

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

Tuesday 14 January 2003
(Afternoon)

Session 1

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2003.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The
Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now
trading as The Stationery Office Ltd, which is responsible for printing and publishing
Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 14 January 2003

	Col.
SALMON AND FRESHWATER FISHERIES (CONSOLIDATION) (SCOTLAND) BILL: STAGE 1	33

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

2nd 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)

WITNESSES

Lord Eassie (Scottish Law Commission)

Jane McLeod (Scottish Law Commission)

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 14 January 2003

(Afternoon)

[THE CONVENER *opened the meeting at 15:05*]

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

The Convener (Murdo Fraser): Good afternoon, ladies and gentlemen, and welcome to the second meeting this year of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee.

I start by intimating apologies on behalf of two members: I am sorry to say that the deputy convener, Gordon Jackson, is down with food poisoning—although not, we trust, from eating a salmon—and John Farquhar Munro is detained at the Rural Development Committee.

There are three items on the agenda. Item 3 is our consideration of the Scottish Executive's response to points that we raised at our last meeting on part 1 of the bill. That response came in late last night and, because we feel that advisers have not had sufficient time to deal with it, we believe that it would be better to defer the item until next week's meeting. We can then consider the Executive's response to points on the whole bill.

I welcome to the committee Lord Eassie, chairman of the Scottish Law Commission, and Jane McLeod, secretary of the Scottish Law Commission. I thank them for attending, particularly as I understand that they gave up other appointments to be here this afternoon.

Lord Eassie (Scottish Law Commission): I am pleased to say that the court appointment to which you are referring finished early.

The Convener: We wrote to Lord Eassie, indicating the point that we wanted to raise with him. We have received a response from the Scottish Law Commission entitled, "Recommendations for Amendment of the Law in Consolidation Bills". Before I ask members of the committee to put questions, I shall ask Lord Eassie whether he wants to speak to his paper or make any general comments.

Lord Eassie: On the assumption that committee members have had the opportunity to read the paper that was submitted yesterday—it sets out the statutory background to the Law Commission's work on consolidation and outlines the approach that has been adopted in Westminster—I will not rehearse what is there in writing, unless members want me to do so. As the committee is aware, since at least 1983, the practice or test for Law Commission recommendations in Westminster has been whether the recommendation is necessary for producing a satisfactory consolidation. The commission has endeavoured to follow that approach for this bill.

Members are probably aware that the way in which the commission goes about consolidation is different from the way in which it goes about its other work. In its other work, it is concerned with recommending changes and improvements to the substance, whereas, in consolidation, it is concerned not with the reform or the policy of the law, but with whether the consolidation is a satisfactory consolidation or restatement.

As the commission's written submission states, the need to make recommendations is commonly flagged up by draftsmen. Their concern is obviously that the product of their efforts should be useful and satisfactory to the user and to the legislature as a basis on which future amendment can be envisaged.

The production of a satisfactory consolidation necessarily involves questions of judgment and assessment. On occasion, there will be scope for differing but equally legitimate views. The term "satisfactory" often involves questions of degree. With metric measurements, for example, we took the view that it was not satisfactory to restate the law using conversions up to six decimal points. The committee would probably agree with that, but other people might think that, although that approach may not be satisfactory, it could be functional. It may be that the current situation is not sufficiently unsatisfactory to warrant change.

Another example from our report is the prohibition in existing law against fishing with a set line. Some people might find a complete prohibition unsatisfactory. That is a matter of policy, which is why we indicated it as such and deemed that it was not appropriate to make any recommendation on that point in the consolidation.

Another point to mention is that in some areas it is easier to produce a satisfactory consolidation without recommending adaptations than it is in other areas. A field contained within what is essentially a relatively modern statutory code is more readily susceptible to a consolidation than a field such as the one with which we are dealing—the subject relates to a large number of statutes, some of which are quite elderly.

The Convener: Thank you, Lord Eassie. We are obliged to you for your opening statement.

Mr Duncan Hamilton (Highlands and Islands) (SNP): The criterion of what is necessary to achieve a satisfactory consolidation has obviously given rise to a great deal of debate and no small element of confusion. Initially, we were not sure whether the Scottish Law Commission had followed that test, although we now understand that it did.

The Scottish Parliament is not necessarily bound to take the same approach as Westminster. We have the benefit of potentially being more flexible. Did you consider using any other yardsticks? Did you assume that the method that has been adopted was the right way to go forward and then work from there? Are you aware of yardsticks in other jurisdictions that might be of interest and that might represent a better way of doing things?

Jane McLeod (Scottish Law Commission): In this consolidation, we continued to use the yardstick that we always used in pre-devolution days. To be honest, we did not give any specific thought to changing the yardstick.

Lord Eassie: I deferred that question to Jane McLeod because, as the committee will appreciate, I have only recently assumed the reins of the Scottish Law Commission. I was not there when the project began.

