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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Shark Fins Bill



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Delegated Powers and Law Reform Committee

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;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Oliver Mundell
Scottish Conservative
and Unionist Party



Carol Mochan
Scottish Labour

Membership changes

1. The following changes to Committee membership occurred during the course of the Committee's scrutiny of the delegated powers relevant to Scotland in the Shark Fins Bill:
 - on 19 January 2023, Carol Mochan MSP replaced Paul Sweeney MSP.

Introduction

2. At its meetings on 10 and 24 January 2023, the Committee considered the delegated powers relevant to Scotland in the [Shark Fins Bill](#) ("the Bill")ⁱ.
3. The Committee considered the delegated powers in the Bill under its remit, in Rule 9B.3.6 of Standing Orders which provides that, where a Bill contains provisions conferred on Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on these provisions.
4. The Bill is a Private Members' Bill introduced by Christina Rees MP in the House of Commons on 15 June 2022. The Bill passed at Committee Stage on 16 November 2022. It is currently at the second reading stage in the House of Lords.
5. A [Legislative Consent Memorandum](#) ("the LCM") for the Bill was lodged by the Scottish Government on 23 November 2022.
6. The lead committee for the LCM is the Rural Affairs, Islands and Natural Environment Committee, to which this Committee directs its report.

ⁱ On both dates, Jenni Minto MSP substituted for Stuart McMillan MSP

Overview of the Bill

7. The purpose of the Bill, according to the accompanying [Explanatory Notes](#), is to ban imports and exports of detached shark fins or parts of shark fins, or things containing them, except in limited circumstances (i.e. in connection with the conservation of sharks), so that only fins naturally attached to the body of the shark can be imported or exported.
8. The Bill consists of three clauses and a schedule.
9. Clause 1 sets out a ban on the import and export of shark fins. Fins that are naturally attached to the body of the shark or where the body of the shark is substantially intact are not caught by the prohibition (Clause 3(2)). The prohibition applies to the whole of the UK but reflects different arrangements for Northern Ireland after EU Exit under the Northern Ireland Protocol. Clause 1 also allows for exemption certificates to be issued, and these are provided for in the schedule. An exemption certificate may be issued if “the shark fins concerned are to be used for purposes connected with the conservation of shark” (paragraph 2(b) of the schedule). The schedule sets out the process for applying for a certificate of exemption (paragraphs 1 to 3). It also sets out a penalty not exceeding £3000 for providing inaccurate information in connection with an application (paragraphs 4 to 6).
10. The schedule makes provision in relation to the administration of this exemption. The Scottish Ministers are the “appropriate authority” in relation to the entry into, or removal from, Scotland of shark fins or things containing them. Accordingly, they will be responsible for determining applications for exemptions and for any penalty that might be imposed.
11. Clause 2 of the Bill extends prohibitions on purchasing, offering for sale and selling shark fins contained within retained EU legislation (*Council Regulation (EC) No 1185/2003 on the removal of fins of sharks on board vessels (the retained Regulation 1185/2003)*) so that they apply to all vessels in UK waters and to UK vessels wherever they are, rather than Member States’ vessels.
12. Clause 3 sets out the extent, commencement and short title of the Bill. It contains a power which provides that the Bill will come into force when the Secretary of State provides for this through regulations. It also contains a power to make transitional or savings provision in connection with the coming into force of the Bill. Those powers are conferred solely on the UK Ministers.

Legislative consent

13. All clauses of the Bill extend and apply to the whole of the UK.
14. The Scottish Government state in their LCM that legislative consent is required for Clauses 1 to 3 and the schedule of the Bill, so far as matters relating to shark finning fall within the legislative competence of the Scottish Parliament or alter the executive competence of Scottish Ministers.
15. The Scottish Government supports the Bill and states in the LCM that the Bill is aligned with the Scottish Government's emphasis on animal welfare and supports the Scottish Government's position against shark finning practices.

