

# The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No 2) on the Fisheries Bill

September 2020

## 1. Background

The UK Government's Fisheries Bill<sup>1</sup> (the Bill) was introduced to the House of Lords and given its first reading on 29 January 2020. 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).

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<sup>1</sup> Fisheries Bill 2019-21 (HL Bill 71).



## The Welsh Government's Legislative Consent Memorandum

1. On 12 February 2020 the Welsh Government laid before the Senedd a Legislative Consent Memorandum<sup>2</sup> (LCM) in respect of the Bill.
2. We reported on the LCM on 21 May 2020 (first report).<sup>3</sup> The first report sets out in more detail the background to the Bill, including the Fisheries Bill 2017-19<sup>4</sup> (the 2017-19 Bill), to which it is similar in a number of respects. The first report also summarises the purpose and extent of the Bill.
3. The Minister for Environment, Energy and Rural Affairs, Lesley Griffiths MS (the Minister), responded to the first report on 30 June 2020.<sup>5</sup>

## The Welsh Government's Supplementary Legislative Consent Memorandum

4. Since the publication of the LCM, the Bill was amended during its passage through the House of Lords.
5. As such, on 8 July 2020 the Minister laid before the Senedd a Supplementary Legislative Consent Memorandum (No. 2)<sup>6</sup> (LCM No 2) in respect of the Bill.
6. The Business Committee agreed that the Legislation, Justice and Constitution Committee (the Committee) and the Climate Change, Environment and Rural Affairs Committee should report on LCM No 2 by 24 September 2020.<sup>7</sup>
7. Paragraphs 9 to 22 of LCM No 2 describe the amendments made to the Bill during the House of Lords Report Stage which make provision in relation to Wales and are within the legislative competence of the Senedd.
8. As stated in LCM No 2, such amendments, tabled by non-Government Members of the House of Lords, were made to:
  - clause 1 – sustainability objective;

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<sup>2</sup> [Welsh Government, Legislative Consent Memorandum, Fisheries Bill, February 2020](#)

<sup>3</sup> [Legislation, Justice and Constitution Committee, Report on the Welsh Government's Legislative Consent Memorandum on the Fisheries Bill, May 2020](#)

<sup>4</sup> [Fisheries Bill 2017-19 \(HC 278\)](#)

<sup>5</sup> [Letter from the Minister for Environment, Energy and Rural Affairs, 30 June 2020](#)

<sup>6</sup> [Welsh Government, Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Fisheries Bill, July 2020](#)

<sup>7</sup> [Business Committee, Timetable for consideration of the Supplementary Legislative Consent Memorandum on the Fisheries Bill, July 2020](#)

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- clause 18 – national landing requirement;
- clause 26 – distribution of quota;
- clause 27 – new quota from the English allocation for new entrants and under 10m boats;
- clause 48 – remote electronic monitoring;
- Schedule 10 – Common Fisheries Policy Regulation.

**9.** LCM No 2 also notes that a number of amendments were tabled, at the request of the Welsh Government, to clauses<sup>8</sup> 11, 41, 45, 50, and 53, and Schedules 1 and 8, to change references in the Bill to the ‘National Assembly for Wales’ to ‘Senedd Cymru’. The reference to “Measure or Act of the National Assembly for Wales” has also been amended to “Measure or Act of Senedd Cymru” in clause 51<sup>9</sup>.

**10.** Paragraphs 23 to 29 of LCM No 2 set out the Welsh Government position on the Bill as amended at the Lords Report Stage. It states that the Welsh Government supports the amendments to clause 26 and Schedule 10, and that it welcomes the amendments that reflect the Senedd’s name change. However, with regards to the amendments agreed to clauses 1, 18, 27 and 48, LCM No 2 states:

“... this is a rapidly developing situation and we need to consider the policy and devolution implications of each amendment in detail. Our key concerns are to ensure the changes introduced are consistent with our Welsh fisheries policies and do not cut across either the Senedd competence or Welsh Ministers executive powers.

If after detailed analysis, we are content for amendments to remain in the Bill, at the very least, we expect we would need drafting issues to be resolved, to add clarity in both policy intent and to more clearly reflect the devolution settlement.

