

AQUACULTURE AND FISHERIES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Aquaculture and Fisheries (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

INTERPRETATION

2. In this Memorandum:

“the 1937 Act” means the Diseases of Fish Act 1937;

“the 2003 Act” means the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

OUTLINE OF BILL PROVISIONS

3. The Bill progresses a range of policies designed to help support the aquaculture industry and build public and international confidence in fish farming by underpinning the voluntary approach by providing backstop provisions to tackle the long running and difficult issues of control of parasitic sea lice and the containment and prevention of farmed fish. The Bill also progresses a range of policies designed to ensure the future sustainability of the freshwater fishery by improving; the rules on access, fish health & welfare and introducing conservation measures. The provisions in the Bill are based on the consultation paper, *Aquaculture & Fisheries Bill: Consultation Paper and Draft Regulatory Impact Assessment*, published in December 2005.

4. The Bill is divided into 5 Parts and in summary provides for the following:

- **Part 1** provides a series of information gathering, inspection and enforcement measures aimed at controlling parasites on fish farms and shellfish farms and at improving, in respect of fish farms only, the containment of fish, prevention of

escape of fish, and recovery of escaped fish. It also provides a power for the Scottish Ministers to approve a code of practice giving guidance and promoting desirable practices in respect of each of these matters;

- **Part 2** provides powers for the containment and treatment of the disease causing parasite of salmon *Gyrodactylus salaris*, should it be introduced into Scotland. These include powers to construct barriers, to purchase land compulsorily for the purpose of doing so; to maintain and dismantle any such barriers; and to treat waterways with chemical agents;
- **Part 3** provides a series of measures in respect of salmon and freshwater fisheries. It also makes an amendment to section 30(1) of the Fisheries Act 1981;
- **Part 4** provides a series of miscellaneous measures, including the regulation of the movement of live fish with a view to preventing the spread of fish diseases and protecting local fish populations; a discretionary power for the Scottish Ministers to make payments in certain circumstances; and the provision of certain information about fish farming and shellfish farming; and
- **Part 5** makes provision in respect of the application of the Bill to the Crown; concerning offences by bodies corporate; in respect of minor and consequential amendments; for the making of ancillary provisions by order; for the exercise of powers conferred by the Bill by statutory instrument; in respect of interpretation of the Bill; and for commencement of provisions of the Bill.

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has carefully considered the importance of each matter against the need to:

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- ensure that the aquaculture industry is regulated through flexible measures which can be applied in an appropriate manner based upon the industry's success, or otherwise, with respect to self policing and its application of voluntary codes of practice and other appropriate systems.

GENERAL SUBORDINATE LEGISLATION PROVISION

6. Section 36 (orders) contains the general subordinate legislation provisions and provides that any power conferred on the Scottish Ministers to make an order under the Bill must be exercised by statutory instrument. Subsection (1)(b) allows different provision to be made for different purposes. Subsection (2) provides that all of these powers are subject to negative resolution procedure, except for orders made under section 29(1) and section 35 (if it contains

provisions which add to, replace or omit any part of the text of an Act) which are subject to the affirmative procedure, and the commencement provisions where no procedure is required.

DELEGATED POWERS

Section 1(1) – power to require information about fish farms and shellfish farms: parasites

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

7. This provision allows the Scottish Ministers to make an order requiring fish and shellfish farmers to compile, retain and provide information in relation to the prevention, control and reduction of parasites affecting their stock.

Reason for taking power

8. Stocks of wild salmon and sea trout have declined in recent years on the west coast of Scotland and it is likely, given research findings, that sea lice infestation from salmon farms has and can play a part in this decline unless lice numbers are properly managed and controlled. The precautionary approach suggests it is reasonable that sea lice levels on farms are controlled and section 6 of this Bill enables Scottish Ministers to serve notices requiring the farmer to undertake control measures. In order to determine whether the serving of a notice is required Scottish Ministers need access to data concerning levels of infestation and control measures undertaken.