Delegated Powers

16. The UK Government published a [Delegated Powers Memorandum](#) to accompany the Bill (“DPM”). As is normal for UK Bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s view is set out in the LCM.
17. The DPM identifies each of the provisions of the Bill which confer powers to make delegated legislation. It explains in each case the purpose of the power, why in the UK Government’s view a delegated power is appropriate, and the parliamentary procedure that has been selected.
18. At its meeting on 10 January, the Committee agreed it was the content with the following delegated powers:
 - Clause 3(2) - power to make commencement regulations; and
 - Clause 3(5) - power to make transitional or savings provisions.
19. However, the Committee agreed to [write](#) to the Scottish Government to raise questions in relation to the delegated power in paragraph 4 of the Schedule (penalty for providing inaccurate information in connection with an application).
20. On receipt of the [response](#), the Committee reconsidered these powers at its meeting on 24 January.
21. A copy of the correspondence can be found in the **Annex**.

Paragraph 4 of the Schedule – Penalty for providing inaccurate etc information in connection with an application

Power conferred on: the appropriate authority (Scottish Ministers in Scotland)

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Provision

22. Paragraph 4 of the Schedule gives the appropriate authority (Scottish Ministers in relation to Scotland) a power to impose a civil monetary penalty up to £3,000 on an applicant where they deliberately provide inaccurate information or where they fail to correct or update relevant information before an exemption certificate is issued.
23. Paragraph 4(4) provides that the appropriate authority may by regulations substitute a different amount for this penalty. Paragraph 4(7) specifies that any regulations made under paragraph 4(4) should be made using the affirmative procedure.

Committee consideration

24. The reason given in the DPM for the conferral of this delegated power is to allow for the adjustment of the penalty in the future, particularly to take account of changes in the value of money or where it becomes necessary to increase the protection

bestowed upon sharks in the future by increasing disincentives to kill them for their fins. Nonetheless, it is acknowledged in the DPM that it is unusual to confer a power to vary a penalty by subordinate legislation. Given that the Scottish Government did not offer a view on this provision in the LCM and given the significance of adjusting a penalty, the Committee agreed to write to the Scottish Government, seeking its views on:

- the appropriateness of including a power to adjust a civil penalty in the Bill; and
 - what the Scottish Government intends to do to ensure that the penalty is consistent across the UK.
25. In its response, the Scottish Government explained that it considers it appropriate to include a power to amend the maximum civil penalty amount and noted that this approach has precedent in both UK and Scottish primary legislation.
26. The Scottish Government also explained that it does not anticipate the power will be used frequently. However, it noted it would allow Scottish Ministers to respond to changes in circumstance, such as increased risks to highly sensitive shark species.
27. The Scottish Government stated that given that the value of detached shark fins and products containing them are determined by market forces and can fluctuate, this power would enable Scottish Ministers to respond to a material increase in that market value, which would otherwise result in the value of the illegal activity associated with shark finning and importing or exporting detached shark fins, or products containing them, far exceeding the value of the monetary penalty set out in paragraph 4(3) of the Bill schedule, which would reduce the deterrent effect of this penalty.
28. Furthermore, the Scottish Government stated that the power would also enable the penalty amount to be amended to reflect changes in the value of money, which could otherwise undermine the deterrent effect of this penalty.
29. In the absence of a power to make regulations to amend the maximum monetary penalty amount, any amendments would require to be made through primary legislation, which the Scottish Government does not consider it to be a proportionate use of Parliamentary time, given that the affirmative procedure would enable an appropriate level of scrutiny of any regulations made under paragraph 4(4).
30. **The Committee is content with the explanation provided by the Scottish Government. It therefore accepts the power in principle and is content that its exercise will be subject to the affirmative procedure.**

Annex

12 January 2023, the Committee asked the Scottish Government

At its meeting on 10 January, the Delegated Powers and Law Reform Committee considered the delegated powers that are exercisable within the Scottish Parliament's legislative competence in the Shark Fins Bill as described in the Legislative Consent Memorandum ("LCM") lodged on 30 November 2022. The Committee would appreciate a response to the points set out below.

Paragraph 4 of the Schedule – Penalty for providing inaccurate etc information in connection with an application

Power conferred on: in relation to England, the Secretary of State; in relation to Wales, Welsh Ministers; in relation to Scotland, Scottish Ministers

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Paragraph 4 of the schedule of the Bill gives the appropriate authority (the Scottish Ministers in relation to Scotland) a power to impose a civil monetary penalty up to £3,000 on an applicant where they deliberately provide inaccurate information or where they fail to correct or update relevant information before an exemption certificate is issued.

