

SCOTTISH LAW COMMISSION

SALMON AND FRESHWATER FISHERIES CONSOLIDATION

DRAFT RECOMMENDATIONS BY THE SCOTTISH LAW COMMISSION

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CONSOLIDATION OF THE SALMON AND FRESHWATER FISHERIES LEGISLATION IN SCOTLAND

DRAFT RECOMMENDATIONS BY THE SCOTTISH LAW COMMISSION

In these recommendations-

"The 1607 Act" means the Theft Act 1607 (c.6);

"The Solway Act" means the Solway Fisheries Act 1804 (c.xlv);

"The 1862 Act" means the Salmon Fisheries (Scotland) Act 1862 (c. 97);

"The 1868 Act" means the Salmon Fisheries (Scotland) Act 1868 (c.123);

"The 1902 Act" means the Freshwater Fisheries (Scotland) Act 1902 (c.29);

"The 1933 Act" means the Trout (Scotland) Act 1933 (c.35);

"The 1951 Act" means the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 (c.26);

"The 1976 Act" means the Freshwater and Salmon Fisheries (Scotland) Act 1976 (c.22);

"The 1986 Act" means the Salmon Act 1986 (c.62);

"The 2001 Act" means the Salmon Conservation (Scotland) Act 2001 (asp 3).

General

1. These draft recommendations deal with matters arising out of the consolidation of legislation relating to salmon and freshwater fishing in Scotland. The 1862 Act was repealed in 1986; it is included in the above list only because it is referred to in these recommendations. The Scottish provisions in the other Acts listed are either being consolidated or repealed by the consolidation. While the basic structure of the legislation is not affected by the consolidation process, we are taking the opportunity to tidy up some peripheral matters which, for a variety of reasons, have been dealt with differently in the various Acts. The aim is to provide the user of the legislation with a coherent body of law which will both assist those affected by it in the short to medium term, and enable the Parliament to make any future amendments to it from a more satisfactory base.

2. This will be the first consolidation to be dealt with by the Scottish Parliament. Since the Parliament cannot legislate for areas outwith Scotland, among the issues which require to be considered is how to deal with the Border rivers, the Esk and the Tweed, in relation to which particular provision is made in the Scotland Act 1998 (c.46). We understand that Orders in Council under section 111 of the Scotland Act will be prepared for the River Tweed and the Esk.

3. Before outlining our proposed recommendations in relation to detailed adjustments, it is right that we should deal with human rights issues.

European Convention of Human Rights

4. Some of the prohibitions in this body of legislation reverse the onus of proof in criminal cases. That is to say, they require a person, for example, found in possession of salmon in the close time to establish that it was lawfully caught, rather than requiring the prosecutor to establish that it was unlawfully caught. Further, it is possible in many cases to

convict a person of the offence charged on the evidence of a single witness, contrary to the normal Scottish practice of requiring corroboration before a conviction is possible, although in practice we understand that prosecutors seek to lead corroborating evidence wherever possible.

5. It is for consideration whether this departure from the normal rules is legitimate in terms of the European Convention on Human Rights and, in particular, of Article 6 of the Convention. In that connection we note, in relation to the second matter mentioned above, that the requirement for corroboration is not one shared by all criminal legal systems in the member states of the Council of Europe. In relation to the first matter, it is necessary to balance the interests of the accused against the interests of society in ensuring the proper implementation of the criminal law. There are other areas of the criminal law where it is thought proper to reverse the onus of proof. In relation to the poaching of salmon, the Scottish courts have noted that without the reversal of onus the legislation would be unenforceable (*Fairley v Fishmongers of London, 1951 JC 14, per LJG Cooper at 23*). It is certainly the case that where, for example, a person is found in possession of salmon in suspicious circumstances, he is in the best position to prove that it was caught lawfully: from the point of view of the prosecution, it will generally be difficult to establish the provenance of a dead fish.

6. We consider that the current arrangements are, on balance, compatible with the requirements of the Convention and we are not minded to make any recommendation in that regard. But we would welcome the views of consultees.

Conversion of imperial measurements to metric measurements.

7. Council Directive 80/181/EEC is implemented in the United Kingdom by the Units of Measurement Regulations 1995 (SI 1995/1804). Subject to certain exceptions which are not relevant for present purposes, it requires any provision of United Kingdom primary legislation which has effect for economic, public health, public safety or administrative purposes to be converted from imperial measurements to metric measurements. The phrase “economic, public health, public safety or administrative purposes” is clearly very wide and has not, to our knowledge, been authoritatively interpreted, at least not in a context which would be of assistance in this consolidation. It appears to us that there are three possibilities.

First, if the imperial measurements used in the salmon legislation fall within that definition, they must obviously be converted, and no recommendation to that effect is required.

Secondly, even if not all of the measurements could be said to fall within the definition, it seems probable that some of them could be said to be for “administrative” or “economic” purposes.

Thirdly, it is possible but not, in our view, probable, that none of the measurements fall within the terms of the Directive.

8. In either of the second and third cases mentioned above, we consider that the imperial measurements should nevertheless be converted. It would be wholly inappropriate to produce a new Act relating to salmon fishing while retaining a set of measurements whose use has been departed from for most purposes.

9. We therefore **recommend**

1. That, to the extent that conversion is not required in order to give effect to the Directive, it should nevertheless be carried out.

Rounding up or down of metric measurements

10. Further, some of the exact conversions from imperial to metric measurements produce very awkward results. For example, the exact conversion of one mile is 1.609344 kilometres. It would be sensible to adjust them so that the process of conversion does not produce absurdly detailed figures.

11. We therefore **recommend**

2. That the metric equivalents of the imperial measurements be rounded up or down to suitable metric measurements.

12. The equivalent metric measurements proposed are shown in the following table.

Imperial Measurement	Metric Measurement	Round Figure Adopted
1 mile	1.609344 km	1.5 km
8 inches	20.32 cm	20 cm
3 miles	4.828032 km	5 km
10 miles	16.09344 km	16 km

Repeal of section 22 of the 1868 Act

13. This section, read short, provides for all exports of salmon to be cleared by HM Customs and Excise and for penalties in the event of a failure to notify. We understand that the section is not used and has not been used for some considerable period. It may reasonably be regarded as spent. Further, we consider that it is almost certainly incompatible with the single market provisions of the EC Treaty on the exportation of salmon, and we understand that the European Commission have in the past requested that it be repealed.

We accordingly **recommend**

3. That section 22 of the 1868 Act should be repealed without re-enactment.

“Sheriff” and “Sheriff-Principal”

14. Sections 26, 27, 29, 31, 32 and 35 of the 1868 Act confer certain functions specifically upon the sheriff, by that name.

15. Section 4 of the Sheriff Courts (Scotland) Act 1971 provides, *inter alia*-

“(1) The office of sheriff (that is to say, the office known formerly as the office of sheriff depute, but known immediately before the commencement of this Act as the office of sheriff) shall be known as the office of sheriff principal, the office of sheriff substitute shall be known as the office of sheriff, and the office of honorary sheriff substitute shall be known as the office of honorary sheriff.

(2) Accordingly, any enactment or other document in force or having effect at the commencement of this Act which refers whether expressly or by implication, or which falls to be construed as referring, or as including a reference, to the office of sheriff (as defined in subsection (1) above, or to the office of sheriff substitute, or to the holder of any of the said offices, shall be construed in accordance with subsection (1) above.”

