether the £7.5 million of Scottish Government funding that was put in place for the new cruise hub is regarded as linked to the £4 million grant from HIE in August 2014, and whether funding includes conditions on how the organisation conducts itself.

The £4m funding from HIE in August 2014 was provided on the basis that the majority of project funding should come from private sources. It would be accurate to reflect that the

cruise hub element of the project (£7.5m) would not have happened without the additional quayside (£4m) having been delivered first. As with all financial investments made by HIE, standard terms and conditions are applicable. These can be viewed at https://www.hie.co.uk/about-us/policies-and-publications/terms-and-conditions.

Each financial approval also has a legal undertaking attached to it and these can contain project specific conditions in relation to provision of support. HIE, as economic and community development agency for the North and West of Scotland would seek only to apply conditions within its formal remit.

All privately owned and trust ports have similar access, as commercial businesses, to investment needed to deliver their vision and objectives. There is the potential for public funding to deliver infrastructure port developments. HIE and Scottish Enterprise would consider a request for support from a trust port in the same way they would from any commercial business. The key considerations for such proposals would be related to wider economic benefit, value derived from the investment and whether the project would proceed without such investment.

A supplementary question from the Committee raised the issue of local residents or community groups accessing funding for legal representation to challenge whether a port is acting outwith their legal jurisdiction. There is local legislation for each port setting out the parameters of their legal authority, and like all companies, they must ensure they work within their legal basis. If members of the public believe a company has acted outwith their legal compliance, and they believe they have evidence to prove this, they are fully entitled to consider taking legal action.

The Committee questioned whether legal aid could be provided to assist stakeholders investigating whether a port has acted outwith their legal compliance. In the first instance a stakeholder will want to obtain advice from a solicitor to find out what could be done, and they can do this using the Civil Advice and Assistance Scheme provided they are financially eligible.

The Scottish Legal Aid Board (SLAB) provides information on solicitors who offer help through legal aid, or other advice providers funded by SLAB at: http://www.slab.org.uk/public/solicitor-finder/.

Advice and Assistance (A&A) is available subject to a financial eligibility test, on any matter of Scots law for various forms of legal advice and assistance short of representation in court. It can include advice on whether there is a legal case to take forward, advice on options to proceed, negotiating a settlement, or writing letters on the applicant's behalf.

A person qualifying for A&A will have to pay a contribution if their disposable income exceeds £105 a week. This is paid directly to the solicitor. Eligibility for A&A is assessed and granted by the solicitor, not the Scottish Legal Aid Board.

A person whose disposable capital exceeds the capital limit of £1,716 is not eligible for advice and assistance, whatever their disposable income or eligibility for state benefits. A person whose disposable income exceeds the limit of £245 a week is not eligible for Advice and Assistance, whatever their level of disposable capital, unless they are in receipt of certain state benefits - for example, income support. Disposable income is the total income an applicant and any partner has, from all sources, after deducting standard allowances. It is the solicitor

that grants advice and assistance and it is for the solicitor to decide whether they collect the contribution from the applicant.

If there is a situation where a number of potential litigants have claims which are the same as, or similar or related to each other the Court may give permission to allow a group procedure. Group procedure allows multiple litigants the opportunity to bring one group action at a lower cost to individual litigants.

If judicial review is deemed to be appropriate, then anyone looking to take action will need to raise their own individual proceedings in the Court of Session, as the newly introduced rules on group proceedings do not currently apply in these cases.

If an applicant is deemed to have a joint interest with other persons, and they cannot show that they would be seriously prejudiced in their own right if legal aid were not granted, then Reg 15 of the Civil Legal Aid (Scotland) Regulations 2002 applies, and SLAB may need to ask more about those who share a common interest in the matter including information about their financial resources, and ability to assist with the cost of the proposed proceedings.

If the merits tests are met, and the applicant can show they would be prejudiced in their own right if proceedings are not raised, then SLAB have the ability to assess the applicant as an individual as detailed above.

I hope that this has been of assistance.