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

Tuesday 21 January 2003
(*Afternoon*)

Session 1

£5.00

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SALMON AND FRESHWATER FISHERIES (CONSOLIDATION) (SCOTLAND) BILL COMMITTEE
3rd 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

David Dunkley (Scottish Executive Environment and Rural Affairs Department)
Patrick Layden (Legal Secretary to the Lord Advocate)
Susan Sutherland (Scottish Law Commission)
Robert Williamson

CLERK TO THE COMMITTEE

Tracey Hawe

SENIOR ASSISTANT CLERK

Mark Brough

ASSISTANT CLERK

Catherine Johnstone

LOCATION

Committee Room 4

Scottish Parliament

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

Tuesday 21 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 3rd meeting in 2003 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee. I have received apologies from Brian Fitzpatrick, who has been detained in Bridge of Allan. He has said that he might be able to join us later.

Today we will consider the Scottish Executive's responses to questions that the committee asked about the bill. We will then take evidence from our last set of witnesses, who will be given time to make a short introduction.

We asked many questions of the Executive on the recommendations that were made by the Scottish Law Commission and on the restatement of existing law. I turn first to the commission's recommendations. The Executive appears to have answered our queries in relation to recommendations 5, 7, 13, 16, 20 and 23. In relation to recommendations 2, 14.2, 15.3, 17, 18 and 28, I suggest that we seek further oral evidence from the Executive and that we seek confirmation that those recommendations are necessary in order to produce satisfactory consolidation. Are members agreed?

Members *indicated agreement*.

The Convener: On recommendation 9.1, there is an outstanding question as to whether harling is covered in the definition of rod and line in section 4(1) of the bill. In relation to recommendation 9.2, a question remains as to the correct interpretation of the proviso to section 2(1) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 and, in relation to recommendation 14.1, a question is outstanding on whether it is possible to define the methods of fishing by rod and line that are unlawful.

In relation to recommendation 24, questions remain about the definition of the word "enactment", I suggest that we ask those questions of the Executive in an oral evidence-taking session. Are we agreed?

Members *indicated agreement*.

The Convener: I turn to the questions that have been asked on the restatement of the law. Our questions in relation to the issues of scope and structure appear to have been satisfied. Questions raised in relation to sections 1(3), 1(5)(d), 1(6)(a), 1(6)(b), 4(1), 9(1), 9(2), 14(1), 14(2), 15(1), 17(2), 19(2) and 24(1) appear to have been answered. The Executive also appears to have satisfied our queries in relation to sections 25(2), 26(1), 31(1)(c), 31(3) and 31(6), 33(1) and 33(7)(a), 34(1)(b) and 34(3) and 38(6)(a), 40(8), 44(10), 48(9), 48(12), 70, schedule 1(3), schedule 2(5)(1) and schedule 3(10).

The Executive has undertaken to lodge amendments to address several of the committee's concerns. Some outstanding points remain in relation to the application of the bill to the River Esk. In relation to section 8(1), there is an outstanding query on the meaning of the reference to "mean low water springs" and on section 11, there is a question as to whether the law is being changed and whether that should have been the subject of a Scottish Law Commission recommendation. On section 31(5), there is a question as to which periods cannot be reduced by regulations. On section 34(1)(a), there is a question as to whether section 1(1) of the Salmon Act 1986 should be restated or whether it requires amendment and there is a query as to whether section 34(2) is really required.

There are questions about whether section 36(2)(a) should be redrafted to refer to estuary limits' being fixed and defined by byelaws under the Salmon Fisheries (Scotland) Act 1862; whether section 37(2) should be redrafted to match more closely the terms of section 6(2) of the Salmon Act 1986, and whether section 38(1) will correctly consolidate section 10A(3) of the 1986 act, because it will change a power to make regulations into a power to make an order.

There also remains the question whether section 40(7)(a) should be redrafted to reflect more closely section 11(7) of the Salmon Act 1986. On section 43(2), there is a question about whether the tailpiece to the subsection is necessary, or whether reliance can be placed on general savings provisions. Finally, in relation to section 68, we have questions about the particular nature of the savings provisions in the bill.

Are members content to raise those matters in hearing evidence from the Executive?

Members *indicated agreement*.

The Convener: Do members have any other questions that they would wish to ask?

Members: No.

The Convener: In that case, we will now take evidence from the witnesses. First, I thank you for attending. It might be helpful for the committee if you could introduce yourselves and say in what capacity you are here.

Patrick Layden (Legal Secretary to the Lord Advocate): I am currently legal secretary to the Lord Advocate. Prior to devolution, I worked in the Lord Advocate's department in London, both as parliamentary counsel and as a legal secretary. I have been responsible for drafting the consolidation.

Susan Sutherland (Scottish Law Commission): I am Susan Sutherland. I am a member of the legal staff at the Scottish Law Commission. I have been working on the project for the past couple of years.

Robert Williamson: I was formerly the inspector of salmon and freshwater fisheries for Scotland. I am retired, but I have been a consultant to the Scottish Law Commission and the Scottish Executive during the preparation of the bill.

David Dunkley (Scottish Executive Environment and Rural Affairs Department): I am from the Scottish Executive environment and rural affairs department's freshwater fisheries, aquaculture and marine environment division. I head the policy branch that looks after salmon and freshwater fisheries.

The Convener: I suggest that we move to questions from members. It is probably better if we start by considering the commission's recommendations, then move on to consider questions of actual consolidation.

Gordon Jackson (Glasgow Govan) (Lab): I would be happy if the convener asked the questions one at a time. Members could then just chip in as we come to each question.

The Convener: Okay. Our first point relates to the commission's recommendation 2—under appendix 1 of the commission's report—on electronic communications. The committee wants to know whether the proposed changes to the provisions of the Freshwater and Salmon Fisheries (Scotland) Act 1976 and the Salmon Act 1986 are necessary in order to produce satisfactory consolidation. We feel that the consolidation would be perfectly satisfactory without those proposed amendments. Could the witnesses comment on that?

Patrick Layden: The Electronic Communications Act 2000 enabled orders to be made that would put into existing statutes various provisions to the effect that communications under those statutes could be made electronically and those communications could be stored. If we were drafting a new policy bill, we would either assume that any communications that it mentioned could be made electronically—because that is a recognised way of communicating nowadays—or we would make specific in the bill any such provision. We would, if there were doubt, make it clear that communications could be made electronically.

15:15

It seems to me to be appropriate that in producing a modern statute, even a consolidation act, we should acknowledge the fact that life has moved on since the 19th century; we should provide for electronic communications to a certain extent. I accept entirely that some provisions that will not be made by the bill could be made by an order under section 8 of the Electronic Communications Act 2000, but the bill makes minimal provision for electronic communications. The recommendation does not apply to all the communications in the bill because, clearly, that would be inappropriate in respect of some communications. I cannot say that the bill would not work without such provisions, but in order to produce a satisfactory and coherent modern law package, such provisions are sensible.

Gordon Jackson: I am not trying to niggle, but perhaps we are being over-careful. I do not dispute that the approach is sensible, but we keep stumbling over such necessary things—

Patrick Layden: There are two words in the golden rule: "necessary" and "satisfactory". As the chairman of the Scottish Law Commission said last week, "satisfactory" implies some kind of value judgment. The value judgment is that, with the addition of the provisions in question, this is a satisfactory consolidation in the sense of its being a satisfactory package of law.

Gordon Jackson: Forgive me for not understanding, but if the provision was not included in the bill, an order could be made—

Patrick Layden: The provision could and, no doubt, would be made by an order under section 8 of the Electronic Communications Act 2000.

Gordon Jackson: Would that amount to the same thing?

Patrick Layden: Yes.

The Convener: The next recommendation about which we had a query is recommendation 14.2, which deals with the power of Scottish ministers to amend the definition of "rod and line". Is conferment of such powers on ministers necessary for a satisfactory consolidation?

