

**SALMON AND FRESHWATER FISHERIES
(CONSOLIDATION) (SCOTLAND) BILL
COMMITTEE**

Tuesday 7 January 2003
(Afternoon)

Session 1

£5.00

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CONTENTS

Tuesday 7 January 2003

	Col.
SALMON AND FRESHWATER FISHERIES (CONSOLIDATION) (SCOTLAND) BILL: STAGE 1	9

SALMON AND FRESHWATER FISHERIES (CONSOLIDATION) (SCOTLAND) BILL COMMITTEE

1st Meeting 2003, Session 1

CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)

*Mr Duncan Hamilton (Highlands and Islands) (SNP)

*John Farquhar Munro (Ross, Skye and Inverness West) (LD)

*attended

THE FOLLOWING ALSO ATTENDED :

Iain Jamieson (Adviser)

CLERK TO THE COMMITTEE

Tracey Haw e

SENIOR ASSISTANT CLERK

Mark Brough

ASSISTANT CLERK

Catherine Johnstone

LOCATION

Committee Room 4

Scottish Parliament

Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee

Tuesday 7 January 2003

(Afternoon)

[THE CONVENER *opened the meeting at 15:16*]

Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill: Stage 1

The Convener (Murdo Fraser): Good afternoon, ladies and gentlemen, and welcome to the second meeting of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee, which is our first meeting of 2003. A good new year to everybody to whom I have not already wished a good new year. The purpose of today's meeting is to commence consideration of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill, but there are a number of matters to deal with before we get to that point.

The first matter that I draw to members' attention is that we have received two written submissions—one from the Salmon and Trout Association of Scotland and one from the National Farmers Union of Scotland. Both submissions have been circulated to members. Neither organisation has any particularly adverse comments to make—indeed, the Salmon and Trout Association commends the Executive for the consolidation. We are still waiting for, and may still receive, responses from other parties. If we do, we will circulate the submissions to members. We will consider whether we need to take oral evidence from any parties as and when the responses are received.

The legal adviser, to whom I am extremely grateful, has produced a paper on general matters in relation to the bill, as this is the first consolidation bill to come before the Scottish Parliament. As we agreed at our previous meeting, the committee's role is to consider the following issues: whether the bill consolidates all and only the relevant enactments relating to salmon and freshwater fisheries in Scotland; whether the bill correctly restates that law, or changes it only to the extent of giving effect to the Scottish Law Commission's recommendations; whether the recommendations of the Scottish Law Commission

should be approved; whether its recommendations are clearly and appropriately given effect in the bill; and whether the bill consolidates the law clearly, coherently and consistently.

The legal adviser raises the point that the guidance on public bills does not provide as much detail on consolidation bills as would be helpful to us. There is a point to consider in relation to that. The legal adviser states that there is a procedure for making corrections and minor improvements to consolidation bills at Westminster, under the Consolidation of Enactments (Procedure) Act 1949. As I understand it, there is no equivalent provision in Scotland. I suggest that we draw that matter to the attention of the Parliament and recommend that the Parliament consider whether there is a need for such legislation to be introduced at a future stage. Do members agree to that suggestion?

Members indicated agreement.

The Convener: The next point to consider is whether we need to have a yardstick or criteria by which to judge whether the recommendations in the Scottish Law Commission's report should be regarded as being within the scope of what might appropriately be in the bill. As I understand it, the position at Westminster is that only amendments that are necessary to produce a satisfactory consolidation are treated as acceptable. There is nothing in our standing orders to deal with that point and we need to consider whether we are happy to proceed on the basis that such a yardstick is necessary or whether we want to take another approach.

Gordon Jackson (Glasgow Govan) (Lab): That is a serious issue, which will affect how we deal with all the details of part 1 of the bill—and no doubt the other parts—and the Scottish Law Commission's recommendations. There is the possibility of having a strict yardstick, whereby we would accept only those amendments that are necessary for a satisfactory consolidation. The other way of looking at the matter is to take a more open and, perhaps, more liberal approach, whereby we would allow changes that are desirable in order to produce a satisfactory consolidation.

At first blush, it might seem pedantic to distinguish between "necessary" and "desirable". However, having read all the papers, I have formed the view that the distinction is absolutely crucial. When we come to consider the Scottish Law Commission's recommendations, we may not always get a positive answer to the question whether they are necessary to produce a satisfactory consolidation. However, if we apply the test of whether they are desirable to produce a satisfactory consolidation, we might be persuaded on every occasion that they are desirable.

If we apply the “desirable” test, we may get into policy changes and make substantive changes to the law. That might be a good thing, but perhaps the strict view is that the job of a committee on a consolidation bill is not to do good things in that sense. It is for the Parliament as a whole to do such things; our job is to ensure a consolidation of the existing law.

It is not easy to decide where we should draw the line between “necessary” and “desirable”, but settling on the yardstick could be crucial to how we deal with the detail of the bill. I suggest that we take evidence from the Scottish Law Commission on precisely what yardstick it applies, because all it has told us in its report is that it was charged with making a satisfactory consolidation. I can see why that is all that it wants to say, but we have to look beneath that and ask what yardstick it applied and why. I am torn, because on the one hand I do not want to make the yardstick that which is absolutely necessary, because that might prevent us from doing good and proper things. On the other hand, I do not want us to go beyond our remit as the committee on a consolidation bill. The only way in which I can deal with the question is to ask the Scottish Law Commission to explain to us precisely how and why it did what it did.

