



Law Society
of Scotland

Fisheries Bill

Law Society of Scotland briefing for report stage

June 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

In July 2018, the Department for Environment, Food and Rural Affairs published its paper *Sustainable fisheries for future generations*¹ to which the Law Society responded.² We welcome the opportunity to consider the Fisheries Bill³ and have the following points to make for the Bill's Report Stage in the House of Lords, scheduled for 22 June 2020.

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 2018, landings by Scottish vessels contributed 58 per cent of the value and 64 per cent of the tonnage of all landings by UK vessels⁴. 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 collectively as 'Fisheries Administrations'. We welcome the recognition given by Defra⁵ of the importance of engaging with the devolved administrations and legislatures and the collaborative approach taken by the Bill.

¹ <https://www.gov.uk/government/consultations/fisheries-white-paper-sustainable-fisheries-for-future-generations>

² <https://www.lawscot.org.uk/media/360983/18-09-12-mar-consultation-fisheries-white-paper.pdf>

³ <https://services.parliament.uk/Bills/2019-20/fisheries.html>

⁴ Scottish Sea Fisheries Statistics 2018, paragraph 2.1.

⁵ See comments in *Sustainable fisheries for future generations*.

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.

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. As regards the future relationship with the EU, the contents of the agreed Political Declaration⁶ are referred. This 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 within the context of the overall economic partnership. The Parties agreed to use their "best endeavours to conclude and ratify their new fisheries agreement by 1 July 2020". We note the terms of the statement given by Michel Barnier on 3 February 2020 at the presentation of the Commission's proposal for a Council recommendation on directives for the negotiation of a new partnership with the UK⁷. He stated: "our free trade agreement must include an agreement on fisheries. This agreement should provide for continued reciprocal access to markets, and to waters, with stable quota shares." We also note the UK's published approach to negotiations with the EU, including the terms of the draft Fisheries Framework Agreement⁸.

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.

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf

⁷ https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_185

⁸ <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

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. 24 of the policy areas in question were identified as being subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part. The Cabinet Office published in April 2019 a *Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland*⁹. This revised analysis has reduced the number of policy areas where legislative common frameworks may be required to 21. 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.

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

Comments on the Bill

Clauses 1 – 11

Clause 1 lists objectives for fisheries. We note that objectives (a) to (d) are in line with those set out in 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 welcome the inclusion of a “climate change objective” at objective (h).

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 3 concerns the practical arrangements for a JFS – preparation, commencement, amendment, deadlines for preparation of the first fisheries statement and details of the obligations to review. Fisheries policy authorities are to publish the JFS within 18 months of the Bill being passed. We welcome the requirements for review of the statements under clause 3(4), however, suggest that if the fisheries policy authorities consider changes are not required, the current provisions could be strengthened by a requirement to publish a statement setting out the reasons why no changes are required. The Bill does not set out a process for circumstances where the fishing authorities are unable to agree a JFS.

Clause 4 and 5 provide for a Secretary of State Fisheries Statement (SSFS) that sets out policies not included in the JFS. Our comments relating to review of JFS’ apply equally to SSFS’. Clause 6 imposes a duty on a relevant fisheries authority or authorities to prepare and publish the fisheries management plans proposed in the list in the JFS.

Clause 7 contains provisions allowing for the departure from the JFS where it is considered that a management plan should be amended, replaced or revoked in view of a change of circumstances. We consider it appropriate that clause 7(5) requires the authority preparing a new plan to explain how and why it is different from the plan contemplated in the JFS.

Clause 10 requires national fishing authorities to exercise its functions in relation to fisheries, fishing or aquaculture, in accordance with a JFS, SSFS or fisheries management plans “unless a relevant change in circumstances indicates otherwise”. We welcome the clarification as to “relevant” changes in circumstances set out in clause 10(4).

We welcome the requirements set out in clause 11 on fisheries policy authorities to report on JFS and fisheries management plans, and on the Secretary of State to report on the SSFS.