Patrick Layden: I am sorry, but I am feeling my way here slightly.

Gordon Jackson: We are all doing that. We will all be slow—it is difficult to find our way around the papers.

Patrick Layden: I think that there were questions relating to harling, which was mentioned earlier, and to the definition of "rod and line". In respect of the latter, the bill seeks to replace the general provision of section 24(2) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, which simply states:

"Nothing contained in this Act shall render legal any method of fishing which was or would have been illegal at the date of the commencement of this Act".

We sought to replace that wording with a provision that specifies the methods of fishing that were illegal prior to the coming into force of the 1951 act.

The Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 repealed various acts but retained the offences under the provisions that were repealed. The result is that, if somebody is charged with an offence under the 1951 act, it is necessary to go back and look at the various statutes that had been repealed by the 1951 act before one can find out precisely what the offence is. That is not thought to be a satisfactory way in which to produce law. The commission therefore made the recommendations, which the bill reflects, that section 24(2) of the 1951 act be repealed and that the offences to which section 24(2) refers but does not specify should be set out in the bill. At least two of those offences—the offences of striking and dragging for fish, which are mentioned in section 4(1) of the bill—are not defined in the Salmon Fisheries (Scotland) Act 1868, which made them offences. It therefore seems to be desirable, if not necessary, to provide for a power to define what those offences are.

At present, the courts make up their minds what is implied by "striking" or "dragging". As I said in my letter to the committee, the essence of fishing with rod and line is that a lure that the fish is enticed to take is towed through the water. Striking, dragging and pointing are all methods of using a rod and line whereby one tries physically to attach the fish and pull it out, rather than go through that process of enticing.

It seems to be sensible that we should complete the picture, as it were, by providing for a power to enable clarification of the law, such as we had hoped to achieve, without going off the rails. It would be sensible to give ministers a power to define the unlawful methods of fishing that are mentioned in the bill, but which have been left off the face of the statute book for the past 52 years or so.

Does that answer the question, convener?

The Convener: I am sorry if I confused Patrick Layden slightly by not following the expected numbering. I jumped around slightly because I have these various bits of paper. Never mind.

I think that I understand Patrick Layden's points. I understand why it is clear that it is desirable to give ministers the power, but the committee was concerned whether giving ministers such a power is necessary for the purposes of the consolidation. I will ask a slightly different question on that same point. Does harling fall within the definition that is given in section 4(1) of the bill?

Patrick Layden: I will refer that question to the experts on my right.

Robert Williamson: My understanding is that harling, to the extent that it means fishing for salmon by trolling with a rod and line from the back of the boat, is within the meaning of "rod and line". Nowhere have I seen or found any reference to harling as a right of fishing that is separate from the ordinary meaning of rod and line, as defined in the 1951 act, nor have I seen any correct reference to the continued use of harling as dependant on, or covered by, the proviso to section 2(1) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951.

It might be appropriate to add that trolling for trout—an exactly similar operation using a rod and line with a bait or lure at the end of the line, which is towed at the back of a boat—has been accepted as a lawful means of fishing by rod and line for trout under section 2(2) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951. Section 2(2) of that act does not contain a proviso such as is found in section 2(1). The whole matter is covered by "rod and line" and is not protected by the proviso.

The question that might arise is whether some forms of trolling that use a rod and line out of the back of a boat fall within the definition; for example, if the rod was fixed to the boat or if there were half a dozen rods stuck out at the back. However, I understand that the use of one or, it could be argued, two rods and lines trolling through the water from the back of a boat while the boat is moving has always been held to fall within the meaning of rod and line.

The Convener: How common is the practice?

Robert Williamson: Harling is practised on the River Tay and it is practised in some lochs, for example Loch Langavat in Lewis and other places. My colleague David Dunkley might have more experience of places in which that method is used, but it is used. It is common enough; it is one of the standard methods of fishing on the broader beats of the Tay.

John Farquhar Munro (Ross, Skye and Inverness West) (LD): It is the standard form of fishing on several lochs; for example, it is the predominant type of fishing on Loch Ness. There might be a single person in a boat, but he has two rods, one on either side. I do not think that it is malpractice. It is a regular feature of fishing.

I wonder why we are including a section on harling. There does not seem to be a clear indication of what is implied by harling, so why are we including it in the bill?

Robert Williamson: Harling is not included in the bill. The bill says that it is lawful to fish by rod and line. As I understand it, the question that the committee and others asked is whether harling falls within the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951's description of rod and line. If it did not fall within that description, the only way in which it would continue to be lawful would be if a specific right were saved by the proviso, but my understanding is that such a right is not saved by the proviso. One can fish unlawfully and can harl in a manner that is unlawful. It is clear that there are ways of doing that, for example if umpteen lines are being used; however, the normal way of harling is, as I understand it, lawful and can be used for salmon or trout. It falls within the meaning of rod and line, as defined in the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, and would therefore fall within the meaning of rod and line as it is defined in the bill.

Gordon Jackson: I am still not entirely clear—certainly about harling. If you tell me that harling is rod and line fishing, that is fine. I had never heard of harling until a month ago, so if you tell me that it is part of rod and line fishing, I do not have any problem with that.

I am still not clear about one point, which I accept might be my fault. Section 4(1) of the bill states what rod and line means; it defines rod and line, which includes harling, and it tells us what rod and line fishing does not include. It is not clear to me—if this is repetitious, I am sorry—why the power in section 4(3) is necessary and not merely desirable. My difficulty is not with the harling question, but with the Scottish ministers' defining rod and line by regulation. Section 4(1) defines rod and line—I think—because it contains the phrase "'rod and line' means". There is therefore a definition of rod and line which, I presume, constitutes the consolidation and—I presume from what I have been told today—includes harling. Section 4(1) is the consolidation, but why is the giving to the Scottish ministers of extra powers to redefine rod and line—they could, I presume, redefine it in any way they wished, within reason—necessary, as opposed to desirable?

Robert Williamson: I cannot speak for the Scottish ministers.

Gordon Jackson: Of course not.

Patrick Layden: The Scottish Law Commission makes the point at paragraph 88 that,

"It is not clear whether 'striking' or 'dragging' are different offences or different ways of describing the same offence. We have accordingly mentioned both words in section 4 of the Bill."

Paragraph 89 states:

"The uncertainty over the precise meaning of offences created some 150 years ago as well as the development of different practices in relation to methods of fishing has caused us to consider whether primary legislation by itself is sufficiently flexible to reflect such changing practices."

As a result, the Scottish Law Commission recommended that ministers should be given a power to adjust the definition in order to reflect changing practices and because there was doubt about the precise meaning of some of the offences in the very old legislation.

15:30

Gordon Jackson: That seems to me like a very good argument for changing the law and giving the ministers the power to make that adjustment, instead of its being a good argument for including the issue in the consolidation process.

Patrick Layden: Although I understand that other views have been expressed on the matter, it is perfectly open to the committee to say that it should be left to the courts to sort out any uncertainty over legislation that was passed 150 years ago. I have not defined striking or dragging in the bill because I do not know how the courts have defined them. I have not yet worked that out from the research and, even if I tried to do so, I am not sure whether the courts' decisions would give a clear picture about what might constitute striking or dragging in particular circumstances.

The definition of "pointing" that we have included in the bill is taken from the "Oxford English Dictionary"—I do not apologise for doing so, because it is a good source. However, as a matter of law and drafting, it would be feasible simply to leave any uncertainties in the old statutes to wash their own faces. The courts have managed to work out definitions for the past 150 years and should be left to work out the meaning of rod and line.