Discussions continue with UK Government on some areas of the Bill and on the amendments made during the Lords Report stage. We will set out more detail on our position as the situation develops and the Bill continues its passage through the House of Commons.”<sup>10</sup>

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<sup>8</sup> References to the Bill as introduced: clauses 11, 39, 43, 47, 50, and Schedules 1 and 8.

<sup>9</sup> Reference to the Bill as introduced: clause 48.

<sup>10</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Fisheries Bill, July 2020, paragraphs 27-29

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**11.** LCM No 2 sets out the reasons for making the provisions for Wales in the Bill. It states:

“We remain committed to the UK wide approach to create the Fisheries Framework which can only be done in a UK bill. For the non-framework powers in the Bill, it is important the Welsh Ministers are able to act quickly and decisively in Wales, until we can bring forward a comprehensive Welsh Fisheries Bill.”<sup>11</sup>

**12.** LCM No 2 also confirms that, further to recommendation 7 in our first report, Annex A to LCM No 2 sets out the regulation-making powers for the Welsh Ministers contained within the Bill, the reasons for taking the powers and the choice of procedure for each power.<sup>12</sup>

**13.** LCM No 2 concludes:

“We continue to work with the UK Government on this Bill. It began its progress in the House of Commons on 2 July and there will be further opportunities to seek to amend any parts of the Bill which do not currently work in the best interests of Wales.

It is anticipated a further Supplementary Legislative Consent Memorandum will be laid following House of Commons Committee stage, and in advance of a consent motion debate within the Senedd.”<sup>13</sup>

## Latest developments in the UK Parliament

**14.** Following its consideration by the House of Lords, the Bill moved to the House of Commons on 2 July 2020. The Second Reading of the Bill took place on 1 September 2020 and Committee Stage began on 8 September 2020.

**15.** The Welsh Government laid Supplementary Legislative Consent Memorandum (No. 3) (LCM No 3) before the Senedd on 16 September 2020.<sup>14</sup>

**16.** LCM No 3 states:

“This Supplementary Legislative Consent Memorandum covers amendments tabled up to and including 7 September (and the outcome of the first day of Committee consideration on 8 September). (...)

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<sup>11</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Fisheries Bill, July 2020, paragraph 32

<sup>12</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Fisheries Bill, July 2020, paragraph 30

<sup>13</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Fisheries Bill, July 2020, paragraphs 34-35

<sup>14</sup> [Welsh Government, Supplementary Legislative Consent Memorandum \(Memorandum No 3\), Fisheries Bill, September 2020](#)

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In relation to any amendments tabled after 7 September (and considered in later Committee days) the Minister will write to all Members of the Senedd and the Climate Change, Environment and Rural Affairs and Legislation, Justice and Constitution Committees to provide further information and to confirm the outcome of the Committee consideration, in advance of the Legislative Consent Motion debate.”<sup>15</sup>

**17.** Paragraphs 11 to 38 of LCM No 3 set out the amendments that have been tabled to the Bill since the publication of LCM No 2 for which consent is required. Further, paragraphs 39 to 62 of LCM No 3 set out the Welsh Government position on those amendments tabled for consideration at Commons Committee Stage.

**18.** LCM No 3 states that the Welsh Government supports all the amendments tabled to the Bill by the UK Government.<sup>16</sup>

**19.** The Bill completed Committee Stage in the House of Commons on 15 September 2020.

## 2. Committee consideration

**20.** We considered LCM No 2 at our meeting on 14 September 2020.<sup>17</sup>

**21.** We were not in a position to hold an evidence session with the Minister due to the timescales for reporting. However we wrote<sup>18</sup> to the Minister on 31 July 2020, and raised a number of matters including the amendments made to:

- clauses 1, 18, 27 and 48 of the Bill;
- Schedules 5 and 10 to the Bill regarding the length of time a determination of UK fishing opportunities can be made by the Secretary of State;
- Schedule 10 to the Bill which change references from “fisheries administration” to “Secretary of State”.

**22.** Our letter to the Minister of 31 July 2020 additionally sought clarification on a number of points raised by the Minister in her response to our first report.

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<sup>15</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 3), Fisheries Bill, September 2020, paragraphs 7-8

<sup>16</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 3), Fisheries Bill, September 2020, paragraph 67

<sup>17</sup> [Legislation, Justice and Constitution Committee, 14 September 2020](#)

<sup>18</sup> [Letter to the Minister for Environment, Energy and Rural Affairs, 31 July 2020](#)

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- 23.** The Minister responded<sup>19</sup> to our letter on 3 September 2020, which we considered at our meeting on 14 September 2020.<sup>20</sup>
- 24.** It was not possible to undertake detailed scrutiny of LCM No 3 given the date on which LCM No 3 was laid and our reporting deadline.
- 25.** However, where possible, references to LCM No 3 have been made in the remainder of the report.

## Matters relating to the Minister's response to our first report

### A sunset clause and the introduction of a Welsh Fisheries Bill

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- 26.** In our first report, we commented on the Minister's intentions as regards a Welsh Fisheries Bill. Given the Welsh Government's intention to bring forward its own fisheries legislation, we said that it remained unclear why the Minister had not sought the inclusion of a sunset clause in the Bill.
- 27.** Recommendation 4 of our first report stated that the Minister should seek an amendment to the Bill to insert a sunset clause that would limit the use of the clauses in the Bill relevant to Wales up until 2024. We suggested that this would ensure there was future clarity about the application of primary legislation on fisheries in Wales.
- 28.** While agreeing that clarity about the timings of a Welsh Fisheries Bill is desirable and stating that it was essential it remains a priority for government, the Minister rejected our recommendation. She said:

"Sunset clauses are usually considered where there is a clear timetable for replacement of Welsh provisions and... we are in a significant period of uncertainty for our fishing industry. Pushing forward with legislation for the sake of it is not the way to deliver good policy or legislation. (...)

In the meantime, we will need to ensure we have the necessary toolkit in place to manage the challenges of Brexit (and now COVID-19) on our fisheries industry, so we need to retain these powers in this UK Bill, for as long as we may need them. We do not want to impose a sunset clause which creates the risk of key powers for Wales being lost, by automatic function of law. We want to introduce Welsh legislation which has been developed with sufficient time to allow for proper scrutiny and consideration. I am not prepared to seek a sunset clause which will potentially disadvantage the Welsh fishing industry in comparison to the rest of the UK industry.

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<sup>19</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

<sup>20</sup> Legislation, Justice and Constitution Committee, 14 September 2020

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However, I can also assure you it is not my intention to have these powers in a UK Bill for any longer than is necessary..."<sup>21</sup>

**29.** The Minister's written statement 'A response to the Brexit and our Seas consultation and the next steps towards a future fisheries policy for Wales', issued on 15 September 2020, stated:

"Whilst remaining committed to the UK Framework, it is our intention to take the non-framework powers for Welsh Ministers in the Bill as an interim measure until a Welsh Fisheries Bill is brought forward to the Senedd."<sup>22</sup>

**30.** This written statement also drew attention to the UK Government's Internal Market Bill:

"The threat of a no deal EU exit has not gone away; the publication of the UK Government's Internal Market Bill sends a worrying signal about the future of our high environmental and food safety standards in Wales and about where and how decisions about key decisions are made in the future."<sup>23</sup>

Memorandum of Understanding relating to the exercise of the Secretary of State's power to determine fishing opportunities

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**31.** In our first report we noted our disappointment that the LCM did not include any information about the memorandum of understanding (MoU) 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 and that the MoU appeared to be critical to the Minister's recommendation for consent to be given to the Bill.

**32.** We concluded that the Senedd is being placed at a severe disadvantage in not having access to the detail of this key agreement, and that we would welcome more information regarding the progress being made in developing the MoU, particularly as regards a dispute resolution mechanism.

**33.** Recommendation 5 of our first report asked the Minister to clarify why it was appropriate for the Senedd to be asked to make a decision about whether to consent to the relevant provisions in the Bill without the MoU having been agreed.

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<sup>21</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 30 June 2020

<sup>22</sup> Welsh Government written statement 'A response to the Brexit and our Seas consultation and the next steps towards a future fisheries policy for Wales', 15 September 2020. See also LCM No 3, paragraph 10.

<sup>23</sup> Welsh Government written statement 'A response to the Brexit and our Seas consultation and the next steps towards a future fisheries policy for Wales', 15 September 2020

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**34.** Recommendation 6 asked that the Minister provide us with regular updates regarding the progress being made in finalising the MoU.

