FISHERIES
INSHORE NEW ZEALAND

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SUBMISSION TO THE PRIMARY PRODUCTION SELECT COMMITTEE ON THE FISHERIES AMENDMENT BILL JUNE 2022

1. Fisheries Inshore New Zealand Limited (*Fisheries Inshore*) appreciates the opportunity to comment on the Fisheries Amendment Bill (the Bill), which received its first reading on 5 May 2022. The purpose of the Bill is to amend the Fisheries Act 1996 (the Act) in response to fundamental issues in the fisheries management system and to ensure our fisheries management rules operate cohesively to incentivise good fishing practices.

Request to be Heard

2. Fisheries Inshore requests the opportunity to be heard in support of this submission. The issues addressed in the Bill and raised in our submission are complex but it is vital that the amendments proposed to the Act work together in a coherent way with the other provisions of the Act for the 600+ fishers, 900+quota owners and 190+ LFRs involved with inshore finfish. It is these people that must work with the resultant legislation. We seek sufficient time to set out our concerns and proposed solutions to the Committee.
3. Please contact Laws Lawson, Chairperson, Fisheries Inshore New Zealand Limited (021 529 701) for any queries in respect of this submission or our appearance before the Select Committee.

Who we are

4. Fisheries Inshore represents more than 80% by value and volume of the inshore finfish, pelagic and tuna fisheries of New Zealand. We were formed in November 2012 as part of the restructuring of industry organisations at that time. Our role is to address national issues on behalf of the sector and to work directly with, and on behalf of, our members in both the development of measures and their application at a regional level. In doing so we also work collaboratively with our regional committees, other industry organisations, Seafood New Zealand, Ministry for Primary Industries (MPI) and the Department of Conservation.
5. Our key outputs are:
    - the development of, and agreement to, appropriate policy frameworks, processes and tools to assist the sector to manage inshore, pelagic and tuna fishstocks more effectively,
    - to minimise the sector’s interactions with protected species and associated ecosystems; and
    - to work positively with other fishers and users of marine space where we carry out our harvesting activities.

6. Fisheries Inshore also works closely with other commercial stakeholder organisations that represent other sectors of the fishing industry – viz., Deepwater Group, Rock Lobster Industry Council, Paua Industry Council, the Federation of Commercial Fishermen - and our industry umbrella group – Seafood New Zealand. We also work alongside Te Ohu Kaimoana. We support the submissions made by all these organisations on the Bill.

Our Interest in The Bill

7. Fisheries Inshore represents both:
    a. quota holders who own quota shares in the fish stocks in the inshore finfish sector and
    b. fishers and operators who currently fish in that sector.

8. We have also liaised with Licensed Fish Receivers (LFRs) - companies who receive and process fish for the inshore finfish sector. Many of these are integrated companies with quota, contracted or supplying fishers, processing units, wholesaling, and distributing inshore finfish.

9. The Bill seeks to implement legislative changes to:
    - amend the rules for commercial fishers that set out what fish must be brought back to port (landed) and what fish may, or must, be returned to sea; and
    - introduce an approval process that provide for alternative avenues for fishers to dispose of unwanted catch once landed; and
    - introduce a graduated offences and penalty regime; and
    - introduce a new defence to lawfully return fish to the sea to save protected species; and
    - introduce streamlined processes for adjusting commercial and recreational catch limits; and
    - introduce technical amendments to assist with the roll out and cost recovery of cameras on commercial fishing vessels.

10. This Bill introduces fundamental changes both in the legislative form of the Act and in the obligations of fishers. It will impact on all quota holders, operators, fishers and processors in the inshore finfish sector. As such, Fisheries Inshore's interest in the Bill relates to the potential impacts on those parties.

11. Fisheries Inshore supports the need to address the above issues and does not seek to prevent any of the issues being addressed or the legislation being implemented. However it is critical that these changes work alongside the other provisions in the Act in a pragmatic and effective way that encourages all fishers to undertake their activities in a manner that supports the purpose of the Act. This submission seeks to offer suggestions that would better achieve that.

Context

12. This is the first significant amendment to the Act since 2001 when the catch balancing regime was amended. The introductory preamble to the Bill refers to "*the current model reflects outdated expectations for how fisheries should be managed. The rules are inconsistent and open to interpretation, have enabled fishers to catch too much and discard what they cannot sell and have not sufficiently incentivised fishers to reduce unwanted catch by improving fishing practices*".

13. Fisheries Inshore cannot support that statement and considers it to be based on inaccurate innuendo and allegations from uninformed parties rather than a real reflection of the state of fishing practices.

14. The current model is not based on outdated expectations – the Quota Management System (QMS) remains at the forefront of sustainable fisheries management regimes but, like all systems, technological capability and societal norms may change and we acknowledge there are issues that require addressing. In practice industry has itself requested that these issues be addressed.

15. With electronic reporting and electronic monitoring becoming a reality and offering new opportunities for obtaining more detailed timely information, changes should be made to the Act to take advantage of the transparency of and access to information on offer. The Bill is extremely disappointing in that regard – it ignores the potential future options for fisheries management improvements and retains the historical norms and standards of management. It is clear that the Bill will not provide an Act that is "fit for the future" for fisheries management. At a time when MPI will be able to see it all ("it" being how we fish and what we catch) and extract it all from imagery ("it" here being management and scientific information), MPI proposes a primitive 'land it all' policy framework, ("it" being generally every QMS fish). While this may be aiming at strengthening the incentives for further improving selectivity, fishers do not need that encouragement - they will continue to be active because leaving small QMS fish in the water is next year's income and not catching fish that isn't wanted by the market reduces costs and bother for them. But our inshore finfish swim and are caught in complexes of different fish stocks and because of this selectivity measures will never operate at 100%. The policy of "land it all" does not better advance the purpose of the Act. The Bill in its current form lacks foresight and constrains the ability/fails to realise potential technological benefits that could assist that.

16. There is no doubt that the current landing rules are inconsistent between species and may be somewhat open to interpretation. The Minimum Legal Size (MLS) provisions require, largely for sustainability reasons, the return to the sea of juvenile fish but this does not apply to all QMS stocks. There are only 11 species with an MLS and a further 87 species without an MLS. An MLS assists to protect the sustainability of a stock by ensuring that any sub-adult fish not incidentally killed by fishing activity are returned to the sea to fulfil their ecological purpose. The application of that approach is inconsistent and the issue is going forward which approach is the most appropriate – protect sustainability to the extent possible or not.

17. Schedule 6 currently provides for certain species to be returned to the sea for a range of reasons including their protected nature, their reproductive state, their likelihood of survival, and their desirability by non-commercial fishers and under a range of conditions. Schedule 6 applies to 36 species but again does not apply to all species.

18. The Act does permit fishers to catch in excess of the Total Allowable Commercial Catch (TACC) and their catch balancing capacity but that is neither illegal nor unexpected being expressly provided for in the Act. Where a fisher is unable to balance his catch with ACE, they are required to pay a deemed value on the excess catch. That payment is designed to incentivise a fisher to balance their catch by removing any ability to profit from over-catching.

19. Contrary to what some commentators contend, the current model does not enable fishers to discard what they cannot sell. Fishers are required to land all QMS species as set out in the Act except where certain QMS species can be returned to the sea under the regulated provisions (as per above). Non-QMS species can be returned to the sea. There are undoubtedly returns to the sea in contravention to the terms of the Act but they are minor compared with the overall take and do not constitute a sustainability risk. They occur for a variety of reasons, including gear failure, inappropriate catch settings, economic considerations and fisher-held sustainability concerns. There has been disagreement between parties as to the extent of the illegal returns but none of those illegal returns have ever been demonstrated or alleged to

have led to sustainability issues for stocks. We note MPI reviewed the report by Glenn Simmons who alleged New Zealand's catch was 2.7 times the amount reported to the United Nation's Food and Agricultural Organisation (FAO) and considered the report significantly overstated the issue[1].

20. With the advent of electronic reporting (2019), fishers have been able and required to report additional information not previously reported. Fisher returns for the 2019-2021 period indicate that around 19,000 tonnes of fish are returned to the sea annually (out of a total annual catch of 450,000 tonnes). Of those, returns to the sea, 37% are non-QMS species such as carpet shark and rattails, a further 39% are returns under Schedule 6 provisions (the vast majority being spiny dogfish for which no utilisation opportunity exists), a further 15% are discards of QMS fish under the authorisation of an observer, 8% are returns under MLS conditions and the remainder are accidental losses. Illegal returns to the sea must be added to those discards. The volume of such discards is much lower than perceptions or commentators would have society believe.

21. MPI has recently provided data on discards from the camera trials on the west coast of the North Island. It scanned some 616 fishing events and recorded only 6 events where there might have been an illegal discard. The volume of that fish they estimated to be 55kgs (0.005% of the total catch of 989 tonnes for the events). Discards recorded totalled 210 tonnes, of which 163 tonnes were non-QMS stocks and 47 tonnes (5% of the total catch) were legal discards of QMS fish.

22. In justifying the need for the Bill and its landing provisions, the Minister frequently resorts to mentioning the significant compliance actions of the past – Achilles, Hippocamp, Overdue. They relate to a different era, a different fleet – and the issues revealed in those operations were addressed at the time using the existing powers within the Act. They are yesterday's problems that the Minister uses to justify an attack on the industry.

23. The suggestion that commercial fishers have not been incentivised to improve fishing practices reflects an ignorance of the changes those fishers and associated companies have voluntarily made in their fishing practices. Commercial fishers have almost universally voluntarily adapted their harvesting practices to make their gear more selective and avoid capturing fish they do not wish to capture. To reduce the catch of small juvenile fish commercial fishers have almost universally moved to using different mesh orientations and net mesh sizes greater than those regulated or used historically. Commercial fishers have also almost universally moved to reduce their fishing duration to improve the quality of caught fish. Commercial fishers have almost universally become more focused on where and how they fish to reduce the level of bycatch. Commercial fishers have almost universally adopted mitigation practices, voluntarily and mandatory, to reduce protected species captures. Fish processors have sought to increase the range of fish available for sale. Fish processors have innovated and sought alternative uses for those parts of a fish or those fish species not wanted for food consumption. Those innovations and improvements have generally not been captured in any published reports and are largely the result of "business as normal" for fishers and companies.

24. The inshore finfisheries are mixed fisheries – a mixture of different species of fish of mixed age ranges and mixed desirability are caught at the same time because they will generally be found swimming in association with each other. The inshore finfish species may have different morphological forms - from large thin species such as john dory to more compact streamlined forms such as gurnard and every other shape in between. Some species are particularly spiny, e g, sea perch, while others are smoother with no or little protuberance e.g. mackerel; some

[1] https://www.mpi.govt.nz/news/media-releases/how-many-fish-in-the-sea-is-the-proper-measure-of-a-healthy-fishery/

swim vertically e.g. john dory while others swim horizontally -e.g. flounder; some are large e.g. skates while some are small ,e.g. pilchards; some are soft skinned .e.g. sea cucumbers while others are robust, e.g. snapper. It is common that a trawl will capture up to 12 different species in the same event and within that event, a range of different ages and different morphological forms. While a degree of selectivity is possible, the opportunities in the inshore finfish fisheries are significantly less than in other fisheries.

25. Contrary to common belief, fishing is a highly complex activity that requires specific knowledge, expertise and innovation to stay in business during the hard times that the industry has been and is continuing to work through. Fishing is not wasteful, not traditionally hidebound by old ways but we, as a sector, have probably focused more on innovating and improving performance than informing society as to what a good job we are doing and how our actions have improved.

26. The premises contained in the preamble of the Bill are **not a fair reflection** of the current state of the industry.

27. What are omitted from the preamble are the failings of government to utilise the QMS to properly and appropriately manage New Zealand's inshore finfish fisheries resources.

28. There is no strategic plan for the future management of New Zealand's fisheries resources, a point highlighted by the Prime Minister's Chief Science Adviser, Dr Juliet Gerrard, in her report "The Future of Commercial Fishing in New Zealand" [2]. The Ministry has made two attempts to establish a strategic plan for the inshore finfish sector. Both initiatives appear to have floated like a brick and have not seen the light of day. There appears to be no agreement as to the principles that should underpin management of New Zealand's fisheries resources. Are we to maximise sustainable utilisation of resources as set out in the Act or to achieve greater abundance under a different resource management agenda?

29. Most of our inshore finfish QMS stocks have no agreed plans as to how they should be managed. Many have never had a review of the catch limits since they were first introduced into the QMS. Many of those stocks had TACCs set on reported catches prior to the QMS, from a time when different management priorities and principles applied. There are few management driven approved research plans for inshore finfish stocks.

30. The QMS depends on being informed by science and having responsive processes. New Zealand spends only $25 million on science to inform the management of fisheries including impacts on marine ecosystems, and that amount has failed to keep pace with inflation or the needs of the management system. This is an indictment on the Government's commitment to the sustainable use of marine resources. That it has then funded enforcement activity of poor rules to the tune of over $60 million per year in preference to acquiring better management information indicates the extent of its failure to manage the marine resources appropriately. There are limited processes by which the government consults with interested parties on the status of the stocks, emerging issues and future plans.

31. It is against the above background above that Fisheries Inshore has based its submission on the Fisheries Amendment Bill.

[2] https://www.pmcsa.ac.nz/topics/fish/

SUMMARY OF SUBMISSION

32. Our submission can be summarised as follows:

Landings and Returns

a. Fisheries Inshore supports the following principles that underpin sound fisheries management– i.e.:
   i. All fish that are caught, whether QMS species or not, must be reported
   ii. QMS species mortality, including those caused by commercial fishing, must be accounted for within the fisheries management system.

b. Fisheries Inshore cannot support the principle that
   a. QMS species, live or dead, must be landed unless included in an instrument issued by the Minister – in which case they either may or must be returned to the sea.

   unless for those vessels that are required to have government owned cameras operating that are focused on the catch sorting area there is an alternative framework that operates in parallel that achieves the principles but in a manner more consistent with the purpose of the Act by using that electronic monitoring to monitor returns to the sea.

c. Fisheries Inshore supports the Minister's ability to approve instruments that, in the absence of electronic monitoring:
   i. *requires* the fisher to return the fish or plant if the Minister approves the return must be made for a biological, fisheries management or an ecosystem purpose
   ii. permit the fisher to return the fish or plant if the Minister is satisfied:
      a. the returned fish would have an acceptable likelihood of survival or
      b. the retention of the fish would have a negative economic value arising from inter alia, the possibility of damaging other fish taken by the fisher or are damaged as a result of unavoidable circumstances.

   subject to :

   i. a new provision in the Act which states the considerations a Minister must have regard to when approving instruments

   ii. a new provision that would allow a fisher to return to the sea a fish that is diseased, predated, or due to unexpected circumstances rendered unfit for human consumption

- Fisheries Inshore supports the proposal to amend s 191 so that alternative additional disposal options for fish approved in accordance with new regulations, subject to

   i. the regulations approving those alternative options being consulted with interested parties

   ii. the options complying with all the existing reporting obligations to maintain the integrity of the transfer and possession of fish

- Fisheries Inshore supports the introduction of a new defence in section 72 (5) of the Act for releasing fish to enable the release of a marine mammal

Offences and Penalties

a. Fisheries Inshore supports the introduction of the amended Offences and Penalty regime subject to the following changes:
    i. Offences should be limited to acts of deliberate illegal actions, accidental breaches of the law should not be offences
    ii. Forfeiture of vessels should only apply at the discretion of the Court to convictions of discarding more than 50 fish
    iii. Provisions are included in the Act to enable the Minister to approve an infringement offence regime but that regime must ensure the infringement offences and fees are commensurate with the level of harm involved in the offending
    iv. The proposed demerit point system be deleted and be replaced by an option within the infringement fee regime to address the risk of multiple offending
    v. If a demerits point system is to be introduced, we would not support additional observers being placed on a vessel or a vessel is subjected to full scanning of electronic monitoring for the reason of non-compliance and enforcement. If however Parliament proceeds with that proposal, the costs should not be borne by quota owners.

Pre-Set Decision Rules

a. Fisheries Inshore supports the introduction of pre-set decision rules subject to the following changes:
    i. The provision should accommodate the setting of ranges and limits but must also specify that changes of the Total Allowable Catch within those ranges shall be determined using management procedures agreed at the time of approving the pre-set decision rules, and
    ii. The revocation of a pre-set decision rule should be subject to consultation

Miscellaneous Matters

a. Fisheries Inshore supports the setting of recreational catch controls by an instrument
b. Fisheries Inshore supports the inclusion of wider electronic monitoring of fishing and fishing related activity in the definition in fisheries services subject to that not including any terrestrial electronic monitoring

Fit For Purpose

a. Fisheries Inshore considers that the legislative form for amendments proposed in the Bill do not meet the Legislation Design and Advisory Committee standards for acceptable legislation

b. We consider the issues need to be addressed and have made recommendations to progress resolution of the issues;

c. A provision should be inserted in the Act that provides for consultation with appropriate parties in respect of the implementation of any secondary legislation where this is not already required by the Act or Amendment Bill, and such consultation limited to ensuring consistency with the decision, clarity and practicality

d. The Bill is not fit for purpose in not providing for the use of future electronic monitoring

Additional Option to Landings

33. Fisheries Inshore recommends that the Act be amended to provide that, where cameras are appropriately fitted to vessels to provide coverage of returning fish or plants to the sea, fishers should:

    a. land all QMS fish they wish to land and

    b. be permitted to return to the sea any QMS fish they do not wish to land including those for which exceptions might otherwise apply

    c.

Yours

Laws Lawson
Executive Chair
Fisheries Inshore New Zealand

FISHERIES INSHORE SUBMISSION TO THE PRIMARY PRODUCTION SELECT COMMITTEE ON THE FISHERIES AMENDMENT BILL

34. The submission is structured into different components as follows:
- Fit For Purpose
  - Legislative form issues
  - Absence of consultation rights
  - Fit for the future
- The Bill's Content
  - Landings and discards
  - Offences and penalties
  - Pre-set decision rules
  - Miscellaneous
    - Recreational catch controls
    - Definition of fisheries services

FIT FOR PURPOSE

35. We consider there are a number of significant issues related to the legislative form of the amendments and the omission of references to the use of electronic monitoring that render the Bill's provisions a lost opportunity and not "fit for purpose".

Legislative Form

36. The Legislation Design and Advisory Committee (LDAC) was established in 2015 to, inter alia,

- provide advice to agencies in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared, including to:
  - focus on significant or complicated legislative proposals, basic framework/design issues, instrument choice, consistency with fundamental legal and constitutional principles and impact on the coherence of the statute book
  - assist agencies with the allocation of provisions between primary and secondary legislation
  - provide advice on delegated legislative powers
  - provide advice on the appropriateness of exposure draft bills
- help improve the quality of law making by helping to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LDAC Guidelines and discouraging the promotion of unnecessary legislation.

36. The LDAC produces guidelines for the preparation of legislation. The guidelines are endorsed by Cabinet. The most recent edition was published in 2021The guidelines indicate, inter alia:

- what matters should be contained in primary legislation,
- what matters are suitable and not suitable for inclusion in secondary legislation
- principles for the design of legislation.

37. The LDAC produces guidelines for the preparation of legislation. The guidelines are endorsed by Cabinet. The most recent edition was published in 2021[3].

38. The guidelines indicate determining what is appropriate for Parliament to delegate under an Act should take into account:
    - The legitimacy of the law—Important policy content should be a matter for Parliament to determine in the Act through an open democratic process
    - The durability and flexibility of the law—Delegation can be important to how a law (and the regulatory system it is part of) performs over time in terms of the need for change
    - The certainty or predictability of the law—If too much policy content is delegated without clearly scoped mandates, clarity about what is required by the law can be undermined
    - The transparency of the law—Layers of secondary legislation can create complexity and fragmentation in a regime.

39. The LDAC guidelines indicate, inter alia, that:
    - matters of significant policy
    - matters relating to rights
    - procedural matters if they, in effect, set the fundamental policy of a legislative scheme.
    - where the policy has the potential to give rise to wide-spread public interest or controversy (whether political or otherwise)

    should be addressed in primary legislation. Secondary legislation is appropriate where policy decisions are clear and decisive.

40. Fisheries Inshore considers the Bill unduly and excessively relies on secondary legislation to a far greater degree than is appropriate for fisheries resource management legislation. Fisheries resources are a natural resource belonging to all New Zealanders. How the resources are managed and the appropriate nature of the enforcement regime should be a matter for the scrutiny of Parliament and not delegated to a Chief Executive, Minister and the Cabinet.

41. Fisheries management sometimes generates widespread public controversy as the many campaigns, petitions, media columns, public meetings and public submissions attest. The nature of the landings policy, the offences and penalties regime and the camera installation all arise from misunderstandings and public controversy and interest, not from a strategic review of fisheries management in New Zealand.

42. The QMS provides quota owners with an in-perpetuity right to receive a share of the total allowable commercial catch. An in-perpetuity right aims to provide certainty and create incentives to invest in long-term management and in innovation. Fisheries are subject to natural fluctuations and human induced change requiring that fisheries management must be dynamic to ensure sustainable utilisation. The Act contains provisions as to how that catch and therefore quota right might be impacted by Ministerial decisions and the policy principles that guide the Minister's decisions. Ministerial decisions as to the exceptions of stocks from

[3] [Legislation Guidelines: 2021 edition | The Legislation Design and Advisory Committee (ldac.org.nz)]

the landing obligation and the terms and conditions of each exception can impact significantly on the value of those rights.

43. Fisheries Inshore does not accept that the detail of the landings and discards, offences and penalties and cameras issues are of such lesser significance that they should be set by secondary legislation without further guidance in the Act than the Bill currently provides. All the resultant measures will impact on the rights and livelihoods of a significant number of New Zealanders and on the management of one of New Zealand's greatest natural resources.

44. Where the Act requires a decision, the Act provides guidance to the decision-maker through listing the considerations the decision-maker either must or could take into consideration. For examples, see: sections 13 – sustainability measures; 15 – fishing-related mortality limits;17 – determination that stock or species be subject to quota management system; 21 setting or varying commercial catch limits; 75 - setting deemed value rates; 91 – issue of fishing permit.

45. The provisions to be inserted in the Act that enable instruments to be created for returns to the sea fail to provide any guidance to the Minister as to the considerations the Minister should take into account. The Bill identifies what may be contained in the exceptions notices but does not provide any guidance to the Minister in respect of the considerations the Minister must or should take into account in approving the exceptions. For example, it would be appropriate for the Minister to take into account the sustainability impacts on the stocks and on related species, the environmental impacts on other marine life, the impact on utilisation of the fish, the impacts on wider society, and the impacts on terrestrial environment. The Act provides no such guidance to the Minister and effectively allows the Minister to determine the policy through the setting of exceptions.

46. We do not accept that the landings policy for QMS fish should only be guided through the Minister setting out his proposed exceptions with conditions and considering feedback on the regulations that must be consulted on as per the proposed section 72A (5). Consultation at this point is to ensure the details are correctly specified rather than the fundamentals driving the headline decisions.

47. In respect of infringement offences, we note the Bill enables the making of regulations in section 297. The Bill however provides no guidance as to the objective of the policy principles that should be followed in establishing that offence regime. The Cabinet documentation equally provided no guidance. Infringement regimes have typically received considerable scrutiny by Parliament.

48. In respect of demerit points, we note that while the Bill provides for the making of regulations in section 298 as to the details of demerit points schemes, there are no provisions to be inserted in the Act as to:
    - the purpose of a demerits point system
    - provide guideline or policy for the setting of demerit points or offences subject to demerits points.

49. In fact, other than in the proposed provision enabling the demerits points system to be created, the term "demerits points" does not exist in the Act.

50. We have requested additional information on the policy intent of demerits points and received none. The Cabinet paper that approved the development of a demerit points system and was the basis of drafting instructions for the Bill contains only two references to demerits points – the first being that such a system was to be proposed and the second a recommendation that a demerits points system be introduced. There was no advice to Cabinet on the objective, purpose, issues or content of a possible demerits system. Informal

discussions with the Ministry indicated that there had not been any policy development of the proposal in the time available to get the Bill to the House.

51. The LDAC guidelines specifically state[4]:

"It is *not* (their emphasis) appropriate to empower secondary legislation that involves significant policy:

- to fill any gaps in an Act that may have occurred as a result of a rushed or unfinished policy development process;
- to avoid full debate and scrutiny of politically contentious matters in Parliament;
- solely to speed up a Bill's passage through Parliament."

52. Sections 297 and 298 of the Act are not an empowering or enabling provisions – they merely outline what may be contained in regulations to give effect to decisions made under enabling provisions elsewhere in the Act. The existing provisions in those sections do not identify who has the power to make a regulation or for what purpose. They contain no requirement for consultation on the regulations. The absence of those provisions in section 297 and 298 of the Act supports the contention that the sections do not contain enabling powers. Analysis of section 297 provisions demonstrates their linkage to decision-making powers contained in earlier parts of the Act. It would undemocratic if infringement offences and fees and a demerits point framework could be established without any consultation yet that is what is possible under the Bill's provisions. The construct used in the Bill to establish infringements and demerit points is without doubt contrary to the LDAC guidelines and acceptable legislative standards.

53. We cannot accept that the use of secondary regulation to create a penalty system of offences and demerit points without any guidance from Cabinet. Nor can we accept its use without any justification within the Bill that would allow for Parliament to consider the necessity for such a penalty satisfies in any way its inclusion in the Bill or meets the criteria of acceptable legislation as per the LDAC standards.

54. We consider that the provisions in the Bill do not include adequate detail to ensure consistent disciplined decision-making. We recommend that the Bill be sent back to the Minister with a request to ensure the Bill's provisions accord with the LDAC guidelines and provide for an equitable, democratic process to law making. However in the event that course of action isn't followed we consider that for all the situations where secondary legislation or the use of such instruments is proposed the Minister be required to follow a process that sets out the purpose of the proposed regime change, documents how it fits in with the existing regime and provides for consultation with interested parties.

Absence of Consultation Rights

55. The proposed extensive use of secondary legislation to give effect to the provisions in the Bill has brought to light the absence of consultation provisions within the amendments and more generally in the Act.

56. Section 12 Consultation requires that consultation must be undertaken in respect of decisions relating to sustainability measures (except for emergency measures undertaken under section 16) with that requirement being as follows:

"The Minister shall

[4] 14.1. Is the matter appropriate for secondary legislation? | The Legislation Design and Advisory Committee (ldac.org.nz)

consult with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Maori, environmental, commercial, and recreational interests; and

(b)provide for the input and participation of tangata whenua having—

(i) a non-commercial interest in the stock concerned; or

(ii) an interest in the effects of fishing on the aquatic environment in the area concerned—

and have particular regard to kaitiakitanga."

57. There are a further 12 provisions relating to decisions of the Minister or the Chief Executive r to consult interested parties and a further 6 provisions which require the Minister or Chief Executive to take any submissions into account when making decisions.

58. There is no general requirement in the Act for consultation on the content of any regulations or other forms of secondary legislation that are required to give effect to Ministerial or Chief Executive decisions. The wording of the secondary legislation can contain, and have contained in some instances, terminology and requirements that are inconsistent with the decision or are unclear or uncertain.

59. It is not acceptable practice that secondary legislation can be implemented without their being any requirement to consult interested parties on the content and appropriateness of the legislation.

60. In respect of the landings provisions in the Bill, Schedule 6 provisions are currently contained in the Act and are subject to at least formal Select Committee submission processes. That also applies to the penalty/fine provisions for offences.

61. The Bill provides that the Minister must consult as per the new subsection s 72A (5) for the exceptions to general requirement to land QMS fish.

62. However, the transferral of decisions on infringement offences and demerit points to Section 297 and 298 of the Act removes any formal requirement of the Minister or Chief Executive to consult with interested parties on the policies, principles, or content of that secondary legislation. The fundamental democratic right to make representation on matters that impact on an individual's rights, livelihood and future well-being is being removed by the legislative form. We cannot accept that is an appropriate course of operation.

63. Fisheries Inshore contends the absence of consultation rights to all secondary legislation by the legislative form of the Bill supports the need for the inclusion in the Act of the provisions argued above relating to the decision empowerment and the considerations to be taken into account in making decisions. A requirement to consult should be appended to that provision where this has not already been provided.

64. While that might address the need for consultation with interested parties in respect of the matters raised in the Bill, Fisheries Inshore would also seek an amendment to the Act to require consultation as appropriate and with appropriate parties in respect of all secondary legislation. That consultation would be limited in scope to ensuring consistency with the decisions made and to ensuring clarity and practicality in giving effect to the decision.

65. We recommend the Select Committee seek advice from the LDAC on the appropriateness of there being no consultation requirement for the implementation of secondary legislation in the Act.

Fit for the Future

66. Fisheries Inshore is concerned that the Bill proposes changes to a number of elements but these do not build on one another but are documented to happen in parallel rather than being designed to work in combination. There are two dangers in that approach - first there are inevitably additional costs and second unless enabled the opportunities that new technology can provide will be missed.

67. The Government has decided to place cameras on up to 300 inshore finfish fishing vessels to monitor fishing activity on the vessels and the Ministry is now commencing the implementation of that programme.

68. MPI has limited its interest in digital monitoring in the implementation stages to catch verification, i.e., verifying a capture event took place, and identifying any possible events of returning catch to the sea. While industry sees value in those objectives, industry sees greater value in extracting information of a scientific nature from within the imagery using Artificial Intelligence, for example identifying species, measuring fish lengths and monitoring returns to the sea. A catch verification objective gives no economic return to fishers or the nation and does not justify a $68m investment. There is no workstream to advance the use of digital monitoring in the ways desired by industry and no current ability for them to be advanced without industry needing to set up duplicative systems.

69. Fisheries Inshore expected to see provisions in the Bill that would allow for benefits from electronic monitoring to be incorporated into a future based fisheries management regime. The transparency and the degree of precision and reliability of electronic monitoring has improved markedly in recent times. Notwithstanding the demanding environment they will be required to operate in we can expect to see ongoing improvements in the performance of environmental monitoring including image resolution. Electronic monitoring and the extraction of fisheries management information from the imagery is seen as the way forward for fisheries management, replacing the need for outdated observer programmes and outdated "land it all" management approaches.

70. We refer you to a recent article "*Electronic monitoring in fisheries: Lessons from global experiences and future opportunities*" by Aloysius van Helmond, Lars O. Mortensen et al in Fish and Fisheries January 2020[5]. That article is extensive, reviewing trials and implementations of electronic monitoring in international fisheries, evaluating its performance, identifying issues to be addressed and providing insights as to the future direction for electronic monitoring in fisheries.

71. Their conclusions include the following:

    Findings show that the three major benefits of EM were as follows: (a) cost-efficiency, (b) the potential to provide more representative coverage of the fleet than any observer programme and (c) the enhanced registration of fishing activity and location. Electronic monitoring can incentivize better compliance and discard reduction, but the fishing managers and industry are often reluctant to its uptake. Improved understanding of the fisher's concerns, for example intrusion of privacy, liability and costs, and better exploration of EM benefits, for example increased traceability, sustainability claims and market access, may enhance implementation on a larger scale. In conclusion, EM as a monitoring tool embodies various solid strengths that are not diminished by its weaknesses. Electronic monitoring has the opportunity to be a powerful tool in the future monitoring of fisheries, particularly when integrated within existing monitoring programmes.

[5] https://onlinelibrary.wiley.com/doi/10.1111/faf.12425

72. We are extremely disappointed that given the decisions taken to address issues the Bill does not reflect or enable opportunities to have reforms build on one another to create more agile management that advances an ecosystem approach. Rather by keeping separate the solutions to the various issues, it closes its eyes to the benefits that can be gained from the adoption of new technology and innovation. In that respect, it is not fit for the future management of New Zealand's fisheries resources.

73. We recommend the Select Committee take a strategic decision to refer the Bill back to the Minister and his advisers to incorporate new provisions to ensure New Zealand has a fisheries resource management framework that positions it to adopt the benefits of electronic monitoring where this is appropriate and build a framework suitable for the future, not the past.

The Content of the Fisheries Amendment Bill

74. We now comment on the content of the Bill.

Landings and Returns

75. Fisheries Inshore supports the principles that underpin sound fisheries management in respect of commercial fishing– i.e.:
    - All fish that are caught, whether QMS species or not, must be reported
    - QMS species mortality, including those caused by commercial fishing, must be accounted for within the fisheries management system.

76. But we cannot support the principle that
    - QMS species, live or dead, must be landed unless included in an instrument issued by the Minister – in which case they either may or must be returned to the sea.

    unless for those vessels that are required to have government owned cameras operating that are focused on the catch sorting area there is an alternative framework that operates in parallel that achieves the principles but in a manner more consistent with the purpose of the Act by using that electronic monitoring to monitor returns to the sea.

77. The Bill seeks to change the landing obligations in respect of QMS stocks. The process is that the existing MLS and Schedule 6 provisions will be transferred into new instruments and then subsequently progressively reviewed and transferred to further new instruments over the period until 1 October 2026 when any stocks currently with MLS or Schedule 6 provisions not transferred to the new instrument will have their special return to the sea provisions withdrawn.

78. Clause 13 of the Bill replaces sections 72(1) to (4) of the Act with new provisions that require a fisher must not return to or abandon in the sea any fish or aquatic life that is subject to the QMS unless an exception has been approved by the Minister. Exceptions must be of the following nature:
    a. The fisher <u>must</u> return the fish or plant if the Minister approves the return must be made for a biological, fisheries management or an ecosystem purpose and the stock or species has an acceptable likelihood of survival
    b. The fisher <u>may</u> return the fish or plant if the Minister is satisfied:
        i. the returned fish would have an acceptable likelihood of survival or

ii. the retention of the fish would have a negative economic value arising from inter alia, the possibility of damaging other fish taken by the fisher or are damaged as a result of unavoidable circumstances.

79. Clause 14 of the Bill inserts a new section 72A in the Act which enables the Minister to make the instruments referred to in Clause 13.

Uncertainty

80. It is not possible from the information provided in the Act or in Cabinet papers for fishers and quota-owners to have any certainty as to the future shape of the returns to the sea policy that will finally emerge from the user of the instruments enabled in the Bill.

81. There is no indication as to how the terms "acceptable likelihood of survival" or "negative economic value" or "a biological, fisheries management or an ecosystem purpose" might be determined. They will be established during the course of the transition process. MPI has been unable to provide any indication as to how those terms might be interpreted.

82. There is no certainty as to what conditions the Minister might attach to the return exceptions. Many of the existing Schedule 6 provisions have limitations to the gear used to harvest the fish or to life-stage characteristics of the fish. It is uncertain as to what conditions the Minister might apply to the exceptions.

83. We noted earlier in our context that the MLS and Schedule 6 provisions were inconsistent between the stocks. For example, there are 11 species with an MLS and species and a further 87 species without an MLS. There are 36 species in Schedule 6. While the amended statute does not restrict the ability of the Minister, the Ministry has indicated that it will only consider the use of exception instruments for those existing stocks and species with an MLS or are on Schedule 6. There is no rationale why a live sub-adult snapper should currently be required and may under the instrument after 2026 or earlier be able to be returned to the sea but a sub-adult gurnard – equally a popular species but which currently does not have an approved MLS, should not also be returned to the sea if alive. Returns of juvenile or sub-adult fish with an acceptable likelihood of survival contribute to the sustainability of the stock. Given the inconsistencies, we recommend that exception instruments should be considered for a wider range of stocks and species to address any inconsistencies.

84. There is no certainty as to whether catch entitlements will be adjusted, in proportion to or otherwise, as a consequence of changes to exceptions or how the exception will be accounted for within the fisheries management system. Sub-MLS and Schedule 6 fish that are currently required to be returned to the sea have been reported since 2019. Prior to that time with the paper based reporting system, sub-MLS fish were not included in the TACC and some Schedule 6 species returns were also excluded from the TACC. However, the removal of MLS and Schedule 6 provisions would, in the absence of an exception, require all such fish to be landed. That would require it to be part of the catch that must be balanced with either catch entitlement or a deemed value payment. It is uncertain if there would be a compensating increase in the level of total catch entitlement to reflect the increased landing requirement. A decision not to increase the catch entitlement in full would be inequitableand might have significant impacts on fishers, quota owners and LFRs.

85. We note that different Ministers with different interpretations and agendas may choose to use the revocation and amendment powers in the proposed legislation to seek different outcomes for returns to the sea. Ministers should not have the ability to set the return to the sea policy and principles through the use of secondary legislation. It would be contrary to the LDAC guidelines that decisions made under secondary legislation should determine the policy

principles that otherwise should be contained in primary legislation. The Minister's exercise of powers to approve exceptions to returns to the sea - a critical component of the fisheries management regime - should therefore be constrained by the inclusion of policy principles and considerations in the Act.

86. We **recommend** that a new provision should be written into the Act which provides the factors the Minister must or should consider when making an instrument for an exception to the landing requirement.

Diseased, Predated or Otherwise Damaged Fish Not fit for Consumption

87. Diseased, predated and otherwise damaged fish are consequences of events outside the control of the fisher. While those events are infrequent, they can be expected to occur. It is not acceptable to create a regime that ignores this fact. Of the 660 fishing events provided to us from the West Coast North Island camera trial, MPI analysts identified 8 events where there were predated fish returned to the sea. They included a range of species and varying degrees of predation. The review also identified one barrel with an unknown substance in it being caught in a trawl.

88. Predated, diseased and damaged fish are generally unfit for human consumption and should not be stored with other fish for landing. Therefore they should be returned to the sea.

89. While s72A (2)(b)(ii) might be regarded as providing an exception for the return to the sea of predated or diseased or otherwise damaged fish, to be effective the instrument would need to identify every species and stock a priori. As drafted, the exception applies at the aggregate stock or species level. It is unlikely that this general exception will be provided meaning there will be lacuna. In practice, these events are one-offs and the requirement exists for any individual fish that is predated or diseased or by any other means made unfit for human consumption, e.g. polluted by a drum of dumped oil waste, to be legally able to be returned to the sea.

90. We have considered whether the provision to return predated or diseased or otherwise damaged fish to the sea should be a generic exception or be a defence to any challenge. As a generic exception, any challenge to the discard would require the charging officer to have reasonable cause to suspect an offence has occurred. As a defence, the charging officer does not have to have reasonable cause for the challenge and the fisher would have to prove his innocence. With the fish returned to the sea the evidence of disease, contamination, predation and damage will no longer be available.

91. We **recommend** a new provision be drafted that provides for any individual fish (as against any species or stock) made unfit for human consumption by predation, disease, or any other cause to be returned to the sea. We endorse the proposal set out in the Seafood New Zealand submission that addresses this.

Landing of Juvenile Fish

92. We are concerned that any requirement to land juvenile fish that are alive and have an acceptable likelihood of survival if immediately returned to the sea is contrary to the environmental principles in Section 9 of the Act and contrary to the purpose of the Act. Such a direction does not suggest an ecosystem approach to fisheries management. It is one thing to incidentally kill juvenile fish in the course of fishing activity but it is an entirely different proposition when a fisher is directed by the law to deliberately kill those juveniles, knowing that he could be impacting on the sustainability of the species and that those fish are his future income.

93. The more logical option for sustainability purposes and to further the purpose of the Act is to enable fishers to return all live juveniles to the sea under an exception. That might require setting additional Minimum Sizes for species that do not currently have a MLS, e.g. gurnard, kahawai and elephant fish. We would expect that any dead juvenile would need to be reported and balanced against the catch entitlement, giving fishers an incentive to avoid catching juvenile fish but at the same time avoiding any sustainability impacts by unnecessarily killing juvenile fish.

94. We **recommend** that among the considerations that the Minister must take into account when making an exception instrument is the impact on the sustainability of the fish stock/species.

Environmental Impacts

95. In respect of 72A (2)(c) exceptions, we would note that some returns of both dead and alive fish are consumed by attendant seabirds. We are concerned that the level of food supplied by the returns would be decreased by the retention of any fish deemed not to have an acceptable likelihood of survivability. That might reasonably result in a higher level of mortality of the live fish returned to the sea as the seabirds compete for the decreased level of discards and a reduction in the food generally available to seabird populations.

96. We **would** recommend that the phrase relating to the survivability of the fish be removed in the new 72A(2) (c) be removed to allow dead fish to be returned to the sea for biological, fisheries management or ecosystems purposes.

97. Where a Minister makes such a determination and cameras could be used to verify the level of returns, it would be preferable if all fish unwanted for human consumption or other profitable utilisation could be returned to the sea.

Alternative Disposal Option

98. Section 191 of the Act currently provides for two options for fishers when landing fish. They may sell their fish to an LFR who will then process and distribute the fish or, for minor limited amounts (not more than 10kg of finfish to any person in any 24 hour period) the fisher may sell directly to consumers from the vessel with which they were caught. The latter sales are commonly known as wharf sales. Clause 16 of the Bill provides for the Minister to approve through regulations an alternative method to dispose of landed fish.

99. An LFR must establish product handling processes and reporting systems that document the flow of fish into and out of their possession. They are subject to a food safety and handling regime under the Food Act, MPI audit processes and normal company business practices. Any fisher may establish an LFR company to handle fish but the process to establish and maintain that status is neither simple nor cheap.

100. There are some 190 LFRs registered with MPI. The top 10 companies receive approximately 94% of the fish landed by weight. We estimate there are approximately 30 fishers who have established themselves as an LFR to handle primarily their own fish. Those LFRs are generally in higher value species or in more remote locations where they might be unable to access other LFR facilities.

101. The Act does not require any LFR to accept any fish from a fisher – there is no obligation to do so. In many instances, the fisher will be contracted to provide fish to the LFR, fishing part of the LFRs annual catch entitlement (ACE) . In those cases, the LFR will generally accept all the fish landed by their fisher, albeit that they may not pay the fisher for the unwanted fish and

accepts it as a cost of business. We have heard of instances where LFRs will not accept unwanted fish and the fisher has had to seek an alternative receiver.

102. We have been advised by fishers that the opportunity for wharf sales has declined in recent years as a consequence of local authorities imposing restrictions that restrict access to wharf areas and to exclude sales from fishing boats on the basis of food safety and environmental health. Approximately 20 tonnes of fish per annum are sold through wharf sales, with flatfish making up 50% of those sales. Premium fish such as snapper, tarakihi, john dory, blue cod, and hapuka collectively make up less than 5% of the total sold.

103. LFRs generally have been able to arrange for the disposal of unwanted fish and waste from their processing plants. A number have their own meal plants where fish are processed to produce meal for aquaculture. Others have arrangements to supply to rendering plants that also service the meat industry. Some LFRs supply or have their own fertiliser plants to utilise the waste streams. We are aware that some LFRs deposit their waste of whole unwanted fish and offal streams in landfills but have no information on the quantity.

104. MPI has not been able to provide industry with any indication of the additional fish that will be landed as a consequence of the policy change. It will not be known with any certainty until MPI completes the review of affected stocks and the Minister makes his decisions on exceptions based on the analysis.

105. It is not known therefore whether LFRs will be able to handle the additional landings through their existing channels or whether new options might need to be considered. If we were to assume for illustrative purposes, that that there are no exceptions for MLS and all Schedule 6 and all fish are required to be landed and there are no markets for those fish, then industry will need to be able to accommodate an additional 9,000 tonnes a year of unwanted fish to dispose of. There is a low level of demand for small fish. However, any retailing of small juvenile fish is normally accompanied by public outcry as to possible sustainability impacts. It is not known how large the market for small fish is. It is likely that exception will be established for many of the MLS and Schedule 6 species and the additional landings will be substantially less than 9,000 tonnes. It is likely that, with the advent of cameras, there will be some increase in landings for fish which are currently being illegally returned to the sea, albeit the amount is not likely to be high – the Proof of Concept identified only 55kg in total occurring across 6 of 616 trips.

106. Industry is alive to opportunities to sell a wider range of fish to consumers and to better use more of the fish landed to LFRS with examination of what is currently in the waste stream. There is no need to create additional costs on businesses to encourage innovation. However, we understand that analyses of disposal options for unwanted fish and waste streams undertaken by LFRs have not to date found significant opportunities. The analyses have not been disclosed to us on commercial grounds but the general tenor is that the development of new facilities is prohibitive in view of the low volume of product, the high research costs and the uncertainty of supply in future years.

107. It is not clear what MPI has in mind for alternative disposal options. Industry would be concerned if alternative disposal options were approved that required lesser product handling documentation than currently exists for LFRs and wharf sales. Any options would need to be formally consulted with all parties prior to any specific approvals being given to a prospective participant.

108. We **recommend** that the draft provision of section191(1)(c) relating to the approval of alternative methods of disposal should define who exercises the approval and the

considerations they should take into account in approving methods and that there should be consultation with affected parties in the development of the regulation.

Release of Captured Marine Life

109. Clause 13 provides that fish may be returned or abandoned to ensure the safety of a marine mammal or cartilaginous fishes (sharks and rays) or any other protected species specified by the Minister.

110. We support that additional defence but note the onus will be on the fisher to prove that the release was within the scope of the provision. The capture of marine mammals is an unusual event but sometimes when it occurs the marine mammal is sighted in the net while the net is in the water. In these circumstances attempts are always made to release the mammal while it is alive and in the water. In the absence of a mammal being observable in a camera, it is unclear how a fisherman can prove their innocence to avail themself of the defence.

111. Fisheries Inshore **supports** the proposed defence but notes the difficulty for fishers to prove the defence if challenged

Use of Electronic Monitoring

112. Fisheries Inshore is deeply disappointed that the Bill does not provide a future based option to link electronic monitoring and the operation of the landings and returns policy for those fishing vessels that are required to take and have operating Government owned cameras. With the installation of cameras on all vessels in the inshore finfish sector, MPI will be provided with an additional tool to monitor at-sea behaviour. Rather than force fishers to land catch for which there is no utilisation option, cameras could be used at sea to monitor and using Artificial Intelligence or machine learning record and report on the nature and volume of fish returned to the sea in a transparent and reliable manner. The quality of the footage from cameras will only improve over time and we consider that the policy to allow an alternative regime should be enabled.

113. Sound fisheries management requires that all catch be recorded to inform management decisions, not that all fish be landed.

114. Fisheries Inshore **recommends** that the Act be amended to provide that, where cameras are required and are appropriately fitted to vessels to provide coverage of discard activity, commercial fishers should:
    a. land all QMS fish they wish to land
    b. be permitted to return to the sea any QMS fish they do not wish to land including for which exceptions might otherwise apply
    c. all fish to be accounted for within the fisheries mangement system.

Offences, Penalties and Demerits

115. We agree, particularly with the advent of cameras, that there is a need to augment the existing enforcement regime to address lower level offending. The current enforcement regime in the Act is based on a premise that the probability of detection is low but is balanced as a deterrent by a high penalty or fine, with forfeiture of a vessel being an additional penalty for many offences. Without other options in the Act, the only option to penalise an offending fisher is to formally prosecute the fisher. A Court process is expensive for both parties and is not an option that is necessarily commensurate with the severity of the offence.

116. The move to require cameras to be installed on over 300 inshore finfish vessels justifies a change in the penalty regime for these circumstances where now all fishing activity will be permanently recorded and can be viewed multiple times over a number of years - MPI are not clear but advised that it is likely that all will be held for 7 years. In these circumstances there is little doubt that if any offending occurs it will be able to be detected. There does not need to be high deterrent penalties and they should be graduated with the appropriate level of sanction applies that fits the harm the offence causes. The Ministry contend that the measures will provide for graduated penalties. We do not agree.

117. Clauses 20-22-of the Bill propose to implement a change to the offence of discarding fish. Whereas a maximum fine of $250,000 and automatic forfeiture of a vessel can currently be applied irrespective of the volume of offending, the Bill proposes to provide for a new offence of discarding less than or equal to 50 fish or aquatic plants to have a maximum fine of $10,000 and no property forfeiture. Fishers that discard over 50 fish or aquatic plants could face a fine of up to $100,000 with forfeiture at the discretion of the Court, and fishers that are convicted two or more times in a three-year period could receive the maximum $250,000 fine and an automatic forfeiture of a vessel.

118. In addition to changes in the level of maximum fines and forfeiture provisions, the Bill also proposes to enable the making of regulations which contain an infringement fee regime to offences in respect of fishing and related activities including the taking, possession, return, abandonment, processing or sorting of fish, transportation of fish, or measures to avoid, remedy or mitigate fishing-related mortality. There is no detail to guide the development of the infringement offences or fees.

119. Fish have different values and different amounts fish being discarded can have different impacts on sustainability. For example, the value of say 50 pilchards that were discarded might be $2.00 in total whereas the value of say 50 southern bluefin tuna could exceed the maximum fine of $10,000. It is inherently inequitable that a fisher discarding 50 pilchards should face the same potential penalty as a fisher discarding 50 tuna. The scale of the penalty should be commensurate with the value of the offending. That principle is clearly entrenched in the New Zealand justice regime.

120. We note that the level of harm in offending also relates to the impact on the sustainability of the stock/species. For example, 50 sprats are immaterial and would have no impact whatsoever on the sustainability of the sprat population but 50 crayfish may have a more material impact on the sustainability of the crayfish population in a defined managed area. A number of stocks have catch limits set at the point which balances sustainability and utilisation. Any excess utilisation, whether by retention or discarding, could impact the sustainability of the stock.

121. The Courts have been able in their judgments to differentiate between the level of harm caused by the offending. It is important that the penalties applied in any form are commensurate with the level of harm and are not determined on an arbitrary basis devoid of the level of harm.

122. Notwithstanding the above comments, discarding fish in breach of the legislated provisions remains an offence and should be addressed. The issue for Fisheries Inshore lies in the severity of the penalty to be applied.

123. We support the detailed arguments made in the Seafood New Zealand submission to the Select Committee in respect of the Bill’s provisions relating to offences and penalties. That submission provides a high-level analysis of the provisions and the principles that underpin

them. Our submission is more constrained and focuses on the details rather than the legal arguments.

Offences

124. Fisheries Inshore supports the intent of the draft provisions to differentiate between the severity of offences in the maximum penalties but for the reasons advanced in the Seafood New Zealand submission and the arguments below cannot support the proposed provisions in toto.

125. We note the provisions are based on a threshold of 50 fish to determine which maximum penalty should apply. We presume that the threshold exists as to denote the level of harm in the offence and provides an indication as to the maximum penalty for which an infringement offence might otherwise be used.

126. The Act does not allow for intent as a factor in determining the level of penalty. There is a significant difference between a fisher accidentally discarding some fish and a fisher deliberately discarding fish. The offences provisions in the Act should provide for that differentiation in the consideration of penalties. We consider accidental discards should not be considered an offence.

127. We consider that the appropriate penalty structure would be :
    - Where a fisher is convicted of deliberately discarding less than 50 fish, a maximum fine of $10,000 should apply
    - Where a fisher is convicted on a subsequent charge in separate proceedings within 3 years of the initial conviction for deliberately discarding less than 50 fish, a maximum fine of $100,000 should apply
    - Where a fisher is convicted on deliberately discarding more than 50 fish, the maximum fine should be $250,000.

128. The Bill seeks that forfeiture of a vessel or property should be automatic in the case of multiple offending. Forfeiture is a draconian penalty and should only ever be exercised on a discretionary basis by the Court taking into account all the circumstances. Fisheries Inshore **cannot support** automatic forfeiture of any vessel.

129. Fisheries Inshore cannot support the reverse onus provision that exists in clause 13(3) of the Bill. The presumption of innocence is the basis of New Zealand justice framework and any presumption of criminality should be removed from the Bill and, to the extent it exists in the Act, should be removed from the Act. In respect of alleged discarding offences, the fisher will often be unable to prove his innocence by virtue of the evidence having been returned to the sea. Fisheries Inshore **recommends** that section 72(7) (b) be removed.

Infringement Offences

130. As stated earlier, Fisheries Inshore supports the concept and intent to introduce infringement offences and fees to deal with lower level offending. The current enforcement provisions in the Act have resulted in a lack of effective measures to address lower level offending.

131. The Bill seeks only to enable the development and implementation of an infringements offence regime but contains no details on that regime. It is stated that will be developed in time. We do not accept that the provisions included constitute sound legislative practice as per the LDAC guidelines. The absence of detail precludes Fisheries Inshore being able to provide more comment on the suitability or content of the infringement regime. The absence of detail also precludes Parliament being able to scrutinise and assist in the development of the enforcement regime to support the resource management framework for New Zealand's

fisheries resources. The detail in the regulated infringement regime will effectively determine the policy to be followed. That is contrary to the LDAC guideline as to what should be contained in secondary legislation.

132. The Bill proposes in its suggested new formulation of s 297 (1) (na) to implement a new infringement regime "*without limitation*". The Bill would then enable an unchecked capacity to expand the regime to any part of the Act. This is not reasonable, and the proposed infringement regime should be constrained by the Act to specified matters.

133. As noted in our earlier addressing of the legislative form, we cannot support the section 72 provision in that it fails to designate who may approve the infringement offence and attendant fees and does not provide guidance on the content. The current penalty structure is set out in the Act and is determined by Parliament. Since the infringement offences and penalties are to be defined in secondary legislation, the Act must set out who has the authority to approve the infringement offences and provide guidance to the decision-maker.

134. Discarding is an offence and low-level offending should be enforced through infringement offences but the regime of infringement offences and fees also needs to take into account the level of harm caused by the offending. We note the guidance of the Ministry of Justice to those establishing a new infringement offence that:

> *In setting infringement fees, consideration must be given to the level of harm involved in the offending, the affordability and appropriateness of the penalty for the target group,.*[6]

135. We have noted earlier the difference in the value of different fish species. We would also note that the level of harm relates to the impact on the sustainability of the stock/species. For example, 50 sprats are immaterial and would have no impact whatsoever on the sustainability of the sprat population but 50 crayfish may have a more material impact on the sustainability of the crayfish population in a defined managed area. A number of stocks have catch limits set at the point which balances sustainability and utilisation. Any excess utilisation could impact the sustainability of the stock.

136. Fisheries Inshore **supports** the development of an infringement offence and fee regime to address lower level offending **subject to** provisions being included in the Act to enable the Minister to approve such regulations and to provide guidance on the content of the regulations and a requirement to consult representatives of those likely to be affected by the operative regime.

Demerit Points

137. The Bill proposes that a demerits points system be introduced. While the purpose and objective of such a system is nowhere described in the Bill, Ministry officials have indicated it is a provision to impose a penalty of repeat offending by a fisher. We understand that like the demerits system used for traffic violations, it is intended that demerit points would be attached to an offence and accumulated. It is not clear whether demerit points would endure or dissolve after a period. With repeat offending, the demerits points would be converted into a pecuniary penalty with a maximum amount of $10,000 and the offender would be liable for the amount. It has been suggested that failure to pay may result in the possible loss of a fishing permit.

138. Fisheries Inshore does not support the introduction of a demerits system at this time and in this form. Earlier in the submission, we argued that the creation of a demerits system under

[6] APPENDIX: POLICY FRAMEWORK FOR NEW INFRINGEMENT SCHEMES (justice.govt.nz)

the regulation making powers was an inappropriate use of the provision and that the inclusion of the provisions was inappropriate and did not satisfy the LDAC guidelines.

139. Further to those arguments, we see issues as to which party would be the recipient of the demerit points. Ostensibly, it could be any number of parties. A fishing vessel at sea operates under an operator's permit – a permit issued under Section 91 of the Act. The permit holder may be a company or a person and may or may not be in charge of the vessel when the offence occurred. The permit holder would have a defence under Section 241 of the Act that the offence was due to the act or default of another person, or to an accident or to some other cause beyond the defendant's control; and the defendant took reasonable precautions and exercised due diligence to avoid the contravention. The demerit points could also potentially be applied to the skipper in charge of the vessel. He too could argue a Section 241 defence to the allegation. The crew member who might have created the offence could argue that he had never received instructions relating to avoiding the defence. The cross defences of the parties would need to be traversed before any demerit points could be imposed on any party.

140. Any application of demerit points to the operator would have a significant impact on those operators who own and operate multiple vessels. Of the 710 operators who own vessels, 148 of those own more than one vessel, the largest number of vessels owned by a single operator being 15. It would be inequitable if the operator was to lose access to his whole fleet if one vessel is "non-compliant".

141. Lastly, we see no need for the creation of a demerits points system that will undoubtedly bring with it administrative overheads and unnecessary complexity. There exists a parallel example within the Act for the treatment of multiple offending. The deemed values system, wherein a fisher must pay a civil penalty amount for any fish landed in excess of the catch entitlement he holds, has a progressive basis that increases the amount of penalty per kilogram of fish landed as the amount of fish landed exceeds the catch entitlement. We see a similar system in the infringement fees for amateur fishers who exceed their daily catch allowance. In that system, an amateur fisher who possesses more than the daily limit for a species but not more than 2 times receives an offence fee of $250, whilst a fisher taking over 2 but less than 3 has a fee of $500.

142. We consider a progressively increasing fee could be applied for multiple offending within a year of the first offence. For example, the second offence might incur a fee of twice the fee for the first offence, a third offence a fee of say 5 times the fee for the first offence and a fourth or subsequent offence a fee of say 10 times provided as set out earlier they occur in separate events. Such a graduated range on infringement fees might be a more appropriate means to address multiple offending.

143. Fisheries Inshore **recommends** that the demerit point regime not proceed and could as one option be replaced with a ramped infringement fee structure. We consider that the infringement regime including options within it should be more fully developed and consulted on to ensure the consequences of each can be adequately assessed before the optimal option is approved by the Minister. The regulations that then provide the details for that option should then be developed and consulted on.

Consideration of the Level of Demerit Points in the Placement of an Observer

144. If our advice is accepted and the demerit points regime is not pursued some other measures will also become redundant. However, if a decision is taken by Parliament to proceed subject to suitable safeguards, then other measures in the Amendment Bill will also require further adjustment. Clause 18 of the Bill proposes through an amendment to Section 22 to insert a

new subsection 3A that would enable the chief executive to have regard for the number of demerit points recorded in deciding whether to place an observer on a vessel and for what period.

145. Observers are appointed for the primary purpose of collecting reliable and accurate information for fisheries research, fisheries management and fisheries enforcement. Fishery observers are not and cannot be enforcement officers. In contrast to the powers conferred on fishery officers, observers have no powers to investigate offences or gather evidence of offending or to enter premises (including vessels) for that purpose. The Act maintains a strict demarcation between observers and fishery officer; no fishery officer may be appointed as an observer.

146. We consider Clause 18 is an inappropriate provision to legitimise the use of observers to monitor “non-complying” permit holders’ operations (permit holders with high demerit points) effectively turning observers into de facto enforcement officers. In practical terms the reason for placement of an observer on a vessel with high demerits would be to monitor compliance and detect offences. It could also be viewed as a penalty for accruing a certain level of demerit points.

147. Appointing an observer to observe a poor performing fisher raises issues as to who should pay for the service. Observer services are normally attributed to a range of stocks which represent the fishery to be observed. Quota share owners of those stocks are then levied for the cost of services. The daily cost for an observer in the inshore sector is currently $1,560 Placements are usually for periods of a month.

148. If an observer is appointed to monitor a specific “non-complying” permit holder, a de facto enforcement role, it would be inequitable if the cost of that observer was levied against the quota owners. It would be more equitable to recover the cost from the permit holder but that is not possible under existing cost recovery rules.

149. Fisheries Inshore does not support this measure as a consequence of not supporting the introduction of demerit point. If however Parliament takes the decision to proceed with the introduction of a demerits points, for the reasons discussed above, Fisheries Inshore **recommends** that where observers are placed on vessels or full scanning of vessel imagery is requested for compliance and enforcement purposes, the costs of the service should not be recovered from the quota-owners.

Decision Rules

150. Clause 5 of the Bill inserts new section 11AAA (pre-set decision rules for sustainability measures). Other clauses make additional references to pre-set decision rules.

151. Fisheries Inshore has long advocated for streamlined decision-making for sustainability measures in the inshore sector but has had limited success in establishing and using such measures.

152. We have observed two forms of streamlined decision making in operation in fisheries management.

153. Within the inshore finfish sector, the rules have tended to be based on a simple formulaic approach such as if a stock has a performance level (in abundance from surveys or catch per unit effort) that exceeds the agreed target, catch limits would be increased by a small percentage or set to a pre-defined limit. That form allows for streamlined decisions to give benefits within a limited range but retains the ability for MPI to take appropriate action if performance decreases. While the approach has been much discussed, the absence of

management performance targets for many fishstocks stock has precluded its use. Even for this circumstance however it will be important for certainty and consistency to set out in the consultation to establish the pre-set decision / harvest control rule, the methodology that will be used to affect changes in catch limits and their size for the period that the rule operates.

154. We have observed more complex modelling in the rock lobster industry where precise informed management procedures use input data to provide specific catch limits. The pre-set decision rules used in that sector are information dependent and not range limited. As we understand it, notwithstanding approved decision rules, any review of an updated catch limit requires a consultation afresh on the model rather than the output of the model. We refer you to the discussion on this matter in the submission made by the New Zealand Rock Lobster Industry Council (NZ RLIC) and the Pāua Industry Council (PIC).

155. The clause as drafted in the Bill does not appear to provide for both options. The use of "range or limits" in clause 5 presages a predetermined amount being included in a previous sustainability decision rather than providing for the more complex formulaic construct of the rock lobster industry. We recommend the Bill be changed to address the need for both options.

156. We accept and endorse the need to have consultation to establish the decision / harvest control rules. Consultation should also obviously apply when those rules have a periodic review (usually every 5 years). We also agree that consultation is not needed when the rule is operating. However we cannot support the change in clause 12 to exempt the need for consultation when revoking or not-applying pre-set decision rules. We understand the need for the Ministry to contemplate suspending /not using the rule in the event of significant poor result in catch performance but note that any sustainability recommendation in those circumstances will need to be consulted on. We cannot support that the decision rule would be revoked or not-applied where catch performance is favourable and catch limits could be increased. In that instance, the Minister and Ministry does need to consult with parties before either revoking the rule or not applying it.

157. Fisheries Inshore **supports** the introduction of pre-set decision rules but **recommends** the definition should be extended to include the use of formulaic management procedures as well as a range or limit to the definition and that consultation is required if an approved set of decision/ harvest control rules are to be suspended or revoked.

Setting and adjusting recreational fishing controls

158. Fisheries Inshore supports the ability of the Minister to set and adjust management settings for recreational fishing using a process that is more responsive and timely and provides better protection and incentives for sustainable management. Because of the currrent machinery in the Act, there have been significant lags between the Minister agreeing to new recreational settings in sustainability decisions and the implementation of recreational fishing controls to give effect to those sustainability decisions. Application of amended controls for both recreational and commercial sectors at the same time will improve fisheries management.

159. We **support** the provisions in the Bill that allow the Minister to set or vary management controls using an instrument.

Extension of Definition of Fisheries Services

160. Section 4 of the Bill amends the definition of fisheries services to include the provision, installation, and maintenance of electronic and other equipment to observe fishing and

related activities and the submission, storage and review of electronic and other data from activities electronic observation devices.

161. The purpose of this amendment is to ensure that the costs of digital monitoring can be recovered from the fishing industry. While the Minister has decided that up to $10 million in total of digital monitoring costs will be recovered across 2023-24 and 2024-25 from those parts of the inshore fleet on which cameras are to installed and that the costs will be recovered in accordance with standard cost recovery principles in subsequent years, MPI has yet to establish the operating costs for digital monitoring as a business as usual cost.

162. Fisheries inshore is not averse to the installation of cameras on the inshore fleet but objects to their placement without there being benefits to warrant the expenditure of $68m with the threat of cost recovery from an industry that is currently in dire financial straits.

163. Fisheries Inshore understands from discussions and by looking at other measures in the Bill that it is intended that electronic monitoring will be confined to on vessels. Electronic monitoring should not be implemented by MPI in respect of any terrestrial fishing-related activity, such as LFR premises. To remove any doubt about the intended scope of the use of cameras we recommend that the wording in subsection (e) and (f) of the definition of fisheries services be amended to make clear that the equipment is on fishing vessels

fisheries services means outputs produced for the purpose of this Act or the Fisheries Act 1983 as agreed between the Minister and the chief executive; and includes—

…

e) the provision, installation, and maintenance of electronic and other equipment ***on fishing vessels*** to observe fishing and related activities, including—

(i) the return, abandonment, processing, or sorting of fish:

(ii) transportation connected with fishing:

(iii) measures to avoid, remedy, or mitigate fishing-related mortality:

(f) the submission, storage, and review of electronic and other data from activities on ***fishing vessels*** described in paragraph (e)

We would also that with other amendments in the Bill rescinding the Fisheries Act 1983, the reference to it in the chapeau of this definition seems misplaced.

164. We **do not oppose** the additional services to be included in the definition but note that the term only exists for the purpose of cost recovery.