Jane McLeod: The Scottish Law Commission does not do consolidation work just for the Scottish Parliament. We also work jointly with our English colleagues on Westminster consolidations. From a practical point of view, it would probably be quite difficult and confusing to use two different criteria depending on whether the consolidation that we were preparing was for Westminster or the Scottish Parliament. We did not give any direct consideration to changing the yardstick.

Mr Hamilton: I do not know whether the debate has a history of which you can inform the committee. Some of us are relatively new to the matter. Has there been any debate over the years in the Scottish Law Commission about whether the test should be challenged? Has the committee simply happened upon a redundant point? Can you give the committee some background?

Jane McLeod: I am not sure that I can provide much background, as I have been secretary of the commission for only the past two years. The criterion for a recommendation is whether it is necessary to achieve a satisfactory consolidation. My understanding is that that criterion has been accepted practice since 1983, as our submission states. As far as I am aware, there has been no internal debate since then on whether the criterion should be changed.

15:15

Mr Hamilton: Is there no relevant evidence from other jurisdictions to which you could point us?

Jane McLeod: There is none that I am aware of.

Mr Hamilton: I am not sure that the committee is necessarily minded to change the criterion, but we are minded to look at the options, so that we can be clear that what we are doing represents the best way forward. Could we be given a steer on how we might investigate the matter further? As ours is the first consolidation committee, it is important that we consider the issue.

Jane McLeod: I suppose that the committee has the option of taking a broader criterion than the one that has been used until now. Instead of accepting what is necessary for a satisfactory consolidation, the committee could go a step beyond that by recommending what is desirable. That would give greater flexibility as to what recommendations could be made. Obviously, whether the committee thinks that that is appropriate is a matter for the committee.

The Convener: Should the test that is to be applied be the strictest one?

Lord Eassie: No. One could no doubt apply a stricter criterion by insisting that the consolidation bill reflects exactly the existing law with all its warts, but one would probably end up with a consolidation that was not useful and not much better than what went before. I would have thought that the aim behind consolidation is to try to improve matters by producing a unified legislative instrument that will be easier for lawyers to use and easier for members of the public to understand. The consolidation should also, if I may say so, make it easier for parliamentarians to consider whether the policy of the law needs to be altered and whether the act should be amended.

Mr Hamilton: When the commission was going through this process, was it aware that there would be no real parliamentary debate or scrutiny of the recommendations? I ask that question because, if we move towards a situation in which it has been suggested that the consolidation bill could reflect what was desirable, we may be getting into the area of making policy, which is a step further. Our standing orders provide no opportunity for parliamentary debate or testing of a consolidation bill, so we would obviously not think that such a step would be particularly desirable.

Lord Eassie: Certainly, one is conscious of the limited amount of parliamentary scrutiny of a consolidation measure. For that reason, one tries hard to steer clear of anything that might be regarded as altering the substance or policy of the legislation in a political way.

Jane McLeod: Another point that is worth bearing in mind is that the commission's work on this consolidation started some time before devolution. When the work began, the immediate expectation was that this consolidation bill was destined for Westminster, where it would be dealt with using the yardstick that we were used to.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): I do not seek to ascribe where the time of the bill's drafting kicks in. If I may echo what Duncan Hamilton said, I am intrigued to know where necessity ends and desirability begins—it is difficult to measure something that is so much in the air and so much dependent on which way the wind is blowing.

I do not think that there is any particular magic behind our investigations, but we have identified a number of areas in which there could be a question mark over whether necessity can be established as the reason for a recommendation. An unobjectionable example of that would be the commission's recommendation 2, which is about the electronic delivery of documents. If we were to take a strict interpretation of the necessity criterion by asking whether the consolidation bill could be drafted without such a recommendation, the answer would of course be that it could, as we could simply maintain the present arrangements. However, the suggested reform in relation to the electronic delivery of documents is desirable—of course it is an improvement.

I acknowledge the comments that you make in your submission about the benefits of dealing with consolidation almost on an ad hoc basis. The rationale for carrying out work in that way is more like, "Let's see what things look like and whether we can accommodate them."

However, the committee's difficulty comes back to the point that Duncan Hamilton raised. We represent the only run that the Parliament has at this matter. If we cannot work out a litmus test at this stage, we should not rely on the fact that at some point the bill will have to be passed by Parliament. Indeed, we should be honest about this: the bill will be subject to parliamentary procedures only notionally, because our colleagues will simply be invited to vote yea or nay on it. That will be the extent of scrutiny.

I am concerned that we do not have a real sense of whether there was any real discussion about how the Scottish Parliament's legislative processes could reflect on the commission's recommendations. For example, we do not have a joint committee. We might have raised that question in relation to the Parliament's procedures and how consolidation works under the Scotland Act 1998. Can you help us with that matter?

Lord Eassie: I will do my best.

I wonder whether your starting point should be the notion of what is satisfactory, because that is very much a matter of judgment. You might say, "Well, the instrument doesn't look very satisfactory." If the recommendation is unsatisfactory, you might say, "We must change it." The area of judgment lies in what you consider to be satisfactory. If you come to the conclusion that straightforward consolidation will not produce a satisfactory instrument, obviously you should do something to make the instrument satisfactory. In a way, you will be concentrating on the technical satisfactoriness of the instrument, not on the satisfactoriness of its substance.