**35.** In her letter to us on 30 June 2020, while stating that she accepted recommendation 5, the Minister did not address the fundamental question of principle that was put to her. The Minister's response stated:

"My officials are working with Defra and the other devolved governments to progress the development of the Memorandum of Understanding (MoU). We are pressing for progress to be made on this matter, and it is my intention Members should have the opportunity to review the MoU, in relation to clause 23, in advance of its consent decision."<sup>24</sup>

**36.** With regards to recommendation 6, the Minister agreed to provide regular updates to the Committee regarding the progress being made in finalising the MoU, including a dispute resolution mechanism.

**37.** In our letter to the Minister of 31 July, we asked the Minister to confirm that it is her intention to ensure that there is sufficient time for Senedd Committees to consider the MoU ahead of the relevant consent motion debate in Plenary. The Minister responded:

"I am happy to provide an update to the Committee regarding progress being made to finalise the Fisheries Framework Memorandum of Understanding (MoU) and in particular progress relating to clause 24 (formally clause 23). My officials are engaging in a regular working group which is progressing the drafting of the MoU (including the Dispute Resolution Mechanism and consideration of the Concordat).

In lieu of the MoU, which is still in development and will therefore not be ready ahead of the completion of the Bill's passage, I have written to the UK Government to seek agreement on the key issues on which I need assurance in order to recommend the Senedd gives consent to the Bill. I will share the outcome of this request with the Committee at the earliest opportunity."<sup>25</sup>

#### Regulation-making powers provided for in Schedule 3

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**38.** During our scrutiny of the LCM, and as noted in our first report, we asked the Minister to outline under what circumstances she would consider it necessary and expedient to exercise the Schedule 3 powers granted to the Welsh Ministers as a sea fish licensing authority.

**39.** We noted the Minister's explanation but concluded that the matter warranted further explanation. As such, recommendation 8 of our first report

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<sup>24</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 30 June 2020

<sup>25</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

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asked that the Minister 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.

**40.** The Minister accepted this recommendation and, in her letter to us on 30 June 2020, she provided a detailed response on the provisions and powers within clauses 14 to 17 and Schedule 3. However, in our view, clarity as to why the Welsh Minister's should be given powers to act because of reasons of expediency was not forthcoming. When we wrote to the Minister on 31 July, we asked for further information on this matter. The Minister responded:

"The licensing powers within the Bill and Schedule 3 provide the Welsh Ministers with the necessary powers to deliver an effective and robust licensing system now and in the future. As I noted in my response to your LCM report, we have amended our existing licensing SIs to ensure they remain in place once the Bill comes into force, and the powers within the Bill replicate the previous powers set out in the Sea Fish (Conservation) Act 1967 and the Sea Fish Licensing Order 1992 in relation to British fishing boats. The Bill provisions also impose new licensing requirements upon foreign fishing boats fishing within British fishery limits, which are required in consequence of the UK's exit from the EU.

The sea fish licensing authority powers within the Bill enable us to continue to effectively control and licence fishing in our waters, with powers such as enabling us to condition, vary and revoke licences, work with other authorities where needed etc. These powers are, and will continue to be, used regularly in the normal course of exercising the sea fish licensing authority functions.

In terms of British fishing boats, the current licensing regime will continue. For foreign fishing vessels, the Welsh Ministers, along with the other administrations, have agreed for licences for foreign vessels to be issued by the Single Issuing Authority, who will act under a Section 83 GOWA arrangement. They won't have decision making powers as the Welsh Ministers will authorise the licences before they issue.

At present there are no current plans to use the regulation making powers to either amend the existing system or establish a new one. However, should the Welsh Ministers feel it expedient to do so in the future, the powers will be available to them. Any such regulations will be subject to approval by the Senedd.

I hope this helps to provide further clarity, however, if you have a specific concern, I would be happy to answer it."<sup>26</sup>

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<sup>26</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

## Amendments to clauses 1, 18, 27 and 48

**41.** LCM No 2 provides detail on the amendments made to clauses 1, 18, 27 and 48 of the Bill.<sup>27</sup> Specifically as regards clause 27, LCM No 2 states:

“Our initial view is the drafting of clause 27 lacks clarity and results in a question around whether consent is required by the Senedd. Whilst it requires an element of English fishing opportunities to be reserved for new entrants and vessels under 10 metres, the requirement for the calculation to be carried out before the Secretary of State makes the determination on UK fishing opportunities, raises questions as to how the calculation may impact upon the devolved administrations fishing opportunities. This may not be consistent with the current arrangements within the 2012 Fisheries Concordat. We do not believe this is the intention of the amendment but it has the potential to impact Welsh fishing opportunities and as drafted, we think it will require the consent of the Senedd. However, we think this is a drafting issue which will need to be clarified.”<sup>28</sup>

**42.** As noted in paragraph 10 above, the Welsh Government had concerns about the amendments to these clauses in the Bill in terms of whether the changes were consistent with its Welsh fisheries policies and that they do not cut across either the Senedd competence or Welsh Ministers executive powers.

**43.** In our letter to the Minister on 31 July, we asked her a series of questions about the amendments made to clauses 1, 18, 27 and 48 of the Bill.<sup>29</sup> In her letter on 3 September 2020, the Minister responded:

“In answer to your questions 1 a. – d. and 2 a. – b., 3 a. – c., I can provide an update on these. As you will see, the UK Government has tabled amendments for Commons Committee stage to reverse the amendments made during the Lords Report stage to clauses 1, 18, 27 and 48. Under Secretary of State Victoria Prentis MP sought my views on this approach and advised their position is they support the spirit of the amendments but the amendments themselves are legally and constitutionally unsound.”<sup>30</sup>

**44.** LCM No 3 reiterates the Minister's comments in her letter of 3 September that the UK Government has tabled amendments to reverse the amendments made to clauses 1, 18, 27 and 48 of the Bill during the Lords Report Stage.

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<sup>27</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Fisheries Bill, July 2020, paragraphs 10 - 15

<sup>28</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Fisheries Bill, July 2020, paragraph 14

<sup>29</sup> Letter to the Minister for Environment, Energy and Rural Affairs, 31 July 2020

<sup>30</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

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Paragraph 39 of LCM No 3 confirms that the amendment to clause 1 was considered and agreed on the first day of the Commons Committee Stage.<sup>31</sup>

## Amendments to the Bill regarding the length of time a determination of UK fishing opportunities can be made by the Secretary of State

**45.** A new Schedule 10 has been inserted into the Bill which incorporates the material that was in the original Schedule 10 but with further amendments to retained EU legislation.

**46.** With regards to the power to determine fishing opportunities and quota flexibilities, and as noted in paragraphs 19 and 20 of LCM No 2, the length of time a determination of UK fishing opportunities can be made by the Secretary of State has been changed. References to “calendar year” have been deleted and there is no substitute wording. This change also applies to the Welsh Ministers’ powers in Schedule 5, which LCM No 2 notes is for the reason of consistency.

**47.** In our letter to the Minister, we asked her whether she had discussed the amendments to Schedule 10 with the UK Government and the consequential effect on the Welsh Minister’s powers in Schedule 5. We also asked the Minister to confirm that the Senedd’s consent should also be sought for the relevant amendments to Schedule 5.

**48.** The Minister responded:

“Yes, my officials discussed and agreed these provisions in advance of them being tabled and I confirm the amendment made to paragraph 1 of Schedule 5 will require the consent of the Senedd.”<sup>32</sup>

## Amendments to Schedule 10 changing references from “fisheries administration” to “Secretary of State”

**49.** As mentioned above in paragraph 45, new Schedule 10 contains the material that was in the original Schedule 10 but with further amendments to retained EU legislation.

**50.** Several of the references to “a fisheries administration” in the original Schedule 10 have been changed to “Secretary of State”. In our view, some of the provisions within new Schedule 10 could be considered to relate to the

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<sup>31</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 3), Fisheries Bill, September 2020, paragraph 39

<sup>32</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

observation or implementation of international obligations, which are devolved matters.

**51.** While acknowledging that consent is being sought in relation to Schedule 10, in our letter to the Minister we asked her why these functions are being bestowed upon the Secretary of State rather than the fisheries administrations, and why this was not highlighted in LCM No 2. In her letter of 3 September 2020, the Minister said:

“My officials worked closely with UK Government officials, following legal analysis of each reference in retained EU law, to establish where the roles lie, in line with the devolution settlement. Officials were very clear about the nuances of the devolution settlement in relation to international obligations and our role in implementing them. It is my view, these have been applied correctly in respect of the devolution settlement. I have provided a table at Annex 1 to explain the rationale for the amendments made via Schedule 10 of the Bill.”<sup>33</sup>

**52.** Through Schedule 10, references to “fisheries administration” have been changed to “Secretary of State” in the following EU retained law:

- Articles 28, 29 and 33 of the Common Fisheries Policy Regulation (Regulation (EU) No 1380/2013);
- Articles 4, 6 and 13 of the North Sea Multi-Annual Plan (Regulation (EU) 2018/973);
- Articles 4, 7 and 15 of the Western Waters Multi Annual Plan (Regulation (EU) 2019/472).

**53.** Annex 1 to the Minister’s letter of 3 September explains that, in each case, the EU retained law was amended by regulations made by the UK Government in 2019, as follows:

- The Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019 amended the Common Fisheries Policy EU Regulation 1380/2013;
- The Common Fisheries Policy and Aquaculture (Amendment etc.) (EU Exit) Regulations 2019 amended the North Sea Multi-Annual Plan EU Regulation 2018/973;

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<sup>33</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

- The Common Fisheries Policy and Animals (Amendment etc.) (EU Exit) Regulations 2019 amended the Western Waters Multi Annual Plan EU Regulation 2019/472).<sup>34</sup>

**54.** As statutory instruments made by UK Ministers alone under sections 8, 9 or 23 of, or Schedule 4 to, the European Union (Withdrawal) Act 2018 which contain provisions within the legislative competence of the Senedd or the executive competence of the Welsh Ministers, the Welsh Government laid written statements under Standing Order 30C giving notification of these regulations. Each of these written statements was considered by the Committee.<sup>35</sup>

**55.** Annex 1 to the Minister's letter of 3 September further explains that, in each case, the impact of the amendments already made to the specific Articles by the UK made regulations was such that "the functions under those articles were in effect already transferred to the Secretary of State in relation to Wales"<sup>36</sup>. Annex 1 also states:

"In relation to Wales, the Welsh Ministers are the fisheries administration in so far as the obligation or power under consideration would be within the legislative competence of the Senedd, if included in an Act of the Senedd, or if it could have been imposed or conferred by a function of the Welsh Ministers exercisable immediately before exit day. If a power or obligation does not fall into either of those categories the Secretary of State is the fisheries administration for that matter in relation to Wales."<sup>37</sup>

## Our view

**56.** Our conclusions and recommendations for further action are detailed in the following paragraphs. Our report on LCM No 2 should be read alongside our first report on the Bill.

**57.** We acknowledge the Minister's response to the recommendations in our first report and welcome the Minister's update on the progress of the Bill in the UK Parliament.

**58.** As noted above in paragraph 12, we welcome the inclusion of Annex A in LCM No 2, which sets out the regulation-making powers for the Welsh Ministers contained within the Bill, the reasons for taking the powers and the choice of procedure for each power.

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<sup>34</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020, Annex 1

<sup>35</sup> Written statements under Standing Order 30C – see SO30c(5)42, SO30C(5)107, and SO30C(5)154.

<sup>36</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020, Annex 1

<sup>37</sup> Letter from the Minister for Environment, Energy and Rural Affairs, 3 September 2020

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**59.** However, as regards the other issues raised in our first report, there are certain matters that remain a cause of concern and which require further attention and, in our view, action by the Minister.

**Recommendation 1.** The Minister should respond to all recommendations contained in this report ahead of the debate on the relevant legislative consent motion.

**60.** While recognising that memoranda of understanding are agreements between governments, we have at every appropriate opportunity expressed our concerns with the continued use of such non-binding intergovernmental agreements.

**61.** In our first report, we again said that entering such agreements as a 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.

**62.** In our first report we also said that, and as noted above in paragraphs 31 and 32, the Senedd is being placed at a severe disadvantage in not having access to the detail of the MoU relating to the exercise of the Secretary of State's power to determine fishing opportunities.

**63.** This power for the Secretary of State was a red line issue for the Minister, who indicated that the development of an MoU was critical to any recommendation she may give for the Senedd's consent to be given to the Bill.

**64.** The fact that the MoU will now not be ready ahead of the completion of the Bill's passage through the UK Parliament is a marked concern. This situation, coupled with the fact that we have yet to receive details of the response from the UK Government regarding the Minister's request for agreement on the key issues relating to the exercise of Secretary of State's power to determine fishing opportunities, is not acceptable.

**65.** Scrutiny of the executive's actions is an intrinsic element of the functions of a legislature and it contributes towards a robust democracy. Scrutiny is not an add-on to the daily operation of the executive and nor should the requirement for scrutiny be treated as an afterthought.

**Recommendation 2.** The Minister must—

- provide evidence to the Senedd that the concerns regarding the exercise of the Secretary of State's power to determine fishing opportunities have been fully resolved;
- make available to Members of the Senedd the details of the agreement reached with the UK Government on the key issues relating to the exercise of the power contained in clause 24.

**66.** We also have some concerns with the Minister's response to our call for the Bill to contain a sunset provision that is applicable to the clauses relevant to Wales.

**67.** The Minister has, again, confirmed that it is essential that a Welsh Fisheries Bill remains a priority for the Welsh Government. She has also agreed with us that clarity about the timings of a Welsh Fisheries Bill is desirable.

**68.** We are unclear about the Minister's comments regarding the development of a Welsh Fisheries Bill and why seeking a sunset clause in the Bill would potentially disadvantage the Welsh fishing industry in comparison to the rest of the UK industry.

**69.** While we acknowledge the Minister's statement that it is not her intention to have these powers in a UK Bill for any longer than necessary, we are not reassured by the Minister's assertion that the Welsh Government needs to retain these powers in the Bill "for as long as we may need them". We do not consider it appropriate for the Welsh Ministers to keep executive powers within a UK Bill for as long as the Welsh Ministers see fit.

**70.** Setting a time-limit on the provisions in the Bill relevant to Wales would provide desirable clarity to the Welsh fishing industry, while also strengthening the Minister's assurance that the provisions are transitional. The inclusion of a sunset provision could also assist the next Welsh Government in developing a framework timetable within which to prepare a Welsh Fisheries Bill.

**71.** Recommendation 4 in our first report suggested that a sunset clause should specify a date in 2024. While not ideal, we see no reason why such a sunset provision could not be accompanied by a Henry VIII power for the Welsh Ministers that would permit the extension of the sunset date by two years. Such a regulation-making power should be subject to the affirmative procedure in the Senedd.

**Recommendation 3.** The Minister should seek an amendment to the Bill so that the provisions in the Bill relevant to Wales are subject to a sunset clause

requiring them to expire by the end of 2024. Such a sunset clause should permit the extension of the specified date by two calendar years by virtue of regulations made by the Welsh Ministers that are subject to the affirmative procedure in the Senedd.

**72.** Our comments now turn to the regulation-making powers provided for in Schedule 3 to the Bill. Our first report drew attention to Schedule 3 and the provision that would allow Welsh Ministers to exercise powers, as a sea fish licensing authority, for reasons of expediency.

**73.** We acknowledge that the Minister has provided a response to recommendation 8 in our first report and has also responded to a follow-up question in our letter of 31 July 2020.

**74.** However, we remain unclear as to when and why a Welsh Minister would need to exercise the Schedule 3 powers for reasons of expediency. The Welsh Ministers will also be permitted to use these powers when they consider it necessary and, in our view, that is a more appropriate and sufficient reason.

**Recommendation 4.** The Bill should be amended to remove reference to 'or expedient' from paragraphs 1, 2 and 5 of Schedule 3.

**75.** We are not satisfied with the Minister's explanations provided to date on this matter.

**Recommendation 5.** If recommendation 4 is not agreed, the Minister must clarify under what circumstances the Welsh Ministers would consider it expedient to exercise the powers in Schedule 3 as a sea fish licensing authority.

**76.** As noted above in paragraph 50, some of the provisions within new Schedule 10 to the Bill could be considered to relate to the observation or implementation of international obligations, which are devolved matters.

**77.** We acknowledge the Minister's views on this matter and welcome the level of detail provided by the Minister in the Annex to her letter to us on 3 September. Having reviewed the Minister's evidence and taken advice from the Committee's legal advisers, our understanding of the situation is as follows.

**78.** The Welsh Ministers lost functions in 2019 when they allowed UK Ministers to make three sets of Regulations<sup>38</sup> on their behalf amending EU regulations related

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<sup>38</sup> ~~The Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019; The Common Fisheries Policy and Aquaculture (Amendment etc.) (EU Exit) Regulations 2019; The Common Fisheries Policy and Animals (Amendment etc.) (EU Exit) Regulations 2019.~~

to fisheries (see paragraph 53 above). Our scrutiny of the associated Standing Order 30C statements drew attention to the loss of functions. For example, with regards to The Common Fisheries Policy and Animals (Amendment etc.) (EU Exit) Regulations 2019 (which amended the Western Waters Multi Annual Plan EU Regulation 2019/472) we highlighted that the Regulations created functions that can be exercised by the Welsh Ministers and UK Ministers on a concurrent basis and, that under Schedule 7B to the *Government of Wales Act 2006* (the 2006 Act), the Senedd cannot remove or modify such concurrent functions (in so far as they are exercised by UK Ministers) without UK Government consent. We further noted that while this impacts negatively on the Senedd's legislative powers, the Welsh Government's written statement stated that Welsh Government and UK Government officials were in discussions, with a view to limiting that negative impact by amending Schedule 7B to the 2006 Act (by an order under section 109 of the 2006 Act).

**79.** Schedule 10 to the Bill makes further changes to the EU Regulations (now EU retained law - see paragraph 52). With regards to the amendments Schedule 10 makes to the Common Fisheries Policy EU Regulation and the North Sea Multiannual Plan EU Regulation, the relevant functions placed on the Secretary of State are outside the Senedd's competence so there is no practical effect as a result of changing references from "fisheries administration" to "Secretary of State".

**80.** However, with regards to the amendments Schedule 10 makes to the EU regulation relating to the Western Waters Multiannual Plan, the functions imposed on the Secretary of State are within the competence of the Senedd and so there is a new practical and negative effect on the Senedd's competence. While we acknowledge that (by virtue of paragraph 11(2) of Schedule 7B to the 2006 Act following consultation with the Secretary of State) a future Senedd Act could (or could confer power by future Welsh Regulations to) remove these Secretary of State functions and possibly transfer them to the Welsh Ministers, this is not a satisfactory position.

**81.** We believe that there should be clarity regarding any functions that have been lost to the Welsh Ministers as a consequence of the UK's exit from the EU.

**Recommendation 6.** The Minister must write to the Committee and explain whether the Welsh Ministers have lost functions as result of the amendment of:

- The Common Fisheries Policy Regulation (Regulation (EU) No 1380/2013);
- The North Sea Multi-Annual Plan (Regulation (EU) 2018/973);

- The Western Waters Multi Annual Plan (Regulation (EU) 2019/472),

by either UK Ministers in regulations or subsequently by Schedule 10 to the Bill.

**Recommendation 7.** In relation to recommendation 6, if functions have been lost to the Welsh Ministers, the Minister must write to the Committee and explain how those functions are to be restored.

**82.** As noted above in paragraph 55, the Annex to the Minister's letter to us on 3 September states "If a power or obligation does not fall into either of those categories the Secretary of State is the fisheries administration for that matter in relation to Wales." We are concerned by this reference, which appears to suggest a return to a conferred powers model of devolution, where the Senedd only has legislative competence in the areas specifically conferred to it. We would welcome clarity from the Minister on this matter.

**83.** We draw our conclusions to an end by noting that several changes made to the Bill in the House of Lords should have been included in LCM No 2 as the changes impact on provisions relevant to Wales. These changes relate to clause 2 (Joint fisheries statement), clause 28 (Duties to ensure fishing opportunities not exceeded) and clause 54 (Short title).

**Recommendation 8.** The Minister should explain why the changes made to clauses 2, 28 and 54 are not clearly referenced in LCM No 2 as provisions which are within the Senedd's competence.

**84.** With regards to LCM No 3, it is regrettable that it has been laid at a point in time so close to the Welsh Government's chosen date for a consent motion debate on the Bill that scrutiny by Senedd Committee's will not be possible.