



Law Society
of Scotland

Written evidence

Fisheries Bill inquiry

November 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Marine Law sub-committee welcomes the opportunity to consider and respond to the House of Commons' Environment, Food and Rural Affairs Committee's inquiry on the Fisheries Bill.¹ We have the following comments to put forward for consideration.

General remarks

The Fisheries Bill (the Bill) provides a legal framework for the UK to operate as an independent coastal state under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) after the UK's withdrawal from the EU and from the Common Fisheries Policy (CFP).

Fishing opportunities are a particularly important issue for Scotland: in 2016, landings by Scottish vessels contributed around 65% of the quantity of all landings by UK vessels². Strong collaboration between Defra and the devolved administrations is of considerable importance. The Bill creates common approaches to fisheries management between the UK government and devolved administrations, which are known as 'Fisheries Administrations'. We welcome the recognition given by Defra³ of the importance of engaging with the devolved administrations and legislatures and the collaborative approach taken by the Bill.

It is of crucial importance that Scotland's fishing interests are protected along with those of the other UK jurisdictions, particularly in recognising that positive changes to the UK fisheries position is likely to adversely impact the European fishing fleet and/or impact on trade negotiations, including tariffs.

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/inquiries/parliament-2017/scrutiny-of-the-fisheries-bill-17-19/>

² Scottish Sea Fisheries Statistics 2016, paragraph 1.1.

³ See comments in *Sustainable fisheries for future generations*.

Following the UK's exit from the EU, regulation of fishing in Scotland should fall within the ambit of the Marine (Scotland) Act 2010 and the Aquaculture and Fisheries (Scotland) Acts 2007 and 2013. In line with the marine planning envisaged by these Acts, we consider that it is important that fishing is not looked at in isolation but that an integrated view is taken. In particular, leaving the CFP opens up the opportunity for fisheries to be looked at in detail alongside matters such as conservation, fossil fuel and renewable energy developments, aquaculture, and navigation. This will help to ensure that the system of marine planning envisaged under the Act is comprehensive, rather than having components of use of the sea treated separately.

We note that there will continue to be close co-operation with the EU and coastal states on management of cross-border fish stocks following the UK's exit from the EU. The nature and extent of ongoing negotiations with the EU will depend on the terms of an agreed withdrawal agreement. As regards the future relationship with the EU, we note the contents of the draft Political Declaration which is subject to continuing negotiations. This draft Declaration provides for bilateral and international cooperation to ensure sustainable levels of fishing, promote conservation of resources and foster a clean, healthy and productive marine environment, as well as providing for the establishment of a new fisheries agreement. If no withdrawal agreement is in place, we would expect that bilateral discussions between the UK and EU would be necessary.

We note that a number of sections of the Bill are high level and provide powers for the Secretary of State to introduce regulations on several matters. We consider that extensive engagement with a wide variety of stakeholder groups is important in the context of those regulations being developed and introduced.

We note that other than in relation to a discard charging scheme, the Bill does not provide for any appeal or dispute resolution processes, for example in relation to the granting of licences. We consider that such provision should be made, even on an enabling basis, to bring clarity to the powers of the Secretary of State and devolved administrations in this regard.

Matters arising in the context of devolution

The October 2017 memorandum from the JMC(EN) acknowledges the need for common frameworks to be in place and noted that such frameworks will recognise devolution in Scotland, Wales and Northern Ireland. We note that areas in which common frameworks are anticipated comprise highly regulated areas of policy implemented by EU Directives, Regulations and Decisions and transposed by UK Acts and subordinate legislation, Scottish Acts and Scottish subordinate legislation, as well as a number of administrative, non-statutory arrangements.

We note that the memorandum agreed by the JMC(EN) requires to take into account of the *White Paper on Legislating for the Withdrawal Agreement between the United Kingdom and the European Union* (Cm 9674) (paragraph 67) and also the *White Paper on the Future Relationship between the United Kingdom and the European Union* (Cm 9593) (paragraph 56), while recognising the recommendations of the Public

Administration and Constitutional Affairs Committee's report *Devolution and Exiting the EU: Reconciling Differences and Building Strong Relationships* (HC1485). In addition, the memorandum requires to be amended to take account of the changes which were made to the European Union Withdrawal Bill as it progressed through Parliament. The bill received Royal Assent on 26 June 2018 and is now the European Union (Withdrawal) Act 2018.

