



HOUSE OF LORDS

Select Committee on the Constitution

18th Report of Session 2019–21

Fisheries Bill: Commons amendment 22

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are Matt Korris (Clerk), Ava Mayer (Policy Analyst) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

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Fisheries Bill

Introduction

1. The Fisheries Bill was introduced to the House of Lords on 29 January 2020 and passed on 1 July. It was returned from the Commons with amendments on 13 October. The Lords is due to consider these amendments on 12 November.
2. The Bill provides a framework for fisheries management after the Brexit transition period ends and the UK is no longer part of the Common Fisheries Policy. The Bill is intended to underpin the UK's management of fisheries as an independent coastal state, when the UK Government will be responsible for setting the rules on fishing in UK waters.

Permissive Extent Clause

3. Commons amendment 22 inserts a new subsection (6) into clause 52 of the Bill (the extent clause). This provides that Her Majesty may, by Order in Council, provide for certain provisions of the Bill to be extended to the Channel Islands or the Isle of Man for the purpose of implementing international obligations. This provision was not part of the Bill when it was previously considered by the House of Lords.
4. The Crown Dependencies are not part of the United Kingdom and the UK Government typically seeks their consent before extending legislation to them. The governments of the Channel Islands have expressed concerns about the 'Permissive Extent Clause' (i.e. Commons amendment 22), to which they have not consented.¹ **We draw the attention of the House to the constitutional implications of this new subsection.**

The Government's position

5. On 28 October we wrote to the Parliamentary Under-Secretary of State at the Department for Environment, Food and Rural Affairs, Lord Gardiner of Kimble, seeking clarification of the Government's position on the Permissive Extent Clause. Among other questions, we asked:
 - why the Permissive Extent Clause was introduced at a late stage in the legislative process;
 - why the Permissive Extent Clause was considered necessary if the Government did not intend to use it without consent; and
 - how, if at all, the UK Government had consulted governments of the Channel Islands regarding the Permissive Extent Clause.

Our letter is set out in full in Appendix 1.

6. The Minister responded on 2 November (see Appendix 2). He said that the Government would use the Permissive Extent Clause only "in the most extreme circumstances and after full consultation and the exhaustion of other options". He said the Government does "not currently have any

¹ See correspondence in the appendices.

specific concerns which we would envisage using the [Permissive Extent Clause] to address”.

7. **We are not persuaded of the necessity of Commons amendment 22. The Government should seek powers only when they are necessary and their use is anticipated.**
8. The long-standing practice of the United Kingdom when it ratifies an international agreement has been to do so on behalf of the United Kingdom of Great Britain and Northern Ireland and any of the Crown Dependencies that wish the international instrument to apply to them. Where legislation has been required, it has been enacted by the Crown Dependencies' own legislatures, subject to the usual requirements for Royal Assent, and any potential differences of view have been dealt with in bilateral discussion rather than by the imposition of legislation from Westminster.
9. **Commons amendment 22 undermines the domestic autonomy of the Crown Dependencies and is contrary to long-standing practice. We recommend that the Bill be amended so that consent of the governments of the Channel Islands and the Isle of Man (as appropriate) is required prior to the use of these powers.**

APPENDIX 1: LETTER FROM THE CHAIR TO LORD GARDINER OF KIMBLE, PARLIAMENTARY UNDER-SECRETARY OF STATE, DEFRA

Dear Lord Gardiner,

I write on behalf of the Constitution Committee regarding the Fisheries Bill.

The Government amended the Bill at report stage in the Commons to insert a Permissive Extent Clause, such that the Secretary of State may implement parts of international fishing agreements on behalf of the Channel Islands and the Isle of Man. The governments of the Channel Islands have expressed concerns about these provisions, to which they have not consented.

We would be grateful for clarification about the Government's position on this matter and, in particular, your answers to the following questions:

- For what reasons has the Permissive Extent Clause been added to the Bill at this late stage in the process? What has changed since the Bill was first published in October 2018 and since its reintroduction in January 2020?
- The minister in the Commons, Victoria Prentis MP, said during the debate: “We are not intending to use the provision, but I think it is correct to have it in the Bill” (HC Deb, 13 October, col 310). If the Government does not intend to use the provision, what is the need for its inclusion in the Bill? We do not consider that it is acceptable for the Government to seek powers ‘just in case’ or because they might be ‘convenient’. Powers should only be sought when the need for them can be demonstrated and the form of their exercise can be anticipated.
- What has been the process for consulting with the governments of the Channel Islands regarding the Permissive Extent Clause?
- When the Bill was first introduced in 2018, the Government said in the Explanatory Notes: “The Crown Dependencies are not part of the United Kingdom and the United Kingdom generally seeks their consent before extending legislation to them. This would be the case here.” Is this still the case?
- If the Government intends to extend provisions of the Bill to the Channel Islands without their consent, what is the explanation and justification for doing so?

The insertion of a Permissive Extent Clause is a constitutional matter which would have attracted substantial debate if it had been included in the Bill during its passage in the House of Lords. The Government will need to satisfy the House of the necessity of this provision if it is to avoid it being opposed during Consideration of Commons Amendments.

Yours sincerely,

Baroness Taylor of Bolton

Chair of the Constitution Committee

APPENDIX 2: REPLY FROM LORD GARDINER OF KIMBLE TO THE CHAIR

Dear Lady Taylor,

I write in response to your letter of 28 October regarding the Fisheries Bill. I am grateful for the opportunity to clarify the points that you raised on the Permissive Extent Clause (PEC). I would like to reassure you from the outset that the decisions taken by Defra have not been made without extensive consultation and consideration with the Crown Dependencies.