9. It is appropriate that provision be made by subordinate legislation, for two reasons. First, the requirement to make an order will depend upon the extent to which the information required cannot be gained voluntarily, and this demands a flexibility which could not be achieved were the detail of the information required to be specified directly in primary legislation. Second, any order will require to contain technical detail of the nature of the information sought and the manner in which information should be gathered and compiled, and this level of detail is best dealt with in subordinate legislation, following the principles laid down in the primary legislation.

Choice of procedure

10. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate as any orders will be made after consultation with stakeholders to take into account procedures already adopted by the industry as good practice, and will implement detailed policy within the framework laid down by the Bill.

Section 1(3) – power to require information about containment of fish on, and escape of fish from, fish farms and the recovery of escaped fish

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

11. This provision allows the Scottish Ministers to make an order requiring fish farmers to compile, retain and provide information in relation to the containment of fish on fish farms, the prevention of escape of fish from fish farms and the recovery of escaped fish.

Reason for taking power

12. We require to regulate the containment of farmed fish because of the risk that escaped fish can interbreed with wild salmon. Wild salmon return to the rivers in which they were spawned and have become genetically suited to survive through each stage of development, from fry to smolt to adult, so as to be able to complete up stream migration to reach their spawning grounds. If farmed fish do escape and survive to reach these spawning grounds it is likely that the genetic integrity of the wild stock will be diluted and that the resultant progeny will be less suited to survive in the environment at any stage of their development. There is also the risk that escaped farm fish can act as carriers of disease.

13. As with the power in section 1(1), the extent to which provision will need to be made for the compulsory provision of information will depend upon the degree to which such information cannot be gained voluntarily. For this reason, and also on the ground that the necessary level of detail is best contained in subordinate legislation, it is appropriate to proceed by way of subordinate legislation.

Choice of procedure

14. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate as any orders will be made after consultation with stakeholders to take into account procedures already adopted by the industry as good practice, and will implement detailed policy within the framework laid down by the Bill.

Section 4(2) – Meaning of parasite

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

15. This provision enables Ministers to modify the definition of “parasite” in Part 1 of the Bill.

Reason for taking power

16. Section 4(1) of the Bill defines “parasite” for the purposes of Part 1 of the Bill as meaning the two species of sea lice that presently cause concern: *Lepeophtheirus salmonis* and *Caligus elongatus*. At the present time the Scottish Executive are only aware of two main parasites of salmon and sea trout which the fish farming industry and wild fish interests want controlled. It is possible that other species of parasite may infest fish and shellfish farms and it is prudent that Scottish Ministers should be able to amend the list of parasites for which control measures are appropriate without the need for primary legislation.

Choice of procedure

17. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because any amendment of the definition of “parasite” would be a technical one, based upon scientific advice and consultation with fish farming and wild fish interests.

Section 7(1) and (3) – Powers to approve a code of practice

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

18. This provision allows the Scottish Ministers to approve codes of practice with respect to the prevention, control and reduction of parasites; containment of fish; prevention of escape of fish and recovery of escaped fish.

Reason for taking power

19. The Scottish Executive supports the Code of Good Practice developed by the fish farming industry in accordance with the Strategic Framework for Scottish Aquaculture, and proposes to adopt this Code, with or without modifications, and as amended from time to time, as the benchmark for good practice in fish farming against which inspectors will make their assessments. This section allows the Scottish Ministers to adopt codes of practice, compliance with which will then become mandatory and may be enforced by notices served under section 8. Good practice in fish and shellfish farming continues to develop, and there will be a need to adopt amendments to codes of practice to reflect these developments. In view of this it is appropriate that the adoption of such codes should be by way of subordinate legislation.

Choice of procedure

20. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because any decision to approve a code will be taken after consultation with the industry and other stakeholders, and any amendments to an approved code will be technical in nature, reflecting developing best practice in the industries concerned, and implementing the detail of the policy set out in the Bill.