The Cabinet Office published in late 2017 a list of 111 points where EU Law intersects with devolved matters. This has been supplemented by the publication of the UK Government's *Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* on 9 March 2018. This analysis sets out the UK Government's provisional assessment of areas of EU law that intersect with devolved competence in each devolved administration. We note that 24 of the policy areas in question are subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part. One of these identified areas relates to fisheries management and support.

In order to add further information, we offer a survey of this policy area (annexed to this paper) which includes details of the EU law concerned and the implementing legislation in the UK.

Comments on the Bill

Clauses 1 - 6

Clause 1 lists objectives for fisheries and revokes Article 2 of the Common Fisheries Policy Regulation (Council Regulation 1380/2013, the CFP Regulation), which sets out the objectives which govern the CFP. We note that the objectives in the clause are largely in line with those set out in the CFP Regulation although there are some differences.

The objectives referred to in clause 1 are the basis of the Joint Fisheries Statement (JFS) which is provided for in clause 2. The JFS is a document in which the fishing authorities set out their policies which will be used to meet the objectives as set out in clause 1. This recognises the collaboration required between UK Government and devolved administrations to meet the objectives. Clause 2 also provides for a Secretary of State Fisheries Statement (SSFS).

Clauses 3 - 5 concern the practical arrangements for fisheries statements – preparation, commencement, amendment, deadlines for preparation of the first fisheries statements and details obligations to review. Fisheries policy authorities (in relation to the JFS) and the Secretary of State (in relation to the SSFS) are to publish the respective statements by 1 January 2021. We welcome the requirements for review of the statements under clause 5, however, suggest that this could be strengthened by a requirement to publish the conclusions of such a review.

Clause 6 refers to the requirement for a national authority to exercise its functions in relation to fisheries, fishing or aquaculture, in accordance with a JFS or SSFS “unless relevant considerations indicate otherwise”. It is not clear what this means and we would welcome clarification.

Licences are to be granted, under the various sub-sections, in respect of specific fishing vessels and to the vessel’s owner or charterer. We note that there is no reference within the provisions to the transfer or sale of licenses to third parties. We consider that there would be merit in clarification of the position in relation to such transactions.

Clauses 7- 8

Clause 7 concerns the revocation of requirements for equal access to waters for EU Member States’ fishing vessels. This clause has the effect of giving the UK control over access to its waters by EU fishing boats, both in the 6-12 mile zone and the 12-200 mile Exclusive Economic Zone (EEZ).

Clause 8 restricts the access by foreign fishing boats to UK fishery areas unless fishing is in accordance with a licence or for a purpose “recognised by international law or by any international agreement or arrangement to which the United Kingdom is a party.” Subsection (3) creates an offence where the master, owner and charterer (if any) of a foreign fishing boat breaches these requirements.

Clauses 9 - 13

These clauses concern the arrangements for the licensing of UK fishing boats and for the licensing of other boats in UK waters. These clauses and associated schedules restate some aspects of existing law and revoke others. We welcome this consolidation in the law which will help to ensure clarity and certainty. We note that policy changes are also made by these provisions, in particular in relation to fishing by foreign vessels without a licence, arising as a result of the UK’s withdrawal from the EU.

Clause 9 concerns circumstances in which a licence is required for British boats. The prohibition and subsequent exemptions under clause 9 will apply UK wide and ensure that the basic licensing requirement is consistent throughout UK waters. The effect of this change will be to replicate the effective status quo; that a licence issued by a UK Fisheries Administration will be effective throughout UK waters.

Subject to the exceptions set out in subsection (2), fishing anywhere by a British fishing boat is prohibited unless that boat has been authorised under a licence. These exceptions are the same as those set out in existing licensing orders. Generally, these exceptions are in place as the relevant fishing activity is regulated under another regime or because it would not be appropriate to license the activity.

Subsection (3) provides a power for the Secretary of State by regulations to amend the list of exceptions set out in subsection (2), to the licensing requirement. This will provide the flexibility to require in the future

that further fishing activities are licensed if, for example, the activity is judged to risk the health of fish stocks. It replicates the ability to vary the exceptions by order under section 4 of the Sea Fish (Conservation) Act 1967.

We welcome the requirements of subsection (4) for devolved administrations to consent to any changes to the exceptions from the requirement under subsection (1). Subsection (5) provides that regulations under subsection (3) are subject to the affirmative regulation procedure.

Subsection (6) makes it an offence to fish in contravention of subsection (1). The master, owner and charterer of a fishing boat would be guilty of the offence. Subsection (7) explains that further provision is made about the offence in clauses 14 to 16.