Clause 12

Clause 12 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 14 – 18

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 14 concerns circumstances in which a licence is required for British boats. The prohibition and subsequent exemptions under clause 14 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). However, we note that the provisions allow Scottish Ministers to consent to the Secretary of State making regulations about devolved matters without reference to the Scottish Parliament. It may be appropriate to adopt from the EU Withdrawal processes involving a protocol between the Scottish Government and the Parliament for this purpose.

We consider it appropriate 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 15 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 16 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. However, as referred to above we note that the provisions allow Scottish Ministers to consent to the Secretary of State making regulations about devolved matters (in this case, on regulations concerning the regulation of sea fishing within the Scottish zone) without reference to the Scottish Parliament.

Clause 17 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.

Licences are to be granted, under the various provisions, 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 19 – 22

Clause 19 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 20 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 21 or 22.

Clauses 23 – 27

Clause 23 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.

We welcome the duties of the Secretary of State set out under Clause 24 when making a determination under clause 23. 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 25 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 26 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 27.

Clauses 28 – 32

Clause 28 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 charging 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.”¹⁰ The Bill provides, in clause 29(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 28 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 29 – 32 deal with further provisions around the charging scheme set out in clause 28. We do not make any further comment on these provisions.

Clauses 33 – 35

We have no comment to make on these clauses.

Clauses 36 - 42

Clause 36 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 38 gives the Secretary of State powers to make regulations regarding aquatic animal diseases.

These enabling powers are limited by clauses 39 and 40, which *inter alia* provide that regulations made under clauses 36 and 38 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 40 provides that the Secretary of State may make regulations within devolved competence with the consent of the Scottish

¹⁰ Explanatory Notes, paragraph 181..

Ministers. As referred to earlier, we note that the provisions allow Scottish Ministers to consent to such regulations on devolved matters without reference to the Scottish Parliament.

We welcome the consultation requirement set out in clause 41 in respect of regulations to be made under clauses 36 and 38.

Reference is made to Schedule 8 which concerns the powers of Scottish Ministers to make provisions corresponding to those which may be made by the Secretary of State under clauses 36 and 38. Schedule 9, Part 2 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 Schedules 8 and 9 below.

Clauses 43 – 51

We have no comment on these clauses.

Schedules

Schedule 1 concerns the detail around the Joint Fisheries Statement (Part 1), the Secretary of State Fisheries Statement (Part 2) and Fisheries Management Plans (Part 3). We welcome the consultation and publication requirements. These requirements will allow scrutiny of the documents. 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.

We note the effect of the amendments made by schedule 2 will “ensure that foreign vessels licensed to fish in UK waters will be subject to the same requirements and restrictions as UK fishing vessels operating in those areas.”

Schedule 3 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 4 - 7.

Schedule 8 relates to powers of devolved authorities to make further provisions, and Part 1 of the schedule concerns powers of the Scottish Ministers. These powers mirror the provisions for the Secretary of State under clauses 36 and 38. Paragraph 5 refers to procedural requirements and under paragraph 5(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. We welcome the consultation requirements set out in paragraph 5(1) which will help to ensure scrutiny.

Schedule 9 confers powers on the Marine Management Organisation (MMO), the Welsh Ministers and the Scottish Ministers to make byelaws or orders relating to marine conservation, in connection to fishing activity. In relation to Part 1, we noted that it is important that the MMO's powers and duties are clear so as to ensure that the MMO's remit is fully established and understood.

It is important that the powers provided for by Schedule 9 are utilised in conjunction with other regulatory powers open to the Scottish Ministers. A holistic approach to management of sea fisheries resources is necessary to reduce the prospect of unintended consequences and to ensure coherence and consistency in the law. We note the consultation requirements included within the new provisions set out under schedule 9 and welcome the requirement to consult before orders are made. With regards to the new section 137B set out in paragraph 21, we consider it would be useful to have guidance on matters which "would or might affect the exploitation of sea fisheries resources...". As drafted, this could be considered wide in scope and greater clarity would be welcome.

We make no comment in respect of schedule 10.