Section 13(1) – Additional powers when designating area under section 2 of the 1937 Act

New section 2ZA of the 1937 Act

Power conferred on: the Scottish Ministers

Power exercisable by: order

Parliamentary procedure: none

Provision

21. This provision modifies the existing power to make designation orders in terms of section 2 of the 1937 Act to allow such an order made in relation to *Gyrodactylus salaris* to include provision prohibiting the movement into or out of the designated area of specified vehicles and equipment without appropriate disinfection, to prohibit or regulate the taking into or out of the specified area of dead fish and to regulate entry to or exit from the designated area.

Reason for taking power

22. This amendment is necessary to allow sufficient provision to be made by order under section 2 of the 1937 Act should *Gyrodactylus salaris* be introduced into Scottish waters. Without this amendment, the only restrictions which may be contained in an order under section 2 of the 1937 Act relate to the movement of live fish, live eggs of fish and foodstuff of fish. These restrictions would not be sufficient to limit the spread of *Gyrodactylus salaris*, which can survive for some time without a host and be transmitted via contaminated objects.

Choice of procedure

23. New section 2ZA amends the existing power to make designation orders under section 2 of the 1937 Act, which are presently subject to no Parliamentary procedure. It does not create any new order-making power. The existing regime for making orders under section 2 of the 1937 Act works well, and we have not sought to modify the procedure in the context of this amendment to the scope of the power.

Section 14 – Preliminary designation of area in relation to *Gyrodactylus salaris*

New section 2ZB(1) and (3) of the 1937 Act

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: laid before the Scottish Parliament after it is made

Provision

24. This section enables the Scottish Ministers to make temporary orders designating waters within Scotland or the Scottish zone, and prohibiting or regulating the taking into or out of the designated area, and regulating the movement within the designated area of live fish, live eggs of fish, and foodstuff of fish. An order may be made if the Scottish Ministers have reasonable grounds for suspecting that any inland or marine waters in the United Kingdom are infected by *Gyrodactylus salaris*. An order under this section has an initial duration of 30 days, extendible by further order to 60 days.

Reason for taking power

25. This power is required as a precaution to prevent the spread of *Gyrodactylus salaris* into or within Scotland should the parasite be reported in waters anywhere in the United Kingdom. It would allow restrictions to be put in place which would minimise the risk of the spread of the parasite while urgent research could be conducted with a view to making appropriate, longer term provisions. It is a contingency power, to be used should an outbreak of *Gyrodactylus salaris* be suspected; and as a contingency power whose effectiveness depends upon swift action, it is appropriate that it be taken by means of a power to make subordinate legislation.

Choice of procedure

26. Orders under this section will be laid before the Scottish Parliament after they are made, but subject to no further procedure. The Scottish Executive considers that this is appropriate, bearing in mind three considerations: the urgent nature of the orders, their limited duration, and their limited effect. These temporary orders must be made urgently if they are to be of any value, and their purpose would be defeated by a requirement for parliamentary procedure prior to their coming into force. A made affirmative procedure, in which orders came into force upon being made but ceased to have effect a number of days afterwards unless approved by a resolution of the Parliament, would not be appropriate as the orders are temporary in nature, and intended to have a maximum duration similar to that of the period during which a made affirmative instrument would have had effect without a resolution of the Parliament. The procedure chosen is also appropriate in light of the limited nature of the power – to regulate the movement of live fish, live eggs of fish and foodstuffs for fish, for a fixed period of time specified in the Bill.

Section 16 – amendment of section 31(1) of the 2003 Act (salmon fishing: general regulations)

New section 31(1)(g) of the 2003 Act

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

27. Section 16 of the Bill inserts a new paragraph (g) into section 31(1) of the 2003 Act, permitting the Scottish Ministers to make regulations providing for the closure or alteration of means for the passage of salmon through, round or over dams, lades or water wheels. The principal use of this power would be to require the closure or alteration of fish passes (which are structures constructed to allow fish to move upstream past dams or lades) as a supplement or alternative to the construction of barriers to the movement of fish as part of a plan for the containment or eradication of *Gyrodactylus salaris*.