Gordon Jackson: I have no views on whether future legislation should give ministers the power in question—it might be entirely appropriate for it to do so. However, although I am not against the provisions, I am very zealous about the process that we are carrying out. This is the Parliament's first consolidation bill, so I consider it to be very important that we establish the principle of what such a bill does and does not do. As I have said, I do not want anyone to think that I am against the legislation; I am very zealous about preserving the Parliament's right to consolidate.

Patrick Layden: I do not think that there is a difference between us on this matter; rather, there is a common interest in establishing a proper system for consolidation bills. I still think that it was proper for the Scottish Law Commission to make such recommendations, and that it would be proper for the committee to accept them, if so advised. However, that is entirely a matter for the committee's discretion. I cannot say that the legislation would not work if the recommendation on harling were not accepted—if that is the test. I do not think that it is the test; after all, we have already discussed the terms "necessary" and "satisfactory".

The Convener: If the committee is minded to say that it is not satisfied that the provision in question meets the test, how would you view a proposal to restrict the regulation-making power in section 4(3) to a power to define unlawful practices?

Patrick Layden: That would certainly enable the Scottish ministers to clarify in due course what is meant by striking, dragging or pointing, once we had carried out a survey of how those terms have been defined. It is a matter for the committee whether it is minded to accept the Scottish Law Commission's recommendation to that extent. I certainly would not dissent from that as representing an appropriate halfway house in that respect. However, perhaps I should look to the person on my right on this question.

The Convener: Do you have anything to add, Susan?

Susan Sutherland: I do not think that I can add anything to Mr Layden's comments.

Gordon Jackson: The substance of our discussions last week was right. If we use the terms "necessary" and "satisfactory", people will simply make value judgments about what is necessary or satisfactory and what falls outside those terms.

The Convener: I suggest that we move on and consider recommendation 9.2, which we have also questioned and which deals with preventing by prescription the acquisition of new rights to use cruives. Although you have replied to our query about the provision, we still have three concerns about your response and the meaning of the proviso in section 2(1) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951.

First, if the view that you have expressed is correct, the only lawful methods of salmon fishing since 10 May 1951 have been by rod and line or net and coble. Secondly, the proviso preserved any right of fishing only by other means that existed prior to 10 May 1951; it did not allow any new right to fishing by any of those means to be acquired. That would apply not only to fishing by cruive, but to the certificated fixed engines or haaf nets, and an amendment to the bill would be required to achieve the policy objective. Finally, in so far as fishing by cruive is concerned, the provision would mean not only that, by prescription, no new right of fishing by cruive could be acquired on or after that date, but that no new right of fishing by cruive could have been granted by the Crown on or after that date. Again, that might require an amendment to the bill.

Gordon Jackson: I confess immediately that that is the point that I cannot get my mind around. I am swimming about in a sea of blancmange. I hope that I will get help to understand the point, as it is the one that I have most difficulty with.

Patrick Layden: There are three methods of fishing, other than by rod and line and by net and coble, which the commission has concluded were covered by the proviso to section 2(1) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951. Two of those are not difficult at all in terms of law. It is perfectly clear that cruives were and are a legitimate method of fishing. The Salmon Act 1986 specifically enacted a provision that enables ministers to make regulations about the construction and use of cruives.

A "certificated fixed engine", unsurprisingly, means a fixed engine certificated under the Solway Salmon Fisheries Commissioners (Scotland) Act 1877. At that time, commissioners were sent round the Solway to examine various places where people said that they had a right to use fixed engines and that they had had that right from time immemorial. The commissioners took evidence and studied the practice on the ground, and they issued certificates—actual bits of paper—in respect of various fixed engines at various parts of the Solway. That is a closed class and we do not need to say anything about such engines because, if you do not have a certificate granted by the commissioners back in 1877-78, you do not have a right to use a fixed engine in the Solway. Therefore, we can put that to one side.

As far as cruives and haaf nets are concerned, I have already said that cruives were clearly a legitimate method of fishing. What we are trying to do in the bill is to restate the balance that the 1951 act achieved. It would have been open to the draftsmen of the 1951 act to say, "The legitimate methods of fishing are rod and line, net and coble, and cruives," but they did not do that. They left cruives in the limbo of the proviso and said that fishing was permitted provided that any right of fishing in existence at the date of the passing of that act was not interfered with. The general legality of cruives was not in doubt. The commission dealt with the point because it was

one of the things covered by the proviso, but it did not deal with it in any great detail. However, the commission did make the point that our new bill should reflect the sort of balance that the 1951 act achieved, by saying that, although cruives are a legitimate method of fishing, it is perfectly clear that they are not to be regarded as generally lawful and generally capable of universal extension.

As I said in my note to the committee, the logic of that suggests that any right to use a cruive that was extant as of 10 May 1951 remained, but that prescriptive rights to use cruives could not be established or completed after that date. I accept that the bill does not adequately reflect that analysis and, as I said in my note, the bill ought to reflect it.

I turn to the separate question of royal grants. The two ways of acquiring a right to use a cruive are either to get a direct grant from the monarch or to acquire one by prescription. We have not been able to establish whether any new rights to use cruives have been granted since 1951. We rather think that they have not, but we cannot put our hands on our hearts and say that none has been granted. Perhaps Bob Williamson can comment.

Robert Williamson: All I can add is that I was told by the then Crown Estate receiver, Mr Cooke, in the mid-1980s—I cannot remember exactly when—that no Crown grants of cruives had been given for many years and that a decision had been taken that none would be made. He did not know, but he supposed that that decision was taken before the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951. Section 2(1) of the 1951 act, if read literally, implies that no new grant would be lawful because it would not be a right that was in existence in May 1951. Mr Cooke told me that no new grants had been made for many years and his understanding was that none would be made in future. However, I do not have a piece of paper to that effect—that is just a recollection of the circumstances.

Gordon Jackson: What is a prescriptive right to use a cruive?

Patrick Layden: If a person who has a right to fish for salmon starts using a cruive and none of the people upstream or downstream cottons on and objects within the prescriptive period, at the end of that period, the person has a prescriptive right to use the cruive.

Gordon Jackson: What is the period?

Patrick Layden: Ten years.

Robert Williamson: I think that against the Crown, the period is 20 years, or is that different?

Patrick Layden: Under the new prescription and limitation legislation, if that were relevant to the acquisition of cruives, the period would be 10 years. Under the old law, I suspect that the period was 20 years. Whatever the period was, once one had worked through it without somebody who had a title to object doing so, one would have a right to use the cruive. There are immensely complicated 19th century litigations relating to whether somebody had managed to achieve that happy state.

The 1951 act did not deal with royal grants, but, as far as we are aware, no royal grant has been made since 1951. I do not know what the legal effect would be if a grant had been made between 1951 and the passing of the bill. Whether the 1951 act excludes the possibility that the Queen could grant a new right to use a cruive is an open question. That is one reason why it would not be appropriate for the bill to provide that no grant of a cruive between 1951 and the passing of the bill would be competent.

We have found out that there is no intention to make new royal grants of cruives in the future, which is another reason why the bill does not say that no such grant would be lawful—such a provision is not necessary. On a purely technical basis, the matter was not covered in the 1951 act and it is not necessary to cover it in the bill. The position is that no such grant will be made.

Do you want me to discuss haaf nets, or is that enough to be going on with?

The Convener: That is enough on cruives to be going on with.

Gordon Jackson: I read in section 1(5)(b)(ii) that

"'lawful cruive' means a cruive whose use is … established, prior to the coming into force of this Act, by prescription".

Does section 1(5)(c) say the same thing again?

Patrick Layden: In my letter and this afternoon I have said that I have not got that bit right. Section 1(5)(b)(ii) should refer to a use that was established prior to 10 May 1951 by prescription.

Gordon Jackson: Sorry—that was my fault for not listening.

The Convener: I assume that Patrick Layden intends to propose an amendment to cover the position and to say that any right to fish by cruive, fixed engine or haaf net that existed on 10 May 1951 is lawful.

