

The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill

May 2020



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About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.senedd.wales/SeneddLJC

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Mick Antoniw MS
Welsh Labour

Current Committee membership:



Suzy Davies MS
Welsh Conservatives



Carwyn Jones MS
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Contents

1. Background	5
The UK Government's Fisheries Bill 2017-2019.....	5
The UK Government's Fisheries Bill 2019-2021	5
The Welsh Government's Legislative Consent Memorandum	7
2. Committee consideration	9
UK-wide approach and common frameworks	9
A Welsh Fisheries Bill.....	10
A sunset provision	11
Clause 23 - Power of Secretary of State to determine fishing opportunities	13
Delegated powers and the making of regulations laid before the Senedd	20
Further amendments to the UK Bill.....	24
Our view	25

1. Background

The UK Government's Fisheries Bill 2017-2019

1. The Fisheries Bill 2017-19 (the 2017-19 Bill) was introduced to the UK Parliament in October 2018 and amended following Committee Stage in the House of Commons. A Legislative Consent Memorandum (LCM)¹ and Supplementary LCM² were laid in the Senedd by the Welsh Government on 15 November 2018 and 10 January 2019 respectively. Following the dissolution of the UK Parliament for the UK General Election in December 2019, the Fisheries Bill 2017-19 fell.

2. We reported on the 2017-19 Bill on 12 February 2019.³

3. In that report, we made seven recommendations and concluded that:

“...the Minister's evidence lacked clarity. As a result it delivers a level of uncertainty regarding how much the Welsh Government is in control of, and therefore seeking to influence, important legislation which will impact on Wales.”⁴

4. The Minister for Environment, Energy and Rural Affairs (the Minister), Lesley Griffiths MS, responded to that report on 27 March 2019.⁵

The UK Government's Fisheries Bill 2019-2021

5. The UK Government's Fisheries Bill⁶ (the Bill) was introduced to the House of Lords and given its first reading on 29 January 2020. It is sponsored by the Department for Environment, Food and Rural Affairs.

¹ Welsh Government, [Legislative Consent Memorandum, Fisheries Bill](#), November 2018

² Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum no.2\), Fisheries Bill](#), January 2019

³ [Constitutional and Legislative Affairs Committee Legislative Consent Memorandum Report: The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill, February 2019](#)

⁴ Constitutional and Legislative Affairs Committee Legislative Consent Memorandum Report: The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill, paragraph 121

⁵ [Letter from the Minister for Environment, Energy and Rural Affairs](#), 27 March 2019

⁶ [Fisheries Bill 2019-21 \[HL 71\]](#)

6. The Bill is designed to provide the legal framework for the United Kingdom to operate under the United Nations Convention on the Law of the Sea (UNCLOS) (the Law of the Sea Convention) with regards to fishing activities in the UK's Exclusive Economic Zone (EEZ) after it has left the European Union (EU)'s Common Fisheries Policy (the CFP).

7. The explanatory notes to the Bill (as introduced) also state:

“The Bill creates common approaches to fisheries management between the Secretary of State for Environment, Food and Rural Affairs (the “Secretary of State”) and the Devolved Administrations, known collectively as the Fisheries Administrations, and makes reforms to fisheries management in England. It also confers additional powers on the Marine Management Organisation (“the MMO”) to improve the regulation of fishing and the marine environment in the UK and beyond.”⁷

8. The Bill is similar to the 2017-19 Bill, although some clauses are different and others have been restructured. Some key changes which relate to matters of the Senedd's competence include:

- changes to the fisheries objectives;
- changes to the joint fisheries statement provisions;
- an additional power for the Welsh Ministers to make regulations enabling the sale of rights to Welsh “catch quotas” or “effort quotas”;
- broadening of financial assistance powers;
- an additional power for the Welsh Ministers to impose charges for carrying out functions relating to the regulation of marine activities.

9. The Bill also includes new fisheries objectives, the requirement to prepare and publish fisheries management plans and additional powers for the Welsh Ministers.

⁷ [Fisheries Bill, Explanatory Notes](#), January 2020

The Welsh Government's Legislative Consent Memorandum

10. On 12 February 2020 the Welsh Government laid before the Senedd an LCM⁸ in respect of the Bill.

11. The Business Committee agreed that the Legislative, Justice and Constitution Committee (the Committee) and the Climate Change, Environment and Rural Affairs (CCERA) Committee should report on the LCM by 24 April 2020.⁹ The Business Committee subsequently revised the deadline to 21 May 2020.¹⁰

12. The Welsh Government's LCM states that:

“At the request of Welsh Government, the Bill includes powers for the Welsh Ministers.”¹¹

13. The powers provided to the Welsh Ministers by the Bill are not time limited, as no sunset clause is currently included within the Bill.

14. Paragraphs 7 to 47 of the LCM set out the Welsh Government's assessment of which provisions in the Bill require consent. Paragraphs 48 to 50 of the LCM set out the Welsh Government's assessment of provisions in the Bill for which consent is not required.

15. Paragraphs 51 to 56 of the LCM set out the Welsh Government's reasons why including provision for Wales in the Bill is appropriate. In particular, it states:

“We welcome the inclusion of clause 43 which extends the Assembly's legislative competence for fisheries matters beyond Wales, into the Welsh zone. This brings the Assembly's competence in line with the Welsh Ministers' executive competence.”¹²

16. The LCM adds that the “Welsh Government is supportive of the Bill as drafted”¹³ and concludes by stating:

⁸ Welsh Government, [Legislative Consent Memorandum, Fisheries Bill](#), February 2020

⁹ Business Committee report, [Timetable for consideration of the Legislative Consent Memorandum on the Fisheries Bill 2020](#), February 2020

¹⁰ Business Committee report, [Revised timetable for consideration of the Legislative Consent Memorandum on the Fisheries Bill](#), April 2020

¹¹ Welsh Government, LCM, paragraph 6

¹² Welsh Government, LCM, paragraph 52

¹³ Welsh Government, LCM, paragraph 52

“It is the view of the Welsh Government it is appropriate to deal with these provisions in this UK Bill as there needs to be a UK wide approach to create the Fisheries Framework which can only be done in a UK bill. The Bill also contains a number of provisions which must be in place before the end of the implementation period. For non-framework powers, it is important the Welsh Ministers are able to act quickly and decisively in Wales, until we can bring forward a comprehensive Wales Fisheries Bill.”¹⁴

¹⁴ Welsh Government, LCM, paragraph 58

2. Committee consideration

17. We took evidence from the Minister at our meeting on 16 March 2020.¹⁵

UK-wide approach and common frameworks

18. The LCM states:

“It is the view of the Welsh Government [that] it is appropriate to deal with these provisions in this UK Bill as there needs to be a UK wide approach to create the Fisheries Framework which can only be done in a UK bill. The Bill also contains a number of provisions which must be in place before the end of the implementation period. For non-framework powers, it is important the Welsh Ministers are able to act quickly and decisively in Wales, until we can bring forward a comprehensive Wales Fisheries Bill.”¹⁶

19. We asked the Minister about the differences between the Bill and the 2017-19 Bill. She said:

“I suppose we’ve got everything we’ve asked for. The main addition is the inclusion of the provisions in relation to the extension of the legislative competence for this place, in relation to the Welsh zone.

We’ve also further strengthened the fisheries objectives, the relationship between the joint fishing statement and the Secretary of State’s fisheries statement, and the inclusion of the fisheries management plan.”¹⁷

20. Given that the Minister said the Welsh Government had obtained everything it asked for, we asked her if she was content with the Welsh Government’s involvement in the process of drafting the Bill. The Minister told us:

“Yes, I think, certainly at a ministerial level—obviously, George Eustice was the Minister of State, he is now the Secretary of State, and we have a very good relationship, and, at an official level, you’ll be very well

¹⁵ [Legislation, Justice and Constitution Committee, 16 March 2020](#)

¹⁶ Welsh Government, LCM, paragraph 58

¹⁷ LJC Committee, 16 March 2020, RoP, [31-32]

aware of the relationship, for many years, with the fisheries department.”¹⁸

21. We asked the Minister if she was satisfied that all of the provisions within the current Bill are necessary and effective in delivering on the issue of a common framework across the UK. She told us:

“Yes, we are. We think this Bill creates the primary legislative elements of the UK framework for fisheries management and support. It also provides a uniform set of powers, obligations and objectives. The common framework powers relate to fisheries objectives, joint fisheries statements and the fisheries management plans and the access and licensing provisions.”¹⁹

22. We explored this matter further and asked the Minister why she believes that a common framework for fisheries is necessary. She said:

“It’s an interim measure until we can bring forward our own Welsh fisheries Bill. So, until this UK Bill is passed, within the current devolution arrangements, an Assembly Bill would only be able to deal with the necessary administrative arrangements in relation to Wales, but not the wider Welsh zone.”²⁰

A Welsh Fisheries Bill

23. In the Minister’s response²¹ to our report on the 2017-19 Bill she told us:

“I see the Welsh provisions, not related to the common framework, as transitional subject to the introduction at the appropriate time of a Welsh Fisheries Bill which is able to include provisions which apply to both Wales and the Welsh zone and Welsh fishing Boats beyond that zone. (...)”

In regards to a Welsh Fisheries Bill, it is likely we will at some stage need to make further fisheries provisions in a Welsh Act. The powers we are seeking in this UK Fisheries Bill are needed as soon as possible in order to ensure that the operation of Welsh fisheries is as effective as possible.

¹⁸ LJC Committee, 16 March 2020, RoP, [34]

¹⁹ LJC Committee, 16 March 2020, RoP, [4]. See also Welsh Government, LCM, paragraph 51

²⁰ LJC Committee, 16 March 2020, RoP, [6]. See also Welsh Government, LCM, paragraphs 52 to 55

²¹ Letter from the Minister for Environment, Energy and Rural Affairs, 27 March 2019

However, until the UK Fisheries Bill has passed through Parliament it is difficult to commit to a timetable. We are dependent on a number of provisions, and in particular the extension of the Assembly's legislative competence."²²

24. During our meeting on 16 March 2020 we asked the Minister if she could provide any clarity on a timescale for the introduction of a Welsh Fisheries Bill. She said:

“No, not at the present time. But we've been out to consultation on 'Brexit and our seas'. As I said, I'll be bringing forward a written statement in the near future around that. What we want to do is have our own future fisheries policy, and, whilst we've said there will be a fisheries Bill next term in the Assembly, I'm not able to commit in the way that I am with the agricultural Bill, because we know that will be in the first year of the next Assembly.”²³

25. We also asked the Minister whether the Bill would inhibit the Welsh Government's ability to legislate in this area in the future. The Minister told us that it was her understanding that this was not the case.²⁴

26. On 1 May 2020, following her attendance at our meeting on 16 March, the Minister wrote to us on a number of matters, including a future Welsh Fisheries Bill. She said:

“At this time, while I am committed to bringing forward a Welsh Fisheries Bill in the next term of the Senedd, I cannot guarantee when it will be included in the Senedd's Legislative Programme...”²⁵

A sunset provision

27. The third recommendation in our report²⁶ on the 2017-19 Bill was that the Minister should seek an amendment to insert a sunset clause in order to ensure

²² Letter from the Minister for Environment, Energy and Rural Affairs, 27 March 2019

²³ LJC Committee, 16 March 2020, RoP, [42]

²⁴ LJC Committee, 16 March 2020, RoP, [47]

²⁵ [Letter from the Minister for Environment, Energy and Rural Affairs, 1 May 2020](#)

²⁶ Constitutional and Legislative Affairs Committee Legislative Consent Memorandum Report: The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill, recommendation 3

there is future clarity about the application of primary legislation on fisheries in Wales.

28. The Minister rejected this recommendation. In her response, she said:

“...my position remains therefore it is not appropriate for a sunset clause to be included in the Bill (given the current uncertainties regarding the future management of Welsh fisheries) but I restate my commitment to bring forward Welsh legislation as soon as possible.”²⁷

29. The Bill does not contain provisions that would ‘sunset’ the Bill’s application in Wales or the regulation-making powers available to the Welsh Ministers. We asked the Minister whether she gave, or is giving, consideration to the inclusion of such sunset provisions in the Bill. The Minister said:

“Not at the moment, because I don’t have a timeline for the Welsh fisheries Bill. (...) obviously in the agriculture Bill we have a sunset clause, because I’ve got a timeline...

We did consider it, but that was the decision we took. We can revisit.”²⁸

30. An official accompanying the Minister added:

“We can certainly look at it again, but our view was that having the sunset clause without knowing exactly where the fisheries Bill would be in the Welsh Government and the Assembly’s timetable might make that sunset clause slightly difficult for us.”²⁹

31. In our later scrutiny session with the Minister on the UK Government’s Agriculture Bill 2019-21,³⁰ we asked why a sunset clause was included in that legislation but not the Bill relating to fisheries. The Minister explained it was because the Welsh Government “were so much more further forward” with the Agriculture Bill and thought that it “hopefully, (...) would remove the doubt that we

²⁷ Letter from the Minister for Environment, Energy and Rural Affairs, 27 March 2019

²⁸ LJC Committee, 16 March 2020, RoP, [78] and [80]

²⁹ LJC Committee, 16 March 2020, RoP, [81]

³⁰ Agriculture Bill 2019-21 [HC Bill 7]

would be having that Bill by the end of 2024".³¹ She added that "we're nowhere near along the line of development for the future fisheries policy".³²

32. In her letter to us, dated 1 May, the Minister wrote:

"I said I would revisit whether the Bill should include sunset provisions in relation to the Welsh provisions.

My position is clear and I see the Welsh provisions, not related to the common framework, as purely transitional subject to the introduction at the appropriate time of a Welsh Fisheries Bill.

We are working to deliver a fit for purpose Future Fisheries Policy and this needs to be done within reasonable timeframes, which enable us to reflect on the outcomes of Brexit and the impacts on our industry. The impacts are now compounded by the COVID-19 crisis. The need to respond to this unprecedented situation, shows why we must keep flexibility in our legal powers, given the need to respond to changing priorities and to refocus resources accordingly.

(...) I do not want to create a risk of losing key powers we may need in the future by including sunset provisions in the UK Bill."³³

Clause 23 - Power of Secretary of State to determine fishing opportunities

Disagreement with the UK Government

33. Clause 23 of the Bill provides that the Secretary of State will set the total UK fishing opportunities in terms of the maximum quantity of sea fish and the maximum number of days that British fishing boat may spend at sea. The Secretary of State may only do so for the purposes of complying with international obligations to determine fishing opportunities of the UK.

34. The LCM states:

"Clause 23 provides a broad power for the Secretary of State to set UK quotas, which could as drafted apply to stocks of fish species which are

³¹ LJC Committee, 16 March 2020, RoP, [100]

³² LJC Committee, 16 March 2020, RoP, [141]

³³ Letter from the Minister for Environment, Energy and Rural Affairs, 1 May 2020

only present wholly within the waters of one of the devolved administrations. In relation to the effort quota, clause 23(8) allows the Secretary of State to make regulations for determining the number of days a vessel is to be regarded to have spent at sea.”³⁴

35. The Welsh Government was not content with the drafting of the corresponding clause - clause 18 - in the 2017-19 Bill.³⁵

36. In our report on the 2017-19 Bill, we recommended that the Minister provided an update on the progress made in resolving the Welsh Government's concerns with clause 18 of the Bill, In particular, we said it should include an explanation of whether the inter-governmental agreement referred to by the Minister is likely to be put in place and, if so, if it would allow UK Ministers to act in devolved areas without scrutiny by the Senedd.³⁶

37. The Minister accepted this recommendation but did not comment on whether the inter-governmental agreement would allow UK Ministers to act in devolved areas without a role for the Senedd. This point is also not addressed in the LCM for the current Bill.

38. In her response to the report of the CCERA Committee on the 2017-19 Bill, the Minister indicated that she would share the outcome of discussions with the UK Government about the intended use of the power in clause 18 and strengthened consultation processes in advance of the debate on the consent motion.³⁷

39. As far as we are aware, further information was not made available to the CCERA Committee nor the Senedd as a whole, and the relevant information is not provided in the LCM.

³⁴ Welsh Government, LCM, paragraph 29

³⁵ Welsh Government, Legislative Consent Memorandum, Fisheries Bill, November 2018, paragraphs 25 and 40, and Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum no.2), Fisheries Bill, January 2019, paragraphs 12-13

³⁶ Constitutional and Legislative Affairs Committee Legislative Consent Memorandum Report: The Welsh Government's Legislative Consent Memorandum on the Fisheries Bill, recommendation 4

³⁷ [Letter from the Minister for Environment, Energy and Rural Affairs to the Chair of the Climate Change, Environment and Rural Affairs Committee](#), 27 March 2019

40. We asked the Minister to outline the disagreement between the Welsh and UK Governments on clause 23. She told us that discussions were ongoing, and added:

“I’ve also written to the Secretary of State, and I understand that the letter is with him now for consideration. Of course, we recognise the conducting of international negotiations is a reserved matter, but the implementation of those international obligations, if they’re related to a devolved area of the Assembly—which, obviously, fisheries is—is a matter, I think, for us and for the Assembly. So, our concerns centre around the very broad way in which this power is written. I suppose one example is that, the way it’s currently drafted, the Secretary of State could make a decision about Cardigan bay scallops, for instance. Again, in discussions with officials and at a ministerial level, I don’t think it’s the intention of the UK Government to use them in that way, of course, but who knows what a different Government could do in the future?”
(...) The UK Government is firmly of the belief that it’s a reserved matter and we remain of the view that consent is required.”³⁸

A Memorandum of Understanding and a dispute resolution mechanism

41. We asked the Minister what action she had taken to resolve, with the UK Government, the disagreement on clause 23 of the current Bill. She said:

“So, I’ve reached an agreement with the UK Government to set out in the UK fisheries framework memorandum of understanding more detail on the intended use of the power within clause 23 and what the strengthened consultation processes are. Officials continue to work on this, and, as I say, I have written to George Eustice and I’m expecting a response, which I’ll be very happy to share with the committee.”³⁹

42. During questioning, we also asked the Minister for further detail on why the memorandum will “cement and enhance”⁴⁰ inter-governmental working practices. The Minister said:

“I suppose the reason for that is the inter-governmental working arrangements we’ve had over many, many years in relation to fisheries,

³⁸ LJC Committee, 16 March 2020, RoP, [8]

³⁹ LJC Committee, 16 March 2020, RoP, [9]

⁴⁰ Letter from the Minister for Energy, Environment and Rural Affairs, 27 March 2019

which I just referred to—a fisheries council every December. That's why we use those words, because it's based on very constructive and well-established inter-governmental arrangements."⁴¹

43. As regards the potential for a dispute resolution mechanism, the Minister's official told us:

"...we're still considering whether there will be a dispute resolution within the MOU itself or will it be part of the broader dispute-resolution mechanisms that are being put in place between Welsh Government and UK Government and the Department for Environment, Food and Rural Affairs in particular. So, that's still up for discussion, but we're clear that there needs to be a robust dispute-resolution mechanism in place to allow us to work through that."⁴²

44. We asked the Minister if the memorandum of understanding had been drafted. She told us that it is still being discussed and drafted but "there will be one"⁴³.

45. We highlighted the importance of the memorandum of understanding in terms of the formal legislative consent process, and asked the Minister whether the Senedd would see the memorandum before the Welsh Government brings forward a consent motion for the Bill. She said:

"I certainly can't share it at the moment because it's being drafted. We're going to lay it before the end of the implementation period."⁴⁴

46. The Minister's official added:

"We're anticipating that the MOU will be drafted by the end of the year, so it's unlikely to be before the LCM is laid. I think the assurances that the Minister has sought from the Secretary of State around clause 23—we'll be able to share those reassurances that we'll hopefully have secured."⁴⁵

⁴¹ LJC Committee, 16 March 2020, RoP, [57]. See also [52] and [55].

⁴² LJC Committee, 16 March 2020, RoP, [14]

⁴³ LJC Committee, 16 March 2020, RoP, [11]

⁴⁴ LJC Committee, 16 March 2020, RoP, [63]

⁴⁵ LJC Committee, 16 March 2020, RoP, [64]

47. We asked the Minister if, as currently drafted, clause 23 was a red line for the Welsh Government. The Minister confirmed that it was:

“So, yes, it is, and I’ve said that I could only recommend [consent] if we sort this issue out. But I am confident that the MOU will be in place by the end of the implementation period. If I’ve got what we want in the MOU, and we’ve got that necessary reassurance in place, then I would be happy to recommend it.”⁴⁶

48. The Minister also told us she was confident that there will be amendments made to the Bill that will accommodate the Welsh Government’s objection to and concerns with clause 23.⁴⁷

49. In her letter to us dated 1 May 2020, following her attendance at our meeting on 16 March, the Minister sought to clarify some of the discussion we had on clause 23 and a dispute resolution mechanism. On clause 23, the Minister said:

“During scrutiny I was asked if amendments will be made to the Bill in relation to the concerns I raised previously on clause 23. I want to clarify, we are not seeking any amendments.

This remains a red line issue for me because it is paramount this power is exercised in a manner which respects the devolution settlement. I have reached an agreement with the UK Government to set out in the UK Fisheries Framework Memorandum of Understanding (MoU), or an alternative route if we both agree it is more suitable, more detail on the intended use of the power within clause 23 which will include strengthened consultation processes. I have attached a letter from Victoria Prentis MP which re-confirms this commitment.

We expect the MoU to be in place by the end of the Implementation Period and my officials are working closely with Defra and the Devolved Administrations to progress all elements of the Framework. I am comforted by the collaborative and respectful way all four UK administrations are working together to deliver the UK Fisheries Framework.”⁴⁸

⁴⁶ LJC Committee, 16 March 2020, RoP, [16]

⁴⁷ LJC Committee, 16 March 2020, RoP, [17-18]

⁴⁸ Letter from the Minister for Environment, Energy and Rural Affairs, 1 May 2020

50. In her letter, Victoria Prentis MP, the Parliamentary Secretary of State, said:

“...as officials have discussed, the power set out in clause 23, which allows for the Secretary of State to determine fishing opportunities for the UK, is not a devolved matter. The determination of the UK quota cannot, by its nature, be a devolved function and is therefore a function of the Secretary of State. We agree that the implementation of the UK's international obligations is a devolved matter: managing the share of the UK's fishing opportunities allocated to Welsh Ministers in accordance with the UK's international obligations is of course a matter for Wales.

Clause 24 of the Bill obliges the Secretary of State to consult all Administrations before making or withdrawing a determination under clause 23. That said, I am happy to make clear through the MoU, or another route if we both agree that is more suitable, the commitment you previously received that we will set out the circumstances in which the power under Clause 23 will be exercised, and how consultation provisions could be strengthened beyond those set out in the Bill.”⁴⁹

51. On the matter of a dispute resolution mechanism, the Minister's letter of 1 May 2020 states:

“We discussed dispute resolution mechanisms and I have always maintained the importance of there being adequate dispute resolution arrangements in place. I want to provide reassurances on this matter. Dispute avoidance processes linked to portfolio level structures are already in place and well established. These are the Senior Officials Programme Board and where Ministerial escalation is required, via the Inter-Ministerial Group – Environment, Fisheries and Rural Affairs (IMG-EFRA).

The detailed arrangements for governance in fisheries, including decision making, dispute avoidance and dispute resolution will also be covered, and existing arrangements will be strengthened, through the development of the UK Fisheries Framework. This is part of the UK Common Frameworks approach, which is supported by all fisheries administrations.

⁴⁹ Letter from the Minister for Environment, Energy and Rural Affairs, 1 May 2020, Annex

The fisheries administrations have a strong track record of working closely together to develop fisheries management policy and resolve disputes. In addition to regular Ministerial and Official level contact, all four fisheries administrations are signatories to the 2012 Concordat on the 'Management Arrangements for Fishing Opportunities and Fishing Vessel Licensing in the United Kingdom', which sets out ways of working.

It is, therefore, considered unnecessary to incorporate any additional processes into the UK Fisheries Bill. Additionally given the existence of the wider UK Framework which leads to the Joint Ministerial Committee, it would be inappropriate to introduce legislation which addresses dispute resolution solely for fisheries policies.”⁵⁰

Relationship between clause 23 and clause 4

52. Clause 4 provides for a Secretary of State's fisheries statement to be made in relation to functions under clause 23 of the Bill. The LCM states that clause 4 is one of the provisions in the Bill for which consent is not required. The Minister told us:

“I can understand the link between clause 4 and clause 23, but there's much less in clause 4. That's in relation to the Secretary of State's fisheries statement and concerns the setting of policies on how they'll meet the UK fishing objectives, and it's not our view that this specific provision requires consent. So, there's a contrast—. Clause 23—the Secretary of State will be exercising a function more operational in nature. Under clause 4, he would be setting the UK Government policy, which will outline how he then exercises the UK quotas under clause 23.”⁵¹

⁵⁰ Letter from the Minister for Environment, Energy and Rural Affairs, 1 May 2020

⁵¹ LJC Committee, 16 March 2020, RoP, [20]

Delegated powers and the making of regulations laid before the Senedd

General

53. The Bill includes nine provisions granting the Welsh Ministers delegated powers. As mentioned previously in this report, the LCM states:

“At the request of Welsh Government, the Bill includes powers for the Welsh Ministers.”⁵²

54. However, there is little detail in the LCM to explain the purpose and intended effect of these powers. We asked the Minister why these powers are required. The Minister said:

“We’ve considered the scope of delegated powers very carefully. We’ve got to balance the powers to be broad enough to allow fisheries administrations to act very quickly. We need to be very responsive, I think, at all times in relation to our fisheries. We need to be able to respond to scientific advice very quickly. You’ll be aware the delegated powers cover a range of areas, all of which are designed to enable us to do that, to effectively manage our fisheries, going forward.

Setting detail in the Bill on the devolved areas I don’t think would be appropriate or very useful, really, in the event that we need to react quickly or respond to any unforeseen circumstances. I will be providing adequate opportunity for scrutiny of these provisions.”⁵³

55. We also asked the Minister to outline the provision that she will be seeking to make in regulations using the powers contained in the Bill, and when such regulations would be laid. The Minister told us:

“I think it’s probably a bit too early to say. I suppose I can give you an example in relation to Schedule 5, the detail of any future arrangements are yet to be determined, for example, but we wanted to secure that as an enabling power that is equivalent to the power secured for the Secretary of State so that we can ensure the most appropriate use of any fishing opportunities, for example. So, again, I

⁵² Welsh Government, LCM, paragraph 6

⁵³ LJC Committee, 16 March 2020, RoP, [67] and [68]

just wanted to reassure Members that any consultation process would be open and transparent.”⁵⁴

Secretary of State seeking the consent of the Welsh Ministers under the Bill

56. In a number of circumstances before making regulations, the Secretary of State will have to seek the consent of the Welsh Ministers.⁵⁵ These relate to the powers to:

- add, remove or vary exceptions to the prohibition on unlicensed fishing (clause 14(3));
- create or add, remove or vary exceptions to prohibition on unlicensed fishing by a foreign boat (clauses 16(3) and 17(3));
- amend UK law for listed fisheries purposes and in relation to listed fisheries matters (clause 36);
- make provision for the purpose of monitoring, controlling or preventing diseases of fish or other aquatic animals (clause 38).

57. We asked the Minister whether the Welsh Ministers intended to seek the consent of the Senedd before granting their consent in these circumstances. We also asked whether the Welsh Ministers would formally notify the Senedd when consent has been given, as per the Standing Order 30C process. The Minister told us:

“Again, these are technical issues, so what I will do is follow the practice that I did in January when I wrote⁵⁶... in relation to the devolved areas made by UK Ministers under the direct payment to farmers, I did the SI, so I’ll follow the same practice.”⁵⁷

The exercise of concurrent powers

58. The Bill, as with some other EU exit related UK Bills and statutory instruments, creates concurrent powers to be exercised by both UK and Welsh

⁵⁴ LJC Committee, 16 March 2020, RoP, [70]

⁵⁵ In other circumstances before making regulations, the Secretary of State will consult the Welsh Ministers. These relate to the powers to determine UK fishing opportunities (clauses 23 and 24).

⁵⁶ ~~Letter from the Minister for Environment, Energy and Rural Affairs~~, 31 January 2020

⁵⁷ LJC Committee, 16 March 2020, RoP, [76]

Ministers. As acknowledged by the Welsh Government⁵⁸, there is a potential impact on the legislative competence of the Senedd because there is a risk that the removal of such functions in a future Act of the Senedd could engage the consent requirements in Schedule 7B to the *Government of Wales Act 2006* (2006 Act). We have raised this issue with the Welsh Government on a number of occasions and are aware that an Order to be made under section 109 of the 2006 Act is being drafted which should address the general issue.

59. In her letter to the Minister, Victoria Prentis MP, Parliamentary Under Secretary of State, stated:

“I am aware that officials in the Welsh Office have shared drafting responsibilities of the section 109 GoWA Order with your officials, and that this work is at an advanced stage. The Government is clear that the consent requirements will not apply should the Assembly decide to remove the concurrent powers in the Fisheries Bill from Ministers of the Crown in future. As such I am assured that this matter is close to resolution and will not require an amendment to the Bill.”⁵⁹

Schedule 3 – Sea Fishing Licences: Further Provision

60. Schedule 3, as introduced by clause 18 (Further provision about licences), provides for the relevant national authority to make regulations that make provision as to the manner in which a sea fish licensing authority's licensing functions are to be exercised, and as to the time when a licence or aspects of the licence have effect. Examples of provision that may be made in regulations are contained in Schedule 3, and these include delivery of documents and publication of notices and making of charges. Additionally, the relevant national authority must by regulations make provision as to the principles to be applied by a sea fish licensing authority in exercising its functions.

61. Such regulations are subject to the negative procedure, unless they provide for a principle of reducing the time fishing boats spend at sea during any period by comparison with the time spent during a specified previous period, in which case the affirmative procedure applies.

⁵⁸ See, for example, [Letter from the Trefnydd, 11 November 2019](#); [Letter from the Trefnydd, 17 December 2019](#); [Letter from the First Minister, 12 February 2020](#)

⁵⁹ Letter from the Minister for Environment, Energy and Rural Affairs, 1 May 2020, Annex

62. Under Schedule 3, a sea fish licensing authority may, on granting a sea fishing licence, attach to the licence such conditions as appear to be necessary and expedient for the regulation of sea fishing. Such conditions may include conditions as to the landing of fish, the use to which fish caught may be put, restricting the time the fishing boat may spend at sea or which are otherwise imposed for the purposes of conserving or enhancing the marine and aquatic environment. A sea fish licensing authority may also vary licences, add, remove or vary conditions attached to licences, or, in specified circumstances, suspend or revoke a licence.

63. We asked the Minister if she could outline under what circumstances she would consider it necessary and expedient to exercise the powers granted to the Welsh Ministers as a sea fish licensing authority. The Minister said:

“I think these are really important powers because, sometimes, you need to quickly respond to close a specific area of fisheries, for example. It’s much quicker to have a variation of the licence rather than to use statutory instruments. I know it’s been done in Scotland recently in relation to juvenile fish. So, it’s a really important power.”⁶⁰

Schedule 9 powers

64. Schedule 9 of the Bill inserts a new section 134A into the *Marine and Coastal Access Act 2009* (2009 Act). This section confers powers on the Welsh Ministers to make orders relating to the exploitation of sea fisheries resources for the purpose of conserving marine flora or fauna, or marine habitats in Wales. A second section (section 134B) is also inserted into the 2009 Act which confers a power on the Welsh Ministers to make orders relating to the Welsh offshore region for the purposes of conserving marine flora or fauna, marine habitats or features of geological or geomorphological interest in Wales.

65. These provisions expand the existing order-making powers under section 134 of the 2009 Act. In particular, these new provisions would enable an order to be brought forward for this purpose for any area in Wales or the Welsh offshore region. Section 134 of the 2009 Act previously only related to Marine Conservation Zones (MCZs), of which there is currently one in Wales. The order-making powers exercisable by Welsh Ministers under Section 134 are not exercisable by statutory instrument (pursuant to section 316(4)(a) of the 2009 Act, as amended). As such,

⁶⁰ LJC Committee, 16 March 2020, RoP, [72]

the Senedd would not automatically scrutinise any order made in reliance on the existing or broadened powers.

66. Schedule 9 of the Bill also inserts Section 134C into the 2009 Act, which specifies what provisions the Welsh Ministers may include in orders made under these powers. Section 134C(3)(b) provides for “provision enabling conditions to be attached to a permit”. The Bill does not specify what these conditions should be, nor does the Bill require the Welsh Ministers to consult on such conditions. There is also no requirement for the conditions that will be utilised to be specified within the orders produced under these powers.