Brian Fitzpatrick: You mentioned that you would want to steer away from direct prohibitions. Indeed, the commission has recommended that no line should be taken on that issue. Should we excise that provision?

Lord Eassie: I think that you are referring to my comment about a prohibition on the practice of fishing with a set line.

Brian Fitzpatrick: Which is unique.

Lord Eassie: Yes, but it exists. Altering that provision would be a matter of policy, which would rightly be a subject for proper parliamentary debate and approval. That is why we said that it would be completely inappropriate to make any recommendation on that matter in what is a consolidation measure.

The Convener: I want to use the example that you have mentioned. Although you do not propose that the consolidation bill should contain a prohibition, you recommend that powers should be conferred on the Scottish ministers to make regulations on the definition of fishing by rod and line. As that could have the same policy outcome, does that not go beyond the test of necessity?

Lord Eassie: The power to make regulations—

The Convener: I am talking about recommendation 14.

Lord Eassie: I think that we were suggesting that fishing with rod and line should be put in the same category as the other methods of fishing that were subject to regulatory powers. We were trying to bring some coherence to the matter.

The Convener: The point that I am trying to make is that such a measure could have the policy outcome that you are trying to avoid, which is that there would be a prohibition on fishing by set line. I appreciate that it might not be fair to press you on specifics, because this is not your bill. However, the committee needs to address the problem and might have to come back to you on this matter later in the process. It seems that this is one example of where some of your recommendations stray on to the field of policy.

Lord Eassie: Well, it was not our intention to do so. Again, the whole concept of what is satisfactory involves an area of judgment.

Mr Hamilton: One of the things that have confused me throughout the process is that we are talking about a vast area of legislation that goes back about a zillion years. In relation to our trying to remain true to the spirit and intention of the legislation, it strikes me that it is almost impossible in this context not to give new policy direction in the process. You say in your letter that you do not want to get involved in areas of policy, which is correct, but—this is the way that most questions are going—do you accept that it is inevitable that you will get involved? It might be inevitable and, if it is, perhaps the committee should reflect on that for future consolidation bills and consider how the Parliament and the Executive operate with the commission.

We have a list of seven areas in which we have concerns. Those areas are where new powers are being given to ministers without parliamentary scrutiny or where we might not have wanted to give them powers. People will be directly affected by that decision and I am curious about whether you think that that is an inevitable part of consolidation legislation.

Lord Eassie: It is to some extent. Unless we adhere strictly to the view that we can make no changes whatever and that we must reproduce exactly what already exists, with all its defects and modes of expression, it is inevitable that there will be changes. In this instance, one might have to reconcile definitions that might not be expressed in quite the same terms, so there will be changes in that way. One is endeavouring to produce an instrument that is satisfactory as a technical instrument but does not make what one could describe as changes to the substance of the law in a potentially controversial way.

Brian Fitzpatrick: I am quite attracted to using satisfaction as the test, but the difficulty is where we go with it. Are we talking about workability or something slightly more than that, which represents some form of improvement?

Lord Eassie: It is perhaps difficult to define “satisfaction” in that way. A fairly useful concept is to say, “This seems satisfactory or this seems unsatisfactory and here is a way in which it can be made satisfactory.”

Jane McLeod: The test as we described it in our paper was to consider what amendments were required to make consolidation both workable and coherent and to provide a suitable basis for future legislative reform. It is hard to be specific in a vacuum or in the abstract about what that will mean in any particular case.

Brian Fitzpatrick: You will appreciate that any Parliament has to be jealous of its powers. If the

position is that consolidation can innovate and make new law, the Parliament has to be concerned about that. That is not a reflection on the commission; it is more an anxiety about what we are doing.

Mr Hamilton: Even the term “workable” is laden with judgments.

Lord Eassie: I do not think that we can escape from the fact that there will be an area of judgment. The commission endeavours to make its recommendations as to what it thinks is necessary to make the bill work suitably. I dare say that if the committee, as part of the legislature, thinks that the position is satisfactory without the recommendation, it can reject the recommendation.

Brian Fitzpatrick: I take it that, when instructions were given for this consolidation bill, the process proceeded in the normal UK-bill fashion.

15:30

Jane McLeod: Yes, that was the case at the start of the exercise.

The Convener: If I am correct, the bill started pre-devolution.

Jane McLeod: That is correct.

Mr Hamilton: When did it start?

The Convener: Pre-devolution.

Mr Hamilton: I know, but was it a long time ago? Roughly, when did it start?

Jane McLeod: In 1996.

Mr Hamilton: Did the Scottish Law Commission ever incorporate into its thinking the potential impact that the devolved Parliament would have on the bill?

Jane McLeod: Only in very general terms, such as being aware of the standing orders that would apply to this committee and the way in which the Parliament would deal with consolidation bills. However, as I indicated, we did not consider any changes to the criterion that would apply to making recommendations for amendments.