Gordon Jackson: Any prescription since then is probably lawful.

The Convener: Only rights that existed at that date would be lawful.

Gordon Jackson: No. Any prescription since then would also be lawful.

Patrick Layden: No. The proviso to section 2(1) of the 1951 act means that, after the 1951 act was passed, it was impossible to complete a prescriptive right to use a cruive.

15:45

The Convener: I understand that. Is a clear statement in an amendment the way to deal with that?

Patrick Layden: I will produce a proper amendment to give effect to that.

Gordon Jackson: Just for my nosiness, I ask whether the waters are full of cruives.

Robert Williamson: It might help you to understand why so much fuss is made about cruives to know that they can be an extremely destructive method of fishing. They involve putting a dam across a river. There was one at Beauly, although it is not operating at present. A cruive involves cages, and because it is destructive, the right to use one is not considered to exist in any grant of salmon fishings unless expressly described in that grant.

Gordon Jackson: Just for my curiosity, I ask whether there are many about. Are they common?

Robert Williamson: Two or three were recorded as being in operation when the Hunter committee reported in the 1960s. One was operated at Beauly until 10 or 15 years ago. The cruive is still there. A fishery by net is immediately downstream from it, but the boxes are not used. The right exists to get rid of cruives, but making it unlawful to use any cruive anywhere would interfere with an existing right. Although that right is not exercised, it has been exercised in living memory.

Gordon Jackson: Fine.

The Convener: I understand that. I cannot speak for other committee members.

Patrick Layden mentioned haaf nets. I am not sure whether we have any queries about them.

Patrick Layden: Okay. We will leave that until something comes up.

The Convener: They raise the same point about prescription. Would there be no right to acquire the right to fish by haaf net after 1951?

Patrick Layden: The commission considered haaf nets in much more detail than cruives and certificated fixed engines, because in 1951, there was genuine doubt about whether haaf nets were a legitimate method of fishing. In the case of Salar Properties (UK) Ltd v Annandale and Eskdale District Council, in 1992, Lord Coulsfield was asked to consider the question. After examining all the authorities in considerable detail, he said that

"were it necessary to do so, I would be inclined to hold that a haaf-net was not a fixed engine or an illegal mode of fishing within the principles laid down"

in the various cases to which he had been referred.

The commission said that, in the Solway, haaf nets were a lawful method of fishing. However, paragraph 62 of the commission's report states:

"it is by no means clear that the use of haaf nets has been legitimate throughout the whole of the Solway and the waters flowing into it. We are equally concerned that the entitlement to use such nets should not be extended further than is currently the case".

Paragraph 63 states:

"the best solution is to recognise formally that haaf nets are a legitimate method of fishing within the Solway, but to require any person who considers that he is entitled to use a haaf net to prove that entitlement in any legal proceedings".

Therefore, the doubt about haaf nets is not that they are not a legitimate method of fishing; rather it is whether people in different areas of the Solway are entitled to use them. That is what the bill reflects. I do not know whether it would be possible to acquire a right to use a haaf net by prescription—I do not know how one acquires a right to use a haaf net. I can go no further than Lord Coulsfield did in the Salar Properties case. He resolved the doubt. The commission has accepted that the doubt has been resolved and has tried to reflect the somewhat amorphous nature of the right to use haaf nets in the Solway in the provisions of the bill.

The Convener: Therefore, the proviso in the 1951 act does not apply automatically to haaf nets.

Patrick Layden: No. Several methods of fishing that were extant in 1951 have been considered subsequently by the courts and declared to be unlawful. Those include whammel nets, which are drifting nets with corks along the top and weights along the bottom. Fishermen place them across a river during the tidal flow, wait until they fold in on themselves through the movement of the current, and collect any fish that have been trapped. That method has been held to be illegal. However, in 1951, some people would have said that that was a lawful method of fishing, which was covered by the proviso. There are other methods that may have been lawful and which have subsequently been declared unlawful. The only method that the commission has found to be on the lawful side of the spectrum is fishing with haaf nets.

The Convener: The next recommendation that the committee queried is 15.3, which deals with estuary limits. It recommends that the Scottish ministers be given a power to adjust estuary limits. The committee's concern was that although members agree that it would be desirable to give

the Scottish ministers such a power, it might not meet the strict test of being necessary to achieve a satisfactory consolidation.

Patrick Layden: Recommendation 15 is reflected in section 36(5) of the bill. Section 36(5)(a) states that the Scottish ministers may, by order

"where there is doubt as to the position of particular estuary limits, make provision for removing that doubt".

The Salmon Net Fishing Association objected to that provision because it is particularly exercised about the precise position of estuary limits, which determine which methods of fishing are lawful either side of an estuary.

As I stated in my letter of 17 January, there is a question about whether that power, however desirable, is proper consolidation. Given that there is objection to section 36(5)(a), the committee may want to exercise its discretion.

Section 36(5)(b) is different. It states that the Scottish ministers may, by order

"change a reference used in describing estuary limits where the suitability of that reference for that purpose has lessened or ceased".

That is not a question of changing the law; it simply changes a description that has become inaccurate over the course of time.

In my letter, I referred to the description of the estuary limit for the River Broadford, which is

"a straight line from Mr McKinnon's pier on the north to the cottage on the beach a little to the eastward of the lime kiln and pier on the south"

That was probably a splendid description in 1865, when everybody knew that the pier belonged to Mr McKinnon—or, indeed, which pier belonged to Mr McKinnon—and when there was a cottage on the beach a little to the eastward of the lime kiln. It does not necessarily follow that it would be equally obvious now where the line would be drawn.

I also mentioned the River Wick, where the estuary limit was

"the line of the breakwater now in course of construction"

—we have to assume that construction carried on as was intended at the time—

"and a straight line drawn from the outer end of the said breakwater to the north shore".

Again, it is not difficult to see that that may no longer be a valid description of places on the ground.

The power in section 36(5)(b) simply enables ministers to go back to the River Broadford, work out from old maps where Mr McKinnon's pier was and identify that spot by reference to other geographical features or by grid reference. It does not enable ministers to change the law at all; it simply enables them to clarify old provisions that have become inaccurate over time. I would say that the committee could accept that recommendation.

Gordon Jackson: Those are very good examples of value judgments falling on either side of the line. Section 36(5)(a) clearly goes further down the consolidation line, but I do not think that section 36(5)(b) does. It is a good example of where the line is drawn, and I am happy with the distinction.

John Farquhar Munro: Patrick Layden said that demarcations of the estuary boundaries were defined by a fixed mark and that is pretty well accepted. However, what happens when there are two or three different interests in a fishing? For example, the Crown Estate, SEERAD and a couple of private proprietors could all have land bordering an estuary. A complication arises as to who owns what.

Patrick Layden: That makes the point very well. It is perhaps for that reason that the power in section 36(5)(a) would not be appropriate because resolving the doubt might suit you but not me.

Gordon Jackson: One man's doubt is another man's change.

Patrick Layden: However, the power in section 36(5)(b) would resolve all doubts, because it says to use the spot decided back in 1865 and describe it so that everybody knows precisely where it is. It would stop arguments about where Mr McKinnon's cottage used to be because the point would be fixed.

The Convener: Thank you. That makes things clear.

Recommendation 17 deals with designation orders and the repeal without re-enactment of section 2(2) of the 1986 act.

Patrick Layden: Section 2(2) of the 1986 act is certainly intended to be reproduced, subject to the Scottish Law Commission's recommendation. The committee had some concerns about the precise meaning of that subsection and I am not precisely sure what effect to give to it. It states that a designation order shall

"provide for the application to the district so designated of such regulations"

as the secretary of state specifies in the order.

