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Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate
Change, Environment and Rural Affairs Committee
Memorandwm Cydsyniad Deddfwriaethol ar Fil Pysgodfeydd y DU |
Legislative Consent Memorandum on the UK Fisheries Bill
FB 08
Ymateb gan : Yr Athro Richard Barnes – Prifysgol Hull
Evidence from : Professor Richard Barnes – University of Hull

**Written Evidence submitted by Professor Richard Barnes, The School of Law and
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Personal Statement

I am Professor of Law at the University of Hull. LLB (Hons) (Dundee), LLM (Cantab), PhD (Hull). I have over two decades of experience researching and publishing on law of the sea, with particular focus on fisheries regulation. The submission is presented in a personal capacity only.

What are your views on the legislative framework for the UK after Brexit as set out in the UK Fisheries Bill?

1. **General Comments:** The Fisheries Bill is an enabling piece of legislation. As such it does not set out the detail of all aspects of fisheries management for the UK. It is critical that enabling legislation establish: appropriate powers to enable further legislation or policy guidance; clear responsibilities for those in authority; and provide a suitable framework within which discretionary power is to be exercised. Since fisheries deals with elements of reserved and devolved authority, appropriate checks must be in place to ensure a common framework of fisheries governance at the UK level and the capacity to meet international commitments, is balanced with respect for the constitutional settlements on devolved powers. This is not easy since fisheries management cuts across these areas and cannot be simply dived between devolved, UK and international level issues. The effectiveness of the Bill will depend upon how critical process, such as the adoption of the Joint Fisheries Statement (JFS), are implemented in practice.
2. The main provisions of the Fisheries Bill deal with: Fisheries Objectives and Policy Frameworks, Access to UK waters, Licensing, Fishing Opportunities, Preventing Discards, Grants, and Charges, and Powers to Regulate Fisheries. There is a specific section on the legislative competence of the Welsh Assembly. Each of these sets of provisions is concerned with setting of regulatory authority and regulatory process. The technical detail of fisheries management will occur mainly through the adoption of secondary legislation. As such it is difficult at this early stage to say whether the Bill will improve fisheries management in the UK.
3. The Bill does not appear to lack any critical enabling powers, although some of the process could be refined to enhance the accountability of regulatory authority (eg power to adopt secondary legislation and decision making (eg issue licences). Specific suggestions are noted below. It remains possible for future legislation to be adopted to correct any short-comings, so this Bill should be regarded as final say on fisheries matters.
4. There is room for improvement in respect of some provisions: enhancing the comprehensiveness and legal status of the Fisheries Objectives; the absence of implementation and monitoring requirement to report on the state of progress towards Fisheries Objectives and the absence of provisions on allocation criteria (or developing allocation criteria)

5. ***Fisheries Objectives:*** The range of objectives should be expanded to accommodate generally accepted principles of good fisheries management. These can be derived from the FAO Code of Conduct for Responsible Fisheries. These principles include:
 - a. fair allocation of fishing opportunities, reflecting the wider economic, social and cultural factors, and the importance of maintaining diversity in the fishing sector;
 - b. an integrated approach to fisheries and other marine/coastal activities;
 - c. the compatibility of measures for shared stocks; clear and strong stakeholder engagement in decision-making processes;
 - d. transparent and open decision-making; and
 - e. the use of impact assessments in resource management.
6. By expanding the range of objectives, decision-makers will be provided with a stronger frame of reference for managing fisheries in UK waters. In particular a general requirement to adopt compatible technical regulations will help ensure that localised conflicts do not arise between vessels operating under different rules but for the same stock. In general, a more complete set of objectives/duties would strengthen the policy commitment to world leading, sustainable fisheries management, linked to the specific needs of coastal communities. If these principles are not included in the Bill, then they should be prioritised in setting the terms of the JFS
7. These objectives underpin all aspects of fisheries management. They would be strengthened if they were restated as duties. This could be done by expressly stating in Clause 6(1) that any public body with responsibility for fisheries management shall exercise its functions with regard to the objectives/duties in Clause 1. An example of a similar approach is found in s. 3 of the Well-being of Future Generations (Wales) Act 2015). This could be done by amending Clause 6(1) to include a direct reference to the objectives: A relevant national authority must exercise its functions relating to fisheries, fishing or aquaculture in accordance with *the fisheries objectives and the policies contained in a JFS that are applicable to the authority, unless relevant considerations indicate otherwise*'. Establishing a duty would aid decision-makers by providing a clear set of reference points that must be considered in the exercise of discretionary powers. The duties as framed remain flexible enough to allow a range of adaptive and context specific decisions to be made. Strengthening the objectives would strengthen the environmental credentials of the Bill. It would provide a potential mechanism for ensuring that decision-makers are held to account for the mismanagement of fisheries. By linking the performance of duties to the exercise of power by public bodies with responsibility for fisheries management, the provision would then encompass bodies not specifically listed in the present Bill (eg inshore fisheries conservation authorities, and, potentially, producer organisations) if and to the extent they perform public fisheries management functions.
8. The fisheries objectives are quite complex concepts. The operation of the objectives could be enhanced by a provision requiring the provision of periodic guidance as to how such objectives should be given effect to in the discharge of any public bodies functions, and requiring any such body to have regard to such guidance. (eg Environment Act 2015, section 4: eg 'The Secretary of State shall from time to time issue guidance to relevant national authorities fisheries with respect to objectives/duties which they consider it appropriate for the such authorities (and any other body exercising a fisheries management function) to pursue in the discharge of its function)'. This could be added as a final sub-clause in Clause 1.
9. In operational terms, the objectives should be enhanced by making explicitly linking the provisions on financial assistance under Clause 28 and Schedule 4 (for Wales) to the objectives in Clause 1. This would mean the any terms of the grants scheme would contribute to the achievement of the Fisheries Objectives. This would facilitate an alignment between developmental activities and the operational delivery of sustainable fisheries.
10. The revocation of the CFP Objectives in results in the removal or weakening of some valuable objectives:

- a. 'Environmentally sustainable' (Clause 1(2)) is defined in conjunction with the term 'long term'. This might imply short-term unsustainable practices are permitted. This should be rephrased to make it clear that sustainability is both a present and future condition ie 'in the short term and long term'.
 - b. The scientific evidence objective is framed in facilitative terms (Clause 1(5)). There is no requirement to adhere to scientific advice. This has been the object of significant criticisms of the CFP, where total allowable catch (TAC) levels have often been set higher than the levels recommended by scientific advice. There is an opportunity here to enhance the role of science. This could be done by requiring that 'scientific advice shall be respected in the exercise of any powers under the Act'. If flexibility is required, then an exception to this can be made with a requirement for reasons for this to be provided, and listing the situations where scientific advice can be rejected or modified in its application to catch levels. For example, to ensure critical food supplies, or for overriding reasons of public interest. Any derogation from scientific advice must be exceptional and time limited.
 - c. The discards objective described in the Bill requires a gradual avoidance or reduction of discards. It further requires a gradual move to the landing of all catch. The landing obligation under the CFP (which would potential remain applicable, either in transition or through the reception of EU fisheries law into domestic law under the EU (Withdrawal) Act, requires that all catch be landed from 1 January 2019. The relationship between the discard objective and this existing commitment is unclear but suggests a step backwards in terms of landing requirements. This point needs scrutiny and clarification.
 - d. Article 2(2) of the CFP sets the goal of restoring or maintaining fish stocks at levels capable of producing the maximum sustainable yield (MSY) by 2020. The Fisheries Bill sets no timeframe for the goal of reaching the MSY. At best this might be detailed in a joint fisheries statement (JFS). However, there is no requirement to set target dates. The rigor of the commitment to achieving MSY in the Bill could be enhanced by setting timeframes. Or simply requiring that there is a duty to ensure catch levels are set in accordance with the maximum sustainable yield, combined with a duty to correct this when new information or changed circumstances establish that catch levels exceed the MSY.
 - e. Article 2(5)(f) of the CFP requires fisheries policy to contribute to a fair standard of living. The only comparable reference in the Fisheries Bill is Clause 1(2)(b) which refers more generally to social and employment benefits. This is a weaker reference point. Indeed, the Bill only makes reference to social conditions once in the entire text. The Bill should include a clear commitment to developing fair standards of living for those in the fishing industry and the wider coastal communities that support them. This would better reflect policy commitments in the White Paper to improving the economic position of coastal communities.
11. The Bill lacks any mechanisms for formally reporting progress towards the achievement of Fisheries Objectives. A useful point of reference is the duty on Welsh Ministers to develop, publish and report progress against national indicators of well-being under the Well-being of Future Generations (Wales) Act 2015. The Fisheries White paper promised an annual statement on assessment of stocks. This is narrower than an assessment of progress towards the Fisheries Objectives. The Bill should include a duty to compile this, but it could be expanded to include a progress towards Fisheries Objectives. That failing, the Welsh Government could accommodate fisheries indicators within the 2015 Act mechanism.

12. **Fisheries Statements.** Fisheries statements provide a link between the general fisheries objectives and specific regulatory or decision-making powers. The Bill should include a provision requiring the Secretary of State or fisheries policy authorities (ie Welsh Ministers) to ensure that the fisheries objectives will be implemented. As noted above this would be best achieved by framing the objectives as legal duties. This would replace the somewhat weaker indirect reference to 'policies (however expressed) for achieving, or contributing to the achievement of, the fisheries objectives' in Clause 2(1). The term 'however expressed' allows too much latitude and could generate uncertainty as to whether specific policies relate to the listed fisheries objectives.
13. Fisheries Statements play a critical role in establishing the framework for more specific legal measures to manage fisheries. As such they must be subject to full and transparent scrutiny. There is initial scrutiny of this through the Schedule 1 process. The scope of consultation is generally framed and linked to 'interested persons'. Consideration should be given to enhancing the rigour of this part of the process to recourse to statutory consultees including local authorities, the Environment Agency or other named stakeholders. This should include the proposed Office for Environmental Protection. Schedule 1 should state the period of consultation. It would be advisable for this to be standardized across the fisheries Authorities.
14. There is a review process in respect of the fisheries statements in Clause 5. However, the review process appears to lack independence and formal structure. Objectivity is lacking since it is the fisheries policy authorities preparing the JFS that must review the JFS. Some indication of the purpose and content of the review is desirable, as well as scope for external input into the review (eg proposed OEP – subject to consent by the devolved administrations). If such requirements are not included in the primary legislation, then it would be appropriate for this to be contained in secondary legislation or policy guidance.
15. Clause 6 provides that fisheries statements must be adhered to by national authorities unless 'other relevant considerations indicate otherwise'. This provides a potentially wide exception to the requirements to adhere to statement (and fisheries objectives). The threshold for exceptions should be higher: eg the public body shall exercise its functions with due regard to the (objectives/duties) and policies contained in a JFS unless there are overriding reasons in the public interest for doing otherwise. The requirement to give reasons for not exercising functions in accordance with the JFS is critical. Such reasons must be placed on public record.
16. **Allocation Issues.** The Bill is weak in respect of setting out how fishing opportunities will be determined and allocated. This is significant as it concerns who can fish, and so make use of a public asset. Allocation operates at two levels. First UK fishing opportunities are determined by the Secretary of State. This is done under Cl 18. Second, once UK allocations are determined and shares of the UK allocation determined for each devolved administration, then each devolved administration must determine how these opportunities are allocated to fishing vessels. The former is considered to be a reserved matter for the UK government since it concerns agreement of UK fishing opportunities internationally. The latter is a devolved matter. The delegated powers memoranda indicates that Cl 18 is a reserved matter, so does not require a legislative consent motion. The Scottish Government have already raised concerns about the approach to Cl 18. The Scottish Government have requested an amendment to require the consent of Scottish ministers before decision be taken. The Welsh Government should take a view on

this matter, with a view to ensuring that allocations of fishing opportunity will have on the Welsh sector.

