

THE ASSOCIATION OF SEA FISHERIES COMMITTEES OF ENGLAND AND WALES

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Dear Eileen

CONSULTATION ON INTRODUCING A SYSTEM OF ADMINISTRATIVE PENALTIES FOR FISHERIES OFFENCES

1. The Association of Sea Fisheries Committees of England and Wales represents the 12 Sea Fisheries Committees of England and Wales (and, but not directly relevant for this consultation, the Fisheries Departments of Guernsey, Jersey and the Isle of Man.) The 12 Sea Fisheries Committees were created pursuant to Act of Parliament and operate under Act of Parliament. Their constitution and responsibilities are quite different from those of the 4 Fisheries Departments in the United Kingdom. The Committees are distinct from the Marine Fisheries Agency's enforcement establishment. The Committees' responsibility is to manage the fisheries, including sub-littoral fisheries, from the shoreline to points offshore 6 miles from where the baselines are drawn. The Sea Fisheries Committees have responsibilities to create manage and enforce byelaws (not relevant to this consultation – but please see below -) and to enforce, under powers conferred by Statutory Instrument, EU and UK (now England or Wales) Statutory Instruments dealing with fisheries technical conservation matters. The Committees also have marine nature conservation responsibilities but it is believed that these are not relevant to this exercise either.

The consultation paper

General

2. The Association and the Committees recognise that a trend within the Criminal Justice system is to move away from the traditional position whereby the Courts heard all criminal cases to a system which relies variously on 'decriminalisation' e.g. of parking matters in the Road Traffic Acts and fixed penalties for various other traffic offences. As DEFRA is aware, the Association and the

Committees are willing to explore the practicalities of a similar move for fisheries offences. What we ask is for a coherent system that :

is understood by those against whom allegations are made;

provides for effective remedies that are 'priced' at a level which acts as a deterrent;

allows the alternative of a hearing in Court; and,

is cost neutral for the enforcement bodies.

Q1 Can you provide estimates of the administrative burden (in time and money) of being prosecuted in Court?

3. In the case of the Committees the answer is from the point of view of bringing prosecutions.

4. The Committees operate a scale of responses to the detection of an alleged offence. These are :

a verbal warning;

a written warning;

the issue of a Home Office Caution which can, of course, be referred to in subsequent Court proceedings (after conviction and before sentence) as part of the criminal record and within the Rehabilitation of Offenders rules;

a prosecution in Court.

5. The avenue followed depends on the severity of the alleged offence.

6. Where prosecutions are taken the final preparation of a case and court work is usually done by 11 of the Committees using either an 'in-house' Solicitor provided on a repayment basis by one of their County Council/ Unitary Authority sponsors or a commercial firm of Solicitors. The South Wales Committee continues to run prosecutions led in Court by the Deputy Director. This arrangement is akin to that followed by the police before the Crown Prosecution Service was created. Solicitor's cost thus vary because of locality (and the local market rate) and whether the case is taken commercially or by local authority Solicitor.

7. The tables below gives sample rates and times for both Committee enforcement staff to prepare cases and for Solicitor preparation/prosecution. Although the instances quoted happen to be for SFC byelaw offences the information should not be disregarded for that reason. The need to collect evidence and the burden of proof in Court is just the same for byelaw offences as it is for Statutory Instrument offences. The first table has been provided by the Kent and Essex Sea Fisheries Committee who use a County Council Solicitor. The second by the North Western and North Wales Sea Fisheries Committee and costed at the commercial Solicitor rates that they are charged.

Table 1

3 guilty pleas

CASE 1 FISHING OUTSIDE PERMITTED TIME/FISHING AREA

	CFO	Vessel Crew/ Officers	Office Staff	Legal Fees
Case Preparation time	50 hours	6 Hours	Nil	
Statement/court papers/consultation with Legal	25	1-1/2 hours	1 Hour	
TOTAL	£1575.00	£360.00	£11.00	
Court Attendance	2 Appearances 6 hours	Nil	Nil	
TOTAL	£126.00	Nil	Nil	
GRAND TOTAL	£1701.00	£360.00	£11.00	£2388.00 *

* Solicitor's bill for this case not itemised

TOTAL COST OF PROSECUTION CASE NO. 1 - £4,460.00**CASE 2 SHELLFISH - NO ESCAPE GAPS FITTED**

	CFO	Vessel Crew/ Officers	Office Staff	Legal Fees
Case Preparation time	1 hour	6 hours	0	£304.00
Statement/court papers/consultation with Legal	1-1/2 hours	1 hour	2 hours	0
TOTAL	£53.00	£336.00	£22.00	£304.00
Court Attendance	1 - 1/2 hours	0	0	0
TOTAL	£32.00	0	0	0
GRAND TOTAL	£85.00	£336.00	£22.00	£304.00