Clause 10 grants power to the Fisheries Administrations to grant licences to British fishing boats in their respective jurisdiction, i.e. Scottish fishing boats are licensed by the Scottish Ministers. Licences may be limited by reference to fishing in a particular area; to the periods, times or particular voyages during which fishing is authorised; to the descriptions and quantities of fish which may be caught; and to the method of sea fishing. We consider that this covers all possible means of limitation.

Clause 11 prohibits fishing by foreign fishing boats within the UK EEZ unless they have a licence issued by a Fisheries Administration. This reflects that following the UK's withdrawal from the EU, access for foreign boats to fish in UK waters will be a matter for negotiation and this will be implemented partly through UK licensing.

We welcome the requirement in subsection (3) for consent by devolved administrations to any regulations made under subsection (2) and for such regulations to be subject to the affirmative procedure.

Clause 12 concerns the powers of the Fisheries Administrations to grant licences to foreign fishing boats. Licences issued under subsection (1) may only authorise fishing with respect to the areas of UK waters for which the respective administrations have competence.

Clauses 14 - 17

Clause 14 concerns penalties for licensing offences and replicates existing offences set out in section 4 of the Sea Fish (Conservation) Act 1967. In respect of section 14(2)(b), we note the potential practical difficulties of forfeiture of fish, nets and fishing gear which may be on a foreign fishing vessel and will likely have returned to foreign waters by the time of the order being made.

Clause 15 deals with offences by body corporates. We consider that these provisions make clear who will carry responsibility for offences. We welcome clarity in the criminal law as to who is responsible for the commission of crimes.

We have no comments in respect of clauses 16 or 17.

Clauses 18 - 22

Clause 18 gives the Secretary of State power to set the maximum quantity of sea fish caught by British fishing boats and days that British fishing boats may spend at sea in a calendar year but does not require him to do so. This replaces the current EU provisions which allow the European Council to determine fishing opportunities for EU waters, including UK waters. We note that international relations are reserved under the Scotland Act 1998, Schedule 5, paragraph 7(1). In line with this, subsection (2) requires that a determination under subsection (1) may only be made for the purpose of complying with an international obligation of the UK to determine the fishing opportunities of the UK.

We consider the provisions of subsections (3) and (4) to be appropriate, these provide that: different maxima may be determined based on descriptions of sea fish, areas of sea, or descriptions of fishing boat, but not based on the location of a British fishing boat's home port or any connection of such a boat or any of its owners to any place in the UK.

This clause is an enabling provision and we consider that consultation with relevant stakeholders will be crucial in the development and implementation of the regulations. Limits set under this clause will require to carefully balance a variety of different interests, including those of the fishing business, the environment and consumers.

With regards to the existing system of Fixed Quota Allocation Units, we note that there is uncertainty as to proprietary rights in respect of these Units⁴. The Bill may provide an opportunity for this to be clarified.

We welcome the duties of the Secretary of State set out under Clause 19 when making a determination under clause 18. The provisions require the Secretary of State to consult with devolved administrations and the Marine Management Organisation before making or withdrawing a determination. The clause also requires the Secretary of State to publish a notice of a determination after it being made or withdrawn, lay a copy of the notice in Parliament, and send a copy to the devolved administrations. This will assist in terms of ensuring clarity and accountability.

We note that clause 20 concerns retained EU law relating to the distribution of fishing opportunities to EU Member States. It revokes EU law that will no longer be operable or appropriate after the UK leaves the EU. We have no substantive comment to make on these provisions.

Clause 21 enforces a duty on fishing administrations to exercise functions so as to secure (so far as possible) that fishing opportunities are not exceeded – either in excess of catch quota or days spent at sea.

We make no comment in respect of clause 22.

⁴ See, for example, commentary in *The United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at paragraphs 108-113.

Clauses 23 - 27

Clause 23 is an enabling provision which gives the Secretary of State power to make regulations to establish a scheme whereby chargeable persons are required to pay a charge for unauthorised catches of sea fish. We note that “the purpose of the scheme is to charge for unauthorised catches at a level which deters overfishing and thereby incentivises fishers to use more sustainable fishing practices and avoid unwanted catches.”⁵ The Bill provides, in clause 24(1), that chargeable persons under the scheme are holders of English sea fishing licences or producer organisations that have at least one member that is an English sea fishing licence holder.

Clause 23 provides that such a scheme is voluntary and therefore we note that the scheme is potentially limited in scope. Regulations under this clause are subject to the affirmative procedure and we consider this appropriate. We again note that consultation would be merited in the course of framing the regulations.

Clauses 24 – 27 deal with further provisions around the charging scheme set out in clause 23. We do not make any further comment on these provisions.