Mr Hamilton: This is a point of ignorance, but is the criterion entirely at your discretion, or was it directed to you, initially by the Scottish Office and now by Scottish ministers and the Executive?

Jane McLeod: Going back to Westminster days, the criterion arose by agreement with the UK Parliament. Both houses of Parliament passed a resolution in 1967, which endorsed the practice of the commissions making recommendations for amendment. It was through further debate in the Joint Committee on Consolidation, &c, Bills in

1977 and 1983 that the current criterion for what is necessary for a satisfactory consolidation came about. It is really for the Parliament, rather than for the Scottish Law Commission, to determine what the Parliament regards as a satisfactory measure.

Mr Hamilton: I understand. It would be quite useful to examine that debate, because I presume that we are not going over particularly new ground. I would be interested to know the arguments that were rehearsed and how we ended up in this position.

The Convener: We have that information.

Mr Hamilton: That is what I call an immediate response.

The Convener: The report of the Joint Committee on Consolidation, &c, Bills contains the debate. I dare say that we will not have time to read it, although that option is open to us. The sad fact is that the witnesses' lives would have been easier had the bill gone through Westminster. However, that would only have postponed the inevitable, because another consolidation bill would have come along and the same issues would have arisen, although perhaps some other victims would have been before us.

Lord Eassie: Speaking for myself, I do not think that any other criterion immediately leaps out as being suitable. If one does not try to make some improvements to the legislation, in a technical way at least, consolidation may not be of much value. There ought to be some scope to tidy up errors and ambiguities and generally to make things a little better.

Brian Fitzpatrick: Not doing that might make everybody's life a bit duller—which of course we can decide should be part of our function—but it would make a nonsense of the process. I suspect, with the greatest respect to the witnesses, that the issue is not the remit, but the procedure. It is only because we have to find our way out of the procedure that we have to try to find a form of words for the litmus test. We are basically messing about. We should stop and reflect on the procedure. I understand that you were not given notice of the points that have been identified.

Lord Eassie: That is correct.

Brian Fitzpatrick: Going through those issues now would be a purposeless exercise. I suggest that a more efficient use of everybody's time would be to raise them with you later. It has been helpful to get an idea that we ambled along into the present situation. That is understandable, but we must reflect seriously on the procedure.

Mr Hamilton: I whole-heartedly support what Brian Fitzpatrick has said. What is involved is a matter of procedure and the questions for the commission might not be appropriate. The way out

seems to be to alter not this end of our process, but the other end of the process and our ability to scrutinise the matter. If the Parliament conducts the scrutiny properly, many of the issues disappear. I assume that the commission would be happy about that.

Lord Eassie: I am not sure whether that is in our jurisdiction.

Brian Fitzpatrick: I will ask about a matter that might be mentioned in the joint committee's report. Does Ms McLeod or anyone else know whether the Scottish Law Commission was involved in the discussions in 1967? Duncan Hamilton is right that it would be interesting to know the original intentions. Was the procedure well-inspired do-goodery or did it deal with a substantial point that had arisen?

Jane McLeod: Paragraph 8 of our paper explains how the resolution came about in 1967, when the joint committee considered the Sea Fisheries (Shellfish) Bill. I suspect that that was the first consolidating bill after the Law Commission for England and Wales and the Scottish Law Commission were established and it set the precedent for how Westminster should deal with such situations.

Brian Fitzpatrick: I am only glad that we have not brought the witnesses too far.

The Convener: The discussion has been useful. Committee members will need to reflect on where we go from here. I thank the witnesses for attending and for clarifying their position.

Lord Eassie: I hope that we have made a contribution that is of some use to the committee.

The Convener: It would help if we took a brief break.

15:37

Meeting suspended.

15:51

On resuming—

The Convener: In this session, we will consider parts 2 to 7 of the bill and the schedules. The first set of items to consider is the Scottish Law Commission's remaining recommendations.

Recommendation 4 is a change in reference from "sheriff" in the Salmon Fisheries (Scotland) Act 1868 to "sheriff substitute". I suggest that the committee approves that recommendation. Are members agreed?

Members indicated agreement.

The Convener: Recommendation 11 deals with the geographical area within which the powers conferred by the Scottish ministers under section

10(5) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 might be exercised. It is recommended that the committee approves this and agrees that effect be given to it in section 55(5) of the bill.

Mr Hamilton: Why are we mentioning that the committee has to agree that effect be given to it in section 55(5)? Is there any doubt that effect would be given to it?

Iain Jamieson (Adviser): There is no doubt.

The Convener: It is a matter of clarity. Do members agree to recommendation 11?

Members indicated agreement.

The Convener: Recommendation 12 deals with drafting the provision that was contained in section 11(6) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 in gender-neutral terms. I suggest that the committee approves the recommendation.

Brian Fitzpatrick: How can a reference to females be made gender neutral? Will the provision apply to males, too?

The Convener: You are being far too diligent; it is very concerning.

Brian Fitzpatrick: That is the danger of reading the provision.

The Convener: The bill refers to a "person of the same sex".