Reason for taking power

28. Inserted section 31(1)(g) creates a power to be used if appropriate in the control and treatment of a future outbreak of *Gyrodactylus salaris*. As the power is aimed at a hypothetical

future outbreak, and will require to be adjusted to the facts of such an outbreak, it is appropriate that the matter be dealt with in subordinate legislation.

Choice of procedure

29. The amendment introduced by section 16 does not alter the existing procedure for the making of regulations under section 31(1) of the 2003 Act, which are subject to annulment in pursuance of a resolution of the Scottish Parliament (see section 68(2) of that Act). The Scottish Executive considers that this procedure remains appropriate, as the new power is of a relatively limited nature and of a similar character to the existing provisions of section 31(1).

Section 19 – *Gyrodactylus salaris*: Scottish Ministers’ power to make payments

New section 5F of the 1937 Act

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

30. Section 19 inserts new section 5F of the 1937 Act, which gives the Scottish Ministers power, in accordance with a scheme made by them by order, to make payments in respect of such matters as may be specified by them by order in relation to the exercise of their powers in relation to *Gyrodactylus salaris* (that is, their powers under inserted sections 2ZA, 2ZB, 5A, 5B, 5C and 5E of that Act).

31. The scope of the power is deliberately broad. A number of the powers in respect of which payments may be made under a scheme established under new section 5F – notably sections 5A, 5B and 5C relating to the construction of barriers, the use of chemical treatments and the clearance of certain fish farms – have the potential to involve considerable interference with the peaceful enjoyment of the rights of property of the owners of fishing rights, of sections of river affected by treatment, or of fish farms, and circumstances may arise in which payment is appropriate in respect of the exercise of those powers in order to ensure a fair balance between the interests of affected proprietors and the general interest in controlling and eliminating *Gyrodactylus salaris*.

32. Section 5F(2) provides that payments under subsection (1) may not be made in relation to fish destroyed in the exercise of the specified powers. This is on the basis that such payments may be made under section 29 of the Bill (payments in respect of fish destroyed).

Reason for taking power

33. New section 5F is a reserve power, to be exercised where necessary in conjunction with, or in consequence of, the other powers introduced into the 1937 Act by Part 2 of the Bill. The detail of the payments required will depend upon the facts of each outbreak and the decisions taken in relation to the exercise of these other powers. It is therefore appropriate that the details of any payment scheme be specified in subordinate legislation.

Choice of procedure

34. Orders under new section 5F of the 1937 Act are to be subject to affirmative resolution, as any scheme established by such an order will involve the making of payments from public funds, and it is considered that the Parliament should have the opportunity of considering in detail any proposed scheme for payment.

Section 23 – Weekly close time for freshwater fish

New section 17A(1) of the 2003 Act

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

35. Section 23 inserts new section 17A into the 2003 Act. Section 17A(1) allows the Scottish Ministers, after consulting such persons as they consider appropriate, to make orders specifying weekly close times for fishing for freshwater fish. Such orders may make different provisions for different species of freshwater fish and for different areas of Scotland. Any person who fishes during a specified close time for fish specified in the order shall be guilty of an offence (punishable by a fine of up to level 3 on the standard scale), of which that person may be convicted on the evidence of one witness.