When it comes to the detail of the recommendations, the distinction becomes absolutely crucial. All the recommendations will almost certainly get through the “desirable” test, at least as far as I can see, subject to other interested parties’ telling me why they are not desirable. Whether they would all get through the “necessary” test is a difficult point, but that will become important.

The Convener: If members are agreed, I suggest that we invite the Scottish Law Commission to send a representative to our next meeting, which will be held a week today, to try to address the point. In the meantime, we can proceed on the assumption that we have to consider matters using the yardstick of whether amendments are necessary. We will not produce our report until we have heard from the Scottish Law Commission; we can review any decisions that we take or any opinions that we express in the light of what it has to say.

Gordon Jackson: Perhaps I am stating the obvious, so forgive me if I am being foolish, but I assume that we will tell the Scottish Law Commission precisely what issues we want it to deal with.

The Convener: Yes, we will. It makes sense to do that, so that the Scottish Law Commission sends the appropriate person to address us.

Mr Duncan Hamilton (Highlands and Islands) (SNP): Technically, the Scottish ministers started

the ball rolling by charging the Scottish Law Commission with the responsibility to make recommendations. For the sake of completeness and to be absolutely clear, it might help us if we had a note—just a note at this stage—from the responsible Scottish Executive department on its understanding of the Scottish Law Commission’s remit, specifically on the question of desirability or necessity.

At the same time, it would be helpful to have some clarity about the role of the committee in identifying whether the bill restates the law or changes it in giving effect to the Scottish Law Commission’s recommendations. Are we correctly restating the original law or are we, in giving effect to the Scottish Law Commission’s recommendations, changing the law? There could be a conflict and I would welcome clarity on which we are doing, because we cannot do both.

Iain Jamieson (Adviser): The committee’s task might be to examine whether the Scottish Law Commission’s recommendations—that is, those that are approved—have been given effect properly in the bill and, subject to that, whether the bill correctly restates the original law. The original law is the main consideration. It can be altered only by any recommendations that the Scottish Law Commission makes and the committee approves.

Mr Hamilton: Are you saying that, if the restatement takes account of Scottish Law Commission recommendations that are contrary to the original law, it is open to the committee to take more of a policy position? We will be deciding which of the two positions is preferable.

Iain Jamieson: It is open to the committee to reject the Scottish Law Commission’s recommendations and to go back to the original law, but it is not open to the committee to propose a different policy from that recommended by the Scottish Law Commission.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): It is a question of take it or leave it.

The Convener: Yes, but we can take it or leave it in part. We do not have to take it or leave it in whole. Does that answer your point, Mr Hamilton?

Mr Hamilton: It does.

The Convener: In that case, let us move on to the adviser’s second paper, which is on whether the law should be restated. There are two points to that question. The first is whether the law should be consolidated. The legal adviser advises us that, in general terms, the bill meets the objective of consolidating the existing law. I suggest that we agree that it would be desirable to consolidate and restate the law relating to salmon and freshwater fisheries in Scotland and that the Scottish Law

Commission and the draftsmen should be commended for preparing the bill. Are we agreed?

Members indicated agreement.

The Convener: The second point to consider is whether the bill consolidates all the relevant enactments. The adviser has considered that question and has concerns on one point, which relates to the Sea Fish (Conservation) Act 1967.

Iain Jamieson: The bill is limited to what might be called inland waters or waters above the estuary limits. However, aspects of the law of salmon that relate to the salmon fishery district within the coastal limits—those provisions are contained in the Sea Fish (Conservation) Act 1967—are not consolidated in the bill. Moreover, the bill does not appear to amend them expressly. Members may want to consider whether they are content for the bill to be restricted to inland waters.

15:30

Gordon Jackson: Again, let me state that I have no idea about this subject. However, I noticed that the legal adviser suggested that we ask the Executive why it has done what it has done, which is a good idea. My general approach would be to ask the Executive all the relevant questions, consider the answers to the questions and hope that, by that stage, I understand them.

The Convener: If members agree, I suggest that we write to the Executive and ask for clarification on that point.

Members indicated agreement.

The Convener: There is a question about enactments that are repealed in the consolidation bill but will not be re-enacted. There is specific concern about paragraph 145 in the Scottish Law Commission's paper:

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

Do members agree that we write to the Executive and ask it to explain why it is thought that repeal is necessary to produce a satisfactory consolidation?

Members indicated agreement.

Gordon Jackson: When we ask the Scottish Law Commission to give evidence, can we use that as an example of the problem? It would give the commission a clear understanding of our concerns. Iain Jamieson may disagree, but that is a good example of where repeal may be desirable but not necessary. It would be good to ask the Executive to explain how it applied its yardstick when dealing with that recommendation. Is that fair enough?

Members indicated agreement.

Iain Jamieson: Other recommendations also need clarification, such as those for rod and line fishing.

The Convener: We can deal with that when witnesses attend future meetings.

Gordon Jackson: I want to give the witnesses advance notice and that is a good example of what we are talking about.

The Convener: We are also dealing with the River Tweed and the River Esk, which are peculiar in the sense that they are cross-border rivers. By virtue of sections 72(3) and 72(4), the bill will apply to the whole of Scotland, except for the River Tweed and the Upper Esk. Moreover, section 72(5) states:

"Section 6 of this Act does not apply to the Lower Esk."