The change means that females will no longer be alone in having the advantage of being searched only by a person of the same sex. Under the bill, men, too, will be able to insist on being searched by another man. That answers the point.

Let us move swiftly on. The Scottish Law Commission's recommendation 15 deals with the fixing of estuary limits. It is suggested that we approve recommendation 15.1, and provide for it in section 36(2). Does that meet with members' agreement?

Members indicated agreement.

The Convener: It is also suggested that we approve recommendation 15.2, and provide for it in section 36(2).

Slightly more controversially, recommendation 15.3 proposes a new power for the Scottish ministers. There is a question about whether that meets the test of being necessary to produce a satisfactory consolidation. The recommendation is that we write to the Scottish Executive to ask it to explain how section 36(3) meets that test.

Mr Hamilton: I want to return to recommendation 15.2. There is uncertainty about what is meant by

"the natural limits which divide a river ... from the sea."

It might be difficult to be more precise, but what does that refer to?

The Convener: Section 36(2) is about how the limits of a river can be fixed and defined. The concern is whether the wording

"the natural limits which divide a river ... from the sea"

is as accurate and appropriate as possible. The suggestion that we have is that it would be difficult to come up with improved wording.

Iain Jamieson: I think that the wording is taken from the Salmon Fisheries (Scotland) Act 1862. However, the measure is not a re-enactment; it is a new power. As the power to define estuary limits by judicial decision will be taken away, something is required to cover the gap. That is why the bill uses the definition from 1862, which is,

"the natural limits which divide a river ... from the sea."

Mr Hamilton: Is that workable?

Iain Jamieson: I suggested that it might be difficult to be precise about what the estuary limit is. As it stands, the bill ultimately leaves decisions on the matter in the hands of the courts.

Mr Hamilton: I see.

Brian Fitzpatrick: So we know what the position is in relation to well-litigated stretches of river, but if there are bits of rivers that we do not know about, section 36(2) will cover that.

Iain Jamieson: Precisely.

Mr Hamilton: What would be involved in coming to a conclusion about the natural limit?

Iain Jamieson: Any dispute about estuary limits would go to the court. Section 36(2) affects what methods of fishing are lawful. People can fish by certain methods above the estuary limits and by other methods below the limits.

Mr Hamilton: So although section 36(2) is expressed in fairly archaic language, modern evidence could be presented to define the natural limit.

Iain Jamieson: Yes.

The Convener: If I read section 36(3) correctly, the Scottish ministers will have the power to fix the limits by order.

Iain Jamieson: We should consider where they have not done so and where there is still a gap.

16:00

The Convener: We will approve the recommendations.

We proceed to recommendation 16, which deals with the renewal of protection orders, which were

originally contained in section 1(7) of the Freshwater and Salmon Fisheries (Scotland) Act 1976. The recommendation is that the law should be amended, as there is a hiatus in existing legislation. It is recommended that we approve the Scottish Law Commission's recommendation, but there is a question about how sections 48(7) and 48(8) deal with the matter and whether problems might arise. It is suggested that we write to the Executive to ask for its comments.

Mr Hamilton: Do you mean prior to approving the recommendation?

The Convener: Yes, by all means. Strictly speaking, we will not approve anything until the stage 1 report is passed. Do members agree to that course of action?

Members indicated agreement.

The Convener: Recommendation 17 deals with designation orders and refers to section 2 of the Salmon Act 1986. The legal adviser was concerned about the provision and I think that he disagreed fundamentally with the Executive's approach. I invite Iain Jamieson to speak to the recommendation.

Iain Jamieson: This is the one area in which I perhaps take a different view from that taken by the Scottish Law Commission. The commission suggested that the proviso to what was section 2(2) of the 1986 act is unnecessary. That section required a designation order to provide for the application of certain regulations and it was compulsory that those regulations applied to the new area that was being set up as a salmon fishery district. However, the provisions also allowed a small amendment to be made to the way in which those regulations were applied in respect of meshes, materials and the dimensions of nets used for fishing in the area.

The commission has argued that the proviso is unnecessary, as the power to make general regulations already enables separate regulations to be made for separate districts. That is true, but there is no room for an exemption from the compulsory application of the provisions, apart from that provided by the proviso—therefore, there might be a reason for retaining the proviso.

There is also the argument that the regulations that are applied should be not just the regulations under section 31 of the bill, but also the regulations under what was the Salmon Fisheries (Scotland) Act 1862, which have been saved. However, that is another point—the matter is explored in the note.

Mr Hamilton: There is a difference between empowering and requiring, which is important here.

Iain Jamieson: That is right. The commission is correct in its view that regulations under section 31

could have provided differential provisions for each particular district. However, if one considers what can be done in the designation order, one might consider that there is a need for the proviso. The committee might wish to ask the Executive for its views.

The Convener: If members agree, we will write to the Executive, asking for its comments. Is that agreed?

Members indicated agreement.

