

18 March 2019

Fisheries Change Programme
Fisheries New Zealand
Wellington

By email: fisheries.review@mpi.govt.nz

Fisheries New Zealand: Discussion Paper 2019/20

The New Zealand Law Society welcomes the opportunity to comment on the discussion paper *Your fisheries – your say: Fisheries New Zealand Discussion Paper 2019/20* (paper).

The Law Society comments below on legal issues, principally relating to enforcement provisions, raised by the paper. (The Law Society has not responded to other questions in the paper concerning technical and policy matters that are outside its remit and expertise.)

Offences and penalties

Q7: *Do you think new offences based on the quantity of fish illegally returned to the sea will support a more proportionate system?*

The Law Society supports the introduction of a graduated offences structure that has a stronger focus on the level of offending, which will allow for penalties in accordance with the harm caused.

The Fisheries Act 1996 (Act) currently allows for substantial penalties, including mandatory loss of fishing gear, vessels etc, except in very limited circumstances. The Law Society agrees that the lack of a proportionate response option may discourage prosecutions for low-level offending where some penalty may be warranted, but not to the extent currently prescribed.¹

The paper suggests an example of a penalty structure could be “breaching the rules in relation to fewer than 50 fish in a day illegally returned to the sea”, punishable by a fine up to \$10,000 but not involving vessel/gear forfeiture.² Rather than graduating penalties according to the number of fish caught, referencing the relevant total allowable catch (TAC) may be more appropriate. The suggested trigger of 50 fish, for instance, might be much more significant for some species with relatively low TACs, than it is for others with very large TACs. The Law Society suggests that the trigger should be framed as a percentage of TAC, or alternatively, should alter from species to species.

¹ *Your fisheries – your say: Fisheries New Zealand Discussion Paper 2019/20*, at p15.

² Note 1.

Q9: *We think infringement offences are a useful tool to address offending that involves small amounts of fish. Do you agree or disagree?*

Infringement offences can be a useful additional tool. Infringement offences relieve the burden on the court system in respect of lower level repetitive offending, while enabling a proportionate response to relatively minor breaches of the law. Infringement offences introduced in the related field of the Resource Management Act 1991 have proven useful.

Q10: *If you agree, what amount of fish should have infringement offences, rather than criminal offences? For example, 10 fish.*

The Law Society does not have a view on the specific amount of fish that would trigger an infringement offence, other than the response to question 7 above, that the trigger needs to form part of a coherent penalty scale appropriate for the particular species concerned.

Q11: *We think a defence for returning fish to avoid the capture of protected species achieves the right balance between protection and catch accountability. What do you think?*

A defence allowing fishers to lawfully return fish to the sea to save protected species is supported.

Such a defence must be stated with appropriate precision to achieve its objective. Where protected species are unintended bycatch, it should be expressed clearly if it would be permissible to return other fish as well as protected species to the sea in order to safeguard the protected species (for example, to avoid the need to land the catch and separate out the protected species).

It is preferable that a defence is available in such situations, rather than leaving it to the discretion of the Ministry whether to prosecute. However, it is difficult to comment in the absence of specific wording and to envisage how the suggested defence would operate in practice.

Q12: *We are proposing to remove the defence for returning fish if a fisheries officer or observer approves. Do you agree, or do you think there are good reasons for retaining this defence?*

The complete removal of the defence is not supported, but there is room for an amended defence given the subjectivity of some of the tests posed, in particular in the Sixth Schedule of the Act.³

The Law Society agrees it would be unsatisfactory if, as the paper observes, the approval of a Fisheries Officer makes legal what would otherwise be illegal.⁴ However, if a Fisheries Officer or observer is on board and agrees that bycatch that has been landed is likely to survive if

³ Schedule 6 deals with particular fish stocks and quantities which may be returned to the sea or other waters in accordance with stated requirements.

⁴ Note 1, at p16: "Approval from a fisheries officer or observer could be viewed as potentially legitimising the returning of fish to the sea in circumstances that would otherwise be unlawful and does not incentivise good fishing practice".

returned to the water, the fisher should not be in jeopardy of that opinion being second-guessed after the event, having returned the unwanted fish to the water.

Such a defence could be reframed as “*confirmation*” that a proposed action complies with the Act, rather than “*approval*”. The way section 72(5)(c)(ii) of the Act is currently expressed is unsatisfactory but, with amendments as above, could serve a useful purpose.

Technical fisheries management changes

Q19: *Do you have any comments on any of the technical changes we are proposing?*

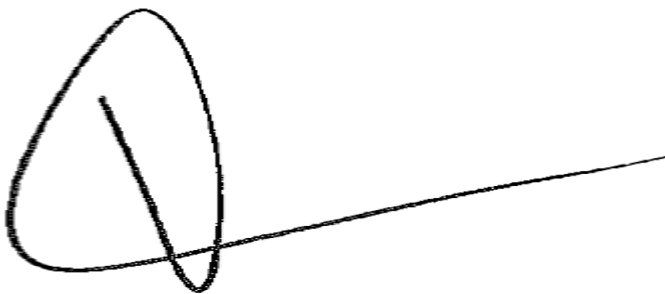
The paper states that no decision has been made at this stage about the use of on-board cameras, and that consultation will come later in 2019 about appropriate monitoring and verification of commercial fisher activities.⁵

The paper does however propose the introduction of electronic catching and position reporting alongside recent changes to how and what will be required to be reported by commercial fishers. The proposed changes would potentially extend the scope for on-board cameras;⁶ if it is not intended that the equipment referenced will include cameras, that should be stated clearly.

Conclusion

We hope Fisheries New Zealand finds these brief comments helpful. If further discussion would assist, the convenor of the Law Society’s Environmental Law Committee, Bronwyn Carruthers, can be contacted via the Law Society’s Law Reform Adviser, Lucette Kuhn (lucette.kuhn@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal stroke extending to the right.

Andrew Logan
Vice President

⁵ Note 1, at p2.

⁶ Sections 113K(1)(n) and 297(1)(ca) of the Act could be interpreted to include the potential for on-board cameras (particularly the latter, which refers to electronic observation).