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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Legislative Consent Memorandum: Fisheries Bill**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
  - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
  - (ii) [deleted]
  - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Committee Membership



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**Alison Harris**  
Scottish Conservative  
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# Introduction

1. At its meetings on 8 and 15 January 2019, the Committee considered the provisions in the Fisheries Bill (“the Bill”) that confer power on the Scottish Ministers to make subordinate legislation.<sup>i</sup>
2. The Bill was introduced by the UK Government in the House of Commons on 25 October 2018 and is currently at Report stage.
3. Most of the provisions of the Bill extend to the whole of the United Kingdom and a number of provisions trigger the requirement for legislative consent to be sought from the Scottish Parliament. Full details of the Bill can be found on the [UK Parliament’s website](#).
4. This report refers to the clauses as numbered in the latest version of the Bill.

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<sup>i</sup> The UK Fisheries Bill is available [here](#).

# Legislative Consent Memorandum

5. The Scottish Government lodged a legislative consent memorandum (“LCM”) on 7 December 2018.<sup>ii</sup>
6. The lead committee in respect of the LCM is the Rural Economy and Connectivity Committee. The Scottish Government said in the LCM that that it "does not currently intend to lodge a legislative consent motion in relation to the Bill."
7. While the Scottish Government may decide not to ask the Parliament to consider a legislative consent motion in relation to the Bill, the lead committee must still report to the Parliament on the LCM.
8. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.
9. As the Bill is still progressing through the UK Parliament and so is still subject to amendments, the Committee may require to look at a supplementary LCM in due course.

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ii The Legislative Consent Memorandum is available [here](#).

## Delegated Powers

10. The Explanatory Notes accompanying the Bill explain that its main purpose is to provide a legal framework for the United Kingdom to operate as an independent coastal state under the United Nations Convention on the Law of the Sea 1982 (“UNCLOS”) after the UK has left the EU and the Common Fisheries Policy.
11. The Bill provides for fisheries objectives in the UK after EU exit, access to UK waters, fishing boat licensing, fishing opportunities in UK waters, marine conservation powers, discard prevention charging schemes, grant schemes and costs recovery.
12. The Bill provides a wide range of powers for the Secretary of State and the devolved administrations.
13. There is no delegated powers memorandum by the Scottish Government available for the Committee’s consideration, but this is normal for UK Bills. The UK Government has published a delegated powers memorandum for the entire Bill (the ‘UK DPM’).<sup>iii</sup>
14. The UK DPM identifies each of the provisions in the Bill that confer powers to make delegated legislation. It explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected.
15. The Committee’s consideration of each of the relevant delegated powers is set out below. The Committee notes that the exercise by the Secretary of State of a number of these powers is subject to the consent of the Scottish Ministers. However, no provision is made for the giving of that consent to be subject to scrutiny by the Scottish Parliament. Given the importance of this principle, both in general and in this particular piece of legislation concerning fisheries in Scotland, the Committee recommends that the lead committee consider whether there should be a process whereby the Parliament has an opportunity to scrutinise the Scottish Ministers’ position before they grant their consent.

## Part 1 – Powers delegated to the Scottish Ministers

16. The Committee found the following powers to be acceptable in principle and was content with the parliamentary procedure attached to each power:
  - Paragraph 7(1) of Schedule 2 – Power to make regulations about the licensing of fishing boats
  - Paragraph 7(3) of Schedule 2 – Power to make regulations about the licensing of fishing boats
  - Paragraph 7(5) of Schedule 2 – Power to make regulations about the licensing of fishing boats

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<sup>iii</sup> The UK Delegated Powers Memorandum is available [here](#).



- Clause 42 – Consequential, supplementary, incidental, transitional or saving provision.

**Paragraph 1 of Part 1 of Schedule 6 – power to make provision about aquatic animal diseases (and equivalent power for Secretary of State under clause 33(1))**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Procedure: Affirmative if they contain provision amending or repealing primary legislation, amending Article 17 of the Common Fisheries Policy Regulation, impose fees, create a criminal offence, increase the penalty for, or widening scope of a criminal offence or relating to the regulation of producer organisations in the UK or an inter-branch organisation in the UK; otherwise negative**

Provision

17. Paragraph 1 of Part 1 of Schedule 6 to the Bill provides Scottish Ministers with the power to make provision for the purpose of monitoring, controlling, preventing or eradicating diseases of fish or other aquatic animals.
18. The power may, in particular, be exercised to regulate the importation, exportation, movement, storage or handling of fish and other things which may carry disease. Regulations may confer a function, impose fees and create criminal offences (although not one punishable with imprisonment).
19. The power can be used to modify functions and amend, repeal or revoke any enactment (with certain exceptions). The Scottish Ministers must also consult the Secretary of State, the Welsh Ministers, the Northern Ireland Department and such other persons as considered appropriate by Scottish Ministers before exercising the power.
20. Under clause 33 of the Bill, the Secretary of State will have the power to make provision in this area which would be within the legislative competence of the Scottish Parliament with the Scottish Ministers' consent.