The Convener: Recommendation 18 from the commission recommends that, in cases in which there are fewer than three proprietors, any one proprietor should be able to initiate the procedures in question. That requires amendment to section 12(2) of the 1986 act. Our legal adviser was concerned that the provision does not meet the necessary test and that it may be a controversial measure. I suggest that we write to the Executive, asking for its comments on the recommendation. Is that agreed?

Members indicated agreement.

The Convener: The commission's recommendation 19 deals with co-opted representatives of tenant netmen. The advice is that we should approve the recommendation, as it meets the necessary test. Effect is given to it in section 42(4) of the bill. Is that agreed?

Members indicated agreement.

The Convener: The commission's recommendation 20 deals with the enforcement provisions in existing salmon and freshwater fisheries legislation being replaced with provisions conferring clear and specific powers on the different enforcement agencies. The advice is that we should approve the proposal; however, there are some aspects of it on which we would welcome the Executive's comments.

We should ask whether the reference to "any water" in section 53(3) should be amended to refer to "any district" of the salmon fishery board having regard to the Law Commission's recommendation 11. We should ask whether the reference to "land" in section 54(1) should be defined so as to exclude buildings. We should ask whether section 55(1) should be amended to provide that a water bailiff who is appointed by a district salmon fishery board has power to act only within his district. We should ask whether the reference to a water bailiff in section 55(2) should be restricted to a water bailiff appointed by a district salmon fishery board. Finally, we should also ask whether the whole of section 55, not just subsection (5), should be expressed as being "subject to section 56". If members agree, we will write to the Executive, asking for its comments. Is that agreed?

Members indicated agreement.

The Convener: The commission's recommendation 21 deals with the repeal without re-enactment of the proviso to section 27 of the 1868 act. The advice is that the recommendation meets the test of necessity and that, accordingly, we should approve it. Effect is given to it in section 54(1) of the bill. Is that agreed?

Members indicated agreement.

The Convener: The commission's recommendation 22 states:

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

Effect is given to that recommendation in section 60, and the advice is that we should approve it. Is that agreed?

Members indicated agreement.

The Convener: The commission's recommendation 23 deals with definitions of salmon and trout and is given effect in the definitions section—section 70(1). The advice is that, in general terms, the recommendation is acceptable; however, we should ask the Executive to explain why the definition of salmon—although it repeats the wording of the recommendation—includes non-migratory salmon. The commission argued that that is unnecessary, and its inclusion appears to be contrary to the reasons that are given by the commission for its recommendation. If members agree, we will write to the Executive in those terms. Is that agreed?

Members indicated agreement.

The Convener: Recommendation 24 deals with the definition of the word "enactment". The advice is that we should approve the recommendation but ask the Scottish Executive to explain why the definition of enactment—although it repeats the wording of the recommendation—refers to the different kinds of acts of the Westminster Parliament, to "instrument or order" and to "able to be made". Is that agreed?

Members indicated agreement.

The Convener: That concludes our consideration of the Scottish Law Commission's recommendations on the bill.

Let us move to the remaining parts of the bill and to the consolidation in the strict sense. The first consolidating measure for our consideration relates to section 34(1), on the definition of a salmon fishery district. A number of concerns were raised about that subsection, and there is a question over whether it properly replicates section 1(1) of the Salmon Act 1986. It may need to be redrafted to replicate it properly. Furthermore, there is a question over whether former designation orders continue to have effect

by virtue of the general savings provision and so come under section 34(1)(b). We will write in those terms. Is that agreed?

Members indicated agreement.

The Convener: Section 34(2) deals with the extent of salmon fishery districts. I suggest that we write to the Executive to draw its attention to the points that the legal adviser has made and to ask it whether it is correct that the extent of a salmon fishery district should be re-enacted as a self-standing provision and should apply for the purposes of any designation order. Is that agreed?

Members indicated agreement.

The Convener: In section 34(3), the expression "existing salmon fishery district" is not defined and it is not clear what is meant. The original provision, in section 1(2) of the 1986 act, is somewhat clearer. I think that we should write to the Executive and ask for its comments, in particular on whether "existing salmon fishery district" should be defined in subsection (3). Is that agreed?

Members indicated agreement.

The Convener: Section 36(2) deals with estuary limits. The legal adviser has raised a number of fairly technical points. I suggest that we write to the Executive, asking for its comments on whether, in view of those points, paragraph (a) should be redrafted so that it refers simply to byelaws under section 6(1) of the 1862 act. Is that agreed?

Members indicated agreement.

The Convener: Section 37(2) deals with conservation measures and close times. There is a question over whether the subsection is clear and correctly consolidates section 6(2) of the 1986 act. I suggest that, in the light of the comments made by the legal adviser, we write to the Scottish Executive, asking for its comments on whether section 37(2) of the bill should be redrafted. Is that agreed?

Members indicated agreement.

The Convener: Section 38(1) deals with salmon conservation orders. It consolidates section 10A(3) of the 1986 act. There is a question over whether it achieves proper consolidation. I suggest that we write to the Executive, asking for its comments on why section 38(1) confers a power to make an order rather than regulations, as is provided for under the 1986 act.

Members indicated agreement.

