

# LEGISLATIVE CONSENT MEMORANDUM

## FISHERIES BILL

### Introduction

1. The Fisheries Bill was introduced into the House of Commons on 25<sup>th</sup> October 2018. It provides a range of powers for the UK Government and, in places, the Devolved Administrations, to manage fisheries upon exit from the EU. This includes powers to amend retained EU law, manage foreign vessels in UK waters and set limits on quota and days at sea (known as effort). The Scottish Government considers that it is a relevant Bill under Rule 9B.1<sup>1</sup> of the Parliament's Standing Orders and the UK Government has also indicated that it considers this Bill requires Scottish Parliament legislative consent. This memorandum has been lodged by Fergus Ewing, Cabinet Secretary for the Rural Economy, in accordance with Rule 9B.3.1(a). The Bill and supporting documents can be found at: <https://services.parliament.uk/Bills/2017-19/fisheries.html>. This memorandum relates to the Bill as introduced.

2. The Scottish Government believes that the best option for the UK as a whole, and for Scotland, is to remain in the EU. Short of continued EU membership, the Scottish Government believes that membership of the European Single Market and Customs Union would be the least damaging option for the UK and Scotland. However, the Scottish Government accepts the need to make preparations for withdrawing from the EU under other circumstances, and maintaining continuity for Scotland's fisheries and seafood sector.

3. The Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of the Standing Orders, the Scottish Government's reasons for not including a draft motion are set out in paragraphs 17 – 20 below. The Scottish Government is considering amendments which, if agreed, and in conjunction with wider discussions with UK Government on legislative consent, could allow it to consider recommending that the Parliament gives consent to the Bill. The Scottish Government may lodge a supplementary legislative consent memorandum, potentially with a draft legislative consent motion, on this Bill in due course, depending on progress with the Bill and on restoring confidence in the operation of the legislative consent convention.

### Background

4. The UK Department for Environment, Food and Rural Affairs (Defra) published a Fisheries White Paper *Sustainable Fisheries for Future Generations* in July 2018.<sup>2</sup> This set out its proposed direction for management of fisheries once the UK has left the EU and the Common Fisheries Policy (CFP).

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<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/26512.aspx>

<sup>2</sup> <https://www.gov.uk/government/consultations/fisheries-white-paper-sustainable-fisheries-for-future-generations/sustainable-fisheries-for-future-generations-consultation-document>

5. The paper made it clear that the UK Government would no longer be bound by the rules of the CFP, that it would take full control of the UK's Exclusive Economic Zone (EEZ) and that it would manage access to UK waters by foreign fishing vessels through the annual negotiation process.

6. The paper also sets out that:

- The UK will become an independent coastal state under international law.
- The UK will continue to meet its international obligations to manage fisheries sustainably and work with other international partners.
- The UK Government intends to move away from the CFP concept of relative stability in deciding shares of jointly managed stocks towards a fairer and more scientific method of sharing.
- The UK will be a member of Regional Fisheries Management Organisations (RFMOs), including NEAFC<sup>3</sup> which supports management of stocks such as mackerel and blue whiting.
- The UK Government sees fisheries negotiations as entirely separate from trade negotiations, the former will be dealt with through the established process of annual negotiations, the latter via any future economic partnership arrangements.
- There are links between sustainable management of fisheries and protection of the marine environment, and as such work on Marine Protected Areas (MPAs) and marine environmental protection will continue to be an important part of Defra's approach.

7. The paper included a section on the territorial extent of Defra's plans. This section set out a proposed approach to UK frameworks setting out that they will be established where they are necessary in order to:

- Enable the functioning of the UK internal market, while acknowledging policy divergence.
- Ensure compliance with international obligations.
- Ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.
- Enable the management of common resources.
- Administer and provide access to justice in cases with a cross-border element.
- Safeguard the security of the UK.

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<sup>3</sup> North East Atlantic Fisheries Commission

8. The paper also states that it is the UK Government's intention that frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- Be based on established conventions and practices, including the competence of the devolved institutions and will not normally be adjusted without their consent.
- Maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.
- Lead to a significant increase in decision making powers for the devolved administrations.

9. Defra also indicated that it proposes to continue to work closely with the devolved administrations to agree where a common approach is required across the UK. It also states that Defra will continue to work closely on areas where commonality is desirable and where it may be possible to consider co-operative arrangements such as memorandums of understanding or more informal arrangements.