As I said in my letter, there are three obvious interpretations. The first would be that the secretary of state would be required to provide that the regulations applied to any new salmon fishery district that he created. That would be rather odd, as all the regulations that are mentioned in section 2(2) of the 1986 act are of general application—they apply throughout

Scotland to every salmon fishery district. There would be no need for a power or duty to apply them; they would apply by virtue of the general law.

16:00

The second interpretation would be that, by omitting references to specific general regulations, section 2(2) of the 1986 act enables the secretary of state not to apply those general regulations to the new salmon fishery district. That would be even odder. If the secretary of state could disapply general regulations, that should be stated in terms and not left to some unhappy inference to be drawn from the way in which the provision is drafted.

The third interpretation—I am being as kind as possible to whoever put section 2(2) of the 1986 act together—would be that section 2(2) enables the secretary of state to include in the designation order a helpful reference to the general regulations that apply. On balance, that is the interpretation that I would go for. It is certainly useful to the users of designation orders to have the general regulations that apply set out in those designations.

However, section 2(2) of the 1986 act does more than that. It states that the secretary of state

"may, in such an order, amend regulations made under section 3(2)(*d*) of this Act or under section 6(6) of that Act"—

the 1862 act—

"in their application under this subsection."

Policy is not a matter for me, as the consolidator of a piece of legislation. Nonetheless, that seems to me to be another peculiar provision. The regulations that can be made under section 6(6) of the 1862 act are the same as can be made under section 3 of the 1986 act—the subject matter is the same. The obvious intention was that, as people got around to replacing the regulations under section 6(6) of the 1862 act, they would do so by introducing new regulations under section 3 of the 1986 act. However, if the general regulations made under section 3 of the 1986 act cannot be amended, why should it be possible to amend the regulations made under section 6(6) of the 1862 act? That is an odd provision.

Leaving aside the technical oddity, I should add that, in practice, the only extant regulations made under section 6(6) of the 1862 act relate to the construction and use of cruives and the observance of the weekly time limits. Those regulations are of general application throughout Scotland and I am told—Mr Dunkley will confirm it in a moment—that they are never amended in relation to any particular salmon fishery district, but are left as regulations of general application. Nobody has used, is using or wants to use the power to amend regulations made under section 6(6) of the 1862 act.

The regulations made under section 3(2)(d) of the 1986 act relate to the mesh sizes of nets that are used to catch salmon. They, too, are of general application throughout Scotland. The environment and rural affairs department has not changed them for any particular district and I am told that it has no intention of doing so. Therefore, that power is never used, either.

All those considerations raise the question whether section 2(2) of the 1986 act has any place in the legislation at all—whether it does anything useful. I have considered—and I am still considering—whether it might be possible to do something about the matter if the committee considers that my third interpretation of section 2(2) is the preferable one and that, properly read, the subsection simply enables the secretary of state to provide a useful reference in a designation order to the general regulations that apply.

If the committee accepts the Scottish Law Commission's recommendation that the specific power to change regulations under section 3(2)(d) of the 1986 act should be repealed and not re-enacted, my preliminary view is that it might be possible to replace the consolidation of section 2(2) of the 1986 act with a provision that simply enables the Scottish ministers to include in a designation order references to the general regulations applicable to salmon fishery districts, which would make it clear that we were not fiddling about with the application. That would be more useful to the reader.

It would be possible to go even further than that and simply leave the subsection out. It would then be for the environment and rural affairs department to include in any designation orders, as a matter of practice, a helpful note of the regulations that were extant when the designation order was made. Perhaps Mr Dunkley can tell us more about what the department does concerning such issues.

The Convener: Briefly, if you will.

David Dunkley: Mr Layden is right. Up to now, the regulations that remain in force have been announced in any designation orders that have been made. Those regulations relate to the construction and use of cruives and to the observance of the weekly close time. That is pretty much it. We would not feel any desire to make those regulations different in different districts—it would be perverse if different practices existed in adjacent districts. We are content to stick with the status quo.

The Convener: Our view is that, because of the doubt about the meaning of section 2(2), it would be preferable if a way could be found to repeal it without re-enacting it.

Patrick Layden: I could see my way to doing that if the committee considered that a legitimate interpretation.

The Convener: Thank you.

Recommendation 18 deals with the potentially contentious issue of whether, where there are fewer than three proprietors of a salmon fishery, one could act on behalf of both. We were concerned that the recommendation could be controversial and represent a substantive change in the law, rather than a straightforward consolidation of it.

Patrick Layden: I do not want to spend long on that recommendation. I have a sense of the committee's view and I would not make any strong representations in favour of the recommendation.

The Convener: The next recommendation is recommendation 24. We had a slight concern about the definition of the word "enactment".

Patrick Layden: This is really a question of pieces of string. The Scotland Act 1998 contained a rather snappy definition of enactment, whereas the Human Rights Act 1998 took about a page and a half to cover what was meant by enactment, subordinate legislation and so on. The reason for the definition in the bill is that, because there is so much old legislation in various odd forms kicking about the place, it seemed sensible to ensure that we had covered everything. Nevertheless, I will reconsider the definition and refine it if I can.

The Convener: The final recommendation to be considered is recommendation 28, which concerns the repeal of paragraph 4 of schedule 17 to the Water Act 1989.

Patrick Layden: As I said in my letter, the recommendation does not take into account fully the effect of the Fire Brigades Union case. Ministers are under a continuing duty to consider whether to implement the enactment. I will not press the committee to accept the recommendation.

The Convener: We will now consider a number of points relating to consolidation of the law. The colourful map that has appeared at the end of the room is relevant to the first point.

Gordon Jackson: I must nip out.

The Convener: If you leave, we will be inquorate.

Gordon Jackson: I am sorry—Ah cannae dae that.

The Convener: Would you like me to suspend the meeting for five minutes?

Gordon Jackson: One minute would be enough.

The Convener: I suspend the meeting for one minute.

16:10

Meeting suspended.

16:15

On resuming—

The Convener: We are taking evidence from the Executive.

The first general point that we want to address concerns the application of the bill to the River Esk. I dare say that the colourful map to which I referred will come into play here.

Patrick Layden: Until 1998, there was no definition of the River Esk. Himsworth makes that point on page 137 of his book on the Scotland Act 1998, in his commentary on section 111 of the act. The wording of the Scotland Act 1998 (Border Rivers) Order 1999 reflects the fact that, until the 1998 act was passed, for the purposes of salmon fisheries legislation the River Esk was thought to end at the mouth of the Esk, at a point just below the River Sark. By administrative arrangement, which was reflected in the legislation, the waters of the Esk upriver of that were dealt with under English legislation. In so far as they were on the Scottish shore, the waters to the west of that were dealt with under Scottish legislation and, in so far as they were on the English side, they were dealt with under English legislation.

The provisions of the bill reflect that split. The Scotland Act 1998 (Border Rivers) Order 1999 and the 1998 act itself did not amend the definition of the Esk for the purposes of salmon fisheries legislation. The 1999 order reflects the fact that, downstream of the River Sark, Scottish legislation applied on the north banks of the Solway. I can provide the committee with an example to illustrate that. In the 1960s, people were charged with contravention of section 1 of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 at Annan, which is well within what the Scotland Act 1998 defines as the lower Esk.

I will reconsider this matter, but I am reasonably sure that the definition of the Esk in the Scotland Act 1998 was not intended to bite on the general salmon fisheries legislation and that the provisions of the bill are therefore accurate.

The Convener: We look forward to your coming back to us on that matter.

Our next point relates to section 8(1) of the bill. In one of our letters, we asked you to comment on that issue, but you appear to have missed it.

Patrick Layden: I have to apologise. I missed that in the generality of the letter. It is a sound point and I will prepare an amendment to replace the reference to "low water mark".

The Convener: Section 11 deals with the Theft Act 1607. We wondered whether that was a straightforward matter of consolidation or whether it should have been referred to the Scottish Law Commission for its consideration.