The Convener: Section 38(5)(b) deals with the specification of

"baits and lures for the purposes of the definition of 'rod and line'".

I suggest that we write to the Executive to draw its attention to the points that the legal adviser has made and to ask for its comments on whether section 38(5)(b) should be redrafted to take account of the altered definition of “rod and line” under section 4(1). Is that agreed?

Members indicated agreement.

The Convener: Section 38(6)(a) deals with the conferment of additional powers of enforcement on constables and water bailiffs. It is not clear where the provision originated from. Although the table of derivations states that it is simply a drafting provision, it seems to confer additional powers. I suggest that we write to the Scottish Executive to ask whether section 38(6)(a) should be redrafted to reflect the terms of the 1986 act.

16:15

Brian Fitzpatrick: Do those powers relate to recommendation 21? We said that it was anomalous that an owner-occupier could put off the bailiff.

Iain Jamieson: Are you referring to the Scottish Law Commission’s recommendation 21?

Brian Fitzpatrick: Yes.

Iain Jamieson: The powers in section 38(6)(a) do not relate to that recommendation. I think that they are meant to be additional to the general powers that sections 52 and 53 confer on bailiffs.

Brian Fitzpatrick: What are those powers?

Iain Jamieson: Section 52 confers various powers on constables and water bailiffs. It will be possible to issue a warrant that will allow them to enter and search—by force, if necessary—various premises and vehicles. Section 53 confers powers on constables to do certain things without a warrant. Those generalised provisions arose from the Scottish Law Commission’s recommendation 20.

The Convener: Is the suggested approach agreed?

Members indicated agreement.

The Convener: Section 40(7)(a) is concerned with defining what is meant by a division of a river for the purpose of identifying the upper and the lower proprietors. It derives from section 11(7) of the 1986 act. There is a question mark over whether section 40(7)(a) consolidates the existing law. It is suggested that we write to the Executive to draw its attention to the points that the legal adviser has made and to ask whether the relevant paragraph should be redrafted to reflect more accurately the original provisions.

Mr Hamilton: I presume that there was an acceptance of what those divisions were if there

was a dispute under the old legislation. What happens if there is a reference to the old legislation?

Iain Jamieson: Section 40(7)(a) simply requires the division of a river to be a line that is drawn across from points on either bank that have been fixed before the bill is enacted. The paragraph is unclear, as it makes no suggestion about where people can find out what the law was. The provision from which section 40(7)(a) is derived is clear, but the reader is being given a map without a compass. I am suggesting that there should be a compass and a signpost.

The Convener: Do members agree to the proposed course of action?

Members indicated agreement.

The Convener: There is a question mark over whether the drafting of section 40(8) consolidates the law accurately. The subsection should define what is meant by a division of a river, but it does not do so. It provides only that the Scottish ministers

“may by order prescribe a point of division on each bank”.

The original wording in the 1986 act might be preferable. I suggest that we write to the Executive to ask whether section 40(8) should be redrafted in accordance with the original legislation.

Mr Hamilton: I assume that section 40(8) creates another additional power.

Iain Jamieson: No—it is meant to be a re-enactment of an existing power. I am querying only its wording, as it does not make it clear what it refers to.

Mr Hamilton: So ministers always had the power to prescribe a point of division.

Iain Jamieson: Yes.

The Convener: Is the suggested action agreed?

Members indicated agreement.

The Convener: Section 43(2) deals with district salmon fishery boards. There is a tailpiece to this section, and it is questionable whether the provision is necessary. I suggest that we write to the Executive to confirm whether it considers the provision necessary. Is that agreed?

Members indicated agreement.

The Convener: There is a question mark over whether section 44(10) is required. It repeats the wording of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, but the act to which the subsection refers has already been repealed and so that may be unnecessary. I suggest that we write to the Executive to clarify its position and whether the subsection is considered necessary. Is that agreed?

Members indicated agreement.

The Convener: Section 48(9) deals with the variation or revocation of a protection order. Again, there is a question mark over whether it is required, although it repeats section 1(10) of the Freshwater and Salmon Fisheries (Scotland) Act 1976. I suggest that we write to the Executive to confirm that it is necessary. Is that agreed?

Members indicated agreement.

The Convener: We come to section 48(12). It is questionable whether the definition of "inland waters" in section 70(1) includes tidal waters or whether it includes only water above the estuary limit. If the provision in section 48(12) is necessary, something similar may also be required for section 66, which is derived from section 4 of the 1976 act.

I suggest that we write to the Executive to confirm that section 48(12) is necessary and if it is, whether a similar provision should be inserted into section 66. Is that agreed?

Members indicated agreement.

The Convener: Section 68(1) is a saving provision, which appears to be somewhat peculiar.

Brian Fitzpatrick: Can you tell us why it is odd?

The Convener: Would Iain Jamieson like to comment on the peculiarities?

Iain Jamieson: A normal saving provision provides, for example, that the effect of a repeal by an act does not revive anything that is not in force at the time when the repeal takes effect. In the case of a consolidation bill, it provides that the effect of re-enacting a provision ensures that any subordinate legislation made under the power that is re-enacted continues to have effect under the new provision.