## **Contents of the Bill**

10. The Explanatory Notes<sup>4</sup> accompanying the Bill set out the UK Government's views of its main purpose and functions which operate alongside the powers conferred by the European Union (Withdrawal) Act 2018. These set out that the main purpose of the Bill is to provide the legal framework for the UK to operate as an independent coastal state under the UN Convention on the Law of the Sea (UNCLOS) once the UK has left the EU and thus the Common Fisheries Policy (through which the EU has exclusive competence in fisheries negotiations). The main provisions of the Bill are as follows:

### **Fisheries objectives and fisheries statements (clauses 1-6)**

This provision establishes joint sustainability objectives for the 4 UK Fisheries Administrations (UKFAs) covering England, Scotland, Wales and Northern Ireland, as well as additional objectives for the Secretary of State in relation to their functions. The UKFAs are required to publish a Joint Fisheries Statement (similar to the Marine Policy Statement) that sets out the policies they intend to apply in order to achieve these objectives. The objectives include one that provides for all UK fishing vessels to have equal access to all waters of the UK. The provision also requires the Secretary of State to produce a fisheries statement establishing policies that apply to England to deliver the Secretary of State objectives. The UKFAs are required to pursue the policies set out in the Joint Fisheries Statement unless relevant considerations indicate otherwise.

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<sup>4</sup> <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0278/en/18278en01.htm>

### **Access to British fisheries (clauses 7-8)**

These provisions revoke the CFP requirement for rights for vessels registered in the EU to access UK waters and for UK vessels to access EU waters. They also provide that it will be an offence for foreign vessels to fish in UK waters without a licence.

### **Licensing of fishing boats (clauses 9-17 and Schedule 2)**

The Bill revokes and replaces existing powers that each of the UKFAs have in relation to licensing fishing boats in UK waters. These powers are simplified, removing some of the powers of each UKFA so that the powers of each UKFA don't overlap. The Bill provides that:

- Fishing anywhere by a British fishing boat is prohibited unless authorised by a licence (with some exceptions).
- Fishing within British fishery limits by a foreign vessel is prohibited unless authorised by a licence. Foreign vessels don't currently require such a licence. This will enable foreign vessels to be required to comply with equivalent licence conditions to domestic vessels when fishing within British fishery limits. The Bill gives UKFAs powers to issue licences in respect of their own fishing boats and in respect of foreign vessels in their waters. The Bill also enables each UKFA to have greater control over other UK vessels fishing in their waters, enabling a more 'level playing field' approach to fisheries management.

### **Fishing Opportunities (clauses 18-22)**

Clause 18 gives the Secretary of State the power to determine the UK's maximum fishing opportunities (quota and days at sea, known as 'effort') as they relate to international obligations. The Secretary of State is required to consult with the Devolved Administrations before exercising this function. Clause 20 pertains to the distribution of fishing opportunities domestically and requires the Secretary of State and the Marine Management Organisation (MMO) to undertake this role according to certain criteria. Clause 21 also requires the UKFAs to ensure that fishing opportunities are not exceeded as far as is possible. Clause 22 provides a mechanism for Secretary of State to sell English quota during a calendar year.

### **Discard Prevention Charging Schemes (clauses 23-27)**

This provision allows the Secretary of State to make regulations to establish a charge for fishing over quota for English vessels in order to incentivise discard reduction practices.

### **Grants and Charges (clauses 28-30)**

This part gives the Secretary of State, MMO, Welsh Government Ministers, and Northern Ireland Executive Ministers various powers to make grants and introduce charges.

### **Powers to make further provision (clauses 31-38)**

Clause 31 gives the Secretary of State the power to make regulations for certain listed fisheries matters and for listed purposes. This power enables the Secretary of State to amend retained EU law. Clause 33 gives powers to the Secretary of State to make regulations about aquatic animal diseases. Clause 34 provides that regulations under clauses 31 and 33 cannot be made in relation to matters which would be within the legislative competence of the Scottish Parliament. However, clause 35(1) provides that such provisions can be included with the consent of the Scottish Ministers. Clause 37 refers to Schedule 6, which confers equivalent powers on the Scottish Ministers (in respect of aquatic animal diseases) and on Welsh and Northern Irish Ministers in respect of aquatic animal diseases and fisheries matters. Clause 38 refers to Schedule 7, which confers powers on the MMO, Scottish and Welsh Ministers to make byelaws or orders relating to the impact of fishing on marine conservation. For Scottish Ministers these powers are granted in the offshore area (the 12-200 nautical mile zone) as executive devolution.

### **Final Provisions (clauses 39-43)**

These clauses contain various standard provisions.

### **Requirement for Legislative Consent**

11. The Explanatory Notes to the Bill set out that the UK Government believes that large parts of the Bill require the Scottish Parliament's consent.

12. The Scottish Government agrees that the Bill is a relevant Bill within Rule 9B.1.1 of Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters the executive competence of the Scottish Ministers.

13. The UK Government regard the following clauses as requiring legislative consent due to their impact on devolved competence on fisheries, the Scottish zone or the licensing and management of Scottish vessels: 1-17, 21, 35-43. The Scottish Government agrees with the UK Government's assessment for where consent is needed, except in relation to clauses 18-19. The UK Government does not believe consent is required for these clauses. Defra's reasoning as to why they do not believe consent is required for clauses 20, 29 and 30 is also awaited.

14. Clauses 18-20 provide for the Secretary of State to set the UK's fishing opportunities (quota and effort) for a calendar year in order to comply with an international obligation of the UK to determine the maximum fishing opportunities of the UK (clause 18) and then sets out the duties in relation to the determining of fishing opportunities including the requirement to consult with Devolved Administrations and the MMO.

15. The Explanatory Notes to the Bill set out that the UK Government's view is that *"clause 18 replaces the current provision in EU law that allows the European Council*

*to determine fishing opportunities for EU waters (of which UK waters are a constituent part). The provisions set out the Secretary of State's reserved function of determining the UK's fishing opportunities, in accordance with the UK's international obligations. These might arise under an agreement with the EU or with another coastal state. They might also arise because of the UK's obligations under UNCLOS or as a member of an RFMO".*

16. As noted above, the UK Government's view is that clauses 18 and 19 relate to reserved matters and as such do not trigger the requirement for an LCM.

### **Scottish Government View**

17. The legislative consent memorandum on the European Union (Withdrawal) Bill, lodged with the Scottish Parliament on 12 September 2017<sup>5</sup>, set out the Scottish Government's position that policy responsibility and expertise for matters within devolved competence lie with the Scottish Government, accountable to the Scottish Parliament<sup>6</sup>.

18. Whilst the United Kingdom is responsible in international law for compliance with its international obligations, it does not follow that it is the UK Government alone which is responsible for the measures required to implement and comply with those obligations in domestic law. Paragraph 7(2) of Schedule 5 to the Scotland Act 1998<sup>7</sup> explicitly provides that observing and implementing international obligations are not reserved matters.

19. The regulation of sea fishing inside the Scottish zone (and the regulation of Scottish fishing boats outside the Scottish zone) is not a reserved matter by virtue of section C6 of Schedule 5 to the Scotland Act 1998.

20. On this basis, it would appear that clause 18 is a provision which legislates with regard to devolved matters and for a purpose which is within the legislative competence of the Scottish Parliament – namely, in this case, the regulation of sea fisheries inside the Scottish zone and the regulation of Scottish fishing boats, whilst observing the UK's international obligations in that regard. The UK Government view is that the function conferred by clause 18 is a reserved one of determining the UK's fishing opportunities. It does not in the Scottish Government's view, follow that the consent of the Scottish Parliament is not required; on the contrary, insofar as the provision is for a devolved purpose, consent of the Parliament is required.

21. Clause 20(3)-(6) corrects Article 17 of the Common Fisheries Policy Regulation<sup>8</sup> to make it operable in UK law.

22. Article 17 requires that Member States distribute fishing opportunities domestically according to transparent and objective criteria, including those of an environmental, social and economic nature. Clause 20(2)-(6) correct Article 17 to

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<sup>5</sup> <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>

<sup>6</sup> See paragraph 17 of that Memorandum.

<sup>7</sup> <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5/part/I/crossheading/foreign-affairs-etc>

<sup>8</sup> Regulation (EU) No 1380/2013 of the European Parliament and Council of 11 December 2013 on the Common Fisheries Policy.

make it operable in UK law and the effect is to maintain the existing requirements insofar as they apply to the Secretary of State and the MMO.

23. Under section 3(2)(a) of the European Union Withdrawal Act 2018 (EUWA), the CFP regulation is “direct EU legislation” and by virtue of section 6(7) of EUWA is deemed to be “retained EU law”. As such, Articles 16 and 17 will be rolled into the domestic law of the United Kingdom on Exit Day (as defined by EUWA).