Patrick Layden: It was mentioned to the commission, which took a close interest in the matter. You will have seen the draftsman's note, which explains how I came to the view that what I have suggested is a proper consolidation. I am in some difficulty because the commission was content with the provision, whereas the committee might have been seeking a recommendation that fishing in a proper stank or loch without permission should be treated as an offence of stealing, rather than as an offence of fishing.

The committee's view seems to be that the offence has been treated as a stealing offence for four centuries. However, I do not accept that. I have no doubt that, when the legislation was first passed, people knew jolly well what they were prosecuting people for, which would be the offence of fishing. It would be inappropriate to have an offence of stealing from lochs, because one cannot steal fish that have not yet been caught. The only case that we have in relation to the act is the 1911 case of Pollok v McCabe—1909 6 Adam 139—in which fish were being taken from a privately owned and privately stocked enclosed stank or pond. It would be possible to describe such an offence as stealing, as it involves taking away fish that a man has put in the pond. However, that would not apply to a loch, even if it were owned by only one person.

I really cannot help the committee much further. I think—and I believe that your legal adviser agrees with me—that the provision in section 11 is an accurate reflection of the 1607 act, which is the only act of the old Scottish Parliament that we are consolidating in the bill. I do not think that there is a major problem involved. It is not the case that hundreds of people who have committed a theft will suddenly find themselves charged with simply fishing. The provision is not often used.

Gordon Jackson: I do not know much about the matter. Is the point that one cannot steal fish?

Patrick Layden: One cannot steal wild fish from a loch or a river. They are res nullius—until someone catches them, they are not owned by anybody.

The Convener: The next point that we queried concerned section 31(5), which deals with the definition of the period of the close time. We were concerned about how the wording would impact on salmon fishing on a Sunday, as we were not sure whether Sunday counted as a period.

Patrick Layden: I have handed the committee clerk copies of section 13 of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951. Subsection (1) says:

"No person shall fish for or take salmon during Sunday."

I think that that is a Sabbath observance provision.

Section 13(2) of the 1951 act says:

"No person shall fish for or take salmon (except during Saturday or Monday by rod and line) during the weekly close time."

Without the words contained in brackets, that section would cover both fishing by rod and line and fishing by net and coble. The inclusion of the words in the bracket means that there is a licence to fish by rod and line during the weekly close time. Therefore, the only prohibition is on fishing by net and coble during the weekly close time.

Section 13(3) of the 1951 act says:

"The weekly close time shall extend from the hour of twelve noon on Saturday to the hour of six on the following Monday morning."

Those periods can be revised because of the provision in the 1986 act, which allows for amendment of the weekly close time. The question is: when the 1986 act says that one cannot shorten the period that is set out in the 1951 act, which period is it talking about? As I said, section 13(2) of the 1951 act states:

"No person shall fish for or take salmon … during the weekly close time."

That is a prohibition on fishing by net and coble. There is a complete exemption from that prohibition for fishing by rod and line. The only period that is specified is whatever period the weekly close time is fixed at. The weekly close time that is fixed in section 13(3) of the 1951 act can vary—it can be longer than the period that is specified in that subsection. The proviso in the 1986 act says that one cannot make the close time shorter than that period. The 1986 act did not have the intention of enabling people to fish on Sunday, because Sunday is the day of rest, on which one should not be fishing, either by rod and line or by net and coble. There was no intention of reducing the period during the weekly close time within which it was legitimate to fish by rod and line. The provision is constructed simply in terms of the period of hours of the weekly close time.

The Convener: Can you tell us why the provision refers to periods rather than to a period?

Patrick Layden: No, I cannot. The relevant provision is in the 1986 act and, like one or two other provisions in that act that we have considered, there are aspects of it that I cannot explain satisfactorily.

Gordon Jackson: I lost track of what you were saying. I am curious to know whether it is still the case that one cannot fish on a Sunday.

Patrick Layden: It is still the law that one cannot fish on a Sunday.

David Dunkley: One cannot fish for salmon on a Sunday.

Gordon Jackson: One learns a lot on this committee. Fishing for salmon on a Sunday is illegal. I would not want to fish Monday to Friday, either.

John Farquhar Munro: The salmon are very discerning—they will not bite the lure on a Sunday. It is okay to fish for brown trout on a Sunday, but not for salmon.

Gordon Jackson: That is amazing; I never knew that.

John Farquhar Munro: If someone catches a salmon when they are fishing for a brown trout, they are in trouble.

Gordon Jackson: Fishing for salmon on a Sunday is not allowed.

John Farquhar Munro: Fishing for salmon or sea trout on a Sunday is not allowed.

Gordon Jackson: I am sorry—I am just wittering on.

The Convener: The next section that we had a concern about was section 34(1)(a). We wondered whether it should replicate section 1(1) of the 1986 act.

Patrick Layden: The committee's concern relates to a relatively minor drafting point. Although I think that the provision is adequate, I could investigate the issue in detail with the committee's legal adviser. If we come to the view that an amendment is necessary, I will produce one. My present advice is that the provision does what it needs to. I would be happy to explain that in more detail, if the committee would like me to, although members might like to move on to other matters.

The Convener: Are members content with the suggested approach?

Members *indicated agreement*.

The Convener: Our question about section 34(2) was whether it was absolutely necessary.

Patrick Layden: The query about section 34(2) is a more important point. Section 24(2) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 provided that the districts that were established under the Salmon Fisheries (Scotland) Act 1868 would extend for three miles seaward beyond the low water mark. It also said that the districts would include all inland waters within the limits that were defined by the 1868 act.

Section 1(1) of the Salmon Act 1986 states:

"A salmon fishery district shall be the area within the coastal limits of a district (within the meaning of the Salmon Fisheries (Scotland) Acts 1862 to 1868) and extending

(a) seaward for 3 miles from mean low water springs; and

(b) landward to include the catchment area of each river which flows directly or indirectly in to the sea within those limits."

The picture that you get of salmon fishery districts in 1986, part of which follows the provision in the 1951 act, is that they go a uniform width out from the coast all the way round Scotland. Obviously, the districts that are opposite England do not go out for three miles, because there are not three miles between the two coasts. Elsewhere, they go out for a three-mile section all the way round the coast.

16:30

The salmon fishery districts all go inland to include the catchment area of all the rivers between the coastal limits of the district. If my interpretation is correct, every salmon fishery district will have those attributes: they will go inland to include all the catchment areas of the rivers and go out to three miles beyond the low water mark. I have taken those points as being common features of all salmon fishery districts.

As the committee has commented, it is possible to interpret section 1(2) of the 1986 act to mean that the secretary of state—now the Scottish ministers—has the power to make any area into a salmon fishery district. That would mean that ministers would not have to extend the district three miles out from the low water mark but that they could make the limit one and a half miles out or 10 miles out, or that they would not need to include the catchment areas of all the rivers but could say that a district included only the river itself. Section 1(2) of the 1986 act could be interpreted as meaning that ministers could fiddle about with salmon fishery districts in any way they pleased. Although that is a possible interpretation, I do not think that it is the best interpretation—it is not the way in which the legislation has operated since 1986. I cannot sit here and tell you that it could not be interpreted in that way, but I suggest to the committee that my interpretation is preferable and that it is my interpretation that is reflected in the bill.

John Farquhar Munro: Is it the case that the regulations that were applied to a specific fishery would extend to whatever demarcation at sea you suggested and that, whether the limit was two miles or three miles, the regulations would apply within that limit?

Patrick Layden: Yes.

John Farquhar Munro: Do you not consider that a bit extreme?

Patrick Layden: That is not for me to say—it is in the legislation.

The Convener: Sadly, all that we are doing is consolidating the existing law. It is not up to us to pass comment on it.