Reason for taking power

36. Fishing for freshwater fish, including fishing for trout, is the sector of the sport of angling showing the greatest growth, and potential for further and faster growth, in Scotland. When this is allied to the measures being taken elsewhere in the Bill to extend the methods of fishing available to bring them into line with those in place in other countries, the scope for increased fishing activity is potentially greatly enhanced. Successful fisheries depend on sustainability, however, and any increase in fishing activity may need to be regulated in future if there is recognition of threats to stocks. There is already a weekly close time when fishing for salmon, but no such close times when fishing for trout or other freshwater fish. Section 17A would allow for the introduction of weekly close times if it became clear that there was a need in particular areas, and for particular species, to reduce fishing effort by this method. The need for weekly close times will be assessed on the basis of monitoring of freshwater fish stocks, and flexibility is required to impose and modify such close times in line with the results of this monitoring. This need for flexibility, together with the level of technical detail which may need to be specified in relation to weekly close times for different species and in different areas, justifies making provision by subordinate legislation.

Choice of procedure

37. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the limited nature of the power, which will be exercised after consultation. This approach mirrors that already in place in respect of close times for salmon fishing (see section 31(5) of the 2003 Act).

Section 23 – Power to specify annual close times for freshwater fish other than trout.

New section 17B(1) of the Salmon and Freshwater Fisheries (Scotland) Act 2003

Power conferred on: the Scottish Ministers
Power exercisable by: order by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

38. Section 23 inserts new section 17B into the 2003 Act. Section 17B(1) allows the Scottish Ministers, after consulting such persons as they consider appropriate, to make orders specifying annual close times for fishing for freshwater fish. These provisions do not apply to trout, for which provisions already exist in section 17 of the 2003 Act. Subsections (2) and (7) provide that orders may make different provisions for different species of fish and for different areas of Scotland. Subsection (3) provides that any person who fishes for or is in possession of freshwater fish during a specified close time for fish specified in the order in that regard shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale, while subsections (4) and (5) set out exceptions to this offence in relation to fish kept in captivity and the transport of live fish between waters. Subsection (6) provides that a person who commits an offence under section 17B may be convicted on the evidence of one witness.

Reason for taking power

39. Fishing for freshwater fish is the sector of the sport of angling showing the greatest growth, and potential for further and faster growth, in Scotland. When this is allied to the measures being taken elsewhere in the Bill to extend the methods of fishing available to bring them into line with those in place in other countries, the scope for increased fishing activity is potentially greatly enhanced. Successful fisheries depend on sustainability, however, and any increase in fishing activity may need to be regulated in future if there is recognition of threats to stocks. There are already annual close times for fishing for salmon and trout, but no such close times when fishing for other freshwater fish. Section 17B would allow for the introduction of annual close times if it became clear that there was a need in particular areas, and for particular species, to reduce fishing effort by this method. Close times could be amended if monitoring indicated that stocks were showing signs of recovery or decline, in light of ongoing monitoring. It is foreseeable that close times will be required, but the detail of where and when, and of what species need such protection, will only become apparent with time, and it is appropriate that this level of detail be left to subordinate legislation.

Choice of procedure

40. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the limited nature of the power, which will be exercised only after consultation.

Section 25(1) – Power to make regulations for the conservation of freshwater fish

New section 51A of the 2003 Act

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

41. Section 25(1) inserts new section 51A into the 2003 Act. Section 51A allows the Scottish Ministers to make regulations if they consider it necessary or expedient to do so for the conservation of freshwater fish. These provisions mirror those already in place in respect of salmon in section 38 of the 2003 Act. Regulations may be made only in relation to freshwater fisheries, which include those for trout, and may only be made in relation to conservation, although they may also have an effect in relation to management. The regulations may make different provisions for different species of fish, and may specify the times at and areas to which they apply. Regulations may specify types of baits or lures that may be used in fishing for freshwater fish. Any person committing an offence may be convicted on the evidence of one witness.

Reasons for taking power

42. Fishing for freshwater fish, including fishing for trout, is the sector of the sport of angling showing the greatest growth, and potential for further and faster growth, in Scotland. When this is allied to the measures being taken elsewhere in the Bill to extend the methods of fishing available to bring them into line with those in place in other countries, the scope for increased fishing activity is potentially greatly enhanced. Successful fisheries depend on sustainability. The ability of Scottish Ministers to make conservation regulations extends the range of measures that may be taken if it becomes clear that conservation measures are necessary.