TOTAL COST OF PROSECUTION CASE NO. 2 - £747.00**CASE 3 CATCHING OVER QUOTA – SHELLFISH**

	CFO	Vessel Crew/ Officers	Office Staff	Legal Fees
Case Preparation time	0	4 hours	0	0
Statement/court papers/consultation with Legal	1 hour	1 hour	1 hour	£81.00
TOTAL	£21.00	£240.00	£11.00	£81.00
Court Attendance	3 hours	0	0	0
TOTAL	£63.00	0	0	0
GRAND TOTAL	£85.00	£240.00	£11.00	£81.00

TOTAL COST OF PROSECUTION CASE NO. 3 - £416.00**ALL CASES COUNTY COUNCIL SOLICITOR USED @ £79 PER HOUR**

Table 2

5 Cases taken to court. Convictions secured in 4 cases 1 pending

Hours	Case preparation ¹	Additional staff ²	Court ³	Solicitor ⁴	Total cost
Illegal cockling	6.5	18	2	5	£1905 + time in Court in July
Illegal cockling	3.5	0	2	2	£589
Illegal cockling	3.5	0	2	2	£589
Illegal netting	4	0	1	3	£630
Lobsters	5.5	0	2	3.5	£807

¹ Case preparation costs are those associated with the paper work not the time on the beach when the offence was detected

² Additional staff costs are for targeted enforcement when extra staff are imported

³ Time in Court - time lost to 'normal' duties

⁴ Solicitors time at commercial rate of £140 per hour

8. These two examples appear to give a representative picture of costs. They are not dissimilar to the costs incurred by the other Committees. They are all for cases to be heard by Magistrates. Any case to go before a jury in the Crown Court would involve Counsel and be very much more expensive.

9. During the discussion at the time of Keith Porter's and Abigail Seager's presentation to the Association and the Committees on 5 April we were told that the Home Office had provided DEFRA with the costs of applying the current fixed penalty systems.

10. These costs are ridiculously low in the context of fisheries enforcement and the continuing need within the Fisheries Administrative Penalty system (FAP) to collect evidence for a potential Court hearing. This is hardly surprising because the Home Office information is restricted to systems where the on costs are pay, allowances, uniform and equipment. The latter is no more than a proportionate cost of a car, a note book, a speed 'gun', or for parking attendants a computerised tablet, and a share of a computerised letter generating system which also acts as an appeal system. The time spent on any of these cases is minimal. Evidence collection amounts to no more than checking a meter or a ticket or a speed 'gun' and issuing a notice either immediately or by post. These Home Office systems work on reliance that very few of those issued with notices will be aware that they can appeal or can be bothered to appeal. It is in any case relatively difficult to prove that a notice has been issued wrongly.

11. The Home Office figures do not provide a realistic comparator with fisheries enforcement and the more so as the proposal is that before any decision is taken to offer a FAP, evidence must be available in proper form to take the case to court. Far more work will rightly have to be done for the proposed fisheries FAP system than for the Home Office systems. That means that evidence collection costs to the Sea Fisheries Committees (and the Marine Fisheries Agency) will remain unchanged.

12. It is important for the funding of the Committees that the move to the FAP arrangement does not mean that prosecution costs that would hitherto have been awarded under the present system by the Courts to the Sea Fisheries Committees are lost to the Sea Fisheries Committees. A new mechanism will have to be developed with DEFRA to secure their payment. Otherwise the SFCs' already fragile budgets will not be able to cope. The same will also apply to MFA if the Treasury net off Court costs awarded before allowing financial provision to the Agency.

Q2. Do you agree with the proposal to proceed with the financial sanctions as an alternative to prosecution in appropriate cases instead of other forms of sanctioning (sic)?

13. In the circumstances described, yes. But it has to be understood that the value of landings is so relatively high that it 'pays' most fishermen to cheat the system knowing that almost any fine that a Court will award and the time and income lost from fishing for the Court hearing still represents a significant net gain in income. Penalties imposed by the Courts are seen by some fishermen simply as "occupational costs" and they are factored into their financial calculations. Sanctions of whatever type have to be set at a level that makes fishermen think very hard before deciding to cheat the system.

14. Further consideration should be given to the confiscation of gear – if necessary in consultation with the Commission. There is no reason why the gear of Continental fishermen cannot be confiscated provided that authority to do is in a Council Regulation or Act of Parliament. Licence suspension also needs to be considered seriously again, even though this sanction cannot at present be extended to foreign nationals. Although DEFRA has concerns about possible Human Rights aspects of this concept, it is exactly the same principle as a person who depends on his driving licence for a living, losing it after committing *n* offences. Equally one must expect Continental administrations to be prepared to take a similar stance.

Q3. Do you think that the proposed structure will allow sufficient provision for representations?

15. The proposed system offers sufficient provision for representation. However at the time of the offer of FAP DEFRA must expect the fisherman to bring his Solicitor with him to any interview by the District Inspector and must also expect fishermen to use the political route of 'Ministers Correspondence' to try to get off. This has been apparent for the past 8-10 years or so when fishermen and their MPs try to influence Ministers outside the advertisement and objections system that has to be gone through before SFC byelaws are confirmed by Ministers.

Q4. What are your views on this proposed process?

16. The process outlined is fine as far as it goes including only applying FAPs to EU offences. However, it is thought that significant problems will arise over time. For example, if one fisherman is offered a FAP for an EU offence, but another individual working alongside is not offered the same option for a contravention of national or byelaw infringements of the same type – or more importantly which seem to the fishermen to be of the same type. Further one and one only FAP seems unnecessarily restrictive. What happens if the next infringement is of less significance than the one for which an FAP was awarded and accepted. Does MFA have to go to Court just to be laughed out of Court? There is room in this equation for MFA to have the opportunity to award Home Office cautions as well as FAPs and

warning letters. The time scales will need to be adhered to without question so that defendants cannot delay to the point where information cannot be laid before a Court.

17. As the Sea Fisheries Committees are intended by Parliament to operate outside MFA/DEFRA/WAG they are not managed by MFA. To ensure that the FAP system is a success effective local means of establishing common understanding of the FAP rules will need to be established and common training provided for SFC personnel by MFA. This is of paramount importance and crucial if there really is to be one and one only offer of a FPA.

Q5. Which offences do you think that this system should cover?

18. In paragraph 4.4 the consultation document proposes that FAPs should only be applied to 'open and shut' cases i.e. with full admission of guilt. This rather implies that they will be restricted to matters capable of measurement or simply ascertaining incontrovertible facts i.e. net mesh sizes, twine thickness, fishing in restricted areas, fishing with prohibited gear, minimum landing sizes, carriage offences, fishing without a licence or permit etc.

Q6. How many levels of FAP should there be and what should the fixed financial value be for these?

19. Three might be appropriate set at £200, £1000 and £2000 exclusive of costs for the enforcing body. The £200 FPA should be restricted to the most minor allegations. It might be used against commercial fishermen and recreational anglers for minor (by number of undersized fish retained) minimum landing size infringements.

The Regulatory Impact Assessment

20. Paragraph 2(ii) of the Regulatory Impact Assessment is incomplete. A reference to the Sea Fisheries Committees needs to be included. It is probably sufficient to add "or Sea Fishery Committee officer" to the first box. A parallel insertion needs to be made on page 3, third paragraph so that the first lines read 'A decision will be taken by a senior official at MFA Headquarters or by a Sea Fishery Committee Chief Officer whether to offer

21. Table 1 on page 5 is incomplete and ignores the information about SFC activity already provided. It follows that the explanations drawn from the table are incomplete. On the figures in the table it is difficult to conclude that there is the serious level of non compliance that is alleged in the consultation document and has been averred by SFI/MFA staff for years. Two Court cases a week in 2000 is hardly an indicator of serious crime and less than 1 case a week in 2004 even for a smaller fleet is no more robust an indicator. Is the real problem lack of enforcement resources to identify and prosecute alleged offences? In the paragraph immediately below the table where does the figure of £400 for the cost of a Magistrates Court case come from? The cost of a Clerk, clerk's staff plus heating, lighting, rent and rates etc. must surely amount to more than that figure.

22. The language for Option 2 at the foot of page 6 seems to miss the point. Time and worry placed on businesses in this context is part of the 'stick' needed to ensure a far higher level of compliance. If fishermen find that there is a high probability of a FAP priced at a level the business can absorb – and the stigma of a

criminal record has been removed – then there is little need to worry, bother or comply! And that rather defeats the objective of the exercise. For the same reasons I doubt the second paragraph of Option 2 on page 7. I also think the conclusion at the end of 7 on page 8 is wrong or at least very weak. There is a danger that the scales of justice are being tilted to favour those who will 'try it on' and away from 'legitimate operators'.

23. I am copying this letter to Keith Porter, Abigail Seager, Glyn Perryman in WAG and to Nigel Gooding in MFA.

Yours sincerely

Peter Winterbottom

P. D. WINTERBOTTOM