Patrick Layden: All I can say is that it would be difficult for fishermen if they had to look at the coast and work out whether they were three miles out, two miles out or six miles out. The regulations might have applied differentially if the secretary of state had had the power to say, "Well, this limit is one mile, and that one is four miles and this one is three miles." Such an approach would be difficult. It may be an unreasonable approach but, if my interpretation is correct, it is at least consistent.

John Farquhar Munro: I think that we need to consider that point.

The Convener: We shall do so.

The next section that we want to consider is section 36(2)(a), which deals with the byelaws to fix and define estuary limits. The Executive's view was that there should be no express reference to the Salmon Fisheries (Scotland) Act 1862. We were concerned about the accessibility of the law and whether it might be better to refer to that act.

Patrick Layden: I entirely understand that point. When I started the consolidation, I was horrified at the extent to which the law relies on byelaws made under the 1862 act, the 1868 act and so on. As a matter of deliberate policy, I decided that, so far as it was proper to do so, I would excise references to those very old acts and try to make the bill look like a modern statute. Statutes have to be accessible, but different parts of statutes and different kinds of statute have different levels of accessibility. Any criminal provision ought to be clear and specific in the legislation, so that anybody who wants to will know how to avoid committing that criminal offence.

Provisions for administration do not need to be quite as up front and transparent, because the people who do the administration know their way round the legislation. The legislation is less a set of provisions requiring people to do one thing or another than a framework within which administration takes place. At the end of the day, that is a matter for the committee, but I took the view that in putting together a modern statute it would be best—in so far as it can properly be done—to get rid of all the dross, such as 1862 act byelaws.

If the committee is of the view that accessibility is all, I can replace section 36(2)(a) and the other provisions where the issue arises with specific references to the acts that have been mentioned. I would prefer to get rid of all the rubbish and to put the legislation into modern terms, while ensuring that we have not lost the legal effect of the regulations that govern the districts concerned. I believe that I have done that. However, it is for the committee to decide whether that drafting policy decision was correct.

The Convener: We understand that the provision is used mainly by administrators, rather than by people who may be involved in criminal proceedings. However, the question of estuary limits may be relevant in criminal proceedings and may have an impact on criminal law.

Patrick Layden: Estuary limits, observance of the weekly time zones and close-time monitoring are all relevant. However, those matters are known to the people in the district who go fishing. It is difficult to imagine someone wandering up to a river to do some casual salmon fishing. Before people start to fish, they find out what the rules are on the river concerned. Local people could tell them what those rules are, but the 1986 act could never give them that information. It could only refer them, directly or indirectly, to some byelaws that were made under section 6(6) of the 1862 act. I am happy to say that I am not responsible for the state of those byelaws.

Gordon Jackson: This is another question of balance. I understand entirely the point that Patrick Layden makes. However, I wonder whether there exists a statute that is not particularly old and which deals with estuary limits. There is a massive gap between 1862 and 1986, but the gap between 1986 and today is quite small. The 1986 act pointed back to where the byelaws are to be found. Is it not almost misleading to remove that provision from a consolidation bill? Someone could say, "The 1986 act referred to the byelaws. The consolidation bill does not do that, so the provision must be somewhere else." In fact, the provision is still in the same place—you simply do not want to refer to the 1862 act.

Patrick Layden: I have no problem with that. I have a view on the issue, but there are other views. If the committee's view is different from mine, I will change the provisions to reflect it.

Gordon Jackson: I do not suggest that a full reference be included every time an old piece of legislation is mentioned. However, it might be

misleading to change a provision that relates to estuary limits. If we were to do so, people might say that the byelaws no longer apply because they were mentioned in previous legislation but are not mentioned in the bill.

Patrick Layden: No one who uses the legislation would be in that difficulty. That is the point.

The Convener: The next point relates to section 37(2). We are concerned about whether the section should be redrafted to match more closely the terms of section 6(2) of the 1986 act—specifically, the reference to dates and periods being determined under section 6(5) of the 1862 act. In addition, section 37(2) should be redrafted to reflect more closely the fact that the provision applies only where no designation order has been made in respect of a district. The point is similar to the one we have just considered.

Patrick Layden: Yes. The committee also made a point concerning the relationship between sections 35 and 37.

When the 1986 act was passed, annual close times were in force for every salmon fishery district in Scotland. The designation orders procedure enabled the secretary of state to amalgamate and change salmon fishery districts. When he did so, part of the process was to fix a new annual close time, either for the whole of the new district or for different parts of it.

The powers in section 37 enable the Scottish ministers to change the annual close time after the designation order process has taken place and on receipt of an application made by people living in the district. The annual close time is fixed as at the date of the 1986 act, but it can be changed by means of a designation order. If people want to alter the annual close time subsequently, a new order can be made under section 37 of the bill.

As I said, I am perfectly happy to consider the point about the reference back to the 1862 act. What I have just said is intended to answer the committee's second point.

The Convener: Are members happy with that answer?

Gordon Jackson: Yes. I am probably being irrational, but I am happier with that power than I was with the previous one. I do not quite know why, but it seems more appropriate for the estuary limits. I think, however, that I am making an arbitrary distinction.

The Convener: Okay. The next section for our consideration is section 38(1), which confers powers on the Scottish ministers to make an order. Our concerns relate to the question whether the section properly consolidates the original provision, given that it contained a power to make regulations rather than a power to make an order.

Patrick Layden: Since I received the committee's comments, I have been trying to think of something Shakespearean along the lines of "what's in a name?" We can call a regulation by any other name, such as "order", as it does the same job. There is a wide variety of forms of subordinate legislation, such as regulations, orders, byelaws and orders in council, and a multitude of different procedures under which Parliament controls the making of such legislation. Some orders in council have affirmative resolution procedures, others have no procedure at all or a publication date after they are made and so on.

In the case of the bill, I was concerned to put all the provisions about the making of the orders in the schedule in a consistent manner. That is why I changed the reference to regulations in the Salmon Conservation (Scotland) Act 2001 to a reference to an order-making power in section 38(1). That change does not affect the content of what can be done in the subordinate legislation; it simply changes the name of it.

If members look at the Interpretation Act 1978 and the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1379/1999), they will find that the provisions that make reference to subordinate legislation made under a previous act that continues to be in force do not refer to orders or regulations; they talk about subordinate legislation. I am referring to section 17(2)(b) of the Interpretation Act 1978 and to paragraph 14(2)(b) of the schedule to SI 1379/1999, which was introduced to do the same job in the Scottish Parliament. Both pieces of legislation talk about subordinate legislation; they do not talk about orders and regulations. It is a distinction without a difference.

Gordon Jackson: Have we used the word "order" all the way through the bill?

Patrick Layden: No. In some cases, because too much history was involved in the regulations, I had to stick to the word "regulations". In the case that we are referring to, I changed the word to "order" so that all the provisions in schedule 1 to the bill, which have the same procedure for a different set of subordinate legislation, would talk about orders. I am making a point about consistency.

Gordon Jackson: Quite—fair enough.

The Convener: Section 33(7) sets out that

"schedule 1 to this Act shall apply to the making of regulations".

Patrick Layden: Those regulations are separate from the standard regulations under schedule 1. That is why section 33 is not in part 2. I do not claim to have got the consistency thing completely

right. I do not think that anybody who tried to consolidate this legislation could have made it entirely internally consistent. I have moved as far as I could in that direction.

The Convener: Thank you. We will consider that point. You will be pleased to hear that we are moving towards the end of our consideration of the Executive responses.

Section 40(7)(a) deals with lines across rivers between points on the riverbank.

16:45

Patrick Layden: I accept that section 40(7)(a) could be more clearly drafted and will draft an amendment.

The Convener: Thank you.

Let us now consider section 43(2).

Patrick Layden: I will also reconsider section 43(2).