17. It is right that allocation criteria for Welsh vessels be left to be determined by the Welsh Government. However, the impact of such criteria on enhancing the capacity of the Welsh sector is limited by the overall share of opportunities it is allocated by the UK Government. Currently this is around 1%. It should be questioned whether this share is fair. It is difficult to state what constitutes a fair share since this could encompass need, population size, fisheries physical distribution and past entitlements. It is important that a wider range of allocation criteria be used so that this can break the lock on allocation limits currently in place. In the UK allocation is currently addressed through the Fisheries Concordat. This effectively locks in the allocation of fishing opportunities according to existing allocations of Fixed Quota Allocations. The White Paper promised a move towards a fairer system of allocations. There is no evidence of this in the Bill. Continued use of FQA will not achieve this.
18. Other factors that should be included in the list of allocation criteria include:
 - a. the state of the target and dependent fish stocks (this is a critical baseline consideration and would justify variations in accordance with actual or threatened changes in stocks/ecosystem conditions);
 - b. the structure and diversity of the fishing fleet (this is particularly important if the policy commitments to support the small/inshore sector are to be met);
 - c. the needs of coastal fishing communities which are dependent mainly on fishing (this is more targeted to coastal communities than contributions to local economies); and
 - d. owner/operator/agency contributions to data collection, scientific research and management of fish stocks (thereby strengthening engagement in scientific/research activities)
19. By establishing clear criteria in law, the Secretary of State (and as appropriate fisheries authorities) would have clear points of reference for potentially difficult allocation decisions. The existence of such criteria may help public bodies defend their decision from legal challenge.
20. As a final point on allocation, consideration needs to be given to the question of how long fishing opportunities can be held. Currently FQA lock in some degree of security. However, consideration should be given to limiting the duration of holdings in law. Unlimited duration means a de facto privatisation of a public asset since. The duration of allocations needs to be set with reference to the needs of fishing businesses, political accountability and expedience, stewardship and opportunities for enabling new entrants and movement within the industry. A period of 7-10 years as the maximum expect duration of a holding would ensure opportunities to rest allocation in order to ensure that a public asset can be distributed in a way that benefits the public. This could be tailored to the needs of different sectors. For example, longer holding could be allocated in respect of pelagic stocks where a limited number of larger vessels are engaged in catch activities. For smaller inshore fleets where there are lower capital costs, shorter duration of holdings could be used. This would then enable greater movement into and around the sector.

What are your views on the provisions in the UK Fisheries Bill that will enable the Welsh Ministers to bring forward policy in relation to Welsh fisheries after Brexit?

21. There are two related issues that I would highlight here: the opportunity to grow the sector and the provision of financial support and licensing of fishing vessels.
22. **Sector Growth.** The Welsh Sector is relatively small and almost entirely focused on the non-quota sector. There are valuable quota stock (eg nephrops) within the Welsh zone. However the Welsh fleet is not currently focused upon these, nor do vessels have the capacity to harvest such species. There may be new opportunities to benefit from such stocks if foreign vessels lose their entitlement to catch such stocks. Responding to any opportunities will require investment over time in the Welsh fleet.
23. **Financial Support.** Schedule 4 deals with the replacement of the European Maritime Fisheries Fund as it applies to Welsh waters/vessels. This is a devolved matter. This is a new regulatory power. The provision is drawn in terms nearly identical to the provisions for English waters/boats. The powers are widely drawn and cover any matter that relates directly or indirectly to the sea fishing. The way in which this scheme is to be implemented is in the hands of the Welsh Government. The only limit is that it is restricted to the Welsh zone or Welsh boats. I think the principal limit here is budgetary. How much budget resource can the WG afford to support this scheme? Notionally there are two ways in which the scheme could be funded. The first is through charges/levies on the industry. This power exists under the Bill. However, the amount of costs recovered from the sector would then determine the scale of monies available for financial support through the financial scheme. Since the Welsh sector is small, and vulnerable to increased costs, it is unlikely that much could be levied from the industry. The other way to support the scheme is to draw upon general budget. In effect, the fishing industry is subsidized from general funds. Here, the scope of financial support may be larger since it is not linked to the costs on the industry. The Welsh Government should be aware of the risks this may present for future investment in the industry.
- Licensing. Under the Bill, the Welsh Government will have greater responsibility for licensing and regulation. To develop its own processes for licensing of fishing vessels. This is to be done in accordance with Schedule 2, and includes conditions, and requests from other licensing authorities. This would help enable compatibility.
 - *Licensing arrangements* Clause 9 seeks to consolidate and refine licensing for British vessels. The approach is broadly consistent with previous laws (Namely the Sea Fish (Conservation) Act 1967. No fishing without a licence. By making this a UK wide provision ensures consistency and reinforces the equal access requirements. The provision respects the devolution arrangements by requiring affirmative consent.
24. I have to say I am not entirely clear on what happens if there is no affirmative consent

Do you wish to raise any other matters in relation to the provisions in the UK Fisheries Bill as they relate to Wales?

No further points.