Section 68(1) does neither of those things. It continues to enforce things done by or under enactments that are not repealed by the bill but that were repealed in the middle of the 19th century or were finally repealed in 1986. Because of its peculiar provisions, I suggest that the Executive should be asked for an explanation.

There may well be cases where the legislation that the bill repeals saves, for example, byelaws made under section 6 of the acts in the middle of the 19th century. If that is the case, it is suggested that they should be specified rather than simply left as they are because it is not clear what is being saved or why.

The Convener: Do members agree that we write to the Executive to draw its attention to the points that the legal adviser has made and to ask for its comments on whether section 68(1) needs to be redrafted?

Members indicated agreement.

The Convener: It is not clear what section 68(2) seeks to achieve. I suggest that we write to the Executive to ask it to confirm the intention of the subsection and to give some examples. Is that agreed?

Members indicated agreement.

The Convener: Section 70 is the interpretation section. The legal adviser is unhappy with the detail of a number of the definitions that it contains. I suggest that we write to the Executive to draw its attention to those points and to ask it for its comments. Is that agreed?

Members indicated agreement.

The Convener: We will move on to the schedules. Paragraph 3 of schedule 1 deals with estuary limits orders. It appears that the reference in paragraph 3 to an

"estuary limits order in respect of a salmon fishery district"

may be mistaken, because such an order should be made for a river rather than for a district. I suggest that we write to the Executive to draw its attention to the matter and to suggest alternative wording. Is that agreed?

Members indicated agreement.

The Convener: In paragraph 5 of schedule 2, it is not clear what the source is for the second half of paragraph 5(1). The first half comes from paragraph 6(1) of schedule 2 to the 1986 act. It is not clear where the second half comes from. I suggest that we write to the Executive to ask it for its comments. Is that agreed?

Members indicated agreement.

The Convener: Paragraph 10 of schedule 3 deals with the publication of orders. It provides that ministers shall publish each year

"a list of prescribed areas."

The reference to "prescribed areas" is not defined in schedule 3 or in the interpretation section—section 70. However, there is a definition in section 49(3). It is suggested that it would be clearer if paragraph 10 referred to "prescribed areas which are the subject of protection orders", which would reflect the wording in paragraph 10 of schedule 1 to the 1976 act. I suggest that we write to the Executive to ask it for its comments. Is that agreed?

Members indicated agreement.

The Convener: Finally, as was the case last week, the legal adviser has made a number of comments on how the table of derivations could be improved to make it more accurate. I suggest that we write to the Executive to draw its attention to those points and to ask for its comments. Is that agreed?

Members indicated agreement.

The Convener: If members are content, that concludes our consideration of the bill at stage 1. I thank members for their attention. At the committee's next meeting, next week, we will consider the response from the Scottish Executive to points that we raised on part 1 of the bill. Our aim is to get a letter to the Executive and, we hope, to have a reply by close of business on Friday and certainly no later than the opening of business on Monday, to allow the adviser time to examine the response in time for the meeting on Tuesday afternoon. We will consider the responses and take evidence from the Executive and the Scottish Law Commission.

Mr Hamilton: I have a couple of questions. Should the Executive not be minded to accept some of the suggested amendments, is it open to the committee to lodge committee amendments?

Tracey Hawe (Clerk): Yes.

Mr Hamilton: Is it open to the committee, as it is open to other committees in the Parliament, to ask for a committee debate on the subject, even though under standing orders that is not part of the process?

Tracey Hawe: I presume that that would be possible, although in practical terms such a debate would have to be held in committee time. I am not sure whether any committee time will be scheduled between the intended date for publication of our report and the end of the session. The Conveners Group would have to determine the priority.

Mr Hamilton: But procedurally there is nothing against it. Is that right?

Tracey Hawe: Absolutely.

Brian Fitzpatrick: Why would Duncan Hamilton want to debate the issue when he states that he is satisfied that the bill represents a consolidation?

Mr Hamilton: All that was in my head was that, given that there are a number of points that we felt it was fair to share, one option is to remove the points of contention and to pass the bill, and another option is to pass the bill, but raise the points of contention in a debate. If there is a flaw in the current process for the bill, I wondered whether one way round that might be for us to air the concerns using a different procedure.

Brian Fitzpatrick: We would need to get advice on that matter. If we are saying that we will let the bill under the net, because we have satisfied ourselves that there is a good reason, or we cannot think of a bad reason against—

Mr Hamilton: I am not promoting the use of such a procedure. I am interested to know about the full panoply of options that are at our disposal.

Brian Fitzpatrick: I would like to get some guidance.

The Convener: It might be useful if we could find out for the next meeting exactly what options are available to us. We can then decide how to proceed.

Meeting closed at 16:29.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Monday 27 January 2003

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75

Special issue price: £5

Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 622 7017

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF1 2BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation
Helpline may be able to assist with additional information
on publications of or about the Scottish Parliament,
their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers