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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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Introduction

1. At its meetings on 11 and 18 August 2020, the Committee considered the provisions in the UK Government's [Fisheries Bill](#) ("the Bill") that confer power to make subordinate legislation in areas of devolved competence.
2. The Bill was introduced by the UK Government in the House of Lords on 29 January 2020. It was amended in the House of Lords at Report stage on 24 June and again at Third reading on 1 July. First reading took place in the House of Commons the following day with no debate. The Bill is currently at Second reading in the House of Commons, which is scheduled to take place on 1 September 2020.
3. A previous UK Fisheries Bill was introduced by the UK Government in the House of Commons on 25 October 2018 (referred to in this paper as the "original Fisheries Bill"). The original Fisheries Bill was intended to set out the framework for the UK's fisheries policy following the UK's exit from the EU. It reached Report stage having passed Committee stage in the House of Commons on 18 December 2018. The Committee reported on the delegated powers conferred by the original Fisheries Bill on Scottish Ministers on 16 January 2019.ⁱ Due to the dissolution of the UK Parliament on 6 November 2019 the original Fisheries Bill lapsed.
4. A [Legislative Consent Memorandum](#) ("LCM") for the Bill was lodged by the Scottish Government on 15 June 2020. This considered the Bill as introduced but does not take account of the latest version of the Bill (or indeed any amendment made to the Bill). Like the original Fisheries Bill, 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.
5. 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. The lead committee in respect of the LCM is the Rural Economy and Connectivity Committee.

ⁱ [Delegated Powers and Law Reform Committee, Legislative Consent Memorandum: Fisheries Bill , 3rd Report, 2019 \(Session 5\)](#)

Overview of Bill

6. The Explanatory Notes accompanying the latest version of 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 EU Common Fisheries Policy.
7. The Bill provides for fisheries objectives in the UK, access to UK waters, fishing boat licensing, fishing opportunities in UK waters, discard prevention charging schemes, marine conservation powers, costs recovery, and financial assistance, among other things. It includes powers to amend UK law (including primary legislation and retained EU law) related to fisheries and aquatic animal health. It also extends the legislative competence of the Senedd Cymru (Welsh Assembly).
8. As the original Fisheries Bill did, the Bill provides a range of powers for the Secretary of State and the devolved administrations. The Bill provides for a further extension of the powers of devolved administrations so that they now have powers equivalent to those of the Secretary of State as follows:
 - powers to introduce schemes for the sale of fishing opportunities (Secretary of State – clause 29 / Welsh Ministers – Schedule 5);
 - grant-making powers, which have been broadened compared to the original Fisheries Bill (Secretary of State – clause 35 / all devolved administrations – Schedule 6);
 - powers to allow charging for certain fisheries functions (Marine Management Organisation – clause 36 / all devolved administrations – Schedule 7);
 - power to make provision about fisheries and aquaculture for certain purposes and in relation to certain matters (Secretary of State – clause 38 / all devolved administrations – Schedule 8);
 - power to make provision about aquatic animal diseases (Secretary of State – clause 40 / all devolved administrations – Schedule 8);
 - powers relating to the exploitation of sea fisheries resources for marine conservation purposes (Marine Management Organisation, Welsh Ministers and Scottish Ministers – Schedule 9).

Delegated Powers

9. The Bill confers powers on the Scottish Ministers and/or on UK Ministers in devolved areas in the following five ways:
 1. Powers conferred solely on Scottish Ministers in devolved areas and one extension to all existing powers;
 2. Powers delegated to Scottish Ministers which may also be exercised by the Secretary of State in devolved areas with Scottish Ministers' consent;
 3. Powers delegated solely to the Secretary of State covering devolved areas to be exercised with the consent of the Scottish Ministers;
 4. A power delegated solely to the Secretary of State to be exercised following consultation with Scottish Ministers; and
 5. A power delegated solely to the Secretary of State to be exercised without any requirement for consent or consultation.
10. In the event that powers are exercised by the UK Ministers, there would be no formal means by which the Scottish Parliament could scrutinise such regulations, nor be notified that they had been laid before the UK Parliament.
11. The Committee reiterates its view, as previously expressed in relation to other legislation arising from EU Withdrawal, that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
12. The Committee considers it appropriate, as a minimum, that all consent decisions of the Scottish Ministers in respect of powers under the Bill exercisable by UK Ministers in devolved areas are subject to the process set out in the proposed new SI Protocol covering powers exercised by UK Ministers in devolved areas arising from EU withdrawal.