16. Section 4 has been interpreted as requiring the references to “sheriff” in the 1868 Act to be read as references to “sheriff principal”. In the context of the 1868 Act, the references to sheriff are juxtaposed in most cases to justices of the peace. They accordingly read more plausibly as references to a sheriff substitute.

17. Be that as it may, the nature of the functions conferred on the sheriff by the 1868 Act is much more apposite to the sheriff substitute than to the sheriff (principal).

We therefore **recommend**

4. That the references to “sheriff” in the 1868 Act be treated as if they were references to “sheriff substitute”.

Defence of possession of salmon in the close time if lawfully caught (section 21 of the 1868 Act)

18. Section 21 of the 1868 Act provides, so far as material:

“21. Any person who shall.....have in his possession any salmon takenbetween the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district, shall be liable to a penalty.....”

19. Section 6 of the 1986 Act, which replaced sections 7 and 8 of the 1862 Act, provides:

“6 (1) The annual close time for a salmon fishery district shall be a continuous period of not less than 168 days and shall apply to every mode of fishing for salmon except to the extent that provision is made for periods within that time during which it is permitted to fish for and take salmon by rod and line.”

20. There are two difficulties about these provisions.

21. The periods mentioned in the underlined part of section 6(1) of the 1986 Act are set out in regulations applicable in the particular salmon fishery district concerned. It is thus possible to fish legally for salmon using rod and line at a time when it is illegal to fish for them using nets.

22. The words underlined clearly have effect in relation to those periods within the annual close time when it is permitted to fish for salmon by rod and line. There is therefore a conflict between permitting a person to fish for and take salmon by rod and line while making it unlawful for him or her to possess that salmon during that period.

23. As a matter of practice, the courts recognise as a good defence to a charge under section 21 that the salmon was lawfully caught during the annual close time by rod and line. The courts also recognise as a good defence proof that a salmon bought, sold etc. or possessed during the annual close time was lawfully taken during the open season. Cf *Fishmongers of London v Stiven* 1912 JC 28 per Lord Salvesen at p30 – “It is a special defence which, the Courts have held, may be implied from the statute taken as a whole; but it is a defence which the accused must establish”.

24. We consider that the anomaly between section 6 of the 1986 Act and section 21 of the 1868 Act should be removed.

We therefore **recommend**

5. That a statutory defence be provided along the lines of that already recognised by the courts.

No prosecution for illegal possession of salmon in the annual close time unless the close time is in effect in every district (section 21 of 1868 Act)

25. Prior to the enactment of section 6(1) of the 1986 Act, the annual close time was a continuous period of neither more nor less than 168 days, although different starting dates were set in different districts. While the close times for different districts could and did overlap, there was invariably a period, as set out in section 21 of the 1868 Act (above) “between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district”, during which fishing for salmon by net was illegal in every fishery district in Scotland.

26. This was a sensible recognition that while salmon might have been illegally caught in a particular salmon fishery district, it would be impossible to prove that salmon in a person’s possession had been so caught as long as it was not the close time in another salmon fishery district.

27. Thus the prohibition against possession of salmon only had effect when the annual close time was in force in every district in Scotland.

28. Following the enactment of section 6(1) of the 1986 Act the annual close time has been a continuous period of “not less than” 168 days. As was intended when the amendment was made, the annual close time in some salmon fishery districts is more than 168 days. It is therefore now possible for the close time which begins earliest to finish latest. Accordingly, the period “between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district” is no longer a period when there is necessarily a close time in force in every district in Scotland. That period may now include a period when it is legal to fish for salmon by net in one or more salmon fishery districts in Scotland. This will in turn cause serious evidential difficulties.

29. We consider that this was an unintended consequence of amending the definition of the annual close time in 1986.

We therefore **recommend**

6. That the definition of the offence in section 21 be amended so as to ensure that a prosecution under that section cannot be taken at a time when any river in Scotland is open for net fishing.

30. A draft provision showing the effect of the amendments mentioned in recommendations 5 and 6 is attached as Annex A.

Removal of salmon fishing tackle during the annual close time (section 23 of the 1868 Act)

31. Section 23 of the 1868 Act requires that the owner or occupier of any salmon fishery shall, within 36 hours of the commencement of the annual close time, remove from the fishery and landing places boats, oars, nets, engines “and other tackle used in salmon fishing”. In the context of possible prosecution, there are two practices which have been tacitly accepted – namely the leaving of the pins of stake nets, and the rock fastenings for bag nets, in position. The pins are very difficult to fix or to remove, and cannot in themselves be used quickly to set up an illegal net. The rock fastenings are fixed into rocks in appropriate places on the coast and would be almost impossible to remove. (There was a prosecution brought in the early 1970s in respect of non-removal of pins (*Joseph Johnston v Ingram* 1976 SLT (N) 30) but the conviction was quashed on a technicality.) The current accepted practice is that pins and rock fastenings are permitted to remain *in situ*.

32. We consider that the accepted practice described should be legitimised.

We therefore **recommend**

7. That pins for stake nets and rock fastenings for bag nets be exempt from the requirement that “tackle” used in salmon fishing be removed in accordance with section 23 of the 1868 Act during the annual close time.

Poles and pins of certificated stake nets in the Solway (section 23 of the 1868 Act)

33. If our recommendation as to the pins of stake nets is accepted, this will draw attention to the current practice in the Solway, where the stakes as well as the pins of certificated fixed engines are left in place during the annual close time. The rationale for this practice is said to be first, that it is particularly difficult to remove and fix stakes in the Solway because of the movement of the sands and silt which mean that the poles have to be driven deep and may become very deeply embedded and, secondly, that by virtue of the operations of the Solway Commissioners in 1877, all such pieces of apparatus require to be fixed in precise locations each year. We understand that the practice of leaving the poles *in situ* is accepted locally and that prosecutions are not taken on that ground.

We therefore **recommend**

8. That the current practice in the Solway be recognised as legitimate.

34. A draft provision showing the effect of recommendations 7 and 8 is attached as Annex B.

Repeal of section 6 of the Trout (Scotland) Act 1933

35. Section 6 of the 1933 Act provides –

“6. Nothing herein contained shall affect any Act of Parliament, general or local, passed for the preservation of the salmon fisheries in Scotland, or in relation to the fishing of salmon or fish of the salmon kind in Scotland.”

36. It is not at all clear why this provision was enacted in 1933. Nothing in the other provisions of the Act have any bearing whatsoever on fishing for salmon in Scotland. There is therefore no reason to suppose that anything in that Act could affect salmon fishing.

37. On the other hand the inclusion of this provision in a new consolidation might well cause confusion to readers and users of the legislation in the future.

We therefore **recommend**

9. That this provision be simply repealed and not replaced.

Lawful methods of fishing for salmon (section 2(1) of the 1951 Act)

38. Section 2(1) of the 1951 Act provides-

“2(1) No person shall fish for or take salmon in any inland water, except by rod and line or by net and coble:

Provided that any right of fishing for salmon in existence at the commencement of this Act may continue to be exercised as if this Act had not been passed.”

39. The Act thus specifies the two generally lawful methods of fishing for salmon in inland waters (“rod and line” and “net and coble”). The inclusion of the proviso that “any right of fishing for salmon in existence at the commencement of this Act may continue to be exercised as if this Act had not been passed” was a recognition that there were one or two traditional methods of fishing of doubtful validity, and which Parliament did not intend to render illegal. The particular methods which are thought to have prompted the provision are fishing by cruives and fishing by haaf and whammel nets in the Solway; the certificated fixed engines in the Solway are also covered by the proviso. In the case of cruives, the doubt is thought to have been because, as will appear below, it is difficult to establish other than by a specific grant. The doubt in relation to haaf nets and whammel nets related to local methods of fishing.

40. Generally, we consider that it would be appropriate, if it can properly be done, to specify all the methods of fishing which are now lawful. The generally lawful methods of fishing were specified in 1951. It is not satisfactory to continue in force a provision which consolidates doubts which appear to have existed for some fifty years. It would be better to see whether the passage of half a century has done anything to resolve the doubts. The use of whammel nets was confirmed as illegal on an appeal to the High Court in 1962 (*Woodman, v Irving & Burrell* (unreported)); the position regarding certificated fixed engines, cruives and haaf nets is considered below.

Certificated fixed engines

41. The use of certificated fixed engines is not doubtful, although the Notes on Clauses for the 1951 Bill mention that the proviso to section 2(1) was in part intended to protect such fixed engines. Since the Solway has long been treated differently from the generality of fishing rivers in Scotland, in 1877 an Act was passed under which Commissioners were appointed to investigate which fixed devices, or “engines” in use in the Solway had been used in certain qualifying years. The Commissioners duly investigated, took evidence, and reported. Those fixed engines which they found to have been so used, they certified as privileged and these have since been known as “certificated fixed engines”, and their proper use has not been challenged. It therefore appears to us that it would have been open to Parliament, in 1951, to have specified the use of such engines in the Solway as a legitimate method of fishing.

Cruives

42. So far as is known, no cruives are now actually operated in Scotland but there were certain rights to cruives lawfully exercised after 1951. The method of creating a right to fish by cruive is either a specific grant from the Crown or a right acquired by prescription. In order not to interfere with rights which the 1951 Act left in place, we are of the view that the right to fish by cruive should continue to be recognised. Nevertheless, as an exception to the general rule in relation to legitimate methods of fishing, it should not be further extended. We understand that the Crown has indicated that no further grants of the right to use cruives will be made. We accordingly consider that the Crown's right to make specific grants should be formally ended, and that it should no longer be possible to acquire such rights by prescription.

Haaf nets on the Solway

43. Serious questions have been raised as to whether or not this method of fishing is legitimate in all or part of the Solway (it is clearly unlawful elsewhere in Scotland). While it is a permissible method of fishing on the English side of the Solway, it has caused more controversy on the Scottish side. The 1951 Act expressed no view on the matter. The Commissioners appointed under the Solway Commissioners Act 1877 who were tasked with deciding on the legality or otherwise of fixed engines, and the granting of Certificates to those whose use was legitimate, were clearly aware of haaf nets. They did not, however, appear to consider such nets to be fixed engines as defined by their remit. They, therefore, took no view as to the legitimacy or otherwise of their use.

44. The writers on salmon fisheries do not present any conclusive or agreed view as to the legitimacy or otherwise of the use of haaf nets. While Tait¹, at page 236, indicates that there have been many prosecutions resulting from the use of haaf nets, he further states that most of these appear to have been because their use was without the permission of the proprietors of the fishing. He goes on to state that their use without a certificate from the 1877 Commissioners was apparently liable to prosecution. Stewart², at page 366, says that 'half' nets are clearly within the definition of fixed engines; but he seems to be considering a different sort of net (he likens it to a stell net which is a variant of net and coble in which the net is held still until fish strike it when the outer end is then drawn to the shore). Scott Robinson³, at page 177, notes that haaf nets are not certificated engines for the purposes of the 1877 Act or Section 7B(1) of the 1951 Act which refers to the earlier legislation. He expresses no view as to the legality or otherwise of haaf nets on the Scottish side of the Solway.

45. Finally, Beak⁴, at page 25, says that the legal position of haaf nets has always been somewhat obscure, but the 1951 Act does not materially affect this position and that if the nets were legally used before that Act they continue to be able to be so used following its passing.

46. There appear to be no reports of successful prosecutions for the use of haaf nets in the Solway *simpliciter*, whether before or after the passing of the 1951 Act. The Report of the Hunter Committee (Departmental Committee on Scottish Salmon and Trout Fisheries 1965 cmdn 2691) did not comment on the legality of the method but recommended that steps be taken to run it down.

47. The legality of the practice was carefully considered, however, in the case of *Salar Properties (UK) Limited v Annan and Eskdale District Council* in which Lord Coulsfield was asked to declare that a haaf net is a fixed engine and is not privileged and secondly that it was *ultra vires* the respondent and legal to license the use of haaf nets within the area where they controlled the fishing rights.

¹ The Law of Scotland as applied to Game Laws and Trout and Salmon Fishing, by John Hunter Tait, 2nd edition 1928

² Stewart on the Law of Fishing, 2nd Edition 1892

³ The Law of Game, Salmon and Freshwater Fishing in Scotland, Stanley Scott Robinson 1990

⁴ Salmon and Trout Fishing: Law of Scotland, by T W Beak, 1954

48. Lord Coulsfield considers in detail the responsibilities of the Commissioners under the Solway Commissioners Act of 1877. He notes that the Commissioners issued a list of fixed engines and that they did not make any Order for or against the use of haaf nets. Lord Coulsfield expressly rejected the contention of the petitioners that, while haaf net fishing had been legal until the 1877 Act came into force, the effect of that Act was to render it unlawful. Having considered further authorities put to him by the petitioners, Lord Coulsfield came to the following view -

“In my opinion, therefore, the 1877 Act established a regime for the Solway which has to be considered and applied on its own terms. If that is correct then, for the reasons given earlier, it seems to me clear, as a matter of statutory construction, that haaf nets are not fixed engines within the meaning of the 1877 Act and are, therefore, not rendered unlawful by it, notwithstanding anything said in the *Glover Incorporation* case.”

49. After considering further authorities quoted by the petitioners Lord Coulsfield said –

“Although, therefore, I regard the question as one of some difficulty, on balance, were it necessary to do so, I would be inclined to hold that a haaf net was not a fixed engine or an illegal mode of fishing within the principles in the cases above-mentioned”.

50. While the case was not appealed, the fact remains that after a consideration of the relevant legislation and prior authorities, the Court of Session has held that haaf nets are not an illegal mode of fishing.

51. We are therefore of the view that the ambiguity deliberately left in the 1951 Act has been resolved in favour of the legitimacy of the use of haaf nets in the Solway.

52. There remains a question of how extensive the use of haaf nets in the Solway might have been. While the use of haaf nets should be recognised as lawful, their use does constitute an exception to the general rule as to the legitimate methods of fishing and, as such, should be extended no further than is necessary. While there is no reference in the books to the use of such nets otherwise than simply “in the Solway”, that is a very considerable area. We understand that this method of fishing is used only in tidal waters. Further, we understand that, in practice, such nets are used only in part of the river Nith and in a particular stretch of water in the Solway adjacent to the River Annan. It was in relation to the use of these nets in this latter area that the question arose which was decided in the *Salar Properties* case.

53. Accordingly, our view is that the use of such nets should be recognised as legitimate. Since, as noted above, it is not clear that this method of fishing is at present used except in the two areas described above, those are the only two areas mentioned in the attached draft provision.

54. We would welcome the views of consultees on this matter.

Conclusion

55. As noted above, we are of the view that the methods protected by the proviso to section 2 (1) of the 1951 Act should be clearly stated.

We recommend

10. That the methods to be recognised as lawful as at 10th May 1951 should be cruives, fixed engines certificated by the Solway Commissioners in 1877/78, and haaf nets in the areas mentioned in the attached draft provision. In relation to cruives, it should no longer be possible to acquire a right to use a cruive either by grant or by prescription.

56. A draft provision showing the effect of these recommendations is attached as Annex C.

Savings for acts done re trout for scientific purposes (section 9 of the 1951 Act)

57. Section 9 of the 1951 Act provides, so far as material-

“9(1) A person shall not be guilty of any contravention of [various provisions] in respect of any act if he does the act for some scientific purpose, or for the purpose of protecting, improving or developing stocks of fish and has obtained the previous permission in writing of the [Scottish Ministers].

(2) This section does not apply to an act relating to salmon.”

The effect of section 9 is to permit exception from most offences in relation to trout and other freshwater fish.

58. Section 1 of the 1902 Act makes it an offence to fish for, take or be in possession of [wild] trout during the annual close time for trout.

59. Section 2 of the 1933 Act makes it an offence to sell or be in possession of brown trout less than 8 inches (20 centimetres) in length during the annual close time.

60. Neither of these provisions benefits from the saving in section 9 of the 1951 Act, and the absence of such a saving has created a legal difficulty when wild trout are trapped during the close time in order to obtain eggs for artificial propagation or for scientific investigation.

61. We consider that since this Bill consolidates the legislation on trout and freshwater fish as well as salmon, the opportunity should be taken to make these two minor alterations

so as to have in place fully comprehensive savings in respect of acts done to trout for scientific etc. purposes.

We therefore **recommend**

11. That the provisions of section 9 of the 1951 Act be extended to the provisions of section 1 of the 1902 Act and section 2 of the 1933 Act.

Power of Scottish Ministers to appoint persons in relation to “any water” (section 10(5) of the 1951 Act)

62. Section 10(5) of the 1951 Act provides, so far as material-

“10(5) Any person appointed by the [Scottish Ministers] in that behalf may exercise in relation to any water any of the powers specified in subsection (1) of this section”.

63. The subsection enables Scottish Ministers to appoint persons to exercise powers otherwise available only to water bailiffs or police constables. The power is described as being exercisable in relation to “any water”. There has been discussion as to whether the phrase “any water” enables Scottish Ministers to specify the waters in which the power is to be exercised or whether the appointment is invariably in respect of all waters covered by the 1951 Act, the Scottish Ministers having therefore no discretion to specify any lesser area. As a matter of practice, the area of operation of the appointee has been restricted to a specified area, if thought appropriate.

64. We consider that the scope of the power should be made unambiguous. It is clearly unnecessary, and may be inappropriate, for such persons to be given powers for a wider area than is required.

65. Further, since the powers conferred upon persons appointed by Scottish Ministers are for most purposes equiparated with those conferred upon water bailiffs, it would be more consistent to express the former in the same terms as the latter, that is, by reference to “districts” rather than by reference to “waters”. It is only since the 1986 Act that salmon fishery districts are expressed in terms of areas of land, previously they were rivers, coast and areas of sea. We do not know why the opportunity was not taken in 1986 to carry out the rationalisation which we now recommend.

We therefore **recommend**

12. That it be made clear that Scottish Ministers may restrict the geographical area within which the powers conferred by them under that subsection may be exercised, and that the geographical area in question should be expressed in terms of “district” rather than “waters”.

66. A draft provision (Powers of water bailiffs and persons appointed by Scottish Ministers) showing the effect of this recommendation is attached as part of the draft provisions on enforcement as Annex H.

Repeal of paragraph 4 of Schedule 17 to the Water Act 1989 (section 15 of the 1951 Act)

67. Section 15 of the 1951 Act provides a power to [Scottish Ministers] to require the supply of information as to salmon fisheries from proprietors of such fisheries and others. Paragraph 4 of Schedule 17 to the Water Act 1989 (c.15) provided for the amendment to section 15 so as to confer upon the [Scottish Ministers] a power to make orders as to the information which was to be provided. That paragraph has never been commenced.

68. In practice, we understand that the information provided under the existing powers in section 15 is adequate for Ministers' purposes, and that the extra powers which would be available if paragraph 4 of Schedule 17 were commenced are not required. No doubt the matter could be re-examined in the context of some general future legislation on this matter. In the meantime we are of the view that it would be better to remove the unwanted amendment from the Statute Book.

We therefore **recommend**-

13. That paragraph 4 of Schedule 17 to the Water Act 1989 should be repealed without re-enactment.

Prohibition of the use of fish roe, fire and light (section 24(1) of the 1951 Act)

69. Section 24(1) of the 1951 Act provides –

““rod and line” means single rod and line with such bait or lure as is lawful at the passing of this Act and, in the case of fishing for salmon in an area to which and at a time during which regulations made under section 8 of the Salmon Act 1986 apply, is not specified in such regulations in respect of that area and time;”

70. As we have noted in relation to lawful methods of fishing, it is unsatisfactory to retain a provision which preserves an inspecific reference to what was lawful half a century previously. We understand that the only three baits or lures which are generally unlawful are fish roe, light and fire. It therefore seems appropriate to make specific provision in relation to those specific prohibitions. We note that if there are other baits or lures which are generally unlawful, they will be caught by the provision in the consolidation replicating section 24(2) of the 1951 Act. That section provides that nothing in [the 1951 Act] shall render legal any method of fishing which was illegal at the date of commencement of the Act.

We therefore **recommend** –

14. That the reference to such bait or lure as was lawful on 10 May 1951 be replaced by a specific prohibition of the use of fish roe, fire and light.

Fishing otherwise than by approved methods illegal in rivers where no estuary limits have been fixed (section 2(1) and 24(2) of the 1951 Act)

71. Section 2(1) of the 1951 Act provides –

“2(1) No person shall fish for or take salmon in any inland water, except by rod and line or by net and coble.”

Section 24(2) of the 1951 Act provides –

“24(2) nothing contained in this Act shall render legal any method of fishing which was or would have been illegal at the date of the commencement of this Act.”

Section 24(1) of the 1951 act defines “inland waters” as follows –

“ “inland waters” includes all rivers above estuary limits and their tributary streams, and all waters, water courses and lochs whether natural or artificial draining into the sea;”

72. The effect of these provisions is to prohibit fishing for salmon otherwise than by rod and line or by net and coble in rivers above the estuary limits. But there are a number of rivers for which no estuary limits have been fixed. While these are small rivers, many of them contain salmon. As a matter of fact, the provisions of section 2(1) simply restate what was the existing common law: the two methods of fishing identified in that subsection were the only two methods of fishing which were generally legal in the rivers (including their estuaries) throughout Scotland. While the proviso to section 2(1) preserves any other lawful method of fishing, there appears to have been no intention on the part of Parliament to legitimise any illegal method of fishing in rivers where no estuary limits had been fixed.

73. We consider that it would be sensible to make it clear on the face of the new Act that fishing in rivers where no estuary limits have been fixed is illegal otherwise than by net and coble or rod and line.

We therefore **recommend**

15. That fishing otherwise than by the approved methods should be made clearly illegal in rivers where no estuary limits have been fixed.

74. A draft provision showing the effect of this recommendation, and of recommendation 17 is attached as Annex E.

Renewal of protection orders (section 1(7) of the 1976 Act)

75. As currently drafted, section 1(7) of the 1976 Act provides for the renewal of a Protection Order but only if, on the date of the expiry of the Order, Scottish Ministers have received no “objections to renewal” or have decided that all those made are insignificant. There can therefore be a hiatus if an objection is timeously lodged and requires consideration, but in the meantime the existing order expires. Where such a hiatus does occur but renewal is thereafter granted, there may be a question as to whether this is a proper use of the renewal power. And the section as currently in force makes no provision for what is to happen if any objections to the current protection order are well founded. Logically, it seems reasonable that the renewal without further procedure should only be

possible where there are no valid objections: where there are such objections then the whole matter should be started afresh.

76. While it would be possible for Scottish Ministers to invite objections to be made by some earlier date, that could only be done informally, and could not affect their obligation to consider such objections made up to the date on which the order ceases to have effect.

77. We are of the view that this potential for a hiatus is a defect in section 1(7), that it should be remedied, and that the appropriate way to do that is to provide for objections to the renewal of protection orders to be made not later than four months before the renewal date, so that they can be considered, if appropriate, in time for renewal to take place when the order ceases to have effect. It will also be necessary to provide specifically for what is to happen when any objections to a protection order appear to the Scottish Ministers to be well founded.

We therefore **recommend**

16. That section 1 be amended so as to require any objection to the renewal of an existing Protection Order to be lodged not later than 4 months before the date of expiry of the order and considered, if necessary, by Scottish Ministers before that date, and that where any such objections are considered to be well founded then renewal without further procedure is not to be possible.

78. A draft provision showing the effect of this recommendation is attached as Annex D.

Adjustment of reference points which identify estuary limits (section 7(1) of the 1986 Act)

79. There is a minor improvement which might be made in relation to estuary limits. While section 1(4) of the 1986 Act enables the [Scottish Ministers] to make minor adjustments to the boundaries of salmon fishery districts without going through the somewhat laborious procedure set out in Schedule 1 to that Act, no such power exists in relation to the fixing of estuary limits.

80. At present, many sets of estuary limits are still as they were fixed under old enactments, such as byelaws made under the 1862 Act. While there is no disagreement as to the general line of such limits, in many cases the original markers have disappeared or have been removed. (In the case of *Duke of Athole v Maule (1812) 16 FC 537*, one marker had disappeared in shifting sands, and the other had been removed by a local farmer to make a gatepost). It would be useful and appropriate for Scottish Ministers to have a power, not involving the full procedures for the making of an estuary limits order, to rectify such minor matters.

We therefore **recommend**

17. That a power be conferred on Scottish Ministers to adjust estuary limits so as to resolve doubts or to change the reference points by which existing limits are identified.

81. A draft provision showing the effect of this recommendation, and of recommendation 15 above, is attached as Annex E.

References to two proprietors (section 12 of the 1986 Act)

82. Various provisions in the salmon fisheries legislation provide for procedures to be initiated by not less than two proprietors. The contingency of there being only one proprietor is also dealt with. Section 12(1) of the 1986 Act provides-

"Where there is in a salmon fishery district only one proprietor of salmon fisheries, for references in this Act, except under paragraph 1 of Schedule 2 to this Act, to two proprietors of salmon fisheries in a salmon fishery district for which there is no board there shall be substituted references to that sole proprietor."

83. The effect of this provision is that, except in relation to applications for the establishment of a district salmon fishery board, procedures requiring the agreement of at least two proprietors (such as an application for the making of a designation order) can be initiated by a sole proprietor.

84. That provision does not, however, cover the case where there are only two proprietors, one of whom is opposed to the initiation of the procedure in question. In such a case half of the proprietors can exercise a veto which is not open to such a proportion of the proprietors in any other case.

We therefore **recommend**

18. That section 12(1) be amended so as to secure that, where there are fewer than three proprietors, any one of them can initiate the procedures in question.

85. A draft provision showing the effect of this recommendation is attached as Annex F.

Mandatory of co-opted representative of tenant netsmen (section 13(2) of the 1986 Act)

86. The co-opted representative ("co-optee") of tenant netsmen for the purpose of District Salmon Fishery Board meetings may be a company or other non-natural person. However, the terms of section 13(2) prohibit a co-optee from appointing a person to represent it, although as a matter of practice this is in fact done. The legal position has hitherto been safeguarded by relying upon section 17(4) of the 1986 Act whereby the proceedings of a Board are not vitiated by any defect in the qualification of a person acting as a member.

87. We are of the view that this anomaly should be removed.

We therefore **recommend**

19. That provision be made whereby, when a co-opted representative of tenant netmen is not a natural person, that co-optee should be able to appoint a natural person to represent it at meetings of the relevant district salmon fishery board.

88. A draft provision showing the effect of this recommendation is attached as Annex G.

Repeal of provisions in the 1986 Act relating to Transitional District Boards

89. Section 14(8) of, and Schedule 3 to the Salmon Act 1986 provide for the constitution and proceedings of transitional district boards.

90. The intention of these provisions was to secure continuity of operations between the boards established under the Salmon Fisheries (Scotland) Act 1862 and the district salmon fishery boards constituted under the 1986 Act.

91. Paragraph 6 of Schedule 3 to the 1986 Act provides –

“6. A transitional district board shall cease to be deemed a district salmon fishery board and shall cease to have such powers and the duties on the expiry of –

(a) three years from the date of the last meeting of proprietors within the meaning of sections 18 or 24 of the Salmon Fisheries (Scotland) Act 1862 or section 3 of the Salmon Fisheries (Scotland) Act 1868; or

(b) six months from the date of the commencement of section 14 of this Act,

whichever is later.

92. Since both of those dates are now well in the past, these transitional provisions are now spent.

We therefore **recommend**

20. That section 14(8) of, and Schedule 3 to, the 1986 Act be repealed without re-enactment.

Repeal of the Solway Act except for section 9

93. The existence of a separate regime for the Scottish part of the Solway is a historical survival of a less settled political climate. The Solway Act was a comprehensive code relating to the estuary and the rivers running into it, but almost all of it has been superseded by general Scottish legislation. Provision was made in the 1860s and 1870s that the use of uncertificated fixed nets would be illegal anywhere in the Solway, even outwith the estuary limits of the various rivers running into it. For Scotland, certificates of privilege were issued under the provisions of the Solway Salmon Fisheries Commissioners (Scotland) Act 1877.

94. The only remaining section of the Solway Act which we understand to be in current use is section 9, which, read short, makes it an offence to fish for any fish other than salmon anywhere in the rivers flowing into the Solway without permission. This is, however, subject to the exception of the River Annan which had its own legislation from 1841 until 1951. The Annan legislation repealed the Solway Act in so far as relating to the River Annan and the repeal of the Annan Act in 1951 did not revive the Solway Act. Accordingly, the position now is that it is illegal to fish without permission in the rivers of the Solway area (except in the River Annan).

95. While section 9 of the Solway Act is anomalous, in relation to the regime in force throughout the rest of Scotland, we do not consider that it should be repealed in this legislation. So far as the remainder of the Act is concerned, however, we consider that it should be repealed, and that the Solway, with the exception of the provisions relating to certificated fixed engines and haaf nets, should be treated in the same way as other districts in Scotland.

We therefore **recommend** –

21. That, with the exception of section 9, the Solway Act 1804 should be repealed without re-enactment.

Enforcement

96. Section 26 of the 1868 Act authorises the granting of search warrants to “any constable or any water bailiff or other officer of a district salmon fishery board” to carry out searches on premises for the purpose of investigating alleged breaches of some 18 offences under various enactments. Section 11 of the 1951 Act extends the warrant granting power of Sheriffs and Justices of the Peace to include persons appointed by the Scottish Ministers, and to vehicles, but in relation to a shorter list of offences. Section 10 of the 1951 Act empowers water bailiffs to stop and search boats, search and examine nets or other instruments used in fishing and seize any fish instruments, boats or vehicles liable to be forfeited in pursuance of the 1951 Act without any warrant. Section 27 of the 1868 Act enables constables or water bailiffs or other officers of a district salmon fishery board to enter and remain upon lands for the purpose of detecting or preventing breaches of the 1868 Act. Finally, section 29 of the 1868 Act authorises a water bailiff or a person appointed by the Scottish Ministers to seize and detain any person found committing an offence mentioned under a wide range of enactments and hand that person over to a constable.

97. Separately, the 1976 Act makes provision for the investigation of alleged offences under protection orders to be investigated by wardens appointed by the Scottish Ministers.

98. The clear message to be derived from these different provisions as to enforcement is that Parliament perceives it to be in the public interest that the Salmon and Freshwater Fisheries Acts should be properly enforced, and that it is impracticable to leave such enforcement only to the police. But the multiplicity of powers, and the variations in them, make it extremely difficult to ascertain which enforcement powers are available in relation to which offence, and at the hands of which officer. We consider that it would be in the interests both of proper enforcement of the legislation and of clarity in identifying the

powers which may properly be exercised by different bodies if the sections mentioned above were to be consolidated into a smaller number of coherent provisions.

99. On a point of detail, section 16 of the 1951 Act empowers “any officer of a district board” to open packages suspected to contain salmon etc. It would in our view be better if this power were restricted to water bailiffs for whom a statutory appointment procedure exists. This would to some extent reduce the proliferation of officers who are entitled to carry out enforcement functions.

100. The draft provisions attached to these recommendations make no distinction between the powers conferred upon water bailiffs and those conferred upon persons appointed by Scottish Ministers. Historically, the powers conferred upon the latter have been less extensive than those conferred upon the former. There appears to be little logic in the distinction.

101. It is for consideration, and we would welcome the views of consultees upon this point, whether it would be more logical and consistent simply to provide - as the draft provision do - that the enforcement powers in the legislation should be equally exercisable by either kind of enforcement officer.

We therefore **recommend**

22. That the enforcement provisions be replaced with provisions conferring clear and specific powers on the different enforcement agencies and in relation to all offences under the Acts being consolidated.

102. Draft provisions showing the effect of this recommendation are attached as Annex H.

Forfeiture

103. Like the general provisions in relation to enforcement, the provisions as to forfeiture are confused. There are both specific and general forfeiture provisions in the 1868 and 1951 Acts. The 1986 Act applied the regime in section 19 of the 1951 Act to offences committed under section 15 of the 1868 Act. One or two mandatory forfeiture provisions still remain (cf section 24(1) of the 1868 Act.

104. Forfeiture is clearly a useful sanction against poaching but, like other sanctions, it should be clear to persons potentially affected by it what is involved. Further, we consider that such provisions as still provide for mandatory forfeiture should be repealed. In practice, we understand that all forfeiture is treated as discretionary, but the law should formally reflect that practice.

We therefore **recommend-**

23. That the existing provisions in relation to forfeiture be replaced with a single, discretionary provision.

105. A draft provision showing the effect of this recommendation is attached as Annex I.

Definition of “Salmon” and “Trout”

106. The various Acts making up this consolidation show a certain confusion as between the definitions of the fish to which they apply.

107. In the 1951 Act the following definitions were used –

“Salmon” includes all migratory fish of the species *Salmo salar* and *Salmo trutta* and commonly known as salmon and sea trout respectively of any part of any such fish;

“Trout” means non-migratory trout of the species *Salmo trutta* living in fresh waters or estuaries;

“Freshwater fish” means any fish living in fresh water, including trout, and eels and the fry of eels, but exclusive of salmon and of any kind of fish which migrate between the open sea and tidal waters;”

108. In section 40(1) of the 1986 Act the following definition is used –

“Salmon” means all migratory fish of the species *Salmo salar* and *Salmo trutta* and commonly known as salmon and sea trout respectively or any part of any such fish;

109. The principal difference between the definitions of “salmon” in the two Acts is the use of the word “includes” in the 1951 Act as opposed to the use of the word “means” in the 1986 Act. The practical effect of that difference is that while the 1951 Act will include non-migratory types of salmon, the 1986 Act definition will not. It seems that this difference was the result of a policy decision during the preparation of the 1986 Act, although the reason for the policy decision is not clear.

110. Whatever that reason may have been, we are firmly of the view that in a consolidation Act it is not appropriate to have different definitions for similar purposes in different sections: it is essential to have a single comprehensive definition. While that definition should broadly distinguish between the migratory and non-migratory types, it seems sensible for the definition of salmon to include any freshwater salmon. If they were not included, there would be difficulties about protection and enforcement: provisions relating to the young or fry of salmon would not apply to the non-migrating species, although at that stage in their development it is impossible to say whether the fish concerned will grow into a migratory or non-migratory adult.

111. If the definition of “salmon” is to include migratory species of trout, the definition of “trout” should accordingly be confined to non-migratory species of trout. There appears to have been no issue in the previous legislation with regard to the definition of “freshwater fish”. That term should continue to include non-migratory trout. Since the definition of

“salmon” is to include, exceptionally, non-migratory salmon, however, the definition of freshwater fish should not exempt those salmon from the general exclusion of “salmon”.

112. We accordingly **recommend**

24. That the following definitions be used for the purposes of the consolidation –

24.1 “Salmon” means all fish of the species *Salmo salar* and migratory fish of the species *Salmo trutta* and commonly known as salmon and sea trout respectively or any part of any such fish.

24.2 “Trout” means non-migratory trout of the species *Salmo trutta* living in fresh waters or in estuaries;

24.3 “Freshwater fish” means any fish living in fresh waters, including trout and eels and the fry of eels, but exclusive of salmon and of any fish which migrate between the open sea and tidal waters;”

Definition of “enactment”

113. The word “enactment” is defined in various ways in the various Acts which are being consolidated. A great deal of the relevant legislation was in the past made by way of bye-laws and other forms of subordinate legislation. Further, it is necessary to include in this consolidation an extension of the definition to include Acts of the Scottish Parliament.

114. We therefore **recommend**

25. That “enactment” be defined as follows –

“Enactment” includes any Act of Parliament whether public, general, local or private, any Act of the Scottish Parliament, and any instrument or order made or able to be made under either of such Acts;”.

1 Buying and selling salmon in close time[j032.doc]

- (1) Any person who buys, sells, exposes for sale or has in his possession any salmon taken within the limits of this Act during the period when the annual close time is in force in every salmon fishery district, including the River Tweed shall be guilty of an offence.
- (2) It shall be a defence to a prosecution brought under this section for the accused to prove that the salmon was caught lawfully.
- (3) The burden of proving that any salmon was caught beyond the limits of this Act shall lie on the person charged with selling the salmon, exposing it for sale or having it in his possession. [1868s21;1976sch2]
- (4) A person who commits an offence under this section may be convicted on the evidence of one witness.[1986s30(2)]

1 Removal of boats and nets during annual close time[j034.doc]

- (1) The proprietor or occupier of any salmon fishery shall within thirty-six hours after the commencement of the annual close time—
 - (a) remove and carry from such fishery, and from the landing places and grounds adjacent thereto, all boats, oars, nets, engines and other tackle used or employed by such occupier in taking salmon; and
 - (b) effectually secure the same so as to prevent their being used in fishing until the end of the close time,with the exception of such boats and oars as may be used in angling.
- (2) The proprietor or occupier of any cruive shall within thirty-six hours after the commencement of the annual close time—
 - (a) remove and carry away all the hecks, rails and inscales;
 - (b) effectually secure the same so as to prevent their being used in fishing; and
 - (c) remove all planks and temporary fixtures and other obstructions to the free passage of fish through the cruive.
- (3) Any proprietor or occupier who fails to comply with the duty imposed by subsection (1) or, as the case may be, (2) above shall be guilty of an offence.
- (4) A person who commits an offence under this section may be convicted on the evidence of one witness.[1986s30(5)]
- (5) Nothing in this section applies to—
 - (a) any ferry-boat or prevents the continued use of any boat by any owner of lands or his or her family, if the boat has the owner's name painted on it, and is secured, when not in use for lawful purposes, by lock and key; [1868s23;]
 - (b) the pins permanently fixed in the ground to assist in the support of the stakes or poles of fly nets or other stake nets;[recommendation]
 - (c) the fastenings fixed in rocks for the support of bag nets;[recommendation] or
 - (d) in the Solway, the pins and poles of certificated fixed engines.[recommendation].

1 Methods of fishing - salmon[j04.doc]

- (1) Any person who fishes for or takes salmon in any inland waters, except by—
- (a) rod and line;
 - (b) net and coble;
 - (c) lawful cruive, or
 - (d) in the Solway, a certificated fixed engine; or
 - (e) in the Annan Charter Area and the Nith, a haaf net,
- shall be guilty of an offence.[1951s2(1),(4)]
- (2) Subject to section (fixed engines in the Solway) of this Act, any person who fishes for or takes salmon in any waters in a salmon fishery district other than inland waters except by rod and line, net and coble or bag net, fly net or other stake net shall be guilty of an offence. [1951s2(1A)]
- (3) Any person who does any act preparatory to the commission of an offence mentioned in this section shall be guilty of an offence, and liable to the same punishment as if he had committed the offence mentioned.
- (4) For the purposes of this section—
- “net and coble” and “bag net, fly net or other stake net” shall be construed in accordance with regulations made under section (regulations)(4) of this Act;
 - “lawful cruive” means a cruive whose use is licensed by an express grant from the Crown or established, and not lost, prior to the coming into force of this Act, by prescription;[recommendation]
 - “certificated fixed engine” means a fixed engine certificated as privileged under section 5 of the Solway Salmon Fisheries Commissioners Act 1877 (c.ccx1);
 - “the Annan Charter Area” means the area in relation to which salmon fishing rights were conferred by the Charter of 10th July 1612 granted by King James VI in favour of the Burgh of Annan; and
 - “the Nith” means the River Nith between a line drawn from Ordnance Survey Grid Reference NX 993 597, to Ordnance Survey Grid Reference NY 081 671 and a line drawn across the river from Kingholm Quay at Grid Reference NX 975 735.

1 Increased availability of, and protection for, freshwater fishing[j071x.doc]

- (1) Where the Scottish Ministers are satisfied that, if proposals submitted to them under this section were implemented, there would be a significant increase in the availability of fishing for freshwater fish in inland waters to which the proposals relate, they may, subject to subsection (3) below, make an order (in this Act referred to as a “protection order”).
- (2) A protection order shall—
 - (a) be made in relation to such area as the Scottish Ministers may prescribe, which shall be the catchment area, or such part thereof as the Scottish Ministers think appropriate, of any river; and
 - (b) prohibit persons without legal right or without written permission from a person having such right from fishing for or taking freshwater fish in the inland waters in the prescribed area.
- (3) The Scottish Ministers shall not make a protection order unless—
 - (a) they have received proposals in writing from or on behalf of an owner of land, to which pertains a right of fishing for freshwater fish in any inland waters in the area to which the proposals relate, or an occupier of such right, in relation to the improvement of, or the giving or availability of access to, fishings; and
 - (b) they have consulted a body which in their opinion is representative of persons wishing to fish for freshwater fish in inland waters in Scotland; and
 - (c) they are satisfied that, if such proposals were implemented, fishing for freshwater fish in the area to be prescribed by them in the protection order would be available—
 - (i) to a degree, which they consider reasonable having regard in particular to what is, in their opinion, the demand, by persons who are neither owners nor occupiers of a right of fishing for freshwater fish in the waters to which the proposals relate nor members of a club which is such an owner or occupier in those waters, for fishing in that area, and
 - (ii) on such terms and conditions as they considered reasonable; and
 - (d) they have taken into consideration the need for conservation of any species of fish and have carried out such consultation in this regard as they consider necessary.
- (4) Proposals referred to in subsection (3)(a) above shall specify—
 - (a) the limits of the waters to which they relate;
 - (b) the extent to which, and the places with regard to which, it is proposed to grant leases or permits in respect of fishing for freshwater fish in those waters, and any terms and conditions (including charges) relating to such leases or permits;
 - (c) any operations which it is proposed to carry out for the purpose of improving such fishing in those waters;
 - (d) such matters as the Scottish Ministers may at any time in relation to the proposals direct;

and the person submitting such proposals to the Scottish Ministers may at any time withdraw them or, after consultation with the Scottish Ministers, modify them.

1 Estuary limits[j015.doc]

- (1) For the purposes of this section “estuary limits” means limits which divide each river including its mouth or estuary from the sea. [1986s7(6)]
- (2) The estuary limits of a river shall be the limits fixed and defined under—
 - (a) an estuary limits order made under subsection (3) below; or
 - (b) subject to any order made under paragraph (a) above, by judicial decision,and, where no such limits have been fixed as provided for in the preceding paragraphs of this subsection, the estuary limits of a river shall be the natural limits which divide a river (including its estuary) from the sea.
- (3) The Scottish Ministers may, in relation to any river, by order (in this Act referred to as an “estuary limits order”) prescribe limits which shall be the estuary limits for that river. [1986s7(2)]
- (4) Paragraphs 5, 6 and 10 to 15 of schedule (procedure) to this Act shall have effect in relation to the making of an estuary limits order. [1986s7(5)]
- (5) Where the estuary limits of any river have been fixed, and after consulting such persons as they think fit, the Scottish Ministers may, by order—
 - (a) where there is doubt as to the position of particular estuary limits, make provision for removing that doubt; or
 - (b) change a reference used in describing estuary limits where the suitability of that reference for that purpose has lessened or ceased,but such an order shall not be an estuary limits order. [recommendation]

1 Where fewer than three proprietors in a salmon fishery district[j082x.doc]

Where there are in a salmon fishery district fewer than three proprietors of salmon fisheries, for references in this Act, except under paragraph 1 of schedule (procedure) to this Act, to two proprietors of salmon fisheries in a salmon fishery district for which there is no board there shall be substituted references to any one of those proprietors. [1986s12(1), recommendation.]

Mandatories

1 Mandatories[j083x.doc]

- (1) A qualified proprietor or an elected member or convener of a district salmon fishery board may at any time authorise a person to act on his behalf; and such a person is referred to in this Act as a “mandatory”.
- (2) A mandatory may as such be elected under schedule (procedure) to this Act as a representative of qualified proprietors or as convener but, subject to subsection (4) below, a person may not authorise another to act as a co-opted member under this Act nor shall a mandatory be co-opted under section XX(2) of this Act.
- (3) A person who is both an upper and a lower proprietor by virtue of section XX(5) of this Act may authorise a person in accordance with this section in either or both of those capacities or may do so in each capacity.
- (4) Where a co-opted member is not a natural person, it may authorise a natural person to represent it for the purposes of this Act.[1986s13, recommendation]

1 Grant of warrant to search premises or vehicles [j036a.doc]

- (1) Any sheriff or justice of the peace, upon information on oath that there is probable cause to suspect that—
 - (a) a breach of any of the provisions of this Act has been committed; or
 - (b) any salmon or trout illegally taken, or any illegal nets or other engines or instruments are concealed,on any premises or in any vehicle, may by warrant under his hand authorize and empower any constable, water bailiff or person appointed by the Scottish Ministers under section 51(5) of this Act, to enter such premises or vehicle, if necessary by force, for the purpose of detecting such offence, or such concealed fish or instruments, and to seize all illegal nets, engines or other instruments, or any salmon or trout illegally taken, that may be found on such premises or in such vehicle. [1868s26;1951s11(1)]
- (2) A warrant granted under this section—
 - (a) may specify the time or times in the day or night at which it may be exercised; and
 - (b) shall not continue in force for more than one week from the date on which it is granted. [1868s26]
- (3) A person authorised by a warrant issued under subsection (1) above to search any premises or any vehicle may search every person who is found in, or whom he has reasonable ground to believe to have recently left or to be about to enter, those premises or that vehicle, as the case may be. [1951s11(2)]
- (4) No female shall in pursuance of any search authorised by this section be searched except by a female. [1951s11(6)]

1 Powers of constables [j048a.doc]

- (1) A constable who has reasonable grounds for suspecting that an offence against any of the provisions of this Act has been committed, and that evidence of the commission of the offence is to be found in any vehicle, but who considers that by reason of urgency or other good cause it is impracticable to apply for a warrant to search such vehicle, may stop and search that vehicle and any person who is found in, or whom he has reasonable grounds to believe to have recently left or to be about to enter the vehicle. [1951s11(3)]
- (2) A constable who has reasonable grounds for suspecting that an offence against any of the provisions of this Act is being committed and that evidence of the commission of the offence is to be found in any premises (other than a dwelling house or any yard, garden, outhouses and pertinents belonging thereto or usually enjoyed therewith) but who considers that by reason of urgency or other good cause it is impracticable to apply for a warrant to search such premises, may search them without warrant. [1951s11(3A)]
- (3) Any constable may exercise [in relation to any water] any of the powers conferred on a water bailiff by section XX of this Act. [1951s10(4)]
- (4) No female shall in pursuance of any search authorised by this section be searched except by a female. [1951s11(6)]

1 Powers of constables, water bailiffs [and persons appointed by the Scottish Ministers] to enter land [j430.doc]

- (1) Any constable, water bailiff [or person appointed by the Scottish Ministers] may enter and remain upon any land in the vicinity of any river or of the sea coast during any hour of the day or night for the purpose-
 - (a) of preventing a breach of the provisions of this Act; or
 - (b) of detecting persons guilty of any breach of those provisions.[1868s27, recommendation]

1 Powers of water bailiffs and persons appointed by the Scottish Ministers [j046a.doc]

- (1) Any water bailiff within his district may do all or any of the following things—
 - (a) examine any dam, fixed engine or obstruction, or any lade, and for that purpose enter on any land;
 - (b) stop and search any boat which is used in fishing or any boat which there is reasonable cause to suspect of containing salmon or trout;
 - (c) search and examine nets or other instruments used in fishing or any basket, pocket or other receptacle capable of carrying fish, which there is reasonable cause to suspect of containing salmon or trout illegally taken;
 - (d) seize any fish, instrument or article, boat or vehicle liable to be forfeited in pursuance of this Act. [1951s10(1)]
- (2) A water bailiff who has reasonable grounds for suspecting that an offence against any of the provisions of this Act has been committed and that evidence of the commission of the offence is to be found in any vehicle on any private land adjoining any water within his district or any adjoining district or in any stationary vehicle on a road within the meaning of the Roads (Scotland) Act 1984 (c.54) adjoining such water or such land, may search that vehicle. [1951s11(4)]
- (3) Any water bailiff may exercise in any district adjoining that of the district salmon fishery board by which he was appointed any power which he may lawfully exercise in the district of such board. [1951s10(2)]
- (4) The production by a water bailiff of the instrument of appointment purporting to be signed on behalf of the district salmon fishery board by which he was appointed, or of any badge or other device indicating his appointment and purporting to be issued by such board, shall be a sufficient warrant for the exercise of any power conferred on such water bailiff by or in pursuance of this Act. [1951s10(3)]
- (5) Any person appointed by the Scottish Ministers in that behalf may exercise in relation to such district or districts as may be specified in the instrument of appointment any of the powers specified in subsection (1) above, and the production of the instrument of appointment purporting to be signed by or on behalf of the Scottish Ministers shall be a sufficient warrant for the exercise of any such power. [1951s10(5),11(5)note]
- (6) It shall be lawful for a water bailiff, or a person appointed by the Scottish Ministers under subsection (5) above, without any warrant or other authority than this Act, to seize and detain any person who shall be found committing an offence against any provision of this Act to deliver such person to a constable. [1868s29;1951s12(2)]
- (7) For the purposes of this section “land” includes land covered by water, but does not include a dwelling house or any yard, garden, outhouses and pertinents belonging thereto or usually enjoyed therewith. [1951s10(7)(part)]

1 Offences in relation to obstruction[j047.doc]

Any person who refuses to allow—

- (a) a constable;
- (b) a water bailiff; or
- (c) any person acting in pursuance of section XX(5) of this Act,

to exercise any power conferred on him by or in pursuance of this Act, or who obstructs the exercise of any such power, shall be guilty of an offence. [1951s10(6)]

1 Forfeiture [j403.doc]

- (1) Any person who is convicted of an offence against any of the provisions of this Act shall be liable to the forfeiture of—
 - (a) any fish illegally taken by him or in his possession at the time of the offence;
 - (b) any instrument or article by which the offence was committed;
 - (c) any vehicle or boat used by him to assist in the commission of the offence.
- (2) Any vehicle or boat forfeited under this section shall be disposed of as the court may direct.[1951s19]
- (3) Any fish seized under this section as liable to forfeiture may be sold by the person seizing it, and the net proceeds of the sale shall be liable to forfeiture in the same manner as the fish sold.
- (4) No person shall be subject to any liability on account of any neglect or failure to exercise the powers conferred by this section.[1951s20]