24. Notwithstanding the changes proposed to be made by the UK Fisheries Bill, Article 17 will, on Exit Day, become part of retained EU law. It will apply to Member States. Under paragraph 7(2)(a) of Schedule 5 to the Scotland Act, responsibility for implementing EU obligations in devolved areas lies with the Scottish Ministers and Scottish Parliament. Under section 53, the Scottish Ministers have the power to implement EU obligations under s2(2) ECA.

25. If Article 17 remained unamended, the obligation imposed by it would fall within a devolved area in relation to Scotland, and would be for the Scottish Ministers and the Scottish Parliament to implement.

26. The changes made by the UK Fisheries Bill to Article 17, while not expressly applying to the Scottish Ministers, affect the devolved competence of the Scottish Ministers to determine their own criteria for distributing fishing opportunities in Scotland. The Scottish Government’s view is that this therefore triggers the need for an LCM.

### **Draft Legislative Consent Motion**

27. Under Rule 9B.3.3(d) of the Parliament’s Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. As the Scottish Government is not in a position to recommend consent to the Bill, no draft motion is included.

28. For the purposes of complying with Rule 9B.3.3(d), the Scottish Government cannot recommend to the Parliament that it gives consent to the Bill as currently drafted.

29. That is because, following events concerning the European Union (Withdrawal) Act, the Scottish Government does not believe it should currently seek consent from the Scottish Parliament to UK legislation related to withdrawal from the EU, except in exceptional circumstances. During the passage of that Bill, the UK Government sought consent from the Scottish Parliament, in line with the Sewel Convention. The Scottish Parliament voted (by 93 votes to 30) to refuse consent. The UK Government then decided to continue with the Bill and legislate for matters within or affecting the responsibilities of the Scottish Parliament without its agreement.

30. The Scottish Government believes that decisions on legislative consent by the Parliament are as significant as its other legislative decisions, because, as envisaged in the constitutional arrangements embodied in the Sewel Convention, those decisions involve consenting to legislation for purposes within the legislative competence of the Parliament, or affecting devolved competence, being enacted by the UK Parliament.

31. The UK Government has, however, made clear that it is prepared to proceed with any future legislation relating to the UK's withdrawal from the EU without the consent of the Scottish Parliament when that consent is required and sought. The UK Government has, in the view of the Scottish Government, effectively suspended the established legislative consent process in relation to legislation concerning EU withdrawal. In these circumstances, the Scottish Government will continue to work to develop and to improve UK legislation related to EU withdrawal. The Scottish Government does not, however, believe there is a practical purpose in bringing forward legislative consent motions when the UK Government has made clear any decision of the Scottish Parliament is liable to be set aside. The Scottish Government believes it is unacceptable for the deliberations and decisions of the Parliament to be treated in this way.

32. The Scottish Government is seeking urgent discussions with the UK Government on how to strengthen and protect the Sewel Convention, and has set out proposals for how its confidence in the operation of the legislative consent convention could be restored. The Scottish Government will consider progress in those discussions in deciding its position on seeking legislative consent for this Bill as its Parliamentary consideration proceeds.

## **Conclusion**

33. It remains a matter of regret to the Scottish Government that the UK plans to withdraw from the EU. The Scottish Government considers this will have widespread detrimental effects on the UK and Scotland. However, the Scottish Government accepts that proper, responsible preparations should be made for withdrawal, including provisions to deliver support to agriculture and the wider rural economy to provide much needed continuity for rural businesses, employees and consumers.

34. Whilst much of the Bill recognises and indeed enhances devolved responsibilities and while it is recognised that the UK Government have changed the Bill quite considerably in response to Scottish Government input, it still fails to recognise the role of Scottish Ministers in certain aspects, in particular in relation to implementation of international obligations, and thus enables the Secretary of State to interfere in the devolved management of Scottish fisheries. In addition, the UK Government has made clear that it will not amend its EU-withdrawal related legislation based on legislative consent decision-making of the Scottish Parliament. The Scottish Government does not therefore believe it should seek legislative consent until there has been progress in discussions to strengthen the convention.

35. The Scottish Government supports the provisions of this Bill and welcomes that, in large part, it seeks to recognise the devolved competence of the Scottish Parliament, and enhance its powers. However, given the difference of view on a key power within the Bill and the related concerns around impact on devolved competence, the Scottish Government cannot recommend that the Parliament consents to the Bill at this time.

Scottish Government  
December 2018



*This Legislative Consent Memorandum relates to the Fisheries Bill (UK legislation) and was lodged with the Scottish Parliament on 7 December 2018*

# **FISHERIES BILL – LEGISLATIVE CONSENT MEMORANDUM**

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