The advice from the legal adviser is that, in accordance with the existing legal provisions and given the historical situation, we should recommend that the bill should not extend to the River Tweed and that the enactments that relate to the River Tweed should not be restated. I understand that there is an intention to introduce another bill to deal with the River Tweed. Do members agree that we should make that recommendation?

Mr Hamilton: I may be wrong, but our advice is that further orders in council must be made under section 111 of the Scotland Act 1998. Has that been confirmed?

Iain Jamieson: I understand that that is the case.

The Convener: Do members agree with the recommendation?

Members indicated agreement.

John Farquhar Munro (Ross, Skye and Inverness West) (LD): The law has worked well in the past, so there is no reason to change it.

The Convener: The bill deals with the question of the River Esk. Different provisions relate to the Upper Esk and the Lower Esk. There was some concern about the way in which some of the provisions knit together and I suggest that we write to the Scottish Executive to clarify the position. Unless members are particularly interested, I do not intend to go through all the detailed concerns, which are outlined in the legal note.

We must now consider the Scottish Law Commission's recommendations on part 1 of the bill. Part 1, which is the largest and most substantive part of the bill, deals with methods of fishing and fishing without permission. The legal adviser has produced a paper that deals with the Scottish Law Commission proposals in relation to part 1. I suggest that we go through the paper

point by point as expeditiously as we can. Members may raise any points that they wish to.

The first point relates to the reverse onus of proof. The suggestion is that the onus of proof for salmon legislation should be adjusted. At the moment, there is a reverse onus of proof, but the Scottish Law Commission recommends a move from a persuasive to an evidential burden of proof. Do members agree that that recommendation should form part of the bill and that effect should be given to it in section 61?

Members indicated agreement.

Gordon Jackson: I have no problem with that—but then I would not have.

The Convener: I am sure that the poaching community will be delighted at that provision.

Brian Fitzpatrick: When the evidence is out, the evidence is out.

The Convener: The Scottish Law Commission's second recommendation deals with electronic communications. Our legal adviser was concerned that the recommendation was not appropriate in a consolidation bill and that it may not be necessary in order to produce a satisfactory consolidation. If members are agreed, I suggest that we write to the Scottish Executive asking why it considers that measure necessary.

Gordon Jackson: May I ask about a point of protocol? When we are getting in touch with the Scottish Law Commission, should we point out that we are asking the Executive those questions? What I do not want to happen is for the Executive to come along and say, "Why did we do it? Because we sent the Scottish Law Commission, who are very bright boys, out to the library and they suggested that it was a good idea. Go and ask them."

Obviously, I do not know how the Government works in that respect, but I want to be sure that we are putting the right questions to the right people. Iain Jamieson will know better than I do how the system works. Who is behind the recommendations and is therefore in a position to justify them? I do not mean someone who could justify the recommendations just because they have read a brief. Ministers—goodness knows—seem to be able to read briefs, but I want to know who can be questioned about the issues that are behind the words of the brief. We need to find out who understands what is happening.

Iain Jamieson: If the committee raises the points with the Executive, the Executive will liaise with the appropriate people and produce the necessary response. The suggestion that we are now considering is another example of a case where the yardstick comes into operation.

Gordon Jackson: If there is a crossover between the Scottish Law Commission's approach and that of the Executive, I want to ensure that we are targeting the right people.

The Convener: I cannot imagine that there would be any problem with sending to the Scottish Law Commission a copy of our letter to the Executive. I suggest that, when we write to the Scottish Law Commission, we enclose our letter to the Executive, highlighting many of the points of concern. Is that agreed?

Members indicated agreement.

The Convener: The third proposal from the Scottish Law Commission concerns the rounding up or down of metric measurements. The advice that we have had is that the committee should accept that proposal and that effect should be given to it in the bill. Does that meet members' approval?

Members indicated agreement.

Brian Fitzpatrick: We can welcome the Scottish Landowners Federation to the 21st century, or perhaps even to the early 19th century.

The Convener: Metric measurements predate the 21st century quite considerably.

Brian Fitzpatrick: That is why I said the 19th century. I was referring to the letter of 6 July 2001.

The Convener: You have the advantage on me, Mr Fitzpatrick. I do not have that letter in front of me.

Brian Fitzpatrick: It is a fantastic submission by the Scottish Landowners Federation. It says:

"SLF's view is that conversion is probably inevitable, inimical though it may be to many concerned with salmon fishing."

So there. You have missed a chance, even with your badge.

The Convener: How does a 20lb salmon convert into metric measurements?

Brian Fitzpatrick: Deliciously, I would have thought.

Gordon Jackson: Pepper and lime would be absolutely fine.

The Convener: The Scottish Law Commission's fourth recommendation concerns the defence of possession of salmon in the close time if it is lawfully caught. A statutory defence to the offence exists in section 21 of the Salmon Fisheries (Scotland) Act 1868: if a person is accused of catching salmon in the close time, their defence can be that it was lawfully caught. The recommendation is that the committee approve that proposal, but there is a question about section 16(2), given that some ambiguity arises from the

wording. It is suggested that we ask the Scottish Executive whether the wording of that subsection could be made a little clearer.