The Convener: Finally, let us consider section 68, which is the savings provision.

Patrick Layden: I have read the committee's comments on the usefulness of the Interpretation Act 1978. I started off the exercise feeling that that act would do most of what I wanted. However, consultation with my colleagues on the drafting side of the office has made me slightly more cautious about that, and section 68(1) was part of that increased caution. If the committee takes the view that more specific references should be made to earlier legislation, it may be possible to look again at sections 68(1) and 68(2).

The Convener: To an extent, the issue touches on the points that were made a few moments ago about the 1862 act.

Patrick Layden: Yes.

Gordon Jackson: Before we conclude the meeting, I wonder whether, just for the record, I might take a further two minutes to pursue a final matter of interest to me.

The committee raised the issue of the reversed onus of proof that is required in relation to cruives. Section 1(5) provides that the onus of proof remains on the person charged. The decision has been made not to change that, despite the fact that it has been changed elsewhere because of a Scottish Law Commission recommendation on compatibility with the European convention on human rights. When we asked about that, the Executive response stated that, in point of fact, it would be compatible to leave the onus of proof as it stands. That reasoning is fine, as far as I am concerned. This is a peculiar situation, and the state should not need to prove that someone did not have the right to use a cruive, given the fact that the person would know whether they had such a right. However, in that context, you wrote one or two comments that interested me about how consolidation acts in general consider the application of the convention. I refer to pages 4 and 5 of your letter to the committee of 13 January.

There is a fairly important principle here. Paragraph 23 of your letter states:

"The fact that this is a consolidation clearly makes no difference to the requirement that the Bill should be within competence and therefore compatible with Convention Rights."

Obviously, I agree with and understand that. However, the first sentence of the next paragraph points out that there may be a difference for consolidations. Will you explain that?

Patrick Layden: Scotland is blessed with a statute book that has been almost wholly created by the United Kingdom Parliament. The Human Rights Act 1998 operates on the UK Parliament's statute book and if any provision on that statute book is thought to be incompatible with the human rights convention as set out in the 1998 act, the courts come under the duty that is set out under section 3 of that act:

"So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights."

The courts have looked at that provision and have said that it obviously goes beyond the usual provision, which says that United Kingdom legislation is presumed to be, and should be read as being, compatible with our international obligations. Before the 1998 act came into force, if a provision of a UK act looked incompatible with an international obligation, the UK statute usually won and the international obligation lost.

Section 3 of the 1998 act requires the courts to bend the meaning of statute so that the obvious interpretation will not be taken if that interpretation is incompatible with the human rights convention. Instead, the courts will reinterpret the statute so as to make it compatible with the convention.

In relation to acts of the Scottish Parliament, section 101 of the Scotland Act 1998 makes the same sort of provision—indeed, some commentators have said that it goes further than section 3 of the Human Rights Act 1998. Section 101 says that any provision in an act of the Scottish Parliament

"is to be read as narrowly as is required for it to be within competence".

In relation to the Scotland Act 1998, the meaning of the term "competence" is much wider than simple compatibility with human rights; however, for our purposes, it includes ECHR compatibility.

My proposition is that in consolidating legislation we should not be required to ensure that every provision that could be read in two ways must be amended to make it clearly compatible. We are entitled to leave such decisions to the courts, because all we are doing in a consolidation bill is repeating the law as it stands. If any member can think of a provision in the existing legislation that is of doubtful ECHR compatibility, section 3 of the Human Rights Act 1998 will require the courts to twist it until it is compatible. Further, if any such provision is consolidated and therefore included in an act of the Scottish Parliament, the courts come under an equivalent duty set out in section 101 of the Scotland Act 1998 to twist it until it becomes compatible.

As a result, I would say that we should not change any provisions unless they are obviously and demonstrably incompatible with the ECHR. We should just leave the matter to nature and the courts, which will make any necessary decisions about ECHR compatibility.

Gordon Jackson: I am not arguing against what you have said, but I want to make this point. Many things flow from consolidation bill procedure, such as the issue that we are discussing; however, the point is that the bill will still become an act of the Scottish Parliament in 2003. One view is that any provision in legislation—including consolidation bills—that is not ECHR-compatible should not be included in that legislation.

I have a slight difficulty with what the test is. That is why we changed the onus of proof following another Scottish Law Commission recommendation. We have already said no and made it clear that, although this is a consolidation bill, we are going to change provisions to make them compatible; we are not simply going to consolidate the existing legislation and let the courts read it down. What is the benchmark for deciding whether to change a provision to make an act of the Scottish Parliament compatible or to leave the matter for the courts?

Patrick Layden: The benchmark is whether it is clear from the bill that a provision in its present form is incompatible with the ECHR. I agree with the committee's observation that the Scottish Law Commission took a rather cautious view of the provisions of the fisheries legislation in recommending that the transfer of the onus of proof should be revised.

Gordon Jackson: But you could have left the Scottish Law Commission with the same argument that you have already put forward in your letter.

Patrick Layden: Precisely so.

Gordon Jackson: That is my difficulty—the whole approach seems inconsistent.

Patrick Layden: If I had made the decision myself—

Gordon Jackson: —you might have left all the provisions.

Patrick Layden: Yes. Deciding whether a particular provision is so clearly incompatible that it has to be changed is a value judgement.

Gordon Jackson: But if that is the apparent inconsistency, why have you said that the Scottish Law Commission has been cautious when such caution was perhaps unnecessary?

Patrick Layden: The circumstances are different. I am not saying that the commission's decision was wrong.

Gordon Jackson: Neither am I.

Patrick Layden: I am simply saying that the particular case we are discussing is demonstrably different from the one that the commission considered. I do not think that there is any doubt in this case; I am reasonably happy that the provisions in question are ECHR-compatible. If anyone in future doubts that—no doubt some whizz-kid will take the point to court in due course—the answer will be fairly clear. However, the answer is less clear with the provisions that the Scottish Law Commission told me to change. I am perfectly happy with that situation. I cannot give the committee a hard-and-fast, black-and-white rule that says, "This side of things is compatible and that side is not." In matters such as transferring onus of proof, we need to have a wider consideration of the balance between the interests of society and the interests of the individual. The balance is set at different points in relation to different offences.

Gordon Jackson: Should we, as parliamentarians, be making it clear that we are responsible for passing the bill as an act of the Scottish Parliament and that one act is the same as another as far as those responsibilities are concerned?

Patrick Layden: You could do that. However, if you come to the view that, for whatever reason, a provision that is being consolidated is not compatible with the ECHR, you have to make a policy decision about what it should say rather than concentrate on what it actually says. By doing so, you run the risk of straying into the area that you wanted to avoid.

The Convener: If there are no more questions, I thank the witnesses for their attendance. It has been a long afternoon but we have completed our business.

Next week, we will consider the draft stage 1 report on the bill. Do members agree to take that in private if necessary?

Members *indicated agreement*.

Gordon Jackson: Can anyone remember the procedure for lodging amendments to the bill? I imagine that the Executive will lodge amendments. When will that happen?

Patrick Layden: As I understand it, amendments are lodged at stage 2. If the committee can give me some indication of its view on referring back to old acts, I can take account of that in drafting amendments. I will then discuss them with the Scottish Law Commission and the committee's legal adviser. I hope that, by the time we reach stage 2, we will have a set of agreed amendments that should have been refined to a very narrow compass. After all, I am not aware that any serious issues of principle are still kicking about the place.

The Convener: We will discuss our draft stage 1 report next week and I undertake to come back to you then with our views on that outstanding issue. The intention is that the committee will meet once after the stage 1 report is presented to Parliament in order to deal with amendments. I think that that stage 2 meeting will take place in February.

Patrick Layden: I was told that it will take place on 4 March.

The Convener: You obviously know more than I do.

Meeting closed at 16:56.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178