43. The range of conservation measures which could be appropriate is broad, and it is appropriate that the detail of the policy of conservation set out in the Bill should be supplied by subordinate legislation. Potential uses of section 51A include regulating the removal of certain species of fish and prohibiting the use of live vertebrates as bait where this could be detrimental to the populations of fish in the receiving waters. A range of different provisions may be required for different species and different locations, and this level of detail is best specified in subordinate legislation.

Choice of procedure

44. The making of regulations under section 51A is subject to the procedure set out in paragraphs 9A and 11 to 15 of schedule 1 to the 2003 Act (section 9A is inserted by paragraph 5(5) of the schedule to the Bill). This requires the Scottish Ministers, before making regulations, to consult with such persons as they consider appropriate; to publish notice of the proposed regulations and allow time for representations and objections to be made; and provides for a public local inquiry to be held in relation to such objections. Having followed this procedure, regulations may be made subject to annulment in pursuance of a resolution of the Scottish Parliament. Negative resolution procedure is appropriate given the degree of consultation and public scrutiny prescribed by schedule 1 to the 2003 Act.

Section 27 – Power to specify marine waters adjacent to Scotland as “specified areas”, and power to specify areas of marine or inland waters from which fish may not be moved into specified areas without permission of the Scottish Ministers

New section 2C (1), (3) and (4) of the 1937 Act

Powers conferred on: the Scottish Ministers
Powers exercisable by: order/regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

45. Section 27 inserts a new section 2C into the 1937 Act, allowing the Scottish Ministers to specify areas of marine waters into which live fish (of such species as may be specified, and from such salt waters as may be designated) may only be introduced with the prior written consent of the Scottish Ministers. Section 2C(1) allows the Scottish Ministers by order to specify areas of marine waters adjacent to Scotland as “specified areas”. Section 2C(3) allows the Scottish Ministers by order to specify the species of fish and the waters of origin to which the requirement of Scottish Ministers’ consent for introduction into specified areas will apply. Section 2C(4) permits the Scottish Ministers by regulations to provide for the form and timing of an application for consent, and to specify the information provided and any assessment to be made as part of an application for consent.

Reason for taking power

46. Unregulated movements of live fish between marine fish farming areas has been shown to spread disease before clinical signs of disease become apparent, and it is therefore vital that an appropriate risk assessment be carried out before such transfers are made. The salmon farming industry already requires, as part of its Code of Good Practice, such assessments to be carried out for transfers between the ‘farm management areas’ set out in an annexe to that Code. Orders and regulations under section 2C will enable the establishment of a compulsory scheme which builds upon this existing good practice, and which will require the approval of the Scottish Ministers, based upon risk assessments submitted along with the application for consent. It is necessary to be able to vary the specified areas, relevant species of fish and relevant waters of origin in light of changes in fish farming practice and disease risks. This requirement for flexibility, together with the level of detail required, suggests that the necessary provision be made in orders and regulations rather than on the face of the Bill.

Choice of procedure

47. Regulations and orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate on the basis that the initial scheme of specified areas will be based upon the existing best practice of the fish farming industry, as reflected in their Code of Good Practice, and after consultation with them, and that following this initial specification of areas there may be need for amendments of a detailed and technical nature.

Section 29(1) – Payments in respect of fish destroyed

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

48. Section 29(1) gives the Scottish Ministers power to make an order establishing a scheme by which they make payments in respect of any fish destroyed in pursuance of the exercise of such powers of the Scottish Ministers under or by virtue of such enactments as may be specified by them by order. This is a deliberately broad power to make payments in respect of the destruction of fish in the exercise of the Scottish Ministers' compulsory powers.

Reason for taking power

49. We believe that the availability of such payments will encourage prompt notification of suspicion of disease and enable eradication measures to be applied before disease is spread to other areas. Details of any scheme would be specified in subordinate legislation, as this enables schemes to be tailored to the circumstances of particular outbreaks and amendments to be made as circumstances change.

Choice of procedure

50. Draft affirmative procedure has been chosen for orders under this section (see section 36(3)(a)) as such orders would involve payment from public funds and it is appropriate that the Parliament be given the opportunity fully to scrutinize any proposed scheme before it comes into operation.

Section 31 – Power to require the provision of information on the economic, social and environmental aspects of fish farming and shellfish farming

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

51. Section 31(1) permits the Scottish Ministers to make an order requiring any person who carries on a business of fish farming or shellfish farming to provide, or to compile, retain and make available to inspectors on request, such information relating to the economic, social and environmental aspects of fish or shellfish farming as may be specified.

Reason for taking power

52. This power is to facilitate information based policy development and also to allow the production of the High Level Indicators which the Executive has been called upon to develop by the Ministerial Working Group. At the present time, the Executive receives limited information and on a voluntary or confidential basis. Most information is provided in the form of survey returns to the Fisheries Research Service to allow the publication of Fish and Shellfish

Production Survey reports. These survey returns are voluntary and although producers do cooperate there is nothing the Executive could do if a producer or producers decided not to provide this information in the future. Other information is provided from Producer Organisation returns and although the Executive can set out what information it wants, the return is given on a confidential basis and as such the Executive has no right to report on this information.

53. The Executive has found it difficult to answer some fairly basic questions on the social and economic aspects of the industry and has had to base policy development and trade policy in particular on limited knowledge against a background of even more limited real data. The Strategic Framework for Scottish Aquaculture sets out the Executive's main policy aims, objectives and actions yet the Executive does not have a statutory information base which would allow it to monitor progress towards delivery of the Executive's 3 main pillars of sustainable development, namely economic, environment and social performance. The Ministerial Working Group has called on the Executive to develop High level Indicators which would allow it to monitor the delivery of sustainable development, under the 3 main pillars, to ensure that it can track the progress the Strategic framework was designed to achieve. The Executive is still in a process of developing these High level Indicators and these will be adopted by the Ministerial Working Group, which is chaired by the Deputy Minister for Environment and Rural Development and contains representatives from Industry, Environmental Bodies, NGOs and other Government Agencies.

54. It is appropriate for the power to require information as to the economic, social and economic aspects of fish farming and shellfish farming to be taken by subordinate legislation, as this is the most appropriate means of specifying the level of detail required, and of allowing the flexibility required to ensure that the most appropriate information is gathered in order to inform the proper discharge of the Scottish Ministers' powers under the Bill and existing fisheries legislation.

Choice of procedure

55. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate as any order would be made following the recommendation of the Ministerial Working Group which has a full range of stakeholder representation who will discuss and decide upon the type of information required to allow the development of High Level Indicators on economic, social and environmental factors.

Section 35(1) – Power to make incidental, supplemental, consequential, transitional, transitory and saving provisions

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament, except where an order contains provisions which add to, replace or omit any part of the text of an Act, in which case the order will be subject to affirmative resolution procedure

Provision

56. This section gives the Scottish Ministers power by order to make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence of, the Bill.

Reason for taking power

57. Section 35(1) is a reserve power, to permit the Scottish Ministers to make such other provision as may be required to carry out the purposes of the Bill. It is appropriate for the Scottish Ministers to have such a power, which is limited by reference to the purposes of the Bill, in order to deal with any unforeseen obstacles to the implementation of the provisions of the Bill, ensuring that the provisions set out in the Bill and approved by the Parliament can be carried into effect and avoiding the risk that any such unforeseen obstacle would require further primary legislation before the provisions of the present Bill could be carried into effect.