John Farquhar Munro: The commission's recommendation 4 refers to salmon

"lawfully caught during the annual close time."

It could not be lawfully caught during the close season, could it?

Iain Jamieson: In certain circumstances, people are allowed to fish by rod and line.

John Farquhar Munro: For research, for example.

Iain Jamieson: Yes. The case of someone who was caught in possession of a salmon that may have been caught in the open season would also be covered.

The Convener: For example, someone may have put the salmon in their freezer for a few weeks and taken it out again in the close season.

Brian Fitzpatrick: Or they may have taken a piece with them.

Iain Jamieson: It is a question of whether the signposts within section 16(2) are clear or whether they should be clarified.

Brian Fitzpatrick: Clarification would be a good idea. If the subsection can be clarified, why should it not be?

Gordon Jackson: Can I be picky? That point is down as number 4 in the adviser's note, but it is down as number 5 in the list of recommendations in the Scottish Law Commission's report. I do not want anyone to come back to us and say that they do not know what we are talking about. Perhaps I am wrong, but number 4 is about changing sheriff to sheriff substitute, which does not seem to me to be that serious.

Iain Jamieson: I beg your pardon. We are indeed talking about recommendation 5.

Gordon Jackson: I just wanted us to note that.

Brian Fitzpatrick: Who has read his papers?

The Convener: Such diligence.

Gordon Jackson: I am trying to dispel the myth that I do not read anything.

The Convener: Make that man a judge.

Does that mean that we need to look at point 4?

Iain Jamieson: No. Point 4 is covered elsewhere.

The Convener: Let us move on to the commission's point 6, which deals with prosecution for illegal possession of salmon during the annual close time. It is suggested that the

committee accept that as an appropriate recommendation, that we approve it and that we agree that effect be given to it in section 16(1).

Members indicated agreement.

The Convener: The commission's point 7 relates to removal of salmon fishing tackle during the annual close time. It is suggested that the committee approve that recommendation and agree that effect be given to it in section 15(5)(b). However, the question arises whether similar practices, which are tolerated and are not included in the list contained in the measure proposed by the commission, should also be exempted. I suggest that we write to the Executive to confirm that, apart from the practices mentioned in the commission's point 8, there are no similar practices that are tolerated and should also be exempted. Point 8 deals with

"poles of certificated fixed engines in situ".

Does that recommendation meet with members' approval?

Mr Hamilton: I am not qualified to know whether anything else should also be exempt. How can we address that question? Is the issue dealt with in the written evidence that we are to receive from the associations?

The Convener: I understand that the commission consulted widely before it produced its proposals, and the recommendations in its report are intended to be non-controversial and consensual. I understand that anything that was not covered in its proposals would have come out in its consultation and would therefore have been covered in the bill. I believe that that is also Iain Jamieson's understanding.

Mr Hamilton: I suggest that we do as the convener suggests and write to the Executive, but that we should also ask whether any other suggested or controversial exemptions were rejected, so that I am clear on that point.

The Convener: Yes. We can ask the Executive whether anything was not covered.

We covered the commission's point 8 briefly. It is suggested that we approve recommendation 8 and agree that effect be given to it in section 15(5)(d).

Members indicated agreement.

The Convener: The commission's ninth proposal deals with lawful methods of fishing for salmon and with such interesting aspects as cruives, fixed engines, haaf nets—of which anybody who has any interest in the Solway will be aware—and the people who derive their living from fishing on the Solway. The first part of the commission's proposal is that the methods of fishing for salmon to be recognised as lawful as at

10 May 1951 should be cruives and—in the Solway—certificated fixed engines and haaf nets. The third part of the recommendation is that the Scottish ministers should be given the power, through regulations, to define what is meant by fishing by haaf net.

We are advised to approve those measures and to ask the Scottish Executive to confirm whether those methods of fishing for salmon are exhaustive. We are also advised to ask the Executive to explain its position on harling. As I understand it, harling is the method of trawling for fish from the back of a boat. There may be other methods of fishing of which we are not aware and which are not covered by that list. We should ask the Scottish Executive about that.

We should also ask the Scottish Executive why it has stopped preventing the right to use a cruive from being acquired in the future by prescription and whether that meets the test of being

“necessary in order to produce a satisfactory consolidation”.

We should also seek the Executive's comments on whether the proposed reversal of the onus of proof in section 1(6)(d) is considered compatible with article 6 of the European convention on human rights and whether section 61 should apply to it. Iain, would you like to comment on those matters, which are fairly technical?

15:45

Iain Jamieson: I think that they will be clear in the written note to the Executive.

The Convener: Do members agree?

Members indicated agreement.

The Convener: The 10th recommendation from the commission relates to saving for acts done regarding trout for scientific purposes. The advice is that we should approve the recommendation and agree that effect should be given to it in section 28. Do members agree?

Members indicated agreement.

The Convener: The commission's 13th recommendation—

Gordon Jackson: Have we missed out some recommendations because we are happy with them and because they do not raise issues? The list moves from recommendation 10 to recommendation 13. I assume that recommendations 11 and 12 are fine.

Iain Jamieson: We have missed out the recommendations that relate to other parts of the bill. These recommendations relate only to part 1.

Gordon Jackson: So we are not dealing with the recommendations in order and will come back

to recommendations 11 and 12 later. That explains it for me.

The Convener: The 13th recommendation is on the prohibition of the use of fish roe, fire and light. The advice is that we approve the recommendation and agree that effect should be given to it in section 4. However, there is a query about some of the terms. It is suggested that we ask the Scottish Executive to explain where the baits or lures that are to be prohibited were made unlawful in previous legislation and to confirm that the list of unlawful baits and lures was exhaustive at the date of the passing of the 1951 act. We will write to the Executive in those terms. Do members agree?

Members indicated agreement.

The Convener: The commission's 14th recommendation deals with the issue of fishing by rod and line. The recommendation is of some controversy, as it suggests that the Scottish ministers should be given the power to make regulations with regard to fishing by rod and line—in other words, to define what that is. The advice is that we should approve the first part of the recommendation and agree that effect should be given to it in section 4. However, we should ask the Scottish Executive to confirm that the three methods of fishing by rod and line that are specified as offences in the definition of “rod and line” in section 4(1) specify all and only those methods of fishing that were made unlawful by the legislation that was repealed by the 1951 act. We are advised to ask the Executive to explain what is meant by those unlawful methods and their provenance and why it thinks that conferring a power on the Scottish ministers to amend the definition of “rod and line” by regulations meets the test of being

“necessary in order to produce a satisfactory consolidation”.

We should also ask how section 4(3) would give effect to the second part of the recommendation.

Gordon Jackson: That is a good example of the “necessary” problem.

Mr Hamilton: The adviser also raised a question about the definition of pointing. Is that covered by the action that the convener has suggested?

Iain Jamieson: What is meant by pointing and where the definition comes from were covered in the convener's summing up.

The Convener: Members should know that the Subordinate Legislation Committee considered that point this morning and agreed to raise its concerns with the Executive in writing.

John Farquhar Munro: The use of set lines is an issue because it has become standard practice for anglers on a riverbank or loch to set up a series of rods with set lines. That practice is causing a lot of concern, particularly in the managed fisheries that have a high number of rainbow trout. We are getting complaints from that sector.

The Convener: I presume that set lines are used to obtain fish commercially—that is, that people sell them on. Is that correct?

John Farquhar Munro: Yes. They are not used for the sport of fishing. A particular group wants to give oral evidence on that issue to the committee, but I do not know whether that would be appropriate.

The Convener: It would be best to ask the group to submit written evidence. After considering its submission, we could decide whether to invite the group to give oral evidence.

Members indicated agreement.

The Convener: We move on to the fourth and final paper, which contains our adviser's recommendations on whether part 1 correctly consolidates the law. The adviser comments on the bill's general structure. For example, he comments on whether the heading for part 1 is appropriate or should be changed, and on the grouping of sections. I will not go through the adviser's comments in detail. I suggest that we write to the Executive and ask for its comments on the layout of the bill, the numbering of sections and so on.

Section 1(3) deals with persons who attempt to commit an offence. The Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 states that such persons should be treated as being

"punishable in like manner as for the said offence."

That wording has been slightly changed in the bill to:

"Liable to the same punishment as if that person had committed the offence."

There is ambiguity about the mode of trial that would be used for the offence in question. It is recommended that we write to the Executive and ask for its comments on the issue. Does that meet with members' approval?

Members indicated agreement.

The Convener: The next point relates to sections 1(5)(d) and 1(6)(a). Those provisions require any person who considers that he is entitled to use a cruive or a certificated fixed engine to prove that entitlement in any legal proceedings in which the question is raised. That is a new provision; it is not a re-enactment or the

subject of any recommendation by the Scottish Law Commission, although the commission recommended a similar provision in relation to haaf nets. It is questionable whether the new provision is competent within a consolidation bill. The recommendation is that we ask the Executive to explain why it is thought that sections 1(5)(d) and 1(6)(a) can be included in the bill. We should also seek the Executive's comments on whether they are compatible with article 6(2) of the European convention on human rights and whether section 61 should apply to them. Is that agreed?

Mr Hamilton: Should we perhaps be a bit stronger than that, if we are trying to draw clear lines for the future? Should we not intimate that the committee does not think that the bill is a relevant vehicle for those measures?

The Convener: At this stage, we are simply writing to the Executive to ask for its views. We will draw our conclusions in our report.

Mr Hamilton: But should we not do as I suggested to avoid any possible confusion? We are asking the Executive not to justify the measures, but to justify why they are in the bill. It might help if the Executive was clear that it is not that we are confused, but that we clearly do not think that the bill is the right vehicle for what the Executive is trying to achieve—if that is what we are saying.

Brian Fitzpatrick: Are we at that stage? Surely it is a matter of which side we come down on.

Mr Hamilton: That is true.

The Convener: You may have a point, depending on how the parameters for examining that issue are drawn.

Mr Hamilton: Fair enough.

Iain Jamieson: The Executive might also have an argument, and I think that the committee should wait until we receive the Executive's comments before members make up their minds.

The Convener: Are we agreed?

Members indicated agreement.

The Convener: Section 4(1) defines what is meant by "rod and line" for the purposes of the bill and refers to section 33. There is some ambiguity because a power is conferred under section 38(5)(b) to make a salmon conservation order, which may also prohibit the use of specified baits or lures for the purposes of the definition of "rod and line". Therefore, it would seem logical that section 4(1) should also refer to section 38(5)(b). If members agree, we should write to the Executive asking for its comments on that. Are we agreed?

Members indicated agreement.

The Convener: Section 8(1) re-enacts section 6 of the 1951 act, which refers to the “low water mark”. That has been translated in section 8(1) as “mean low water springs”, but the advice from our legal adviser is that the two concepts are different. That is not a straightforward consolidation and it is suggested that we write to the Scottish Executive for its comments on that point. Are we agreed?

Members indicated agreement.

The Convener: Sections 9(1) and 9(2) correctly reproduce sections 7(1) and 7(2) of the 1951 act. However, our legal adviser is concerned that the wording is not clear and is, in fact, archaic. The subsections might make more sense if the wording were clarified and modernised. Again, if members agree, we can write to the Executive for its comments on that point. Are we agreed?

Members indicated agreement.

The Convener: Section 11 deals with the Theft Act 1607, which created an offence of theft. However, the bill’s draftsman considered that the offence created by the 1607 act is one not of theft but of fishing. Given that that perhaps goes beyond the scope of a simple consolidation, our legal adviser has advised that it would be preferable if the Scottish Law Commission had recommended a modernisation of the law rather than a straightforward consolidation. We have been advised that, until there is judicial clarification of the scope and nature of the offence in the 1607 act, it should not be consolidated because doing so would detract from the bill’s intention to include all existing law relating to salmon and freshwater fisheries in Scotland. It has been suggested that we draw the matter to the attention of the Scottish Executive and ask about the scope and nature of the offence under the 1607 act. We could suggest that it would have been better if the matter had been referred to the Scottish Law Commission for its views and recommendation rather than simply translated into the bill. Do members agree?

Members indicated agreement.

John Farquhar Munro: You must be careful, because the adviser’s note states that it does not matter whether a fish is caught or taken if a person is in the act of fishing. The existing law states that an offence is dependent on which bait or lure is used. If a person is fishing on a loch or a river for brown trout and catches a sea trout or a salmon, that is an offence, but the person is fishing legally before the fish catches the hook.

The Convener: I am grateful for your expertise in such matters.

16:00

Iain Jamieson: Section 11 is difficult because it is hard to fault the draftsman’s view—based on his

analysis of the 1607 act—that, for the past 100 years, the courts have misinterpreted the offence that is involved. However, the practice in the courts of prosecuting for theft in such cases indicates that it might have been preferable if the issue had been the subject of a Scottish Law Commission recommendation. We are left with the question of what is to be done with section 11. We should ask the Executive what consultation it has carried out—for example we should ask whether it has consulted the Crown Office on the matter.

Mr Hamilton: In the absence of clarity and of the likelihood of receiving a response from the Executive in time, what should we do? Will we simply have to agree that section 11 will not be part of the bill? If so, that would be an admission of defeat because the bill is supposed to be a clear, all-encompassing and comprehensive statement of the law. You are saying that that is not the case and, given the time scale for the bill, achieving it is well-nigh impossible. Where does that leave us?

Iain Jamieson: Members might be persuaded by the Executive’s comment that, as section 11 is pure consolidation, the committee should just allow it through. The committee must decide.

Gordon Jackson: My concentration went for a minute. At present, are people prosecuted for stealing or for fishing?

Iain Jamieson: They are prosecuted for theft. The draftsman proposes that the offence is really fishing and that therefore it does not matter whether a fish has been taken.

Gordon Jackson: It is a bit late in the day. There is a school of thought, which Lord Marnoch recently expressed succinctly—his comments did not relate to fishing, although that is one of his great interests—that when a law has been thought to be the law for a long time, it is the law. Therefore, if something has been treated as theft for hundreds of years, it is theft.

Iain Jamieson: That is precisely the point.

Gordon Jackson: I should point out that Lord Marnoch is in the minority on that issue, but I have much sympathy with his view. If people have been prosecuted on a certain basis for hundreds of years and the citizen understands that, that is the law.

Iain Jamieson: Yes, although as an interpretation of the statute, it is hard to fault the draftsman’s view.

Gordon Jackson: If a matter has always been handled in a certain way, it would hardly be an act of consolidation to claim that it has been handled wrongly for 300 years and then to change it.

Mr Hamilton: Also, it would be annoying if we changed the only bit that people understand.

Gordon Jackson: The issue is serious in a minor way.

The Convener: We will write to the Executive. We will revisit the matter next week, when, hopefully, we will have a response.

Gordon Jackson: It is a significant power for the draftsman to say that although the law has been interpreted in a certain way for 300 years, that is wrong. The draftsman is saying that the bill will not change the law, just state what the law has always been, even though judges have stated it differently for 300 years. On one view, that goes beyond the draftsman's consolidating power.

Iain Jamieson: That is precisely why the matter should have been the subject of a recommendation by the Scottish Law Commission.

Gordon Jackson: That is fair.

Iain Jamieson: Perhaps we could put a question on the matter to the representative of the Scottish Law Commission when he or she appears before the committee.

The Convener: Yes.

Section 12(1) makes it an offence for any person to fish for or take freshwater fish in contravention of a prohibition that is contained in a protection order. The suggestion from our legal adviser is that it might have been clearer whom the offence applies to if the opening words were not simply "Any person", but "Any person who without legal right, or without written permission from a person having such a right".

The suggestion is that we write to the Scottish Executive to ask for its comments. Is that agreed?

Members indicated agreement.

The Convener: Section 14(1) is a re-enactment of section 15(1) of the Salmon Fisheries (Scotland) Act 1868. The draftsman explains in his note on the bill why it is unnecessary, when re-enacting section 15 of the 1868 act, to make it a criminal offence to attempt or to aid or assist in the criminal conduct. That approach is not followed in section 14(1), which refers expressly to any person who

"aids or assists in fishing for or taking"

salmon.

However, section 14(2) provides a defence to the offence. That is inconsistent and it is therefore suggested that the quoted words in section 14(1) should be deleted.

It is suggested that the committee draw the attention of the Scottish Executive to those points and ask for its comments. Do we agree to do that?

Members indicated agreement.

The Convener: Section 14(2) correctly restates section 15(3) of the 1868 act, except that the reference to byelaws has been translated to refer to regulations. The draftsman explains in his note on the bill that the reference to byelaws in that provision was extended by section 5(2) of the Salmon Act 1986 to include regulations. However, it is not clear why regulations alone are now referred to. The same point applies to section 31(7). It is suggested that we write to the Executive for comments. Do we agree to do that?

Members indicated agreement.

The Convener: Section 15(1) deals with the "annual close time" for salmon, but that expression is not defined either in this section or in section 70(1). The expression is defined in section 14(1), but there are other sections in which it is not defined, such as sections 14(2), 15(2) and 16(1). It is suggested that the annual close time should be defined in section 70(1) as being construed in accordance with section 37 and that references to the annual close time should make it clear expressly, rather than in an implied way, that it refers to the annual close time for salmon, as distinct from that for trout, in view of the fact that criminal offences are created.

Do we agree to draw the attention of the Scottish Executive to those points and to ask for its comments?

Members indicated agreement.

The Convener: Section 17(2) deals with the close time and derives from section 1(1) of the Freshwater Fish (Scotland) Act 1902. It is not clear whether the common trout that is referred to is the same as, or is merely included in, the definition of trout that is included in section 70(1). That expression is not referred to in the Scottish Law Commission's recommendation 23.

Do we agree to write to the Executive to ask for clarification of that ambiguity?

Members indicated agreement.

The Convener: Section 19(2) provides that the offence of being in possession of any salmon roe

"shall not apply to any person who gives a reason, satisfactory to the court before which that person is charged, for being in possession of salmon roe".

That restates section 18(1) of the 1868 act. This is a strange provision because it does not specify the reasons that might be found satisfactory to a court. The matter of what satisfactory reasons there might be seems to be left entirely to the discretion of the court. If that is the case, a question may arise over whether that is compatible with article 6 of the European convention on human rights.

Do we agree to write to the Executive to ask for its comments on that matter?

Members indicated agreement.

The Convener: Section 24(1) refers to

“a salmon fishery district board”,

which is not defined in this section or in section 70(1). It is suggested that such a definition would be helpful.

Do we agree to write to the Executive to ask for its comments on that matter?

Members indicated agreement.

The Convener: Section 25(2) defines the Solway as including

“the rivers, streams or other watercourses running into the Solway”.

Do we agree to write to the Executive to ask where that definition comes from?

Members indicated agreement.

The Convener: Section 26(1) makes it a criminal offence for any person, without legal right or permission, to fish for any fish other than salmon in any of the rivers running into the Solway. The provision derives from section 9 of the Solway Firth Fisheries Act 1804, but that section appears to make it a criminal offence to fish for any fish, including salmon, without permission in the Solway. It is not known why that has been translated to make it an offence to fish for any fish except salmon.

Because of the ambiguity, do we agree to draw the attention of the Scottish Executive to that point and to ask for its comments?

Members indicated agreement.

The Convener: Section 31(1)(c) refers to “dams, including mill dams”. The adviser’s suggestion is that that definition is unnecessary because the definition of a dam in section 70(1) includes such a reference and to include it would cause ambiguity.

Do we agree to write to the Executive to ask for its comments on that?

Members indicated agreement.

The Convener: Section 31(3) contains a reference to “districts” that should properly be to “salmon fishery districts”. Do we agree to draw that to the Executive’s attention and to ask for its comments?

Members indicated agreement.

The Convener: Section 31(5), which derives from section 3(3) of the Salmon Act 1986, prohibits the regulations from shortening the periods that are specified in section 13 of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, which is re-enacted in section

13 of the bill. The periods to which section 13 refers are the weekly close time, the period during which fishing for salmon is prohibited—Sunday—and the period during the weekly close time when fishing by rod and line is permitted. However, the provision prohibits the regulations only from reducing the weekly close time to a period of less than 42 hours.

Because of the ambiguity, do we agree to write to the Executive for an explanation?

Members indicated agreement.

The Convener: Section 31(6) relates to any proprietor or owner of a fishery

“at which stake weirs, stake nets, fly nets or bag nets are used”

and

“who fails, in regard to such nets,”

to do certain acts. It is not clear whether the reference to “such nets” includes stake weirs. Section 24 of the Salmon Fisheries (Scotland) Act 1868, from which the provision derives, contains a relevant definition. If the wording reverted to that, it would make more sense.

Do we agree to draw that to the Executive’s attention and to ask for its comments?

Members indicated agreement.

Brian Fitzpatrick: I am in complete ignorance. What is the concern with stake weirs? Are they not nets?

Iain Jamieson: Section 24 of the 1868 act contains a comma between the word “stake” and the word “weir”, which makes it clear that stake, weir or stake nets are all covered by the word “nets”. In the re-enactment in the bill, a stake weir is an entity in itself. I simply do not know what stake weirs are. I query the reference because it might not be covered by the subsequent reference to “such nets”. The Executive might well have an explanation.

The Convener: Alternatively, a comma might just be missing.

Section 33(1) deals with regulations on baits and lures. The suggestion is that it should be made clear that the regulations prohibit the use of specified baits and lures only for the purpose of the definition of rod and line in section 4 and that they are not making a general prohibition.

As that is ambiguous, do we agree to ask for the Executive’s comments?

Members indicated agreement.

The Convener: Section 33(7)(a) provides that references to a designation order in paragraphs 10 to 15 of schedule 1 should be construed as

references to regulations under section 33(1), but those paragraphs do not appear to refer to a designation order and the expression “designation order” is defined not in section 70(1), but in section 34(3). The suggestion is that the expression should be defined in section 70(1).

Do we agree to write to the Executive to ask for its comments?

Members *indicated agreement.*

The Convener: It is important that the table of derivations in a consolidation bill is accurate. The legal adviser has several concerns about the table of derivations in the bill, which I do not intend to read out in detail. I suggest that we incorporate those concerns in a letter that asks for the Executive’s comments.

Does anyone want to raise any other issues? We will write to the Executive and ask for its comments and I hope that we will have a response in time for next week’s meeting. If not, we will consider the response at a later meeting. We will also write to the Scottish Law Commission to make it aware of our letter to the Executive. We will invite witnesses for next week’s meeting, at which we will deal with the remaining provisions in the bill, if the legal adviser can provide us with notes before the meeting.

Gordon Jackson: Will it be possible to do all that? I am thinking of what we have said about the general principle of the word “desirable”, for example. I guess that we plan to ask around 35 to 40 questions about part 1 of the bill. If we have to sit down, form a final view on the whole of part 1 and take evidence, can we realistically do anything in respect of part 2?

16:15

The Convener: I will let the clerk say something about that.

Tracey Hawe (Clerk): The original intention was to look at part 1 today and the remainder of the bill next week, then to take evidence from the Executive. To judge from the committee’s tone, I think that it would be more practical to take evidence on part 1 from the Executive next week and to try to resolve queries about that before moving to part 2 the following week. However, I am entirely in the hands of the committee.

Gordon Jackson: From our experience on the Subordinate Legislation Committee, we know that what will probably happen is that the Executive will be asked 40 questions and we will end up with 10 live issues. Usually, the Executive replies that we have spotted many things and it suggests amendments to fix the problems. The Executive gives explanations and we will say, “We see that. That is the explanation and it is fair enough.”

Usually, we want to discuss a number of questions with the Executive—in this case, I am guessing that we would want to do so. I would like a chance to read the questions and the answers collectively with committee members to decide whether there is anything further that we want to ask the Executive. Perhaps we could do so in the hour before we took evidence.

Iain Jamieson: Perhaps we could return to the original idea. We could finish off consideration of the bill next week, get the written views of the Scottish Law Commission and the Executive by next week and take evidence the following week. By then, we could sift out problems.

The Convener: So at next week’s meeting, we would deal with part 2 and consider the Executive’s replies in respect of part 1, if we have them. Will we have time for evidence from a witness from the Scottish Law Commission, or should we leave that until the following week?

Gordon Jackson: I would like to hear from the Scottish Law Commission on the issue that I mentioned, as it colours how we will deal with everything thereafter. Could we follow Iain Jamieson’s suggestion? We could look at his questions on part 2 and the written answers in respect of part 1 and then decide what issues are still live. We should get at least half an hour with a senior person from the Scottish Law Commission to tell us about the yardstick that it applies, as that will colour how we will deal with everything thereafter.

The Convener: In that case, it would seem appropriate to take evidence from a representative of the Scottish Law Commission as the first item on the agenda. We could deal with that and then move to consideration of part 2.

Mr Hamilton: Is there any chance that the Scottish Law Commission will say that it did not have discretion in the matter in question and that it was told what to do? Is it definitely right to ask the Scottish Law Commission the question? Should the Scottish Law Commission and the Executive be at a meeting to answer the question?

The Convener: It does not really matter what discretion the Scottish Law Commission has. We are trying to determine the criterion that it used.

Brian Fitzpatrick: We are not inviting the weans along.

Gordon Jackson: There is no danger that the Lord Eassies of this world will use the well-known defence of “A big boy told me.” He will have an explanation about what yardstick he applied. I hate to be boring about the matter, but the question colours everything that we do thereafter. Can we ask the Executive to give us all the answers that we have requested by next week? There are a

serious number of questions. I can see a man in an office getting our request tomorrow and saying, "Oh my!", or words to that effect.

The Convener: All that we can do is to send a letter and find out how the Executive deals with it. We have a further meeting at which we can deal with the matter, if we have to do so.

Gordon Jackson: Are we allowed to ask the Executive now whether it can reply for Tuesday?

The Convener: There are no comments from the back of the room. It would be unfair to put people on the spot.

I thank members for attending and look forward to meeting again at the same time next week.

Meeting closed at 16:19.

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