Paragraph 4(4) provides that the appropriate authority may, by regulations, substitute a different amount for this penalty. Paragraph 4(7) specifies that any regulations made under paragraph 4(4) should be made using the affirmative procedure.

The Committee noted that the reason given in the Delegated Powers Memorandum ("DPM") for the use of a delegated power is to allow for the adjustment of the penalty in the future, particularly to take account of changes in the value of money or where it becomes necessary to increase the protection bestowed upon sharks in the future by increasing disincentives to kill them for their fins.

The DPM acknowledges that it is unusual to confer a power to vary a penalty by subordinate legislation. The Committee noted, however, that the Scottish Government has not provided a view in the LCM on the power to adjust the level of the penalty. Given the significance of adjusting a penalty, the Committee considered that this is a wide power.

The Committee therefore agreed to seek the Scottish Government's views on:

- the appropriateness of including a power to adjust a civil penalty in the Bill; and
- what the Scottish Government might consider in relation to the variation of the penalty, determined in accordance with the relevant power under paragraph 4(4) of the schedule, to ensure it is consistent across the UK.

I would be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on **Wednesday, 18 January**.

18 January 2023, the Scottish Government responded

Thank you for your letter of 12 January outlining the outcomes of the meeting on 10 January of the Delegated Powers and Law Reform Committee, at which the Committee considered the Shark Fins Bill. As you outline, the Legislative Consent Memorandum (“LCM”) relating to the Shark Fins Bill was lodged on 30 November 2022. We are grateful for the consideration of this LCM by the Committee.

Paragraph 4 of the schedule – Penalty for providing inaccurate etc information in connection with an application

I note your questions relating to paragraph 4 of the schedule of the Bill, which confers on the appropriate authority (the Scottish Ministers in relation to Scotland) a power to impose a civil monetary penalty of up to £3,000 on an applicant where they deliberately provide inaccurate information or where they fail to correct or update relevant information before an exemption certificate is issued.

As you outline, paragraph 4(4) does provide that the appropriate authority may, by regulations, substitute a different maximum amount for this penalty. Paragraph 4(7) specifies that any regulations made under paragraph 4(4) are subject to the affirmative procedure. This will ensure an appropriate level of scrutiny by the Scottish Parliament.

The Scottish Government considers that it is appropriate to include this power in the Shark Fins Bill to amend the maximum civil penalty amount. The Scottish Government notes that this approach has precedent in both UK and Scottish primary legislation, in terms of section 44 of the Childcare Payments Act 2014 and section 23 of the Regulatory Reform (Scotland) Act 2014.

We do not anticipate that this power to amend the maximum monetary penalty amount will be used frequently, however, this power would provide the Scottish Ministers with the ability to respond to material future changes, such as increased risks to highly sensitive shark species. In addition, given that the value of detached shark fins and products containing them are determined by market forces and can fluctuate, this power would enable Scottish Minister to respond to a material increase in that market value, which would otherwise result in the value of the illegal activity associated with shark finning and importing or exporting detached shark fins, or products containing them, far exceeding the value of the monetary penalty set out in paragraph 4(3) of the Bill schedule, which would reduce the deterrent effect of this penalty. This power would also enable the penalty amount to be amended to reflect changes in the value of money, which could otherwise undermine the deterrent effect of this penalty.

In the absence of a power to make regulations to amend the maximum monetary penalty amount, any amendments would require to be made through primary legislation, which the Scottish Government does not consider to be a proportionate use of Parliamentary time, given that the affirmative procedure will enable an appropriate level of scrutiny of any regulations made under paragraph 4(4).

We also wish to retain consistency across the UK administrations in the matter of shark conservation. Appropriate guidance on the exemption certificate process will be developed and agreed by the Secretary of State, the Scottish Ministers and the Welsh Ministers. The Scottish Government does not anticipate that these fines will vary in amount across Great Britain.