Committee Consideration

21. The Committee accepts that the explanation in the UK DPM provides justification for this proposed power (so far as delegated to the Scottish Ministers), in principle. In addition, the Committee accepts that the power is subject to enhanced scrutiny under the affirmative procedure in certain specified circumstances and otherwise the negative procedure.
22. The Committee is concerned that the Scottish Parliament does not have any scrutiny function in relation to the Scottish Ministers providing consent to the Secretary of State to make provision in this area which would be within the Scottish Parliament's legislative competence under the Secretary of State's equivalent power in clause 33.

## Recommendations

23. **The Committee finds this power (so far as delegated to the Scottish Ministers) to be acceptable in principle, and is content that it is subject to the affirmative procedure if exercised to amend or repeal primary legislation, amend Article 17 of the Common Fisheries Policy Regulation, impose fees, create a criminal offence, increase the penalty for, or widen the scope of a criminal offence or regulate producer organisations in the UK or an inter-branch organisation in the UK and otherwise subject to the negative procedure.**
24. **However, the Committee recommends that the lead committee may wish to consider, in relation to the equivalent power provided to the Secretary of State in clause 33, what role is envisaged for the Scottish Parliament in the scrutiny of decisions by the Scottish Ministers to consent to any regulations being made by the Secretary of State.**

### **Paragraph 16 of Schedule 7 (new section 137A(1) of the Marine and Coastal Access Act 2009) – power to make orders for marine conservation in the Scottish offshore region**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Order**
- **Procedure: Negative**

#### Provision

25. Paragraph 16 of schedule 7 inserts new sections 137A to 137D into the Marine and Coastal Access Act 2009. New section 137A(1) provides that the Scottish Ministers may make one or more orders relating to the exploitation of sea fisheries resources in the Scottish offshore region for the purpose of conserving marine flora or fauna, marine habitats or types of marine habitat, or features of geological or geomorphological interest.
26. An order under this power must specify the flora, fauna, habitat or feature it is made to conserve. An order may make exceptions or conditions, cease after a specified period and make different provision for different cases.
27. Examples are provided of what the orders might do, for example prohibition or restriction of exploitation, charging fees or restricting methods of exploitation.
28. The Scottish Ministers are required to consult with the Secretary of State and others before making an order. The consultation is not required if the Scottish Ministers think there is an urgent need to make an order.
29. The Scottish Ministers must send a copy of the order to the Secretary of State and those consulted before the order was made. It must also be made available for inspection at a place they think fit and copies must be sent to anyone requesting one.

30. An order under this power is subject to the negative procedure in the current draft of the Bill.

Committee consideration

31. The Committee accepts that the explanation in the UK DPM provides justification for this proposed power in principle.
32. The Committee notes that the Scottish Ministers currently have a power to make marine conservation orders for similar purposes in Marine Protected Areas under section 85 of the Marine (Scotland) Act 2010 (“the 2010 Act”). The Committee notes the statement in the UK DPM that the UK Government is in discussion with the Scottish Government as to whether orders by Scottish Ministers should be laid before the Scottish Parliament on the basis that current marine conservation orders are laid before the Scottish Parliament. The Committee further notes that the Bill as currently drafted makes this power subject to the negative procedure. The Committee considers that subordinate legislation made under this power should be subject to the negative procedure.

**Recommendations**

33. **The Committee finds this power to be acceptable in principle.**
34. **The Committee recommends to the lead committee that orders made under the power be subject to the negative procedure as currently drafted.**

**Paragraph 16 of Schedule 7 (new section 137C(1) of the Marine and Coastal Access Act 2009) – power to make interim orders for marine conservation in the Scottish offshore region**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Order**
- **Procedure: Negative**

Provision

35. Paragraph 16 of schedule 7 inserts new sections 137A to 137D into the Marine and Coastal Access Act 2009. New section 137C(1) provides that the Scottish Ministers may make one or more orders relating to the exploitation of sea fisheries resources in the Scottish offshore region for the purpose of protecting any feature in any area in that region if they think that there are or may be reasons to consider whether to designate the area as a Marine Conservation Zone and that there is an urgent need to protect the feature.
36. An interim order must describe the boundaries of the area to which it applies, come into force on a date specified in the order and remain in force for a period not exceeding 12 months specified in the order and may be extended by further order. Examples are provided of what the orders might do, for example prohibition or restriction of exploitation, charging fees or restricting methods of exploitation.

37. The Scottish Ministers must publish notice of an interim order and keep under review whether it needs to remain in force. The Scottish Ministers must send a copy of the order to the Secretary of State. It must also be made available for inspection at a place they think fit and copies must be sent to anyone requesting one.
38. An order under this power is subject to the negative procedure in the current draft of the Bill.

#### Committee consideration

39. The Committee accepts that the explanation in the UK DPM provides justification for this proposed power in principle.
40. The Committee notes that the Scottish Ministers currently have a power to make urgent marine conservation orders for similar purposes in Marine Protected Areas under section 88 of the 2010 Act. The Committee notes that the UK DPM states that the UK Government is in discussion with the Scottish Government as to whether orders by Scottish Ministers should be laid before the Scottish Parliament on the basis that current urgent marine conservation orders are laid before the Scottish Parliament. The Committee further notes that the Bill as currently drafted makes this power subject to the negative procedure. The Committee considers that subordinate legislation made under this power should be subject to the negative procedure.
41. The Committee notes that Scottish Ministers are required when extending an urgent marine conservation order under section 88 of the 2010 Act, to have an intention that they will make a marine conservation order in respect of the same area. This is not a requirement in respect of an interim order for marine conservation in the offshore area.

#### **Recommendations**

42. **The Committee finds this power to be acceptable in principle and that it is subject to the negative procedure.**
43. **The Committee recommends to the lead committee that orders made under the power be subject to the negative procedure as currently drafted.**
44. **The Committee recommends to the lead committee that it considers whether the power to extend an interim order should be subject to the same requirement as exists for extending an urgent marine conservation order in the 2010 Act.**

## **Part 2 – Powers delegated to the Secretary of State to be exercised with the consent of the Scottish Ministers**

**Clause 9(3) - Power to remove or vary exceptions to the prohibitions on British fishing boats fishing anywhere without a licence**

- **Power conferred on: Secretary of State (with consent of Scottish Ministers and others)**
- **Power exercisable by: Regulations**
- **Procedure: Affirmative**

Provision

45. Clause 9(1) prohibits British fishing boats fishing anywhere without a licence and clause 9(2) provides exceptions to that prohibition. This power provides the Secretary of State with the power to remove or vary the exceptions by regulations but only with the consent of the Scottish Ministers, Welsh Ministers and the Northern Ireland Department (clause 9(4)).
46. The power is subject to the affirmative procedure.

Committee consideration

47. The Committee accepts that the explanation in the UK DPM provides justification for this proposed power in principle.
48. The Committee notes that the exercise of the power is subject to the consent of the Scottish Ministers but that there is no role on the face of the Bill for the Scottish Parliament in considering the consent provided. The Committee is concerned that the Scottish Parliament does not have any scrutiny function in relation to the Scottish Ministers providing consent to the Secretary of State to make provision in this area.

**Recommendation**

49. **The Committee recommends that the lead committee considers what role is envisaged for the Scottish Parliament in scrutinising the decision of the Scottish Ministers to consent to any regulations being made by the Secretary of State.**

**Clause 11(2) - Power to create, or add, remove or vary exceptions to the prohibition on foreign fishing boats fishing within British fishery limits without a licence**

- **Power conferred on: Secretary of State (with consent of Scottish Ministers and others)**
- **Power exercisable by: Regulations**
- **Procedure: Affirmative**

Provision

50. Clause 11(2) prohibits foreign fishing boats fishing within British fishery limits without a licence. There are currently no exceptions to this. This power provides the Secretary of State with the power to create or add, remove or vary exceptions by regulations but only with the consent of the Scottish Ministers, Welsh Ministers and the Northern Ireland Department (clause 11(3)).

51. The power is subject to the affirmative procedure.

### Committee consideration

52. The Committee accepts that the explanation in the UK DPM provides justification for this proposed power in principle.
53. The Committee notes that the exercise of the power is subject to the consent of the Scottish Ministers but that there is no role on the face of the Bill for the Scottish Parliament in considering the consent provided. The Committee is concerned that the Scottish Parliament does not have any scrutiny function in relation to the Scottish Ministers providing consent to the Secretary of State to make provision in this area.

### **Recommendation**

54. **The Committee recommends that the lead committee considers what role is envisaged for the Scottish Parliament in scrutinising the decision of the Scottish Ministers to consent to any regulations being made by the Secretary of State.**

### **Clause 31(1) – Power to make provision about fisheries, aquaculture etc.**

- **Power conferred on: Secretary of State (with consent of Scottish Ministers and others)**
- **Power exercisable by: Regulations**
- **Procedure: Affirmative if amending or repealing primary legislation, amending Article 17 of the Common Fisheries Policy Regulations, imposing fees, creating a criminal offence or increasing the penalty for, or widening the scope of, a criminal offence or conferring functions on, modifying functions of, or otherwise relating to the regulation of a producer organisation or an inter-branch organisation in the UK; otherwise negative.**

### Provision

55. Clause 31 provides the Secretary of State with the power to make regulations for the purpose of implementing an international obligation of the UK relating to fisheries, fishing or aquaculture or for conservation or industry purposes (both defined in clause 31). Such regulations are limited in scope by clause 31(4) with an exhaustive list including the quantity of sea fish that may be caught, landing of sea fish, use of equipment, methods of sea fishing and others.
56. If the regulations made under this power give effect to a requirement imposed on, or recommendation made to, the UK by or pursuant to a regional fisheries management agreement or a regional fisheries management organisation, the power is not restricted by the list in clause 31(4).
57. The power is subject to affirmative procedure if amending or repealing primary legislation, amending Article 17 of the Common Fisheries Policy Regulations, imposing fees, creating a criminal offence or increasing the penalty for, or widening

the scope of, a criminal offence or conferring functions on, modifying functions of, or otherwise relating to the regulation of a producer organisation or an inter-branch organisation in the UK; otherwise it is subject to the negative procedure.

58. The Secretary of State's power to legislate in areas within the competence of the Scottish Parliament or which modify functions of the Scottish Ministers is limited by the requirement to obtain the consent of the Scottish Ministers (clause 34(3)(a) and (5)). Any regulations made under this power require the Secretary of State to consult with Scottish Ministers, Welsh Ministers, the Northern Ireland Department and such other persons likely to be affected by the regulations (clause 36(1)).

#### Committee consideration

59. The Committee accepts that the explanation in the UK DPM provides justification for this proposed power in principle.
60. The Committee notes that the exercise of the power in relation to matters within the Scottish Parliament's legislative competence or which modifies the functions of the Scottish Ministers are subject to the consent of the Scottish Ministers. However, the Committee notes that there is no role on the face of the Bill for the Scottish Parliament in considering the consent provided. The Committee is concerned that the Scottish Parliament does not have any scrutiny function in relation to the Scottish Ministers providing consent to the Secretary of State to make provision in this area.

#### **Recommendation**

61. **The Committee recommends that the lead committee considers what role is envisaged for the Scottish Parliament in scrutinising the decision of the Scottish Ministers to consent to any regulations being made by the Secretary of State.**

## **Part 3 – Power exercisable by the Secretary of State after consultation with the Scottish Ministers and others**

### **Clause 18(1) – Power to determine fishing opportunities**

- **Power conferred on: Secretary of State (exercisable after consultation with Scottish Ministers and others)**
- **Power exercisable by: Determination**
- **Procedure: N/A**

#### Provision

62. Clause 18 provides the Secretary of State with the power to determine for a calendar year the maximum quantity of sea fish that may be caught by British

fishing boats and the maximum number of days that British fishing boats may spend at sea. Such a determination may only be made for the purpose of complying with an international obligation of the UK to determine the fishing opportunities of the UK. Different maxima may be determined for different areas of sea, for different descriptions of sea fish, for fishing boats fishing for different descriptions of sea fish and for different descriptions of fishing boat.

63. Before making or withdrawing a determination, the Secretary of State must consult the Scottish Ministers, the Welsh Ministers, the Northern Ireland Department and the Marine Management Organisation (clause 19). As soon as possible after making or withdrawing a determination, the Secretary of State must send a copy of that notice to the Scottish Ministers.

Committee consideration

64. The Committee notes that the Cabinet Secretary for the Rural Economy wrote to the Secretary of State on 4 December 2018 seeking an amendment to clause 18 so that any determination made under clause 18, insofar as they relate to Scotland, should only be taken with the consent of the Scottish Ministers.

**Recommendation**

65. **The Committee notes the Scottish Government's request for an amendment to clause 18.**



