

Report on the Legislative Consent Memorandum for the Shark Fins Bill

Ionawr 2023

Introduction

1. The Welsh Government laid a Legislative Consent Memorandum (LCM) (PDF 95.7KB) on the Bill before the Senedd on 25 November 2022. On 29 November the Business Committee referred the LCM to the Economy, Trade and Rural Affairs Committee, and the Legislation, Justice and Constitution Committee, with a reporting deadline of 16 January 2022 (PDF 46.7KB). This Committee considered the LCM on 14 December 2022.

Background

2. The Shark Fins Bill ("the Bill"), a Private Members' Bill, was introduced into the House of Commons, on 15 June 2022, by Christina Rees MP. Committee Stage in the Commons took place on 16 November 2022, with Report Stage scheduled for 20 January 2023. The Bill is sponsored by the Department for Environment, Food and Rural Affairs ("DEFRA").

3. The main policy objective of the Bill is to protect sharks against unsustainable fishing practices by prohibiting the import and export of shark fin products which have been obtained through unethical fishing practices. The Bill does not prohibit the sale or consumption of shark fins, only the import and export of detached shark fins, i.e. those obtained through the practice of "shark finning".

4. Shark-finning is a practice where sharks are caught and their fins are cut off, then the body of the shark is discarded. It is driven by the high value of the fins (a delicacy in some cultures), and the low market value of shark meat. Shark-finning is one of the biggest threats to shark conservation. The annual number of sharks killed globally by the practice is estimated to be around 97 million.



5. The landing of fins not attached to sharks has been banned throughout the EU, including the UK, since 2003. This continues to apply to the UK after EU-exit. Where such bans are enforced, shark fins can generally be legally traded after having been detached from the shark on shore, known as a 'fins naturally attached' policy.

6. As such, trade in shark fins and other shark products is allowed, albeit with some restrictions for certain species. The UK imported around 60 tonnes of shark fins per year between 2013 and 2017. In 2020, it exported around five tonnes.

7. There is also retained EU legislation, the personal import allowance, allowing individuals travelling to the UK to carry up to 20kg of dried shark fins for personal consumption. Following a consultation on protecting endangered shark species in December 2020, the UK Government indicated an intention to ban the export and import of shark fins, including the 20kg personal allowance.

Overview of the Bill

8. The Bill makes provision as follows:

- Clause 1 prohibits the import and export of detached shark fins or things containing shark fins;
- Clause 2 amends the Council Regulation (EC) No. 1185/2003 on the removal of fins of shark on board vessels (the "Shark Finning Regulation");
- Clause 3 provides for the extent, commencement and short title of the Bill; and
- The Schedule outlines the process for applicants to apply for an exemption certificate from the prohibition in clause 1, as well as the Welsh Ministers' power as the appropriate authority to refuse and revoke such certificates, and to impose monetary penalties on applicants for providing misleading information.

Provisions for which consent is sought

9. Standing Order 29 provides that the Welsh Ministers must lay an LCM where a UK Bill makes provision in relation to Wales:

- for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd); or
- which modifies the legislative competence of the Senedd.

10. The Annex contained within the Explanatory Notes prepared by DEFRA sets out the provisions in respect of which the UK Government consider that a legislative consent motion is required. In summary, the UK Government considers that the Senedd's consent is required for all clauses of, and the Schedule to, the Bill.

Clause 1 - PROHIBITION ON IMPORT AND EXPORT OF SHARK FINS

11. Clause 1(1) prohibits the import and export of shark fins, or things containing them, into/from the UK following their entry into/removal from Great Britain.

12. The prohibition does not apply if a shark fin is naturally attached to the body of a shark and the body is substantially intact. Clause 1(2)(b) explains the meaning of "substantially intact" as the removal of the head and internal organs.

13. Clause 1(4) defines "shark fins" as "any fins or parts of fins of a shark, other than the pectoral fins or parts of pectoral fins of a ray" and "shark" are defined as "any fish of the taxon Elasmobranchii".

14. The purpose of clause 1 of the Bill is animal welfare and/or conservation, which are devolved matters, therefore it is the Committee's view that Senedd consent is required.

15. The test set out in Standing Order 29.1(i) is whether the purpose of the provision is within the Senedd's competence. The test in Standing Order 29.1(i) is not whether the Senedd has legislative competence to pass the exact same provision (a provision can have a devolved purpose but still fail one of the tests of legislative competence).

16. The Welsh Government's LCM (Paragraph 10) indicates that consent is required for this clause.

Clause 2 - REMOVAL OF SHARK FINS ON BOARD FISHING VESSELS

17. Clause 2 amends the retained EU law version of the Shark Finning Regulation by correcting a drafting error in the Common Fisheries Policy and Aquaculture (Amendment etc) (EU Exit) Regulations 2019 ("the UK Transposing regulations"), which transposed the Shark Finning Regulation into UK law.

18. The Welsh Government's LCM notes at paragraph 12 that prior to being transposed, the Shark Finning Regulation prohibited EU fishing vessels from shark finning in any maritime waters, and from any fishing vessel from shark finning in EU maritime waters. However, a drafting error in the UK Transposing Regulations meant that, currently, the prohibition on shark finning under the Shark Finning Regulation does not apply to fishing vessels that are both non-

UK and non-EU in UK maritime waters. The Bill will amend Article 1 of the Shark Finning Regulation by extending the prohibition to “UK fishing vessels in any maritime waters” and “other fishing vessels in United Kingdom waters”.

19. The purpose of clause 2 of the Bill is animal welfare and/or conservation, which are devolved matters, therefore it is the Committee’s view that Senedd consent is required. The Welsh Government’s LCM (Paragraph 13) indicates that consent is required for this clause.

Clause 3 – EXTENT, COMMENCEMENT AND SHORT TITLE

20. Clause 3(1) sets out the territorial extent which extends to England and Wales, Scotland and Northern Ireland.

21. Clause 3(2) provides power to the Secretary of State alone to make regulations for the commencement of clause 1 and the Schedule to the Bill.

22. Clause 3(3) provides that clause 2 of the Bill will come into force two months after the date on which the Bill is passed. Clause 3(4) provides that clause 3 will come into force on the date on which the Bill is passed.

23. The Welsh Government confirms at paragraph 16 of the LCM that clause 3 (except clause 3(5)) is a non-operative clause and has no legal effect outside of commencing the Bill and confirming the extent, scope of regulations and title. The Welsh Government considers a LCM is not required to be laid for the purposes of Standing Order 29. The Welsh Government is content for the Bill to make provision for Wales and for the Secretary of State to retain the commencement powers. Clause 3(5) provides power to the Secretary of State to make regulations for transitional or savings provision in connection with the coming into force of any provision of the Bill.

24. The Committee considers that clause 3 of the Bill requires the Senedd’s consent, as it makes provision within the Senedd’s legislative competence. The Welsh Government’s LCM indicates that consent is only required for clause 3(5) (see paragraph 17 of the LCM).

25. The UK Government’s view (see the Annex to the Explanatory Notes, at page 10) is that the Senedd’s consent is required for clause 3. The UK Government’s Delegated Powers Memorandum states (see point 6 and 7, at page 2) in respect of clause 3(5):

“6. Parliament has approved the principle of transitional or savings provisions to be provided for by regulations to ensure the smooth commencement of new legislation. There are several precedents for this power.

"7. As is usual with the ancillary powers of savings and transitional provisions, regulations made under this clause are not subject to any parliamentary procedure."

SCHEDULE

26. Paragraph 1 of the Schedule provides that the prohibition on the import or export of shark fins does not apply if the Welsh Ministers (the appropriate authority) have issued an exemption certificate permitting such an import or export on a specified date or within a specific period set out in the exemption certificate. It also confirms that an exemption certificate must contain a unique number; contain enough information to identify the shark fins concerned; and specify whether it relates to an import or export.

27. An "appropriate authority" is defined in paragraph 9 to the Schedule, as follows:

- the Welsh Ministers in relation to Wales;
- the Secretary of State in relation to England; and
- the Scottish Ministers in relation to Scotland.

28. Paragraph 2 provides that a person applying for an exemption certificate must provide information and pay any fee as requested by the Welsh Ministers. The Welsh Ministers are able to refuse an application and must inform the applicant of the reason for refusal.

29. Paragraph 3 provides that the Welsh Ministers may revoke or revise the exemption certificate before the import or export, if it appears that the applicant supplied inaccurate information in their application. The Welsh Ministers must revoke an exemption certificate, if the import or export has not taken place and it is no longer satisfied that the import or export is for the purposes of conservation.

30. Paragraph 4 provides the Welsh Ministers with a power to impose a civil penalty, by way of a monetary penalty, of up to £3,000 on an applicant where they deliberately provide inaccurate or incomplete information or due to a failure to take reasonable care, or where the applicant knows the information is inaccurate or incomplete at the time and fails to inform the Welsh Ministers.

31. Paragraph 4(4) allows the Welsh Ministers to amend the monetary penalty. Paragraph 4(5), (6) and (7) provides that the regulations made by the Secretary of State, the Welsh Ministers, or the Scottish Ministers under paragraph 4(4) must be made using the affirmative procedure.

- 32.** Paragraph 5 outlines the process for monetary penalties. The Welsh Ministers must give the applicant an initial penalty notice which offers the applicant the opportunity to avoid liability by payment of a sum specified in the notice which is less than or equal to the amount of the proposed penalty.
- 33.** Paragraph 5(3) and (4) provides an applicant with the opportunity to make written representations and objections within 28 days from the date of the initial penalty notice. After this period, the Welsh Ministers must decide whether to give the applicant a notice imposing a monetary penalty (a final penalty notice).
- 34.** Paragraph 5(6) provides the penalty specified in the final penalty notice may be the amount specified in the initial penalty notice or a penalty of a smaller amount.
- 35.** Paragraph 5(7) provides the initial or final penalty notice may be withdrawn at any time by the Welsh Ministers.
- 36.** Paragraph 6 provides for the information that must be included in an initial penalty notice and a final penalty notice. A final penalty notice may provide for interest or other penalties to be payable in the event that payment is not made within the period specified by the notice.
- 37.** Paragraph 7 provides an applicant with a right of appeal to the First-tier Tribunal against the Welsh Ministers' decision to refuse an application for an exemption certificate; to revoke an exemption certificate; or to give a final penalty notice.
- 38.** Paragraph 7(2) allows an appeal to be made on the grounds that the decision was based on an error of fact; that the decision was wrong in law; or that the decision was unreasonable.
- 39.** Paragraph 7(3) provides that an appeal against a decision to give a final penalty notice may also be on the ground that the amount of penalty imposed by the notice is unreasonable.
- 40.** Paragraph 7(4) provides that on an appeal against a decision notice, the First-tier Tribunal may confirm the Welsh Ministers' decision to revoke or refuse an exemption certificate; or require the Welsh Ministers to issue an exemption certificate or cancel a decision to revoke one; or require the Welsh Ministers to reconsider their decision.
- 41.** Paragraph 7(5) provides on an appeal against a decision, the First-tier Tribunal may confirm the final penalty notice; quash the final penalty notice; or vary the final penalty notice by reducing the amount of the penalty.

42. Paragraph 7(6) provides that on appeal against a decision to give a final penalty notice the requirement to pay the penalty is suspended until the appeal is finally determined or withdrawn and no interest or other penalty is payable during the suspension period.

43. Paragraph 8 provides that if a person does not pay the whole or any part of a penalty which the person is liable to pay, the penalty is recoverable in England and Wales as if it were payable under an order of the County Court.

44. As the Schedule makes provision for devolved matters, namely animal welfare and conservation, it is the Committee's view that Senedd consent is required. The Welsh Government's LCM (Paragraph 19) indicates this.

45. The UK Government also agrees (see the Annex to the Explanatory Notes, at page 10). The UK Government's Delegated Powers Memorandum states (see paragraph 11, page 3) in respect of paragraph 4 to the Schedule:

"Setting the amount of this penalty via a delegated power will ensure this penalty can be adjusted in the future. A delegated power is required to allow for its adjustment in the future, particularly to take account of changes in the value of money or should it be necessary to increase the protection bestowed upon sharks in the future by increasing disincentives to kill them for their fins. The Department is aware that it is unusual to provide a power to vary penalties, but there is precedent from section 44 of the Childcare Payments Act 2014 which includes a similar power in relation to increasing a £3,000 civil penalty connected to the submission of incorrect information concerning an application made under that Act."

46. Further, the UK Government's Human Rights Memorandum states as follows (see paragraph 21 to 24) regarding the human rights justification on imposing a civil penalty:

"23. Article 6.1 is clearly engaged by the creation of a civil penalty which requires the applicant to have a fair hearing if they challenge the imposition of such a penalty. The refusal or revocation of an exemption certificate, which arguably has an impact on the property rights attached to shark fins may also engage Article 6.1.

"24. However, we do not consider that there is interference with Article 6.1 rights. The Schedule provides for an administrative appeal against the decision to impose a monetary penalty enabling the applicant to make

representations against the imposition or amount of the penalty. A decision of the Secretary of State's to refuse or revoke an exemption certificate or to impose a monetary penalty can be appealed to the First-tier Tribunal (FtT) and the Scottish First-tier Tribunal (in relation to Scottish decisions). The ability to appeal to an independent appeal body such as the FtT is sufficient for compliance with Article 6.1."

Reasons for making these provisions for Wales in a UK Bill

47. Paragraphs 22 to 25 of the Welsh Government's LCM states the reasons why it considers it is appropriate for the Bill to contain devolved provision:

"22. The Welsh Government supports the aims and objectives of the Bill, recognising the need for these provisions to prohibit shark fins obtained through unethical "shark finning" practices from entering UK markets. Shark conservation, and more widely marine conservation, is a key policy for the Welsh Government and it is my view that this Bill helps deliver on these aims at a global level. The Bill as currently drafted sends a key message that shark finning is unacceptable and that Wales would like to distance itself from it.

"23. The Welsh Government recognises the benefit in taking this UK Bill forward so the provisions will apply at the same time across the UK. There is no comparable Senedd Bill planned in the short or medium term and, if the Bill proceeded without Wales or on different timescales, there is a risk of a regulatory gap between the Bill coming into force in the rest of the UK and a comparable Senedd Bill coming into force. This could see Welsh ports targeted for import, with onward distribution into the rest of the UK difficult to prevent. The Welsh Government also acknowledge that a UK wide Bill is the most effective and proportionate legislative vehicle to deliver consistent regulation of the import and export of detached shark fins and the shark finning practice in Wales.

"24. Defra has offered a Memorandum of Understanding for the use of the commencement powers in clause 3, whereby the UK Government and the Devolved Governments agree to a timetable for the Secretary of State to make regulations to commence the relevant provisions in the Bill. In this context, while this is a devolved area, the Welsh Government is content for the Bill to make provision for Wales and for the Secretary of State to retain the commencement powers.

"25. The Welsh Government acknowledges paragraph 7 of the Schedule to the Bill provides a right of appeal to the First-tier Tribunal in a devolved area that could, theoretically, be heard by a devolved tribunal. However, there is currently no appropriate devolved tribunal to hear appeals under the Bill and primary UK legislation would be required to make provision for such a devolved tribunal. In this context, the Welsh Government is content for the Bill to make such provision, noting that a future Senedd Bill could amend the Bill to bring such appeals to a devolved Welsh tribunal."

Financial implications

48. Paragraphs 28 to 33 of the Welsh Government's LCM detail the financial implications of the Bill:

"28. Officials in Defra have conducted a Regulatory Triage Assessment (RTA) examining the potential impacts of the provisions within the Bill for the whole of the UK.

"29. The data used was obtained largely from the Marine Management Organisation (MMO) and relates to landings in UK ports from UK and foreign vessels. Landings data is important as it outlines the potential internal/external market for shark fins. This data is only available at a UK level, therefore, it has not been possible to quantify an impact specifically to Welsh businesses.

"30. The RTA has identified 125 ports across the UK reportedly handling 'shark and dogfish' (found within the elasmobranchii taxon) with Milford Haven and Swansea in the top ten ports with 2019 landings worth £59,641 and £20,708 respectively. Since 2018, records indicate that the UK exported a maximum of 12 tonnes of shark fins valued at £216,000 predominantly to Spain and other countries within Europe.

"31. In the majority of cases these landings are incidental rather than a targeted catch and the provisions within the Bill are unlikely to severely impact these businesses in Wales. Furthermore, it is likely the whole animal was landed as the rest of the carcass is commonly used for bait in other fisheries.

"32. Data for shark fins imported to the UK is unverified due to the Fins Naturally Attached (FNA) policy which largely prohibited the importation of shark fins except for a personal allowance of up to 20kg.

"33. Defra have concluded the cost to UK businesses are estimated to be £216,000 per annum (based on HMRC import/export data). It is not possible to provide a figure for Wales due to insufficient data."

Welsh Government position

49. It is the Welsh Government's view that it is appropriate to deal with the provisions in this UK Private Members' Bill to prevent any risk of legal ambiguities involving the import and export of shark fins in the UK and formation of illegal trades of shark fins within the UK.

50. Consequently, the Welsh Government recommends that the Senedd consents to the Bill as introduced.

Committee View

51. The Committee agrees with the Welsh Government's assessment in the LCM that all clauses and the Schedule to the Bill require Senedd consent.

52. The Committee sees no reason to object to the Senedd agreeing to the Legislative Consent Motion associated with this Memorandum.