For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

AlisonMcNab@lawscot.org.uk

ANNEX
Notes on fisheries management and support which is subject to more detailed discussion to explore whether a legislative common framework agreement might be needed, in whole or in part

Responsible UK Government Department	Area of EU Law (Policy Area)	Devolution Intersect			Additional Information
		NI	S	W	
DEFRA	Fisheries management & support	x	x	x	<p>Policies and Regulations relating to rules relating to the sustainability of fisheries (quotas), access to waters, conservation measures, enforcement and financial support.</p> <p><u>Law Society Scotland Comments</u></p> <p><u>EU Law</u></p> <p>Article 3(1) (d) TFEU provides that the EU has “exclusive competence” in the “conservation of marine biological resources under the Common Fisheries Policy” (CFP). The CFP is a set of rules for managing European fishing fleets and for conserving fish stocks. It gives all European fishing fleets equal access to EU waters and fishing grounds. EU countries have taken action to ensure the European fishing industry is sustainable and does not threaten the fish population size and productivity over the long term. The CFP was first introduced in the 1970s and went through successive updates, the most recent of which took effect on 1 January 2014. The EU maintains that CFP aims to ensure that fishing and aquaculture are environmentally, economically and socially sustainable and that they provide a source of healthy food for EU citizens. Its goal is to foster a dynamic fishing industry and ensure a fair standard of living for fishing communities.</p> <p>The current policy stipulates that between 2015 and 2020 catch limits should be set that are sustainable and maintain fish stocks in the long term.</p> <p>The reform also changed the way in which the CFP is managed, giving EU countries greater control at national and regional level.</p> <p>The CFP has 4 main policy areas detailed in these links: Fisheries management, International policy, Market and trade policy and Funding of the policy The CFP also includes rules on aquaculture and stakeholder involvement The new Common Fisheries Policy: sustainability in depth</p>

			<p>The international dimension of the EU Common Fisheries Policy The European Maritime and Fisheries Fund 2014-2020 Regulation (EU) No 1380/2013 on the Common Fisheries Policy</p> <p><u>Scottish Law</u></p> <p>The Scotland Act 1998 schedule 5 paragraph C6 provides that the regulation of sea fishing outside the Scottish Zone is reserved to the UK. Therefore, the Scottish Parliament has legislative competence over sea fishing within the Scottish zone, subject to the EU competence: Aquaculture and Fisheries (Scotland) Acts 2007 and 2013.</p> <p><u>UK Government Technical Notices</u> Getting an exemption from maritime security notifications if there's no Brexit deal, 13 September 2018 https://www.gov.uk/government/publications/getting-an-exemption-from-maritime-security-notifications-if-theres-no-brexit-deal</p> <p>Recognition of seafarer certificates of competency if there's no Brexit deal, 13 September 2018 https://www.gov.uk/government/publications/recognition-of-seafarer-certificates-of-competency-if-theres-no-brexit-deal</p> <p>Commercial fishing if there's no Brexit deal, 12 October 2018 https://www.gov.uk/government/publications/commercial-fishing-if-theres-no-brexit-deal</p> <p><u>European Commission Preparedness Notices</u> Withdrawal of the United Kingdom and EU Rules in the field of maritime transport, 27 February 2018 https://ec.europa.eu/info/sites/info/files/file_import/maritime_transport_en.pdf</p> <p>Withdrawal of the United Kingdom and EU Rules in the field of inland waterways, 7 March 2018 https://ec.europa.eu/info/sites/info/files/file_import/inland_waterways_en.pdf</p> <p>Withdrawal of the United Kingdom and EU Rules in the field of aviation security and maritime security, 5 July 2018 https://ec.europa.eu/info/sites/info/files/notice-to-stakeholders-brexit-aviation-and-maritime-security.pdf</p> <p>Withdrawal of the United Kingdom and EU Rules on fisheries and aquaculture, 9 April 2018 https://ec.europa.eu/info/sites/info/files/file_import/fisheries_and_aquaculture_en.pdf</p>
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					Withdrawal of the United Kingdom and EU Rules on the minimum level of training of seafarers and the mutual recognition of seafarers' certificates, 19 January 2018 https://ec.europa.eu/info/sites/info/files/file_import/seafarer_qualifications_en.pdf
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