Powers conferred solely on Scottish Ministers in devolved areas and one extension to all existing powers

Paragraph 21 of Schedule 9 (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

13. Paragraph 21 of Schedule 9 inserts new sections 137A to 137D into the Marine and Coastal Access Act 2009 (the “2009 Act”). 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 (“MCZ”, either permanently under section 116 of the 2009 Act, or on an urgent basis under section 119(11) and (12) of that Act) and that there is an urgent need to protect the feature.

14. An interim order must specify the flora or fauna, habitat or type of habitat or features that are to be conserved. It 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. The interim order may be extended by further order. Examples are provided of what the orders might do; e.g., prohibition or restriction of exploitation, charging fees, or restricting methods of exploitation.
15. The Scottish Ministers are required to consult with the Secretary of State and others. The consultation is not required if the Scottish Ministers think there is an urgent need to make an order.
16. The Scottish Ministers must publish notice of an interim order and keep under review whether it needs to remain in force. They must send a copy of the order to the Secretary of State and those consulted before the interim order is made. The interim order must also be made available for inspection at a place they think fit and copies must be sent to anyone requesting one.

Committee Consideration

17. This power is in the same terms as conferred under the original Fisheries Bill. The Committee previously found this power to be acceptable in principle and was content that the negative procedure applied. This was on the basis that the orders to be made under this power are technical in nature and are being made because of an urgent situation. However, the Committee recommended that the lead committee considers whether the power to extend an interim order should be subject to the same requirements as exist for extending an urgent marine conservation order in the Marine (Scotland) Act 2010 (the “2010 Act”).
18. By way of contrast, unlike section 88 of the 2010 Act, no explicit time limit applies by virtue of the Bill to the extension of an interim order under section 137C of the 2009 Act for marine conservation in the offshore area. In addition, there are no equivalent requirements in the Bill to the effect that Scottish Ministers can only extend the period for which an interim order remains in force if they intend to make a permanent marine conservation order in respect of the marine protected area concerned and they have published notice of their proposal to make the order permanent.
19. The Committee therefore wrote to the Scottish Government asking whether the power to extend an interim order should be subject to the same requirements as an extension to an urgent marine conservation order in the 2010 Act.
20. The Scottish Government’s response recognises that an interim order under proposed new section 137C of the 2009 Act, inserted by paragraph 21 of Schedule 9 of the Bill, could in theory be kept in place in perpetuity without there being an obligation on Scottish Ministers to determine whether the area should be

designated as an MCZ. This would be subject to parliamentary approval of the order extending the period for which an interim order remains in force.

21. However, the Scottish Government states its view that if there is a need to protect an area described in section 137C(1) then it should be designated as an MCZ so that it can be protected from all relevant activities rather than just fishing. The response explains that section 119(11) and (12) of the 2009 Act already allows an urgent MCZ to be designated. An urgent MCZ can only be designated for up to two years, unless a further order is made before the end of that period confirming the designation (which would be subject to the full consultation requirements that apply to a permanent designation of an MCZ under section 116 of the 2009 Act).
22. On this basis, the Scottish Government argues that an interim order made under proposed section 137C of the 2009 Act would in practice create an equivalent time limit to that which applies to the extension of an urgent marine conservation order under the 2010 Act.

23. The Committee finds this power to be acceptable in principle and is content that it is subject to the negative procedure.