Choice of procedure

58. It is anticipated that the majority of cases in which this power may be exercised will involve minor technical provisions which would not demand the degree of scrutiny and, more importantly, Parliamentary time, implied by affirmative procedure. Any order which amends the text of any enactment will be subject to affirmative procedure, allowing the Parliament to exercise an appropriate degree of scrutiny.

Section 38(2) – Power to appoint the day upon which the provisions of the Bill will come into force

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: none

Provision

59. Section 38(2) gives the Scottish Ministers power to make commencement orders.

Reason for taking power

60. In line with common practice, it is proposed that most of the provisions of the Bill be commenced at a time or times to be specified by Ministers by order, rather than coming into force directly upon Royal Assent.

Choice of procedure

61. In line with standard practice for commencement orders, orders under section 35(2) do not require formally to be laid before Parliament, but will be scrutinised by the Subordinate Legislation Committee.

Schedule, paragraph 5(3) – amendment of section 31(5)(b) of the 2003 Act (weekly close time for salmon)

Power conferred on: n/a

Power exercisable by: n/a

Parliamentary procedure: n/a

Provision

62. Paragraph 5(3) of the schedule amends section 31(5)(b) of the 2003 Act. Section 31(5) of the 2003 Act allows the Scottish Ministers to make regulations amending the period within the weekly close time for salmon (section 13 of the 2003 Act) during which it is permitted to fish for salmon. Prior to this amendment, section 31(5)(b) provided that this period could not be amended to less than 24 hours. The effect of the amendment is to permit the Scottish Ministers to amend the exception to the weekly close time set out in section 13(3) to specify a period of not less than 18 hours during the weekly close time which the taking of salmon by rod and line shall be permitted.

Reason for taking power

63. The weekly close time for salmon is a means of managing fishing effort and protecting stock. The existing provision of section 31(5)(b), which required that fishing by rod and line be permitted for a minimum period of 24 hours during each weekly close period, did not appear to give adequate time for a complete ban on all fishing as well as a permitted time of 24 hours to fish by rod and line within a total weekly close time of 42 hours. The amendment gives the Scottish Ministers greater flexibility in managing this fishing effort.

Choice of procedure

64. The amendment does not alter the existing procedure for making regulations under section 31(5) of the 2003 Act, which are subject to annulment in pursuance of a resolution of the Scottish Parliament (see section 68(2) of that Act).

Schedule, paragraph 5(6) to (8) – modifications of schedule 3 of the 2003 Act (provisions as to making, variation and revocation of protection orders)

Power conferred upon: n/a

Power exercisable by: n/a

Parliamentary procedure: n/a

65. Paragraphs 5(6) to (8) of the schedule modify the procedure which applies to the making of protection orders under section 48 of the 2003 Act. Paragraph (6) removes the requirement for proposals to be advertised in the Edinburgh Gazette. Paragraph (7) makes provision for the

Scottish Ministers to make an order varying a protection order without the need for an application for variation to be made, and modifies the procedure in schedule 3 to reflect the lack of an application. Paragraph (8) removes the Scottish Ministers discretion in advertising a proposal to revoke a protection order, requiring that publicity be given to such a proposal in every case.

Reason for taking power

66. Under the current legislation, where a protection order has been made it is arguable that an order to vary the area covered by the original order may only be made upon application to the Ministers by the original applicant. If access to fisheries within the protection order area is withdrawn for no sound management reason, or where the original applicant is not able to make an application, it should be clear that Ministers can vary the protection order on their own initiative, and the procedure applying to such a variation of the protection order should be clear. In such cases, Ministers should be able to make the necessary order to vary the area covered by the protection order where such a variation is required.

Choice of procedure

67. The amendments do not alter the existing procedure governing protection orders under section 48(1) of the 2003 Act, which are subject to no Parliamentary procedure.

This document relates to the Aquaculture and Fisheries (Scotland) Bill (SP Bill 67) as introduced in the Scottish Parliament on 29 June 2006

AQUACULTURE AND FISHERIES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM