

SCOTTISH LAW COMMISSION
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Report on the Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland

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Report on the Consolidation of certain Enactments relating to Salmon and Freshwater Fisheries in Scotland

To: Jim Wallace Esq QC MSP, Deputy First Minister and Minister for Justice

The Bill which is the subject of this Report consolidates the principal enactments relating to salmon and freshwater fisheries in Scotland. In order to produce a satisfactory consolidation the Report makes recommendations which are summarised in Appendix 1 to this Report.

Appendix 2 lists those who have been consulted in connection with the recommendations. Appendix 3 lists those who responded to the consultation. The comments received from consultees have been taken into account in framing the recommendations.

(Signed) RONALD D MACKAY, *Chairman*

12 September 2002

Recommendations

In these recommendations -

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

"The Solway Act" means the Solway Firth 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 1877 Act" means the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (c ccxl);

"The 1902 Act" means the Freshwater Fish (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 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 The 1862 Act was repealed in 1986; it is included in the above list only because it is referred to in these recommendations. The Scottish provisions in the other Acts listed are either being consolidated or repealed by the consolidation.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 using it in the short to medium term, and enable the Scottish 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 1998.¹ We understand that Orders in Council under section 111 of the Scotland Act will be prepared for the River Tweed and the Esk. While there are of course separate (local) Acts regulating fishing on the Tweed, many of the provisions of the general legislation apply to that river, either wholly or subject to some variation. It would be difficult to separate out which provisions of the general law clearly have no application to the Tweed. For that reason section 71 of the Bill repeals provisions only in so far as they do not relate to the River Tweed: these will require to be

¹ c 46.

repealed by the appropriate Order in Council. Similarly, the Bill does not alter the existing law in relation to the Upper 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 on Human Rights

4. Some of the prohibitions in this body of legislation reverse the onus of proof in criminal cases. For example they require a person found in possession of salmon in the close time to establish that it was lawfully 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.² 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. In considering this matter we have taken account of some recent decisions of the courts following the coming into force of the Human Rights Act 1998.³ In *R v Lambert*⁴ the court considered the nature of a provision transferring the onus of proof. Lord Steyn analysed the matter as follows:⁵

"Where there is objective justification for some inroad on the presumption of innocence the legislature has a choice. The first is to impose a legal burden of proof on the accused. If such a burden is created the matter in question must be taken as proved against the accused unless he satisfies the jury on a balance of probabilities to the contrary ... The second is to impose an evidential burden only on the accused. If this technique is adopted the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the jury as to the matter beyond reasonable doubt in the ordinary way."

7. The court in *Lambert* came to the view that it would rarely, if ever, be proper to impose a persuasive, as opposed to an evidential, burden of proof on an accused person.

² *Fairley v Fishmongers of London*, 1951 JC 14, per Lord Justice General (Cooper) at 22-23.

³ c 42.

⁴ [2001] 3 All ER 577.

⁵ *Ibid* at 591.

They noted that following the decision in *R v DPP, ex parte Kebilene*,⁶ that Parliament had adjusted provisions imposing a burden of proof on the accused so as to make it clear that the burden being imposed was an evidential rather than a persuasive one.⁷ They referred in particular to section 118(2) of the Terrorism Act 2000⁸ which provides that:

"If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

8. The decision of the House of Lords in *Lambert* has been considered in (at least) two further cases. In *R v Carass*⁹ the accused person was charged with a conspiracy to defraud the creditors of a company. Under the Insolvency Act 1986¹⁰ it was provided that it was a defence for a person charged to prove that he had no intent to defraud. The Court of Appeal held that the persuasive burden of proof enacted in that provision was not justified by the circumstances of such offences. They accordingly "read down" the relevant provision by reference to section 3 of the Human Rights Act.

9. On the other hand, in *R v Drummond*¹¹ the Court of Appeal held that:

"... the legislative interference with the presumption of innocence in section 15 of the Road Traffic Offenders Act 1988 amounts to an imposition of a persuasive burden on the defendant and that such interference is not only justified but is also no greater than necessary."

10. So it seems clear that the decision as between an evidential or a persuasive burden of proof is one to be determined in the light of the circumstances of the individual offence. There is one further point to be made. The imposition of the lesser, evidential burden does not necessarily prejudice the operation of the legislation in question. In *R v Lambert* Lord Hope said:¹²

"The practical effect of ... imposing an evidential burden only on the accused and not a persuasive burden ... is likely in almost every case that can be imagined to be minimal."

11. The same point was made in the *Carass* case:¹³

"With an evidential burden it will be for a defendant to produce some evidence that any concealment established against him was not with the intention to defraud. Common sense dictates that if concealment is proved the evidential burden will itself be quite a difficult burden for the defendant to surmount. If however he were to surmount it, then it would be less than satisfactory if he could still be convicted if the jury were not sure that he had intended to defraud."

12. Applying these principles to the cases in which the salmon legislation reverses the onus of proof, we have come to the conclusion that, while it might be arguable that the

⁶ [2000] 2 AC 326.

⁷ [2001] 3 All ER 577 per Lord Steyn at 593.

⁸ c 11.

⁹ [2002] 1 WLR 1714.

¹⁰ c 45.

¹¹ [2002] EWCA Crim 527 at para 34.

¹² [2001] 3 All ER 577 at 607.

¹³ [2002] 1 WLR 1714 at 1729-1730.

current persuasive burden of proof continues to be justified, it would be preferable to adopt a more cautious approach by changing the onus to an evidential onus.

13. Accordingly, we recommend that:

1. **The reverse onus of proof provisions in the salmon legislation should be adjusted from a persuasive to an evidential burden of proof.**

Effect is given to this recommendation in section 61 of the Bill.

Electronic communications

14. Since work began on this consolidation the Electronic Communications Act 2000¹⁴ has been passed and brought into force. While it is competent, under that Act, for Ministers to make orders amending other legislation so as to enable electronic communications to be used for various purposes under those statutes, this has not yet been done in any of the measures to be consolidated by the Bill. We have accordingly considered whether it would be appropriate for us to suggest amendments to some of the provisions in the legislation relating to salmon.

15. Clearly, many of the references in this legislation to matters being done in writing could not appropriately be done electronically. For example, where a person is fishing with the written permission of the proprietor, it would be essential for him, if challenged, to have that authorisation physically on his person. It is difficult to see how an electronic communication could assist in that sort of situation. Similarly, a water bailiff challenged to produce his written authority from Scottish Ministers or a District Salmon Fisheries Board should have the physical document available.

16. On the other hand, there are cases where applications require to be made to the Scottish Ministers or to a District Salmon Fisheries Board and where we can see no reason why, in modern times, such applications should not be made electronically. The particular provisions which we have in mind are applications under section 1 of the 1976 Act (Protection Orders), proposals made to Scottish Ministers in relation to regulations as to baits and lures (section 8 of the 1986 Act), requests by members of a District Salmon Fisheries Board that a meeting should be held (section 17 of the 1986 Act), applications to Scottish Ministers in relation to designation orders, estuary limits orders etc (schedule 1 to the 1986 Act) and applications in relation to regulations as to conservation of salmon (section 1 of the 2001 Act; section 10A of the 1986 Act).

17. We therefore recommend that:

2. **Certain provisions in the 1976 and 1986 Acts should be amended so as to enable the matters referred to in them to be dealt with electronically.**

Effect is given to this recommendation in sections 33, 46 and 48 of, and paragraph 16 of Schedule 1 to, the Bill.

¹⁴ c 7.

Rounding up or down of metric measurements

18. The "Units of Measurement Directive"¹⁵ provides for the phasing out of imperial units of measurement in their use for economic, public health, public safety or administrative purposes. The Units of Measurement Regulations 1995 (SI 1995/1804) implemented the Directive for those uses of imperial measurements for which implementing legislation had made no specific provision. No specific provision was made to amend the imperial measurements in the salmon and freshwater fisheries legislation. Thus, with effect from 1 October 1995, the 1995 Regulations converted the imperial measurements to exact metric equivalents.

19. However, some of the exact conversions from imperial to metric measurements made by the 1995 Regulations produce very awkward results. For example, the exact conversion of one mile is 1.609344 kilometres. As the legislation is being consolidated it seems to us appropriate to take the opportunity to adjust the metric measurements so that they do not produce absurdly detailed figures. In this connection we have notified the Bill to the European Commission under the Technical Standards Directive¹⁶ and have received no adverse comments.

20. We therefore recommend that:

- 3. The metric equivalents of the imperial measurements should be rounded up or down to suitable metric measurements.**

21. The equivalent metric measurements proposed are shown in the following table, along with details of the provisions of the Bill giving effect to this recommendation.

Imperial Measurement	Metric Measurement	Round Figure Adopted	Provisions in draft Bill giving effect to this recommendation
8 inches	20.32 cm	20 cm	Section 22
1 mile	1.609344 km	1.5 km	Sections 6 and 8
3 miles	4.828032 km	5 km	Section 34(4)
10 miles	16.09344 km	16 km	Schedule 3, para 5(4)
12 nautical miles	22.236 km	22 km	Section 5

¹⁵ Council Directive 80/181/EEC.

¹⁶ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998.

"Sheriff" and "Sheriff-principal"

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

23. Section 4(1) and (2) of the Sheriff Courts (Scotland) Act 1971¹⁷ provides that:

"(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 office of honorary sheriff substitute, or to the holder of any of the said offices, shall be construed in accordance with subsection (1) above."

24. 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.

25. 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.

26. We therefore recommend that:

4. The references to "sheriff" in the 1868 Act should be treated as if they were references to "sheriff substitute".

Effect is given to this recommendation in sections 40, 52 and 62 of, and Schedule 2 to, the Bill.

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

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

"Any person who shall ... have in his possession, any salmon taken ... 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, shall be liable to a penalty ...".

28. Section 6(1) of the 1986 Act, which replaced sections 7 and 8 of the 1862 Act, provides that:

"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 and taking 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.*"

¹⁷ c 58.

29. There are two difficulties about these provisions.

30. The periods mentioned in the italicised 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.

31. The words in italics 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.

32. 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.¹⁸

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

34. We therefore recommend that:

5. **Statutory defences to the offence in section 21 of the 1868 Act should be provided along the lines of those already recognised by the courts, namely that the salmon in question was lawfully caught during the annual close time by rod and line and that salmon bought, sold etc or possessed during the annual close time was lawfully taken during the open season.**

Effect is given to this recommendation in section 16(2) of the Bill.

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)

35. 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.

36. 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.

¹⁸ *Fishmongers of London v Stiven* 1912 JC 28 per Lord Salvesen at 30 – "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".

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

38. 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.

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

40. We therefore recommend that:

6. **The definition of the offence in section 21 of the 1868 Act should 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.**

Effect is given to this recommendation in section 16(1) of the Bill.

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

41. 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.¹⁹ The rock fastenings are fixed into rocks in appropriate places on the coast and would be almost impossible to remove. The current accepted practice is that pins and rock fastenings are permitted to remain *in situ*.

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

43. We therefore recommend that:

7. **Pins for stake nets and rock fastenings for bag nets should 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.**

Effect is given to this recommendation in section 15(5)(b) and (c) of the Bill.

¹⁹ There was a prosecution brought in the early 1970s in respect of non-removal of pins *Joseph Johnston & Sons Ltd v Ingram* 1976 SLT (N) 30 but the conviction was quashed on a technicality.

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

44. 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.

45. We therefore recommend that:

8. **The current practice in the Solway of leaving the poles of certificated fixed engines *in situ* during the annual close time should be recognised as legitimate.**

Effect is given to this recommendation in section 15(5)(d) of the Bill.

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

46. Section 2(1) of the 1951 Act provides that:

"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 the Act had not been passed."

47. 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 the 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, cruive fishing 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.

48. 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 1962²⁰ the position regarding certificated fixed engines, cruives and haaf nets is considered below.

Certificated fixed engines

49. The use of certificated fixed engines is not doubtful. 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 - the Solway Salmon Fisheries Commissioners (Scotland) Act²¹ - 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

50. So far as is known, no cruives are now actually operated in Scotland but certain rights to cruives were 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 consider that it should no longer be possible to acquire such rights by prescription. Finally, it should be noted that Scottish Ministers should continue to have the power to regulate the construction and use of such cruives as may still legitimately be used.

Haaf nets on the Solway

51. Serious questions have been raised as to whether or not this method of fishing is legitimate in all or part of the Solway.²² 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 1877 Act 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.

52. 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 Tait²³ indicates that there have been many prosecutions resulting from the use of haaf nets, he further states that most of

²⁰ *Woodman, v Irving & Burrell* (unreported).

²¹ c ccxl.

²² It is clearly unlawful elsewhere in Scotland.

²³ John Hunter Tait, *A Treatise on the Law of Scotland as applied to Game Laws and Trout and Salmon Fishing*, 2nd edn 1928, p 236.

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. Stewart²⁴ says that 'half' nets are clearly within the definition of fixed engines; but he seems to be considering a different sort of net.²⁵ Scott Robinson²⁶ 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.

53. Finally, Beak²⁷ 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.

54. 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 Committee²⁸ did not comment on the legality of the method but recommended that steps be taken to run it down.

55. The legality of the practice was carefully considered, however, in the case of *Salar Properties (UK) Limited v Annandale and Eskdale District Council* (unreported)²⁹ 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 illegal to license the use of haaf nets within the area where they controlled the fishing rights.

56. Lord Coulsfield considered in detail the responsibilities of the Commissioners under the 1877 Act. He noted 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."

57. 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 laid down in the cases above mentioned."

²⁴ Charles Stewart, *A Treatise on the Law of Scotland Relating to Rights of Fishing*, 2nd edn 1892, p 366.

²⁵ 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.

²⁶ Stanley Scott Robinson, *The Law of Game, Salmon and Freshwater Fishing in Scotland*, 1990, p 177.

²⁷ T W Beak, *Salmon and Trout Fishing: Law of Scotland*, 1954, p 25.

²⁸ Departmental Committee on Scottish Salmon and Trout Fisheries 1965 Cmnd 2691.

²⁹ See 1992 GWD 7-381 for a summary of the case.

58. 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.

59. 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.

60. 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. In the draft provisions annexed to our draft recommendations, we suggested that the right to use haaf nets should be confined to two limited geographical areas. This was on the basis that we had information that such nets had certainly been used in both of those areas recently.

61. The responses to the consultation exercise indicated that fishermen in other areas considered that they too had the right to use such nets.

62. It would not be right, in a consolidation measure, arbitrarily to limit the geographical extent of the entitlement to use haaf nets. On the other hand, it is by no means clear that the use of haaf nets has been legitimate throughout the whole of the Solway and the waters flowing into it. We are equally concerned that the entitlement to use such nets should not be extended further than is currently the case.

63. It appears to us that the best solution is to recognise formally that haaf nets are a legitimate method of fishing within the Solway, but to require any person who considers that he is entitled to use a haaf net to prove that entitlement in any legal proceedings in which the question may be raised.

64. It is inevitable that the formal recognition of the legitimacy of the use of haaf nets will attract attention. It may also be that some at least of those who are entitled to use such nets will seek to develop their use beyond what was the practice in the past and beyond what may be a legitimate use of such nets. We do not think that it would be right for that to happen. We are not seeking to extend the law in this regard: merely to resolve a doubt. Equally, it would not be practicable for us to attempt to define precisely what is involved in the proper use of haaf nets.

65. We consider that the solution to this difficulty is to confer a power on Scottish Ministers to regulate the use of haaf nets. The power would not allow Scottish Ministers to determine the geographic extent of the use as between different rivers or parts of rivers. Rather it would enable them to regulate the manner and circumstances in which haaf nets can be used. The mere existence of such a power may inhibit the improper use of the nets and, if there are real difficulties, will enable these to be addressed without further primary legislation. In that connection, we note that section 3(2)(b) of the 1986 Act provided for a regulation-making power in relation to the construction and use of cruives. It is further to be noted that section 2(2A) of the 1951 Act gives a power to define by regulations fishing for or taking salmon by net and coble and by bag net, fly net or other stake net. We also recommend elsewhere that the Scottish Ministers should have a long-stop power to make regulations in relation to the definition of "rod and line". It therefore seems to us that a

similar power in relation to the use of haaf nets would be consistent with the general pattern of the legislation.

Conclusion

66. 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.

67. We recommend that:

9. **The methods to be recognised as lawful as at 10 May 1951 should be cruives, fixed engines certificated by the Solway Commissioners in 1877/78, and haaf nets. In relation to cruives, it should no longer be possible to acquire a right to use a cruive by prescription. Scottish Ministers should have a power to define by regulations fishing for or taking salmon by haaf net.**

Effect is given to this recommendation in sections 1 and 31(4)(c) of the Bill. In consequence of the formal recognition of certificated fixed engines, the 1877 Act can be repealed.

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

68. Section 9 of the 1951 Act provides, so far as material:

"(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.

69. 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.

70. Section 2 of the 1933 Act makes it an offence to sell or be in possession of brown trout less than 8 inches (20.32 centimetres) in length during the annual close time.

71. 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.

72. 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.

73. We therefore recommend that:

- 10. The provisions of section 9 of the 1951 Act should be extended to the provisions of section 1 of the 1902 Act and section 2 of the 1933 Act.**

Effect is given to this recommendation in section 28 of the Bill.

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

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

"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 ...".

75. The subsection enables Scottish Ministers to appoint persons to exercise powers otherwise available only to water bailiffs or police constables. At paragraph 116 below we recommend that all such persons be called "water bailiffs". 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.

76. 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.

77. Further, since the powers conferred upon persons appointed by Scottish Ministers are for most purposes equated 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.

78. We therefore recommend that:

- 11. It should be made clear that Scottish Ministers may restrict the geographical area within which the powers conferred by them under section 10(5) of the 1951 Act may be exercised, and that the geographical area in question should be expressed in terms of "district" rather than "waters".**

Effect is given to this recommendation in section 55 of the Bill.

Searching of suspects

79. Section 11(6) of the 1951 Act provides that no female may be searched except by a female. We consider that the Bill should adopt the Scottish Executive's general stance on the use of gender-neutral drafting.

80. We therefore recommend that:

- 12. The provision in section 11(6) of the 1951 Act should be drafted in gender-neutral terms.**

Effect is given to this recommendation in sections 52 and 53 of the Bill.

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

81. 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;"

82. 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. No other generally unlawful baits and lures were suggested by consultees. It therefore seems appropriate to make specific provision in relation to those specific prohibitions.

83. We therefore recommend that:

- 13. The reference in section 24(1) of the 1951 Act to such bait or lure as was lawful on 10 May 1951 should be replaced by a specific prohibition of the use of fish roe, fire and light.**

Effect is given to this recommendation in section 4 of the Bill.

1951 Act – section 24(2)

84. Section 24(2) of the 1951 Act provides that:

"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."

85. The effect of this subsection is to preserve the illegality of any method of fishing, the prohibition of which was repealed and not re-enacted by the 1951 Act itself. In order to ascertain the current effect of section 24(2), therefore, it is necessary to examine the Acts repealed by the 1951 Act.

86. We have excluded any consideration of any repealed enactments relating to the River Tweed, since the current Bill does not consolidate any legislation, in so far as it applies to the River Tweed.

87. Generally, we do not regard section 24(2) as a satisfactory method of keeping in place statutory prohibitions existing prior to 1951. As can be seen from the decision in *Lockhart v Cowan and Another*³⁰ the Court has to look not only at the existing salmon legislation but also at the pre-existing legislation which has been specifically repealed. It cannot be right for criminal sanctions to depend upon the terms of statutes repealed some 50 years ago. In our view, in a modern statute, it would be infinitely preferable to specify the offences which can be committed in relation to methods of fishing either on the face of the statute or in regulations made under it.

88. We have accordingly examined the various statutes repealed by the 1951 Act to ascertain what provisions in them created offences relating to methods of fishing which were not reproduced in the 1951 Act. Many, such as the use of poison or dynamite, are specifically prohibited by the 1951 Act. Others, such as otters, cross line or double rod fishing, are clearly not "fishing with single rod and line". In the event it seems that there are only three offences not specifically reproduced in the 1951 Act. They are the use of set lines, the practice of "pointing" and the practice of striking or dragging for fish. It is not clear whether "striking" and "dragging" are different offences or different ways of describing the same offence. We have accordingly mentioned both words in section 4 of the Bill.

89. The uncertainty over the precise meaning of offences created some 150 years ago as well as the development of different practices in relation to methods of fishing has caused us to consider whether primary legislation by itself is sufficiently flexible to reflect such changing practices. We are conscious that considerable changes have taken place in fishing practices since, for example, the first enactment of the prohibition on the use of set lines in the 1860s. It appears from the consultation which we undertook - and also from information given to us by the Scottish Executive Environment and Rural Affairs Department - that Scotland may be the only country in the world where the practice of laying a rod on a stand and remaining with it for the purposes of coarse fishing is a statutorily prohibited action. It would not be appropriate for us to recommend that that practice should no longer be a criminal offence. Apart from anything else, we have not consulted on that matter. We do, however, consider that it would be appropriate for Scottish Ministers to have a power to adjust what is meant by "rod and line" by means of regulations.

90. We accordingly recommend that:

14. **Fishing by single rod and line by means of set lines, pointing, or by striking or dragging for the fish should be specified as offences and a power should be conferred upon Scottish Ministers to make regulations with regard to fishing by rod and line.**

Effect is given to this recommendation in section 4 of the Bill.

Estuary limits

91. Section 2(1) of the 1951 Act provides that:

"No person shall fish for or take salmon in any inland water, except by rod and line or by net and coble."

³⁰ 1980 SLT (Sh Ct) 91.

As mentioned above, section 24(2) of the 1951 Act provides that:

"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, watercourses and lochs whether natural or artificial draining into the sea;"

92. Estuary limits are thus material to the definition of "inland waters". Section 7(1) of the 1986 Act provides that, subject to the power of the [Scottish Ministers] to make an estuary limits order under subsection (2), the estuary limits of a river "shall be the limits fixed by judicial decision or fixed and defined under section 6(1) of the Salmon Fisheries (Scotland) Act 1862". The definition in the 1951 Act was – "limits which divide each river including its mouth or estuary from the sea as fixed by any enactment, byelaw or the decision of a court". Something of the historical background to these provisions may be found in the textbooks.³¹ Briefly, during the first half of the nineteenth century the question whether fixed engines at a given location were within the sea, and hence free of certain restrictions, or within the river or estuary, and hence subject to those restrictions, was raised in a number of civil litigations. No single test was employed in answering the question. As Stewart observes:³²

"A variety of circumstances, varying with the locality, had to be taken into consideration, so that the result, in one case, would be but little guide towards a sound conclusion in another. The rule, accordingly, was fixed, that each case, as it arose, must be decided on its own merits; and the question was therefore submitted to the verdict of a jury, whether the nets to which the litigation related were or were not 'in a situation prohibited by statute'."

The judicial decision therefore decided only whether fixed engines at the particular location in question were or were not within an area subject to the prohibition. In order to remove or limit the scope for dispute, power was given in section 6 of the 1862 Act to commissioners to promulgate byelaws fixing the estuary limits. A large number of such byelaws have been made and we understand that most of the rivers of Scotland now have estuary limits fixed by byelaw or estuary limits order. The Bill provides for such byelaws and any existing estuary limits orders to continue in force (section 36(2); section 68). Most, if not all, of the rivers which featured in litigation will now have byelaws and to that extent the judicial decisions reached in those disputes are superseded. Further, we think that the statutory reference to "limits fixed by judicial decision" may be misleading in so far as it might suggest that the courts have a regulatory power of defining detailed limits equivalent to the power to promulgate subordinate legislation given to the commissioners under the 1862 Act and subsequently to the Scottish Ministers. In these circumstances we recommend that the reference in the 1986 Act to "limits fixed by judicial decision" should be omitted. In the event that, in respect of a river for which no estuary limits have been fixed by byelaw or order, a question arises whether a particular location is within inland waters, the court would of course require to resolve that issue in the context of the facts of the particular case. In order that it should be clear that the prohibition on fishing for or taking salmon in any

³¹ Stewart p 168-171; Tait p 162-163.

³² Stewart, p 170.

inland waters other than by the permitted methods applies in rivers where no estuary limits have been fixed by byelaw or estuary limits order, the Bill provides (section 36) that, as respects those rivers, the estuary limits shall be the natural limits which divide a river (including its estuary) from the sea.

93. There is a further and 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 adjustment of the estuary limits. There may be instances in which there is a doubt as to the position of the particular estuary limit or in which the estuary limit is described by reference to a particular feature which has either ceased to exist or is no longer particularly apposite. 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.

94. We therefore recommend that:

- 15. 1 There should be no reference in the statute to estuary limits having been or being fixed by judicial decision;**
- 15. 2 The estuary limits of a river for which no byelaw or estuary limits order fixing the estuary limits has been made should be defined as being the natural limits which divide the river (including its estuary) from the sea;**
- 15. 3 A power should be conferred on Scottish Ministers to adjust estuary limits so as to resolve doubts or to change the reference points by which the existing limits are identified.**

Effect is given to these recommendations in section 36 of the Bill.

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

95. 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.

96. 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.

97. 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 six months before the renewal date, so that they can be considered in time for renewal to take place, if appropriate, 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.

98. We therefore recommend that:

- 16. Section 1 of the 1976 Act should be amended so as to require any objection to the renewal of an existing Protection Order to be lodged not later than 6 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 should not be possible.**

Effect is given to this recommendation in section 48 of the Bill.

Designation Orders

99. Section 2 of the 1986 Act relates to designation orders, and provides that:

"(1) A designation order shall provide for the abolition of such salmon fishery districts as are superseded by the district so designated.

(2) A designation order shall provide for the application to the district so designated of such regulations -

(a) made under section 3 of this Act; or

(b) made under the Salmon Fisheries (Scotland) Acts 1862 to 1868 as respects the matters specified in section 6(6) of the Salmon Fisheries (Scotland) Act 1862

as the [Scottish Ministers] specify in the order and [they] may, in such an order, amend regulations made under section 3(2)(d) of this Act or under section 6(6) of that Act in their application under this subsection."

When passed, these powers no doubt enabled the Secretary of State to make some useful and minor adjustments to the regime for a new district without making a separate set of regulations.

100. While we understand that some general regulations made under section 6(6) of the 1862 Act are still extant, the power to amend such regulations becomes less relevant as they are replaced by regulations made under more recent powers.

101. In particular, section 3 of the 1986 Act contains a general regulation-making power, under which different regulations can be made in relation to different districts. It includes power to make regulations in relation to the matters mentioned in section 6(6) of the 1862 Act. It is consolidated, along with other general regulation-making provisions, in section 31 of the Bill. It is therefore open to Ministers to make specific regulations in relation to a new salmon fishery district by using the general powers in section 31 of the Bill, and the specific powers in section 2(2) of the 1986 Act appear to be unnecessary.

102. We therefore recommend that:

- 17. The power contained in section 2(2) of the 1986 Act to amend regulations made under section 3(2)(d) of the 1986 Act or section 6(6) of the 1862 Act should not be re-enacted.**

Effect is given to this recommendation in section 35 of the Bill.

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

103. 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 that:

"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."

104. 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 proprietors³³ can be initiated by a sole proprietor.

105. 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.

106. We therefore recommend that:

- 18. Section 12(1) of the 1986 Act should be amended so as to secure that, where there are fewer than three proprietors, any one of them can initiate the procedures in question.**

Effect is given to this recommendation in section 41 of the Bill.

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

107. 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.

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

³³ Such as an application for the making of a designation order.

109. We therefore recommend that:

- 19. Provision should 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.**

Effect is given to this recommendation in section 42 of the Bill.

Enforcement

110. Section 26 of the 1868 Act authorises the granting of search warrants to "any water bailiff, constable, watcher, or other officer of the board, or police officer" 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. (Section 29 in fact also empowers water bailiffs personally to take persons committing offences before a sheriff or magistrate. We do not consider that that aspect of section 29 requires to be re-enacted in modern legislation.)

111. 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.

112. 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.

113. 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.

114. We consulted on draft provisions which made 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.

115. There was general support from consultees for our suggested provisions. The Bill therefore incorporates provisions giving effect to that suggestion. The only exception is in relation to protection orders under the 1976 Act. In that regard, the 1976 Act provides a new and specific regime, and the opportunity was not taken, as it could have been, to provide that protection orders could also be enforced by water bailiffs. Further, we understand that the Scottish Executive is to undertake a review of protection orders in 2003. It would therefore not be appropriate to make any substantial change to important aspects of them at this stage. It should be noted that the Bill includes a general provision consistent with modern practice in relation to offences under the Act by bodies corporate.

116. We therefore recommend that:

20. **The enforcement provisions in the existing salmon and freshwater fisheries legislation should 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 other than those relating to protection orders and that the persons appointed by Scottish Ministers under section 10(5) of the 1951 Act should have the same powers as water bailiffs appointed under section 16(3)(b) of the 1986 Act, and should be known as water bailiffs.**

Effect is given to this recommendation in sections 52, 53, 54 and 55 of the Bill.

Section 27 of the 1868 Act

117. Section 27 of the 1868 Act empowers water bailiffs or constables to go on to land in the vicinity of any river or seacoast for the purpose of preventing a breach of the provisions of the legislation. It also provides that no such person shall be deemed to be a trespasser.

118. There is a proviso to the section which empowers the owner or occupier of such land to require the water bailiff to leave the land and, if he refuses, it makes the water bailiff liable to the penalties of trespass unless he proves that he had reasonable grounds to believe that an offence was about to be committed.

119. The formulation of section 27 reflects an uneasy balance between the public interest in the enforcement of the legislation relating to salmon fishing and the rights of private landowners not to have those responsible for enforcement on their property. The reference to trespass is clearly to the criminal offence of trespass and is likely to be a reference to the offence in the Trespass (Scotland) Act 1865,³⁴ section 3 of which provides that:

³⁴ c 56.

"Every person who lodges in any premises, or occupies or encamps on any land ... shall be guilty of an offence ...".

There are also trespass offences linked to the pursuit of game.

120. It is difficult to believe that the activities of any modern water bailiff could be characterised as lodging in any premises or "occupying or encamping on" any land. If there was some further offence characterised as trespass in 1868 then it has not survived. In any event, section 10(6) of the 1951 Act provides that:

"If any person refuses to allow a water bailiff, constable ... to exercise any power conferred on him by or in pursuance of this Act or of the Salmon Fisheries (Scotland) Acts 1828 to 1868, or obstructs a water bailiff, constable, or any such person as aforesaid in the exercise of any such power, he shall be guilty of an offence against this Act".

121. The proviso to section 27 of the 1868 Act has not, so far, been repealed. It is, however, difficult to see how it can be reconciled with the later expression of Parliament's view in section 10(6) of the 1951 Act. Having regard to this inconsistency, and to the fact that the proviso to section 27 of the 1868 Act does not fit with any remaining prohibitions on trespass, we have concluded that the proviso to section 27 should be repealed without re-enactment.

122. We therefore recommend that:

21. The proviso to section 27 of the 1868 Act should be repealed without re-enactment.

Forfeiture

123. 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.³⁵

124. Forfeiture is clearly a useful sanction against poaching but, as in the case of 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.

125. We therefore recommend that:

22. The provisions in the existing salmon fisheries legislation in relation to forfeiture should be replaced with a single, discretionary provision.

Effect is given to this recommendation in section 60 of the Bill.

³⁵ cf section 24(1) of the 1868 Act.

Definition of "Salmon" and "Trout"

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

127. In the 1951 Act the following definitions are used:³⁶

"Salmon" includes 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;

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

128. 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.

129. 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. We consider it preferable to have a single comprehensive definition of "salmon". The practical effect of the difference is that while the 1951 Act would include non-migratory types of salmon, the 1986 Act definition does not. In the event however, we understand that while non-migratory salmon may be found elsewhere in the world they are not known to exist in Scotland and it is accordingly unnecessary to have a definition embracing non-migratory salmon.

130. We therefore recommend that:

23. The following definitions should be used for the purposes of the consolidation:

23. 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.

23. 2 "Trout" means non-migratory trout of the species *Salmo trutta* living in fresh water or in estuaries.

Effect is given to this recommendation in section 70 of the Bill.

Definition of "enactment"

131. 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 byelaws 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.

³⁶ s 24(1).

132. We therefore recommend that:

24. "Enactment" should 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.

Effect is given to this recommendation in section 70 of the Bill.

Repeals

Repeal of the Solway Act except for section 9

133. 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 Firth Fisheries Act 1804³⁷ 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 1877.³⁸

134. 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).

135. 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 without re-enactment. 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.

136. We therefore recommend that:

25. With the exception of section 9, the Solway Act 1804 should be repealed without re-enactment.

Effect is given to this recommendation in sections 26 and 71 of, and Schedule 4 to, the Bill.

³⁷ c xlv.

³⁸ c ccxl.

Repeal of section 22 of the 1868 Act

137. 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 from Customs and Excise 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, and we understand that the European Commission have in the past requested that it be repealed. HM Customs and Excise have agreed that it should be repealed now.

138. We therefore recommend that:

26. Section 22 of the 1868 Act should be repealed without re-enactment.

Effect is given to this recommendation in section 71 of, and Schedule 4 to, the Bill.

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

139. Section 6 of the 1933 Act provides that:

"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."

140. It is not at all clear why this provision was enacted in 1933. Nothing in the other provisions of the Act has 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.

141. 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.

142. We therefore recommend that:

27. Section 6 of the 1933 Act should be repealed without re-enactment.

Effect is given to this recommendation in section 71 of, and Schedule 4 to, the Bill.

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

143. 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 1989³⁹ 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.

144. 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.

³⁹ c 15.

In the meantime we are of the view that it would be better to remove the unwanted amendment from the Statute Book.

145. We therefore recommend that:

- 28. Paragraph 4 of Schedule 17 to the Water Act 1989 should be repealed without re-enactment.**

Effect is given to this recommendation in section 71 of, and Schedule 4 to, the Bill.

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

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

147. 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.

148. Paragraph 6 of Schedule 3 to the 1986 Act provides that:

"A transitional district board shall cease to be deemed a district salmon fishery board and shall cease to have such powers and 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".

149. These are transitional provisions which are now spent.

150. We therefore recommend that:

- 29. Section 14(8) of, and Schedule 3 to, the 1986 Act should be repealed without re-enactment.**

Effect is given to this recommendation in section 71 of, and Schedule 4 to, the Bill.

Appendix 1

Summary of Recommendations

1. The reverse onus of proof provisions in the salmon legislation should be adjusted from a persuasive to an evidential burden of proof.

(Paragraph 13)
2. Certain provisions in the 1976 and 1986 Acts should be amended so as to enable the matters referred to in them to be dealt with electronically.

(Paragraph 17)
3. The metric equivalents of the imperial measurements should be rounded up or down to suitable metric measurements.

(Paragraph 20)
4. The references to "sheriff" in the 1868 Act should be treated as if they were references to "sheriff substitute".

(Paragraph 26)
5. Statutory defences to the offence in section 21 of the 1868 Act should be provided along the lines of those already recognised by the courts, namely that the salmon in question was lawfully caught during the annual close time by rod and line and that salmon bought, sold etc or possessed during the annual close time was lawfully taken during the open season.

(Paragraph 34)
6. The definition of the offence in section 21 of the 1868 Act should 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.

(Paragraph 40)
7. Pins for stake nets and rock fastenings for bag nets should 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.

(Paragraph 43)
8. The current practice in the Solway of leaving the poles of certificated fixed engines *in situ* during the annual close time should be recognised as legitimate.

(Paragraph 45)

9. The methods to be recognised as lawful as at 10 May 1951 should be cruives, fixed engines certificated by the Solway Commissioners in 1877/78, and haaf nets. In relation to cruives, it should no longer be possible to acquire a right to use a cruive by prescription. Scottish Ministers should have a power to define by regulations fishing for or taking salmon by haaf net.

(Paragraph 67)

10. The provisions of section 9 of the 1951 Act should be extended to the provisions of section 1 of the 1902 Act and section 2 of the 1933 Act.

(Paragraph 73)

11. It should be made clear that Scottish Ministers may restrict the geographical area within which the powers conferred by them under section 10(5) of the 1951 Act may be exercised, and that the geographical area in question should be expressed in terms of "district" rather than "waters".

(Paragraph 78)

12. The provision in section 11(6) of the 1951 Act should be drafted in gender-neutral terms.

(Paragraph 80)

13. The reference in section 24(1) of the 1951 Act to such bait or lure as was lawful on 10 May 1951 should be replaced by a specific prohibition of the use of fish roe, fire and light.

(Paragraph 83)

14. Fishing by single rod and line by means of set lines, pointing, or by striking or dragging for the fish should be specified as offences and that a power should be conferred upon Scottish Ministers to make regulations with regard to fishing by rod and line.

(Paragraph 90)

15. 1 There should be no reference in the statute to estuary limits having been or being fixed by judicial decision;

15. 2 The estuary limits of a river for which no byelaw or estuary limits order fixing the estuary limits has been made should be defined as being the natural limits which divide the river (including its estuary) from the sea;

15. 3 A power should be conferred on Scottish Ministers to adjust estuary limits so as to resolve doubts or to change the reference points by which the existing limits are identified.

(Paragraph 94)

16. Section 1 of the 1976 Act should be amended so as to require any objection to the renewal of an existing Protection Order to be lodged not later than 6 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 should not be possible.
- (Paragraph 98)
17. The power contained in section 2(2) of the 1986 Act to amend regulations made under section 3(2)(d) of the 1986 Act or section 6(6) of the 1862 Act should not be re-enacted.
- (Paragraph 102)
18. Section 12(1) of the 1986 Act should be amended so as to secure that, where there are fewer than three proprietors, any one of them can initiate the procedures in question.
- (Paragraph 106)
19. Provision should 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.
- (Paragraph 109)
20. The enforcement provisions in the existing salmon and freshwater fisheries legislation should 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 other than those relating to protection orders and that the persons appointed by Scottish Ministers under section 10(5) of the 1951 Act should have the same powers as water bailiffs appointed under section 16(3)(b) of the 1986 Act, and should be known as water bailiffs.
- (Paragraph 116)
21. The proviso to section 27 of the 1868 Act should be repealed without re-enactment.
- (Paragraph 122)
22. The provisions in the existing salmon fisheries legislation in relation to forfeiture should be replaced with a single, discretionary provision.
- (Paragraph 125)
23. The following definitions should be used for the purposes of the consolidation:
23. 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.

23. 2 "Trout" means non-migratory trout of the species *Salmo trutta* living in fresh water or in estuaries.

(Paragraph 130)

24. "Enactment" should 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.

(Paragraph 132)

25. With the exception of section 9, the Solway Act 1804 should be repealed without re-enactment.

(Paragraph 136)

26. Section 22 of the 1868 Act should be repealed without re-enactment.

(Paragraph 138)

27. Section 6 of the 1933 Act should be repealed without re-enactment.

(Paragraph 142)

28. Paragraph 4 of Schedule 17 to the Water Act 1989 should be repealed without re-enactment.

(Paragraph 145)

29. Section 14(8) of, and Schedule 3 to, the 1986 Act should be repealed without re-enactment.

(Paragraph 150)

Appendix 2

List of those who were consulted in connection with the recommendations

Access Forum on Inland Water
Angling for Change
Association of Chief Police Officers in Scotland
Association of Salmon Fishery Boards
Association of Scottish Stillwater Fisheries
Association of Sheriffs Principal
Atlantic Salmon Trust
Central Scotland Anglers' Association
Commission for Racial Equality
Consultative Committee on Protection Orders
Crown Agent
Crown Estate Office
Department for Environment, Food & Rural Affairs
Disability Rights Commission
Dumfries and Galloway Council
East of Scotland Water
Equal Opportunities Commission
Environment Agency
Faculty of Advocates
Federation of Highland Angling Clubs & Associations
Fisheries Research Services Freshwater Laboratory
The Fishmongers' Company
The Grayling Society
HM Customs & Excise
Institute of Advanced Legal Studies
Law Commission, London
Law Reform Advisory Committee for Northern Ireland
Law Society of Scotland
Loch Awe Liaison Committee
Loch Lomond Angling Improvement Association
Loch Morar Liaison Committee
Lord President of the Court of Session
John Macaulay & Co solicitors
Donald R Macleod, Advocate
The Hon Lord Marnoch
The Hon Lord Morison
National Farmers Union of Scotland
North West Sutherland Liaison Committee
Principal Clerk of Session and Justiciary
River Clyde Fisheries Management Trust
River Clyde Liaison Committee

River Don Liaison Committee
River Earn Liaison Committee
River Lunan Liaison Committee
River Tay Liaison Committee
River Tummel Liaison Committee
River Tweed Liaison Committee
The Salmon Net Fishing Association of Scotland
Scottish Anglers National Association
Scottish Environmental Protection Agency
Scottish Federation of Coarse Anglers
Scottish Landowners' Federation
Scottish Law Agents Society
Sheriffs' Association
Malcolm Spence QC
Sports Scotland
Upper Spey Liaison Committee
Mr Michael Weir
West Strathclyde Liaison Committee
Mr Robert Williamson

District Salmon Fishery Boards

Annan DSFB
Ayr DSFB
Awe DSFB
Beaully DSFB
Bladnoch DSFB
Broom DSFB
Brora DSFB
Caithness DSFB
Conon DSFB
Cree DSFB
Creran DSFB
Dee (Kirkudbright) DSFB
Dee (Aberdeen) DSFB
Deveron DSFB
Don DSFB
Doon DSFB
Eachaig DSFB
East Lewis DSFB
Esk DSFB
Ewe DSFB
Findhorn DSFB
Fleet DSFB
Forth DSFB
Girvan DSFB
Gruinard DSFB
Harris DSFB
Iorsa (Arran) DSFB

Kinloch DSFB
Halladale DSFB
Helmsdale DSFB
Kanaird DSFB
Kyle of Sutherland DSFB
Laggan and Sorn DSFB
Lochaber DSFB
Loch Fyne DSFB
Loch Roag DSFB
Lossie DSFB
Luce DSFB
Mulanagearan DSFB
Nairn DSFB
Naver and Borgie DSFB
Ness DSFB
Nith DSFB
North & West DSFB
Ruel DSFB
Skye DSFB
Spey DSFB
Stinchar DSFB
Tay DSFB
Teasdale, Eachaig DSFB
Tweed DSFB
Ugie DSFB
Urr DSFB
Ythan DSFB

Libraries

Aberdeen Central Library
Advocates Library
Bodleian Library
The British Library
Cambridge University Library
Crown Office Library
Dundee Central Library
Edinburgh City Libraries
Glasgow University Library
Glasgow Caledonian University Library
Heriot Watt University Library
House of Commons Library
House of Lords Library
Inner Temple Library
Lord Chancellor's Department Library
The Mitchell Library
Napier University Queens Library
National Library of Scotland
The National Library of Wales

The Library, Trinity College Dublin
The Robert Gordon University Library
The Royal Faculty of Procurators in Glasgow Library
Scottish Executive Library
Scottish Executive Solicitors Office Library
Scottish Parliament, Library
Signet Library
SSC Library
University of Aberdeen Law Library
University of Abertay Library
University of Dundee Faculty of Law Library
University of Edinburgh Law Library
University of Paisley Library
University of Stirling Library
University of Strathclyde Law School Library

Appendix 3

List of those who have responded in connection with the recommendations

Association of Chief Police Officers in Scotland
Association of Salmon Fishery Boards
Awe District Salmon Fishery Board
Helen Bell, Councillor, Dumfries & Galloway Council
Department for Environment, Food & Rural Affairs
Dumfries & Galloway Council
Environment Agency
Faculty of Advocates
Fisheries Research Services Freshwater Laboratory
Fishmongers' Company
Grayling Society
HM Customs & Excise
Law Society of Scotland, Rural Affairs Committee
John Macaulay & Company, Solicitors
Donald R Macleod, Advocate
Hon Lord Marnoch
Hon Lord Morison
Nith District Fishery Board
North & West Salmon Fishery District Board
River Doon Fishery Board
Salmon Net Fishing Association of Scotland
Scottish Environmental Protection Agency
Scottish Landowners' Federation
Scottish Law Agents Society
Sheriffs' Association
Malcolm Spence QC
Urr District Salmon Fisheries Board
Robert Williamson