First let me explain that the PEC relates solely to the element of the regulation making power in clause 36 which allows regulations to be brought forward to meet our international obligations, and consequential provisions of the Bill. The UK is responsible for the Crown Dependencies' obligations under international law. Whilst there is no suggestion that a Crown Dependency would act in bad faith, the action of one Crown Dependency could have implications for the UK and for all the Crown Dependencies, including sanctions and penalties.

I will respond to each of your questions in turn.

You ask why the PEC was introduced at a late stage in the process. The decision to include this clause in the Bill followed a great deal of discussion this year with the Crown Dependencies collectively and individually, and with the Ministry of Justice, which is responsible for managing the UK's constitutional relationship with the Crown Dependencies. Our strong preference was to include the clause with the consent of all the Crown Dependencies. That is why we have worked over the last 10 months with good intentions because clearly we did desire that consent. Unfortunately, despite having given as long as possible for discussion, to date, the consent of Guernsey and Jersey has not been secured. The government had to make a decision having reached the last amending stage of the Bill. To protect the whole of the UK family, we decided to introduce the PEC via government amendment.

You asked why we introduced the clause and yet said that it is not our intention to use it without consent. We are mindful of the constitutional responsibility the UK has for the international relations of the Crown Dependencies under international law. It is therefore important that we have an effective mechanism to support the Crown Dependencies in meeting these obligations. The need is stronger now than ever as we move away from the Common Fisheries Policy and we take our place on the international stage as an independent coastal State with all the responsibilities that entails.

As Minister Prentis made clear on the floor of the House as Fisheries Minister, we do not envisage using the PEC. The Crown Dependencies have their own powers which allow them to implement international obligations. The clause is included as a matter of last resort. It would only be used in the most extreme circumstances and after full consultation and the exhaustion of other options. The Government felt it is right that we should introduce this clause to ensure that the UK and the Crown Dependencies can fulfil their international obligations in all circumstances.

To be clear, we do not currently have any specific concerns which we would envisage using the PEC to address. I am very aware that the Crown Dependencies take their international obligations extremely seriously; and I am confident that

they would meet any required commitments, legislating domestically if required, in any normal circumstances. However, it is possible to envisage a scenario where we needed to implement fisheries measures across the UK and the Crown Dependencies to underpin international agreements or to implement measures to ensure that the UK and the Crown Dependencies (whose fishing boats are registered as British vessels) do not breach international law prohibiting illegal, unreported and unregulated fishing.

In the event of such an unforeseen event occurring, there are steps we would take before we would consider activating the PEC without consent: we would ask the Crown Dependencies to consider introducing their own legislation; we would also work with them on considering any other available solutions; and if those steps failed we would consult with the Crown Dependencies on utilising the PEC, hopefully securing their consent. Only in the most extreme circumstances would the PEC be used without that consent. The clause serves to protect the British family.

Were the UK or a Crown Dependency found to have breached international law on illegal fishing, sanctions might include a ban on the export of fish and fish products for all of the UK and each of the Crown Dependencies.

You asked about consultation: on introduction of the Fisheries Bill in January 2020 we wrote to each of the Crown Dependencies about the Bill, stating that we would be in contact about the PEC. Informal discussions with officials then took place over the following months. Fortnightly discussions between Defra officials and the Crown Dependencies were held at that time which became weekly in late spring. Formal consultation on the PEC took place with letters being sent at official level in July 2020. Responses were sought within four weeks and the letters were followed-up with calls. Minister Prentis raised Defra's intention to include a PEC in the Fisheries Bill with each minister of the Crown Dependencies in July 2020.

Due to the speed with which the Bill was re-introduced in 2020 following the general election, we were not able to share a completed draft with the Crown Dependencies eight weeks in advance of introduction as guidance sets out. That is why the Bill was reintroduced without the PEC. Following introduction and a settled draft of the Bill, we began negotiations on its inclusion with the Crown Dependencies. To address the concerns they had raised, we narrowed the scope of the PEC significantly. Previously it had covered more than half the clauses in the Bill and two schedules. We wanted to ensure that it would only extend to the Crown Dependencies the provisions that we felt to be essential to ensure the UK could continue to fulfil its international obligations.

You ask whether it remains the case that the UK generally seeks the Crown Dependencies' consent before extending legislation to them. I can give you my absolute reassurance that it is still Government policy that legislation should not be extended to the Crown Dependencies without first consulting their governments and seeking their consent. I can further assure you that we would consult the Crown Dependencies fully in the unlikely event that we judged the only way to protect the UK family was to activate the PEC in this Bill.

Finally, you ask, if the Government intends to extend provisions of the Bill to the Channel Islands without their consent, what the explanation and justification is for doing so. As I have explained above, use of the PEC without consent would only ever be as a last resort if, having exhausted all other options, an international

obligation is not met that could have significant implications for the British family. The Government is entirely committed to the longstanding constitutional convention that the UK does not impose legislative provisions taking effect on the Crown Dependencies, or otherwise interfere, in areas of their own domestic autonomy without their consent.

This government takes the UK's international responsibilities very seriously. Inclusion of the PEC in the Fisheries Bill helps ensure the UK can meet those obligations, including for the Crown Dependencies, in the unlikely event that such action is required.

I appreciate fully the strong feeling this decision has generated in Guernsey and Jersey. We will continue to engage with their representatives in the hope of reaching a satisfactory outcome.

Yours sincerely,

Lord Gardiner of Kimble

Parliamentary Under Secretary of State for Rural Affairs and Biosecurity