67. We asked the Minister to confirm why these powers are necessary, and how she will ensure transparency and scrutiny of subordinate legislation made in reliance on these powers. The Minister said:

“This is very technical and, obviously, it’s a new power and it does give us the powers to make Orders rather than statutory instruments. I am committed to being very open and transparent around this. It will enable measures to be brought forward for Wales and the Welsh zone. We won’t be constrained to just marine conservation zones as now. Again, it’s a very important part of the toolkit that we’ve got to protect our marine environment and manage our fisheries effectively. Any Orders that I bring forward will be subject to consultation—I go back to what I was saying in my previous answer—and we’ve got to publish notice of any Orders made.”⁶¹

Further amendments to the UK Bill

68. The LCM states:

“We will continue to work with UK Government through the passage of the Bill and will engage fully with the Assembly through the legislative consent motion process.”⁶²

69. We asked the Minister whether the timeline for the Bill’s passage through the UK Parliament would provide sufficient time and opportunity for the Senedd to be asked for its consent. The Minister told us:

⁶¹ LJC Committee, 16 March 2020, RoP, [74]

⁶² Welsh Government, LCM, paragraph 56

“Yes. I do think there is sufficient time. Again, I’ve just mentioned we’re working really closely at official level. I’ll bring forward a consent motion to the Assembly prior to the last amending stage.”⁶³

70. We also asked the Minister if she was aware of any future amendments to the Bill that would be put forward by the UK Government and that would affect the interests of Wales, and whether a supplementary LCM would then follow. The Minister said:

“There would have to be a supplementary LCM. I think the answer is ‘no’—certainly, no substantive amendments. I suppose there could be a few minor, technical amendments, but we’re not expecting anything substantive.”⁶⁴

Our view

71. As we said in our recent report on the LCM for the UK Agriculture Bill, we recognise that this Bill is an important piece of primary legislation in the context of the UK’s exit from the European Union.

72. In a recent report, the External Affairs and Additional Legislation Committee recommended that “the Welsh Government commits to notify the Assembly when legislation, whether to be considered by the Assembly or the UK Parliament, relates to a UK-wide common policy framework”.⁶⁵ We note that the Welsh Government accepted this response “on the basis that the reference to ‘UK-wide common policy framework’ refers to the Common Frameworks Programme”.⁶⁶

73. The Minister suggested that the necessary provisions in the Bill to achieve the objective of a common UK-wide framework relate to fisheries objectives, the joint fisheries statements and fisheries management plans, and access and licensing. If this were the case, it would appear that only half of the Bill’s provisions are needed in order to achieve a common framework for the UK’s fisheries sector as a consequence of the UK’s withdrawal from the European Union.

⁶³ LJC Committee, 16 March 2020, RoP, [26]

⁶⁴ LJC Committee, 16 March 2020, RoP, [40]

⁶⁵ External Affairs and Additional Legislation Committee, [Common policy frameworks: Assembly scrutiny](#), December 2019, recommendation 1.

⁶⁶ [Letter from Jeremy Miles, MS, Counsel General to David Rees MS, Chair of the External Affairs and Additional Legislation Committee](#), 23 January 2020

Recommendation 1. The Minister should, as a matter of urgency and ahead of the Welsh Government tabling a legislative consent motion for the Bill, clarify and confirm which specific provisions in the Bill are necessary for the purpose of achieving the desired aim of a UK-wide legislative common framework for fisheries.

74. If the Minister is satisfied that only the provisions in the Bill relating to fisheries objectives, the joint fisheries statements and fisheries management plans, and access and licensing are necessary for a common framework, it is unclear why the Welsh Government did not bring forward its own Bill to make legislative provision for the other aspects covered by the Bill.

75. In making this point we acknowledge that clause 43 of the Bill extends the Senedd's competence in relation to fishing, fisheries and fish health, to the whole of the Welsh zone. While we welcome this extension of competence, we note that such an extension could also have been achieved via an Order made by the UK Government under section 109 of the *Government of Wales Act 2006*. Such a section 109 Order would be subject to scrutiny under Standing Order 25, including approval by the Senedd. If that approach had been followed, rather than using the Bill, it would have given the Senedd a formal role in approving the extension of legislative competence and also potentially made the powers available in a shorter timeframe. In turn, this may have enabled the Welsh Government to accelerate its development of its Welsh fisheries policy and a Welsh Bill.

76. In our report on the 2017-19 Bill we noted that, while there was a lack of clarity about the certainty of the Welsh Government developing its own Bill, the Minister commented that she did intend to bring forward such a Bill in this Senedd term, i.e. before May 2021.

77. We note the Minister's letter of 1 May 2020, in which she explained that she was working to deliver a fit for purpose Future Fisheries Policy within reasonable timeframes, which reflects the impact of Brexit on our industry and that those impacts are now compounded by the COVID-19 public health crisis.

78. Nevertheless, we believe that stakeholders should have some certainty around the likely timing of a Welsh fisheries policy and an appropriate Welsh Bill. We note that in respect of an Agriculture Bill, the Minister has suggested a 2021 introduction date in the Sixth Senedd (while acknowledging that there would be a new government).

Recommendation 2. The Minister should, ahead of the Welsh Government tabling a legislative consent motion for the Bill, clarify:

- why a Welsh Fisheries Bill has been delayed to an unknown time in the future, when it was the Welsh Government's position last year that such a Bill would be introduced within the next 12 months;
- the time that will be needed to prepare a Welsh Fisheries Bill.

79. Our report on the 2017-19 Bill raised two other issues which we wish to highlight.

80. First, if the UK-wide Bill is intended to be a legislative framework for a common approach across the UK to fisheries policy, it is still unclear how Wales-specific policies in a Welsh Bill will work within that common framework.

81. Secondly, given that the Welsh Government intends to bring forward its own fisheries legislation, it remains unclear why the Minister has not sought the inclusion of a sunset clause in the Bill. We see no reason why the clauses in the Bill applicable to Wales should not expire at the end of 2024, as per the sunset clause now included in the UK Agriculture Bill.

Recommendation 3. The Minister should explain, in advance of the Welsh Government tabling a legislative consent motion for the Bill, how a future Welsh Fisheries Bill will work within a UK-wide common fisheries framework.

Recommendation 4. The Minister should:

- seek an amendment to the Bill to insert provision 'sunset' the clauses in the Bill applicable to Wales by 2024, in order to ensure there is future clarity about the application of primary legislation on fisheries in Wales;
- keep the Committee updated with detailed information about her discussions with the UK Government about such an amendment.

82. It is disappointing that the LCM does not include any information about the memorandum of understanding related to the fisheries framework, particularly as we are aware that discussions on such an agreement have been in progress since our scrutiny of the 2017-19 Bill.

83. The need for this memorandum of understanding appears to be critical to the Minister's negotiation with the UK Government on its intended use of the powers within clause 23. We have concerns about this for three reasons.

84. First, the Minister told us that the governments were working on having the memorandum of understanding in place before the end of the implementation period (i.e. by the end of 2020). However, it is likely that the Senedd will shortly be asked to make a decision on whether to give consent to the relevant provisions in the Bill. Given the fact that the memorandum of understanding appears crucial to the Minister's recommendation or consent to be given, in our view the Senedd is being placed at a severe disadvantage in not having access to the detail of this key agreement. This is unsatisfactory.

85. Secondly, we do not believe that the development of non-binding memoranda of understanding or intergovernmental agreements are an adequate substitute for a legislative solution to the Minister's own red lines. We are concerned with the Minister's acceptance and adoption of this approach, particularly as the Minister herself indicated in evidence to us that she, understandably, did not know what a future UK Government would do with the powers provided by clause 23.

86. Finally, we are concerned about how any such memoranda of understanding or intergovernmental agreements can and would be subject to scrutiny and oversight by the Senedd.

87. As we have recently noted in our report on the LCM for the Agriculture Bill, we recognise that such memoranda of understanding are agreements between governments. However, entering into them as means of resolving issues within a UK Bill that requires the Senedd's consent and then not making that agreement available to the Senedd in a timely manner, minimises the ability of the Senedd and its committees to fully scrutinise the implications of that Bill.

88. We have raised the issue of how the Senedd could play a greater role in scrutinising intergovernmental agreements with the First Minister and welcome his commitment to give further thought to this issue. In the meantime we again raise this issue and our concerns as a means of drawing them to the attention of the Senedd.

89. Notwithstanding our concerns about the use of intergovernmental agreements, we would welcome more information regarding progress being made in developing the memorandum of understanding, including a dispute resolution mechanism.

Recommendation 5. The Minister should clarify why it is appropriate for the Senedd to be asked for its consent to the relevant provisions in the Bill without the memorandum of understanding having been agreed.

Recommendation 6. The Minister should provide the Committee with regular updates regarding progress being made in finalising the memorandum of understanding, including a dispute resolution mechanism.

90. In our report on the 2017-19 Bill, we said that the extensive regulation-making and executive powers provided to the Welsh Ministers in that Bill should not be overlooked. Our view remains the same in respect of the regulation-making powers in the current Bill.

91. It is again frustrating that the LCM for the Bill does not adequately identify the regulation-making powers being taken, nor seek to justify why they are being taken or the procedure to be applied in each case. We are aware that a different approach has been taken with the LCM for the Agriculture Bill. Annex 1 to that LCM includes some information about the regulation-making powers, although we note it does not explain why the powers are being taken or the justification for the procedure chosen in each case.

92. In our view, it would have been appropriate to include more detailed information about the powers for the Welsh Ministers to make subordinate legislation in the LCM for the Bill. More generally, it would be good practice for the Welsh Government to include this information on a consistent basis across its legislative consent memoranda.

Recommendation 7. The Minister should provide information, in either a supplementary document or within any supplementary LCM, justifying why it is appropriate to take each of the regulation-making powers for the Welsh Ministers contained within the Bill, and the choice of procedure for each regulation-making power.

93. Specifically as regards the powers given to Welsh Ministers in Schedule 3, we note the Minister's explanation as to why a sea fish licensing authority may, on granting a sea fishing licence, attach to the licence such conditions as appear to be necessary and expedient for the regulation of sea fishing. However, this matter warrants further explanation.

Recommendation 8. The Minister should, in advance of the Welsh Government tabling a legislative consent motion for the Bill, provide further clarity on the regulation-making powers in Schedule 3, and specifically under what circumstances the Welsh Ministers would consider it necessary and expedient to exercise these powers as a sea fish licensing authority.

94. Further, as regards the order making powers given to Welsh Ministers in Schedule 9 by way of an amendment to the *Marine and Coastal Access Act*

2009, we note the Minister's explanation as to the technical nature of the power and the importance of the power as part of the Welsh Government's toolkit for protecting the Welsh marine environment and managing Welsh fisheries effectively. We also note the Minister's commitment to being open and transparent in relation to the exercise of these powers. However, the broad nature of these powers, and the lack of scrutiny that arises because the orders are not made by statutory instrument, warrant further explanation.

Recommendation 9. The Minister should commit to laying a written statement giving notification of any relevant order made under sections 134A or 134B of the *Marine and Coastal Access Act 2009* in order to ensure openness and transparency.

95. We are disappointed about the lack of information in the LCM about the rationale and process for the Welsh Ministers providing consent to the UK Government acting in devolved areas under clauses 14, 16, 17, 36 and 38.

96. We have continually called for equivalent procedures to that set out in Standing Order 30C for notifying the Senedd of regulations made by the UK Ministers in devolved areas under all the EU-exit related Bills. We intend to keep this matter under review.

97. Finally, we note the Minister has indicated that clause 4 of the Bill does not require the Senedd's consent, despite its relationship to clause 23 for which the Minister does believe consent is required. The Minister's explanation for this difference would benefit from further explanation.

Recommendation 10. The Minister should, in advance of the Welsh Government tabling a legislative consent motion for the Bill, write to the Committee to clarify why the Senedd's consent is not required for clause 4 of the Bill.