24. However, the Committee also wishes to highlight the following observations to the lead committee:

- Regardless of the Scottish Government's view that the area should be designated an a MCZ, it is possible for it, or a future Scottish Government, to make an interim order under section 137C in perpetuity (subject to approval of the order extending the interim order), without being restricted by the two-year time limit in section 119(12) of the 2009 Act that applies to an urgent order designating an MCZ.
- An interim order under the proposed provisions in section 137C of the 2009 Act in respect of the offshore region is not subject to the equivalent requirements that apply to urgent marine conservation orders in section 88(7) of the 2010 Act in respect of the inshore region. Accordingly, there is no equivalent requirement that an urgent order under section 137C(1) of the 2009 Act can only be extended if Ministers intend to designate an MCZ in respect of the area concerned and have published notice of their proposal to make the order permanent.

25. The lead committee may wish to consider whether the power to extend an interim order should be subject to the same requirements as exist for extending an urgent marine conservation order in the 2010 Act.

26. The other powers conferred solely on the Scottish Ministers were:

- Paragraph 1(2) of Schedule 6 – Power of Scottish Ministers to give financial assistance by scheme set in regulations
- Paragraph 1(1) of Schedule 7 – Power of Scottish Ministers to impose charges for a “relevant marine function”

- Paragraph 21 of Schedule 9 (new section 137A(1) of the Marine and Coastal Access Act 2009) – power to make orders for marine conservation in the Scottish offshore region
- Clause 50 – Consequential, supplementary, incidental, transitional or saving provision

27. In relation to these powers, the Committee was content that the provisions were acceptable in principle and with the parliamentary procedure that would apply to their exercise.

Powers delegated to Scottish Ministers which may also be exercised by the Secretary of State in devolved areas with Scottish Ministers' consent

28. In relation to each of the powers set out in the following paragraph, the Committee sought the Scottish Government's position on:
1. Why the Scottish Government considers it appropriate that the power is shared by UK and Scottish Ministers within devolved competence?
 2. In what circumstances the Scottish Government envisages the power will be exercised by UK ministers in devolved areas?
29. Those powers are:
- Paragraph 7(1) of Schedule 3 – Power to make regulations about the licensing of fishing boats
 - Paragraph 7(3) of Schedule 3 – Power to make regulations about the charges for licensing of fishing boats
 - Paragraph 7(5) of Schedule 3 – Power to make regulations about the principles relating to licensing of fishing boats
 - Paragraph 1 of Part 1 of Schedule 8 – Power of the Scottish Ministers to make provision about fisheries, aquaculture etc. (equivalent power for Secretary of State in clause 38(1))
 - Paragraph 3 of Part 1 of Schedule 8 – Power to make provision about aquatic animal diseases (and equivalent power for Secretary of State under clause 40(1))
30. The Scottish Government's response provides a general explanation that each of these provisions does not weaken the powers of Scottish Ministers on the basis that any exercise of the equivalent power conferred on the Secretary of State in devolved areas is subject to the consent of Scottish Ministers. Scottish Ministers have their own equivalent powers to legislate in devolved areas.
31. The response argues that allowing UK Ministers to make subordinate legislation in devolved areas already occurs extensively in respect of transposition instruments under the European Communities Act 1972 (the "ECA") and in respect of instruments made under the European Union (Withdrawal) Act 2018 (the "2018

Act”). In each case, it argues that the decision of the UK Government to legislate in devolved areas has been made with the full involvement of the devolved administrations and the Scottish Government continues to make its own instrument where appropriate.

32. The Scottish Government identifies that there are certain circumstances where legislating four times for each jurisdiction within the UK can cause confusion among stakeholders about the exact provisions that apply to an area of water, when they come into effect, and could also cause enforcement issues. The response argues that in such instances, where policy interests align, it is more appropriate and effective to legislate through a single UK SI.
33. The response states that the new SI Protocol being developed by the Scottish Government and the Parliament will enable the Parliament to scrutinise decisions of the Scottish Ministers to consent to UK Ministers making provision in devolved areas.

34. The Committee is content with each of these powers in principle, and the parliamentary procedures that apply to regulations made under those powers. In particular, the Committee welcomes that the Bill improves on the position set out in the original Fisheries Bill by conferring powers on the Scottish Ministers to make provision about fisheries, aquaculture etc. that are equivalent to the power conferred on the Secretary of State in clause 38(1).
35. However, the Committee wishes to draw to the attention of the lead committee that these powers are capable of being exercised by the Secretary of State in devolved areas with the consent of the Scottish Ministers. This means that these instruments will not be laid in the Scottish Parliament.
36. The Committee also wishes to highlight that the powers in paragraphs 1 and 3 of Part 1 of Schedule 8 (and the equivalent powers for Secretary of State in clauses 38(1) and 40(1)) are particularly significant, as they include, for example, the ability for the Secretary of State to create criminal offences and modify the Scottish Ministers’ functions in devolved areas.

Powers delegated solely to the Secretary of State covering devolved areas to be exercised with the consent of the Scottish Ministers

37. In relation to both powers in the following paragraph, the Committee asked the Scottish Government to provide further information on why the Scottish Government considers it is appropriate for the powers to be conferred on the Secretary of State with Scottish Ministers’ consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence.
38. Those powers are:
 - Clause 14(3) – Power to add, remove or vary exceptions to the prohibition on British Fishing Boats fishing anywhere without a licence; and
 - Clause 16(3) - Power to add, remove or vary exceptions to the prohibition on foreign fishing boats fishing within British fishery limits without a licence

39. The Scottish Government's response states that it is acceptable to allow the exemption of certain classes of vessel only by agreement of all four UK administrations. This is on the basis that there is commonality among Scottish Ministers, UK-wide policy, and best international practice that any type of commercial fishing activity should require a licence.
40. The response argues that a power exercisable only by the Secretary of State with the consent of the four UK administrations avoids the risk that any one administration may decide that certain domestic or foreign vessels do not require a fishing licence. This would exempt them from the majority of fishing regulations, including those on access, which only apply to licensed fishing vessels. The response indicates that it would not be the Scottish Government's intention to consent to the exemption of any vessel from this requirement, except only in very specific or limited circumstances which cannot currently be envisaged.
41. The Committee finds these powers to be acceptable in principle, and is content that they are subject to the affirmative procedure.
42. However, the Committee also wishes to draw the lead committee's attention to the fact that these powers are conferred solely on the Secretary of State and are capable of being exercised in devolved areas with the consent of the Scottish Ministers. This means that these instruments will not be laid in the Scottish Parliament.
43. It also wishes to highlight that these powers are particularly significant as the Scottish Ministers will no longer have their own powers to set exceptions to the prohibition on unlicensed fishing by fishing boats in devolved areas. However, the Committee acknowledges the Scottish Government's stated intention not to consent to the exemption of any vessel from the requirement to obtain a fishing licence, except only in very specific or limited circumstances which cannot currently be envisaged.

Power delegated solely to the Secretary of State to be exercised following consultation with Scottish Ministers

New clause 18(1) – National landing requirement

Power conferred on: Secretary of State (exercisable after consultation with Scottish Ministers and others)

Power exercisable by: Regulations

Procedure: Affirmative (in the UK Parliament)

44. New clause 18(1) requires the Secretary of State, within 18 months of the Bill being passed, to make regulations establishing a national landing requirement which automatically applies to any licensed British or foreign fishing boat unless exempted.
45. The Committee sought the Scottish Government's position on whether it considers it is appropriate for this power to be conferred on the Secretary of State, and with only an obligation to consult the Scottish Ministers.

46. The Scottish Government's response states that it is clear that these provisions, as amended by the House of Lords, do not respect the devolution settlement and as such they should be redrafted to require the consent of Scottish Ministers.
47. However, the substance of the amendments largely reflects the Scottish Government's policy aspirations and commitments and therefore it does not oppose the aim of the amendments. The Scottish Government is willing to support the amendments on the condition that they can be redrafted to respect the devolution settlement and it is encouraging the UK Government to take forward the necessary amendments so they can remain in the Bill.
48. The Committee finds this power to be acceptable in principle, and is content that it is subject to the affirmative procedure.
49. However, the Committee also wishes to draw the lead committee's attention to the fact that these powers, as currently drafted, are conferred solely on the Secretary of State and are capable of being exercised in devolved areas without the consent of the Scottish Ministers, and only with an obligation to consult them. This means that these instruments will not be laid in the Scottish Parliament.
50. The Committee welcomes that the Scottish Government is encouraging the UK Government to seek amendments to the power to ensure it respects the devolution settlement.
51. The Committee would invite the lead committee to consider seeking further information from the Scottish Government on whether the amendments sought by the Scottish Government would take the form of a concurrent power conferred on UK and Scottish Ministers, a power exercisable solely by the Secretary of State subject to the consent of the Scottish Ministers, or something else.

Power delegated solely to the Secretary of State to be exercised without any requirement for consent or consultation

New clause 48(1) – Regulatory enforcement and data collection scheme

Power conferred on: Secretary of State alone

Power exercisable by: Regulations

Procedure: Affirmative (in the UK Parliament)

52. Clause 48 requires the Secretary of State by regulations to require all fishing vessels over 10 metres of whatever nationality fishing within the UK Exclusive Economic Zone ("EEZ"), and all UK vessels over 10 metres fishing outside the UK EEZ, to be fitted with remote electronic monitoring systems. This is for the purposes of full and accurate documentation of fish activities and bycatch, and monitoring compliance with fish activities, bycatch and other marine management regulations.
53. The Committee sought the Scottish Government's position on whether it considers it appropriate for the Secretary of State to exercise this power in devolved areas, without any corresponding power for the Scottish Ministers, or a requirement for their consent, or a requirement to consult them.

54. The Scottish Government's response was the same in respect of this clause as for clause 18(1), considered above.
55. The Committee therefore reiterates its recommendations in respect of clause 18(1) for the power in clause 48, set out at paragraphs 40 to 43 above, with the exception that the reference in paragraph 41 to an obligation to consult Scottish Ministers does not apply to this power.

General Questions

56. In addition to specific questions considered above, the Committee asked two more general questions in relation to this Bill:
1. What are [the] overlapping powers [between this Bill and retained EU law] and is it intended that the powers in retained EU law will be removed in light of the powers in the Bill?
 2. Is the Scottish Government aware of any other legislation that might be brought which would result in further overlapping powers?
57. In response to these questions, the Scottish Government states that there may be some overlap between powers in the Bill and those in retained EU law, but that these powers will not overlap exactly. The response does not identify what those particular overlaps would be, but explains that different aspects of a power in retained EU law may be covered by several different powers in the Bill, and vice versa. The Scottish Government intends to use the most appropriate power for a given purpose, which would be assessed on a case-by-case basis. It also intends to align with EU standards as far as possible and appropriate and so would have to consider amendments to retained EU law very carefully.
58. The response also states that some EU regulations still require to be corrected for deficiencies in retained EU law, but does not identify what those are. Furthermore, the EU may adopt other regulations before the end of the transition period under the Withdrawal Agreement on 31 December that need to be transposed into domestic law, and which may create new overlapping powers. The response refers to the EU Control Regulation as an example, which seeks to modernise, strengthen and simplify the EU fisheries control system.
59. The Committee wishes to highlight that there may be some overlaps between fisheries related powers in retained EU law and the Bill, but that those powers will not overlap exactly. There may also be further overlaps that emerge between now and the end of the transition period on 31 December 2020.
60. The Committee wishes to highlight the Scottish Government's intention to use the most appropriate power for a given purpose assessed on a case-by-case basis. However, it is of the view that any overlaps between powers should be removed as far as possible.

Annex

Letter to the Cabinet Secretary for Rural Economy and Tourism dated 11 August 2020

Fisheries Bill

Dear Cabinet Secretary,

The Delegated Powers and Law Reform Committee considered the delegated powers in the Fisheries Bill at its meeting today and agreed to write to you with the questions below.

Firstly, the Scottish Government's response to the Environment, Climate Change and Land Reform Committee's questions on the Bill indicated that some of the powers in the Bill overlap with more specific powers in retained EU law. These are the powers formerly exercised by the European Commission conferred by EU Regulations and which will transfer to the UK or devolved administrations in retained EU law as amended by UK EU Exit instruments.

1. What are those overlapping powers and is it intended that the powers in retained EU law will be removed in light of the powers in the Bill?
2. Is the Scottish Government aware of any other legislation that might be brought which would result in further overlapping powers?

The Committee also had the following more specific questions related to particular provisions in the Bill.

Paragraph 21 of Schedule 9 (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

If Scottish Ministers wish to extend an urgent marine conservation order under section 88 of the Marine (Scotland) Act 2010, they can only do so if they intend that they will make a marine conservation order in respect of the same area and have published notice of their proposal to make the order permanent. Any continuation of an urgent marine conservation order can only be made for a further period of up to 12 months under this Act.

By way of contrast, per paragraph 21 of Schedule 9 of the Bill, inserting new section 137C(1) into the Marine and Coastal Access Act 2009, no explicit time limit applies to the extension of an interim order for marine conservation in the offshore area. In addition, there are no equivalent requirements in the Bill to the effect that Scottish Ministers can only extend the period for which an interim order remains in force if they intend to make a permanent marine conservation order in respect of the marine protected area concerned and they have published notice of their proposal to make the order permanent.

3. Does the Scottish Government consider that the power to extend an interim order should be subject to the same requirements as exist for extending an urgent marine conservation order under section 88 of the 2010 Act?

Paragraph 7(1) of Schedule 3 – Power to make regulations about the licensing of fishing boats

Paragraph 7(3) of Schedule 3 – Power to make regulations about the charges for licensing of fishing boats

Paragraph 7(5) of Schedule 3 – Power to make regulations about the principles relating to licensing of fishing boats

Paragraph 1 of Part 1 of Schedule 8 – Power of the Scottish Ministers to make provision about fisheries, aquaculture etc. (equivalent power for Secretary of State in clause 38(1))

Paragraph 3 of Part 1 of Schedule 8 – Power to make provision about aquatic animal diseases (and equivalent power for Secretary of State under clause 40(1))

4. In relation to each of the five powers above, the Committee would be grateful for further information on:

(a) why the Scottish Government considers it appropriate that the power is shared by UK and Scottish Ministers within devolved competence?

(b) in what circumstances the Scottish Government envisages the power will be exercised by UK ministers in devolved areas?

Clause 14(3) – Power to add, remove or vary exceptions to the prohibition on British Fishing Boats fishing anywhere without a licence

Clause 16(3) - Power to add, remove or vary exceptions to the prohibition on foreign fishing boats fishing within British fishery limits without a licence

5. In relation to both clause 14(3) and 16(3), could you provide further information on why the Scottish Government considers it is appropriate for the powers to be conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

New clause 18(1) – National landing requirement

6. In relation to the power in clause 18(1), does the Scottish Government consider it is appropriate for the power to be conferred on the Secretary of State with no corresponding power for Scottish Ministers?

7. If so, is it appropriate that there is only a requirement to consult Scottish Ministers rather than consent being required?

New clause 48(1) – National landing requirementⁱⁱ

8. Does the Scottish Government consider it appropriate for the power in clause 48(1) to be conferred on the Secretary of State in devolved areas, without any corresponding power of the Scottish Ministers, particularly with no requirement for the consent of Scottish Ministers, or a requirement to consult Scottish Ministers?

ⁱⁱ The reference to "national landing requirement" here is in error. This should describe the power in clause 48(1) as "Regulatory enforcement and data collection scheme".

The Committee would also like to reiterate its view that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence. It is therefore appropriate that all consent decisions of the Scottish Ministers in respect of powers under the Bill exercisable by UK Ministers in devolved areas are, as a minimum, subject to the procedure set out in the proposed new SI Protocol covering powers exercised by UK Ministers in devolved areas arising from EU withdrawal. There are a number of such powers being delegated in this Bill. Of particular significance are the powers in **clause 14(3)** and **clause 16(3)**, particularly where the Scottish Ministers will no longer have their own powers to set exceptions to the prohibition on unlicensed fishing by fishing boats in devolved areas. The powers in **paragraphs 1 and 3 of Part 1 of Schedule 8** (and the equivalent powers for Secretary of State in **clauses 38(1) and 40(1)**) are also particularly significant, as they include, for example, the ability for the Secretary of State to create criminal offences and modify the Scottish Ministers' functions in devolved areas.

The Committee would appreciate a response to the points raised in this letter by **5pm on Thursday 14 August** so that it might consider that response at its meeting on 18 August in order to report to the Rural Economy and Connectivity Committee in advance of its consideration.

Yours sincerely,

Bill Bowman

Convener of the Delegated Powers and Law Reform Committee

Response from the Cabinet Secretary for Rural Economy and Tourism dated 13 August 2020

Dear Convener,

Thank you for your letter of 11 August asking a number of questions in relation to the UK Fisheries Bill.

Please find my response to your questions attached at Annex A. I appreciate that these matters are not clear cut but what we are seeking to do is to put in place arrangements to ensure that we have all the powers we need to protect Scottish interests in any given circumstance. My officials and I will be happy to address any further questions the Committee may have.

Finally, as regards allowing the Scottish Parliament the opportunity to effectively scrutinise decisions made by Scottish Ministers to consent to UK SIs I would like to reassure the Committee of my support for the new protocol covering these matters.

I am copying this letter to Roseanna Cunningham, Cabinet secretary for the Environment, Climate Change and Land Reform, Mairi Gougeon, Minister for Rural Affairs and the Natural Environment and the Rural Economy and Connectivity Committee.

Yours sincerely,

FERGUS EWING

Annex A

1. What are those overlapping powers and is it intended that the powers in retained EU law will be removed in light of the powers in the Bill?

Whilst there may be some overlap in powers between retained EU law and powers in the UK fisheries Bill, it is important to note these powers will not overlap exactly and there is the potential for the different aspects of one power in retained EU law to be covered by several different powers in the UK Fisheries Bill, with the reverse being equally applicable. It is the intention of the Scottish Government to use the most appropriate power for a given purpose and this would be assessed on a case-by-case basis,.

Any amendments to retained EU law would have to be considered very carefully, given the Scottish Government's intention to align with EU standards as far as possible and is appropriate.

2. Is the Scottish Government aware of any other legislation that might be brought which would result in further overlapping powers?

There are still some EU regulations currently in force which require deficiency fixing to ensure they will work effectively as part of domestic law after the end of the Transition Period; and the EU may also adopt additional regulations, for example in relation to the Control Regulation, before the end of the transition period which would require transposition to the UK statute book.

Such situations may yet create new overlapping powers. In these circumstances, as above, it is the intention of the Scottish Government to use the most appropriate power for a given purpose and this would be assessed on a case-by-case basis.

3. Does the Scottish Government consider that the power to extend an interim order should be subject to the same requirements as exist for extending an urgent marine conservation order under section 88 of the 2010 Act?

The Scottish Ministers can only make an urgent marine conservation order ("MCO") under section 88 of the Marine (Scotland) Act 2010 if the area has been designated as a Marine Protected Area ("MPA"). This has the added benefit of applying the protective provisions of sections 82, 83 and 95 for activities not specifically covered by the MCO. An MCO can only be extended for a further period if Scottish Ministers have published their proposal to make the area a permanent MPA as required by section 88(7).

The proposed new section 137C of the Marine and Coastal Access Act 2009 does not require there to be a connection with an MPA (referred to as a marine conservation zone, or MCZ, in this Act) for an interim MCO to be made. In theory, this means an MCO under section 137C could be kept in place in perpetuity (subject to Parliamentary process) without there being an obligation on the Scottish Ministers to determine whether the area should be designated as an MPA.

It is our view that if there is a need to protect an area as described in section 137C(1) then it should be designated as an MCZ, so that it can be protected from all relevant activities, not just fishing. Should measures be required more urgently, section 119(11) of the Marine and Coastal Access Act 2009 as read with section 119(12) already provides for urgent designation. Connecting section 137C to these requirements means that the interim order could only last for two years as that is the maximum time for an urgent designation. This would create an equivalent scenario to the Marine (Scotland) Act 2010 in practice.

4. In relation to each of the five powers above, the Committee would be grateful for further information on:

(a) why the Scottish Government considers it appropriate that the power is shared by UK and Scottish Ministers within devolved competence?

(b) in what circumstances the Scottish Government envisages the power will be exercised by UK ministers in devolved areas?

These provisions do not weaken the powers of Scottish Ministers, they only allow UK Ministers to legislate in areas of devolved competence with the consent of Scottish Ministers. Equally, Scottish Ministers remain free to legislate in these areas should they choose to do so.

Using UK SIs in this way is not a new development and this approach has been used extensively in transposition instruments under the European Communities Act (ECA) and EU Exit instruments.

As with instruments made under section 2(2) of the European Communities Act 1972 or the European Union Withdrawal Act 2018, the decision for UK Ministers to legislate on behalf of devolved administrations will be made on a case by case basis, and with the full involvement of the devolved administrations. In both these cases some instruments have been made by UK Ministers, but, as noted previously, the Scottish Government has continued to make its own instruments when appropriate to do so.

In certain circumstances, legislating four times for different jurisdictions may leave stakeholders confused about the exact provisions applying to an area of water and when such provisions come into effect, which in turn could cause enforcement issues. On these occasions, where policy interests align, it is appropriate and more effective to legislate through a single UK SI.

Finally, the Scottish Government agrees that the Parliament should be able to scrutinise decisions by the Scottish Ministers to consent to the exercise by UK Ministers of their powers to make regulations on matters within devolved competence. This will be done through the protocol arrangements currently being developed between the Scottish Government and the Parliament on these matters.

5. In relation to both clause 14(3) and 16(3), could you provide further information on why the Scottish Government considers it is appropriate for the powers to be conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

These clauses reflect UK wide and long standing policy that any type of commercial fishing activity requires a licence, in line with best international practice. Given that Scottish Ministers believe all commercial fishing activity should require a licence, allowing the exemption of certain classes of vessel only by agreement of all four administrations is acceptable. It avoids the risk that any one administration may decide that certain vessels, or foreign vessels, do not require a fishing licence and so exempt them from the vast majority of all fishing regulations, including those on access, which only apply to licensed fishing vessels.

It would not be our intention to consent to the exemption of any vessel from this requirement, except only in very specific and limited circumstances. Currently, I cannot envisage a scenario in which we would do so.

6. In relation to the power in clause 18(1), does the Scottish Government consider it is appropriate for the power to be conferred on the Secretary of State with no corresponding power for Scottish Ministers?

7. If so, is it appropriate that there is only a requirement to consult Scottish Ministers rather than consent being required?

8. Does the Scottish Government consider it appropriate for the power in clause 48(1) to be conferred on the Secretary of State in devolved areas, without any corresponding power of the Scottish Ministers, particularly with no requirement for the consent of Scottish Ministers, or a requirement to consult Scottish Ministers?

For both Clause 18 and Clause 48, I am clear that these provisions, as amended by the House of Lords, do not respect the devolution settlement and as such they should be redrafted to require the consent of the Scottish Ministers. However, substantively, they largely reflect this Government's policy aspirations and commitments, so I am not opposed to the aims of the amendments. Provided they can be redrafted to respect the devolution settlement, I am willing to support them and I am encouraging the UK Government to take forward the necessary amendments so that they can remain in the Bill.