Clauses 28 - 30

Our comments are limited to clause 28, which along with Schedule 4, addresses powers to give financial assistance. We note that the Government is intending to establish a UK State Aid regime, which would come into force at the end of the transition period, if the Withdrawal Agreement is approved. The regime would transpose EU rules into UK law, mirroring existing block exemptions for agriculture and fisheries, although we note that some aspects of the EU legislation would not make sense if directly imported into UK law if the UK has left the Internal Market, for example Article 4 of the Fisheries Block Exemption Regulation⁶, which refers to the Common Fisheries Policy⁷. The Competition and Markets Authority would take on enforcement and supervision.

Although certain categories of aid are permitted, we assume that financial assistance given by the Secretary of State (in relation to the English zones), Welsh Ministers, the Northern Ireland Department, or the Scottish Ministers (in relation to the respective zones within devolved competence) would nevertheless need to comply with the overarching State Aid law. It is important that the Fisheries Bill is drafted in such a way as to be compatible with any such UK state aid regime. For example, the EU block exemption only permits state aid to be given where the beneficiaries are compliant with rules of the Common Fisheries Policy. If a UK State Aid regime is to apply a similar requirement, it should be considered now whether this requirement will merely be compliant with the Fisheries Act, or with the Scheme made under section 28, or

⁵ Explanatory Notes, paragraph 160.

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1441292510508&uri=CELEX:32014R1388>

⁷ http://data.parliament.uk/DepositedPapers/Files/DEP2018-0839/BEIS_State_Aid_TN.pdf

with other conditions.

Clauses 31 - 38

Clause 31 is an enabling provision giving the Secretary of State powers to make provision on matters currently regulated under the CFP. These powers will allow the UK to meet its international obligations and conserve the marine environment. Subsection (4) lists a number of matters which the regulations may only concern.

Clause 33 gives the Secretary of State powers to make regulations regarding aquatic animal diseases.

These enabling powers are limited by clauses 34 and 35, which *inter alia* provide that regulations made under clauses 31 and 33 may not include provisions that would be within the competence of the Scottish Parliament, or other devolved administrations, unless the provision is “merely incidental to, or consequential on, provision which would be outside that legislative competence.” Clause 35 provides that the Secretary of State may make regulations within devolved competence with the consent of the relevant Devolved Administration.

We welcome the consultation requirement set out in clause 36 in respect of regulations to be made under clauses 31 and 33.

Reference is made to Schedule 6, part 1, which concerns the powers of Scottish Ministers to make provisions corresponding to those which may be made by the Secretary of State under clause 33. Schedule 7 contains provisions which confer powers on the Scottish Ministers to make byelaws or orders relating to the exploitation of sea fisheries resources for conservation purposes. We make comment on Schedule 6 and 7 below.

Clauses 39 - 43

The only substantive comment we make on these clauses concerns the definition of “fish” in clause 40. It is not clear if this definition extends to crustaceans.

Schedules

Part 1 of Schedule 1 concerns the detail around the Joint Fisheries Statement, and Part 2 around the Secretary of State Fisheries Statement. We welcome the consultation and publication requirements. In relation to paragraph 3(1) and paragraph 7(1), we suggest it may be beneficial to set out a minimum scrutiny period for the respective consultation drafts to be laid before Parliament.

Schedule 2 makes further provision in relation to sea fishing licences. We suggest that paragraph 3(1), which concerns powers to obtain information, should relate only to obtaining 'relevant information'. We note that no reference is made within this schedule to the reinstatement of a licence and we would suggest that this be included.

We make no comment in respect of schedules 3, 4, or 5.

Schedule 6 relates to powers of devolved authorities to make further provisions, and Part 1 of the schedule concerns powers of the Scottish Ministers. Paragraph 1 deals with the power to make provision about aquatic animal diseases, mirroring the provisions for the Secretary of State under clause 33. Paragraph 3 refers to procedural requirements and under paragraph 3(2) and (3), regulations are subject to the affirmative procedure if they meet any of the conditions set out in subparagraph (2), otherwise are subject to the negative procedure.

Schedule 7 confers powers on the Marine Management Organisation, the Welsh Ministers and the Scottish Ministers to make byelaws or orders relating to marine conservation, in connection to fishing activity. We note the consultation requirements included within the new provisions set out under schedule 7 and welcome the requirement to consult before orders are made. With regards to the new section 137B set out in paragraph 16, we consider it would be useful to have guidance on matters which "might affect the exploitation of sea fisheries resources...". As drafted, this could be considered wide in scope and greater clarity would be welcome.

For further information, please contact:

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