

SCOTTISH LAW COMMISSION  
(Scot Law Com No 190)



# Report on Law of the Foreshore and Sea Bed

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Laid before the Scottish Parliament by the Scottish Ministers

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

# SCOTTISH LAW COMMISSION

*Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*

## **Report on Law of the Foreshore and Sea Bed**

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

We have the honour to submit to the Scottish Ministers our Report on Law of the Foreshore and Sea Bed

(Signed)                      RONALD D MACKAY, *Chairman*  
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Miss Jane L McLeod, *Secretary*  
*March 2003*

# Contents

	<i>Paragraph</i>	<i>Page</i>
<b>Part 1 Introduction</b>		
Terms of reference	1.1	1
Background to the report	1.4	1
Land reform action plan	1.5	1
Land Reform (Scotland) Act 2003	1.6	2
Main recommendations for reform	1.8	2
Crown interest	1.9	3
Structure of the report	1.12	4
Legislative competence	1.13	4
Acknowledgements	1.18	5
<b>Part 2 Ownership and Definitions</b>		
Crown ownership of the foreshore and sea bed	2.1	6
Extent of the sea bed	2.3	6
The legal definition of the foreshore	2.8	7
Public rivers	2.12	8
<b>Part 3 Public Rights</b>		
Introduction	3.1	11
The nature and extent of public rights	3.3	11
Options for reform	3.3	11
Consultation	3.6	12
Proposals for reform	3.7	12
Land subject to both access and public rights	3.9	13
Public rights in respect of the shore and foreshore	3.11	13
Public rights in respect of the sea and sea bed	3.18	16
Public rights in respect of inland waters	3.21	17
The exercise of the public rights	3.24	18
The functions of local authorities	3.31	20
Judicial determination of the existence and extent of the public rights	3.35	21
Prescription and the public rights	3.41	23
The effect of change in the nature of land or waters on public rights	3.45	24
Procedure for extinguishing the public rights	3.48	24

	<i>Paragraph</i>	<i>Page</i>
<b>Part 4 Crofting and Udal Land</b>		
Crofting	4.1	26
Introduction	4.1	26
A general right to gather seaweed	4.2	26
Use of seaweed for the purposes of the croft	4.6	26
Udal tenure	4.9	27
Priority of udal titles and titles deriving from the Crown	4.10	27
Pertinent rights ancillary to the foreshore under udal law	4.12	28
<b>Part 5 Harbours</b>		
Introduction	5.1	30
Consultation	5.3	30
<b>Part 6 Property and Conveyancing Problems</b>		
Reclamation	6.1	32
Standard rules of construction of deeds	6.6	32
<b>Part 7 List of recommendations</b>		34
<b>Appendix A</b>		
Draft Sea, Shore and Inland Waters (Scotland) Bill		37
<b>Appendix B</b>		
List of those who Submitted Written Comments on Discussion Paper No 113		67

# Part 1 Introduction

## Terms of reference

1.1 In late 1999 we received the following reference<sup>1</sup> from the Deputy First Minister and Minister for Justice:

"Taking account of the land reform action plan, to consider the existing law of the foreshore and seabed, and to advise on possible reforms with a view to improving clarity and consistency."

1.2 In April 2001 we published our discussion paper on *Law of the Foreshore and Seabed*.<sup>2</sup> The discussion paper was widely distributed and we are grateful to those who submitted comments.<sup>3</sup>

1.3 We were requested by the Scottish Executive to report on the reference by 31 December 2002. However, an integral part of our review concerns the public rights exercisable on the foreshore. As we identified in the discussion paper,<sup>4</sup> the access rights to be established in Part 1 of the Land Reform (Scotland) Bill would have a major impact on this area of the law. Due to the prolonged progress of that Bill through the Scottish Parliament it became clear that the original timetable for reporting could not be met. Therefore, the Scottish Executive agreed to an extension of the period for reporting.<sup>5</sup> The Act was passed by the Scottish Parliament on 23 January 2003 and we have completed our report as soon as possible thereafter.

## Background to the report

1.4 Our review of the law of the foreshore and sea bed is part of the Scottish Executive's wider programme of land reform. In particular, the terms of our reference required us to approach our review as an integral part of the land reform action plan.<sup>6</sup> It is therefore appropriate that we set out briefly the main aspects of the land reform programme in so far as they relate to the present review.

1.5 **Land reform action plan.** The Land Reform Policy Group (LRPG) was established in October 1997 in order to identify and assess proposals for land reform in rural Scotland, including proposals relating to the foreshore. As part of the public consultation exercise undertaken by the LRPG,<sup>7</sup> respondents were asked whether the public rights over the

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<sup>1</sup> Under the Law Commissions Act 1965, s 3(1)(e).

<sup>2</sup> Scottish Law Commission Discussion Paper No 113 on *Law of the Foreshore and Seabed* (2001) ("the discussion paper").

<sup>3</sup> A list of those who submitted written comments on the discussion paper is contained in Appendix B.

<sup>4</sup> Para 1.12.

<sup>5</sup> See the Scottish Executive response of 1 November 2002 to parliamentary question S1W-30492 lodged by Mr Tavish Scott MSP.

<sup>6</sup> Scottish Executive Land Reform Policy Group, *Recommendations for Action* (January 1999). See discussion paper, para 1.3.

<sup>7</sup> Scottish Office Land Reform Policy Group, *Identifying the Problems* (February 1998).

foreshore should be strengthened. There was no support for the creation of new public rights to be held in trust for the public by the Crown. However, support was expressed for greater involvement at a local level and for an appropriate method of resolving disputes concerning the public rights. In relation to the law of the foreshore and sea bed, the LRPG also proposed that we be invited to undertake a comprehensive review.

1.6 **Land Reform (Scotland) Act 2003.** The Land Reform (Scotland) Act 2003 ("the 2003 Act") is an important part of the Executive's programme of land reform and has had a far-reaching influence on our recommendations for reform in this area. Under Part 1 of the Act everyone is given statutory rights of responsible access.<sup>8</sup> These access rights consist of the right to cross land<sup>9</sup> and to be on the land for recreational purposes,<sup>10</sup> educational purposes<sup>11</sup> and for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.<sup>12</sup> For the purposes of the Act, "land" includes the foreshore and inland waters, but not the sea or sea bed.<sup>13</sup> The Act also provides a modern statutory scheme for the regulation, enforcement and suspension of access rights with provision for the judicial determination of the existence and extent of access rights.<sup>14</sup>

1.7 The Act provides that the existence or exercise of access rights does not diminish or displace any public rights under the guardianship of the Crown in relation to the foreshore.<sup>15</sup> This means that the public will enjoy both access rights and common law public rights over the foreshore.<sup>16</sup> We expressed concern in the discussion paper<sup>17</sup> that the co-existence of two separate schemes would create confusion and was therefore undesirable. We submitted a formal response to the Scottish Executive's consultation on the draft Land Reform (Scotland) Bill and to the Justice 2 Committee of the Scottish Parliament at Stage 1 outlining these concerns. However, although the draft Bill has undergone significant changes during its passage through Parliament, our primary concerns were not addressed.

### **Main recommendations for reform**

1.8 Our main recommendations for reform take forward the LRPG themes of strengthening the public rights and local involvement in regulating their exercise and enforcement. In so far as they are additional to the access rights available under the 2003 Act, we place the public rights which are exercisable on the foreshore, sea bed, sea and inland waters on a statutory footing; in so far as they are equivalent to access rights, the public rights are unnecessary and therefore we recommend that they are abolished. We also recommend providing a modern statutory scheme for the regulation, enforcement and suspension of the public rights which mirrors the approach of the 2003 Act to access rights. This includes a new role for local authorities in protecting the public rights instead of the

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<sup>8</sup> S 1(1).

<sup>9</sup> Ss 1(2)(b) and 1(4)(b).

<sup>10</sup> S 1(3)(a). "Recreational purposes" is not defined but s 9 contains a list of conduct which is excluded from access rights. The list is not as comprehensive as in the draft Bill referred to in the discussion paper at para 1.14. But excluded conduct still includes hunting, shooting, fishing, using motorised vehicles or vessels (other than for disabled use) and taking away anything in or on the land for commercial purposes or for profit.

<sup>11</sup> S 1(3)(b). A "relevant educational activity" is defined in s 1(5).

<sup>12</sup> S 1(3)(c). This provision covers professional teachers if, for example, teaching sport for a fee on the land.

<sup>13</sup> S 32. For the definitions of these terms as used in this report, see further Pts 2 and 3 beyond.

<sup>14</sup> S 28.

<sup>15</sup> S 5(4).

<sup>16</sup> See discussion paper, para 1.15.

<sup>17</sup> Ibid.

Lord Advocate and giving the sheriff court jurisdiction to determine the existence and extent of the public rights.

## **Crown interest**

1.9 The Crown owns the sea bed and foreshore for its own patrimonial benefit. It follows that the Crown is entitled to alienate its property. Thus the Crown can grant a real right in the foreshore or sea bed to a third party, for example a lease of part of the sea bed for fish farming<sup>18</sup> or permanent moorings.<sup>19</sup> The grantee takes subject to the public rights.<sup>20</sup> The grant must not constitute a material interference with the exercise of the public rights. If the exercise of a public right is rendered impossible, the public right prevails.<sup>21</sup> However, if the grant merely renders the exercise of the public right more difficult or less convenient that does not of itself amount to material inconvenience.<sup>22</sup> Where the interference is minor the Crown's grant will prevail.<sup>23</sup>

1.10 The management of the Crown Estate including the sea bed and foreshore is the responsibility of the Crown Estate Commissioners who are charged "on behalf of the Crown with the function of managing and turning to account land and other property".<sup>24</sup> The Commissioners have used their powers to enhance the value of the Crown Estate, as arguably they are obliged to do. This has given rise to controversy on the grounds that they have paid insufficient attention to the interests of the local community when reaching decisions in respect of the ownership and use of the sea bed. The consultation responses we received confirmed dissatisfaction regarding the management of the sea bed. In particular, the tension between the Commissioners on the one hand and harbour and local authorities on the other was evident. There were calls for an end to commercial charges for use of the sea bed and for more local control over its use, particularly within harbour areas. However, the question whether the Crown should continue to have full ownership of the sea bed and foreshore and should be able to charge grantees for the exclusive use of the sea bed for such purposes as fish farms, harbour works and permanent moorings is outwith the scope of our remit, which is to advise on reforms which would clarify, and bring consistency to, the existing law.

1.11 Section 1(5) of the Crown Estate Act 1961 has also given concern. This provides:-

"The validity of transactions entered into by the Commissioners shall not be called in question on any suggestion of their not having acted in accordance with the provisions of this Act regulating the exercise of their powers, or having otherwise acted in excess of their authority, nor shall any person dealing with the Commissioners be concerned to inquire as to the extent of their authority or the observance of any restriction on the exercise of their powers."

In *Walford v Crown Estate Commissioners*<sup>25</sup> the Lord Ordinary (Clyde) took the view that the section should be read literally. The immunity conferred by the section was not restricted to

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<sup>18</sup> *Shetland Salmon Farmers Assoc v Crown Estate Commissioners* 1991 SLT 166; 1990 SCLR 484.

<sup>19</sup> *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156.

<sup>20</sup> *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174; *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156.

<sup>21</sup> *Walford v David* 1989 SLT 876.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Shetland Salmon Farmers Assoc v Crown Estate Commissioners* 1991 SLT 166; 1990 SCLR 484.

<sup>24</sup> Crown Estate Act 1961, s 1(1).

<sup>25</sup> 1988 SLT 377. This is the only reported decision in which the meaning of s 1(5) has been discussed.



the parties to a particular transaction but also prevented third parties from questioning the validity of any transaction of the Commissioners. On reflection, we think that section 1(5) is only concerned with upholding the validity of transactions where the Commissioners may have acted beyond their delegated powers, ie the authority granted to them by the Crown or under the Act and not with situations where they purport to act in ways that are beyond the powers of the Crown. On general principles of administrative law, the latter decisions would appear to be subject to judicial review.<sup>26</sup> However, this is primarily a question of public law and as such does not fall within the scope of the present reference.

## Structure of the report

1.12 In Part 2 we consider the Crown's proprietary interest in the foreshore and sea bed and the legal definitions of those terms. We also propose linking the definition of tidal waters to the Ordnance Survey map for the purposes of the extent of the public rights. In Part 3 we set out the extent of the new statutory public rights exercisable on the shore, foreshore, sea, sea bed and inland waters. We also examine the extinction of public rights and the effects of physical change to the land. Part 4 considers the extent of crofters' rights to gather seaweed on the foreshore and certain topics relating to udal tenure and the foreshore. Part 5 concerns the scope of grants of rights of port and harbour. Part 6 examines the rules as to reclamation and the standard construction of deeds. Part 7 lists our recommendations. A draft Bill to implement those recommendations is contained in Appendix A. A list of consultees who submitted written comments on the discussion paper is found in Appendix B.

## Legislative competence

1.13 We require to consider whether the terms of our draft Bill fall within the legislative competence of the Scottish Parliament.<sup>27</sup> The primary issue is whether the Bill relates to devolved or reserved matters.<sup>28</sup> Internal waters and the territorial sea of the United Kingdom in so far as they are adjacent to Scotland fall within the territorial limits of the legislative competence of the Scottish Parliament.<sup>29</sup> The provisions of the draft Bill therefore do not extend beyond or confer functions exercisable outwith Scotland.<sup>30</sup>

1.14 The constitutional aspects of the Crown<sup>31</sup> and the management of the Crown Estate are reserved matters.<sup>32</sup> However, the Crown's prerogative functions are not reserved<sup>33</sup> nor is property belonging to the Crown.<sup>34</sup> The Crown's interest as proprietor of the foreshore and sea bed and the public rights held by the Crown in trust for the public are therefore not reserved.

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<sup>26</sup> *West v Secretary of State for Scotland* 1992 SC 385. See generally The Rt Hon The Lord Clyde and D J Edwards, *Judicial Review* (2000); P P Craig, *Administrative Law* (4<sup>th</sup> edn) (1999).

<sup>27</sup> An Act of the Scottish Parliament is not law in so far as any provision is outside the legislative competence of the Parliament; Scotland Act 1998, s 29(1).

<sup>28</sup> See s 29(2)(b) and (c) of the Scotland Act 1998. S 29(2)(a) is also of relevance here.

<sup>29</sup> Scotland Act 1998, s 29 and s 126(1).

<sup>30</sup> *Ibid*, s 29(2)(a)

<sup>31</sup> *Ibid*, Sch 5, para 1(a).

<sup>32</sup> *Ibid*, Sch 5, para 2(3).

<sup>33</sup> *Ibid*, Sch 5, para 2(1)(a).

<sup>34</sup> *Ibid*, Sch 5, para 4(1) [*erratum: 3(1)*]: "property" includes rights and interests of any description – see s 126.

1.15 In the context of marine transport "navigational rights and freedoms" are reserved.<sup>35</sup> Further guidance as to the meaning and extent of this reservation is not given in the Scotland Act 1998. However, commentators have interpreted it to mean the United Kingdom's international obligations not to impose certain requirements on passing shipping traffic and not the public right of navigation.<sup>36</sup> Indeed, a Bill dealing with the suspension and restriction of the public right of navigation in connection with a wind farm development in the Solway Firth is currently before the Parliament.<sup>37</sup> On introduction of that Bill, the Presiding Officer issued a statement to the Parliament confirming that in his view the Bill was within legislative competence.<sup>38</sup> In our view, the provisions in the draft Bill annexed to this report concerning the public right of navigation similarly fall within legislative competence.

1.16 Moreover, the provisions of the draft Bill relating to the public right of navigation are a restatement of the present law.<sup>39</sup> While an Act of the Scottish Parliament is restricted in its application to reserved matters, restatements of the law on reserved matters are permitted.<sup>40</sup> Therefore, if the view were to be taken that the public right of navigation is in fact a reserved matter, the draft Bill would still remain within the competence of the Parliament.

1.17 An Act of the Scottish Parliament must also be compatible with the European Convention on Human Rights.<sup>41</sup> In our view enactment of the recommendations made in this report would not breach Convention rights.

## Acknowledgements

1.18 We acknowledged in the discussion paper<sup>42</sup> the help given to us during the course of our review by members of our advisory group<sup>43</sup> and many other individuals and organisations. In addition we would like to thank Registers of Scotland for invaluable assistance with our survey of titles to areas of foreshore in Orkney and Shetland.<sup>44</sup> We are also grateful to Ordnance Survey who provided useful practical information on the representation of tidal features on the Ordnance map.<sup>45</sup>

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<sup>35</sup> Ibid, Sch 5, Pt II, Head E3.

<sup>36</sup> CMG Himsworth and CR Munro, *The Scotland Act 1998* (2<sup>nd</sup> edn) (2000).

<sup>37</sup> Robin Rigg Offshore Wind Farm (Navigation and Fishing) (Scotland) Bill.

<sup>38</sup> The Presiding Officer must decide whether a Bill is within the legislative competence before its introduction and advise the Parliament of his view; Scotland Act 1998, s 31(2).

<sup>39</sup> See paras 3.18-3.19 below.

<sup>40</sup> Scotland Act 1998, Sch 4, para 7.

<sup>41</sup> Ibid, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).

<sup>42</sup> At para 1.16.

<sup>43</sup> Mr Ian Abercrombie QC, Sheriff Vincent Canavan, Mr Martin Corbett, Registers of Scotland, Professor Alan Page, University of Dundee, Professor Robert Rennie, University of Glasgow.

<sup>44</sup> See Pt 4.

<sup>45</sup> See Pt 2. In particular we wish to thank Mr Graham Little, Ordnance Survey Operations Manager in Scotland.



## Part 2 Ownership and Definitions

### Crown ownership of the foreshore and sea bed

2.1 It is well settled that the Crown owns the foreshore and can convey it to an individual.<sup>1</sup> The discussion paper noted that, while the Scottish courts have assumed that the Crown owns the sea bed beneath the sea adjacent to Scotland,<sup>2</sup> there is no authority expressly to this effect. We invited views on whether a statutory statement clarifying the existing law would be helpful.

2.2 On consultation there was general support for this proposal. The Faculty of Advocates recognised the importance of such a statement as part of the current programme of land reform. We have further refined the detail of our recommendations in the light of very helpful comments received from consultees.<sup>3</sup>

### Extent of the sea bed

2.3 The territorial sea extends twelve international nautical miles from the baseline from which it is measured.<sup>4</sup> The baseline is generally the low-water line along the coast, including the coast of all islands within the United Kingdom Territories.<sup>5</sup> However, special provision is made for the west coast of Scotland. A series of straight lines between Cape Wrath and Laggan in Galloway, lying generally on the seaward side of the islands off the west coast, is prescribed as the baselines from which the breadth of the territorial sea is measured.<sup>6</sup>

2.4 The Crown is also presumed to own the sea bed beneath the tidal waters landward of the baseline, including the sea bed *inter fauces terrae* (ie between the jaws of the land)<sup>7</sup> and the bed of public rivers.<sup>8</sup> In this report and in the draft Bill we refer to such waters and the territorial sea collectively as "the sea". As so defined, the sea adjacent to Scotland falls within the territorial limit of the legislative competence of the Scottish Parliament.<sup>9</sup>

2.5 The Crown's ownership of the sea bed is, of course, subject to the public rights which the Crown is obliged to protect.<sup>10</sup> Our proposed statutory statement will not affect this position. Several consultees queried whether it was appropriate to extend the proposed provision to sea bed adjacent to land held under udal tenure. Notwithstanding the reservations expressed in the discussion paper,<sup>11</sup> the present law, as set out in *Shetland*

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<sup>1</sup> *Shetland Salmon Farmers Assoc v Crown Estate Commissioners* 1991 SLT 166; 1990 SCLR 484.

<sup>2</sup> See discussion paper, paras 2.2–2.3.

<sup>3</sup> We were assisted by the late Dr Geoffrey Marston, Sidney Sussex College, Cambridge in relation to the extent of territorial waters.

<sup>4</sup> Territorial Sea Act 1987, s 1(1)(a).

<sup>5</sup> The Territorial Waters Order in Council 1964 (SI 1965, 6452A), art 2(1). 1965 III, p 6452A.

<sup>6</sup> See the Territorial Waters Order in Council 1964 (SI 1965, 6452A), art 3, as amended by the Territorial Sea (Amendment) Order 1998 (SI 1998/2564).

<sup>7</sup> *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174.

<sup>8</sup> *Colquhoun's Trs v Orr Ewing & Co* (1877) 4R 344; (1877) 4R (HL) 116.

<sup>9</sup> Scotland Act 1998, ss 29 and 126(1).

<sup>10</sup> See discussion paper, para 3.5.

<sup>11</sup> Para 6.38.

*Salmon Farmers Association v Crown Estate Commissioners*,<sup>12</sup> is that Crown ownership extends to the sea bed adjacent to such land. Any statutory restatement of the present law should therefore reflect this.

2.6 As the Crown enjoys full ownership of the sea bed as a patrimonial right it can alienate its right of property.<sup>13</sup> Rights to former Crown sea bed can also be acquired through prescription, although establishing possession could be problematic. Any statutory expression of the Crown's right must therefore recognise that ownership of the sea bed may have been acquired by third parties.

2.7 We believe that an express statutory statement would be consistent with the present programme of land reform. It would give a clear definition of the extent of the Crown's ownership of the foreshore and the sea bed. Therefore, we recommend that:

- 1. The present extent of the Crown's ownership of the foreshore and the sea bed adjacent to Scotland should be defined by statute.**

(Draft Bill, section 1(1))

### **The legal definition of the foreshore**

2.8 It is well settled that the legal definition of the foreshore is the area of the shore between the high and low water marks of ordinary spring tides.<sup>14</sup> In the discussion paper,<sup>15</sup> we invited comments on whether a statutory definition would be helpful. It had been suggested to us that there was some confusion over the extent of the foreshore. Some members of the public believed it to include the beach or sand dunes above high water mark.<sup>16</sup> To assist the public in identifying the extent of the foreshore we asked whether the high and low water marks of ordinary spring tides shown on the Ordnance Survey map should be definitive of the boundaries.<sup>17</sup>

2.9 Consultation revealed strong support for a statutory definition of the foreshore. Most consultees felt that a clear and consistent restatement of the existing law would be of practical value.

2.10 However, opinions divided over whether the Ordnance Survey map should be definitive of the extent of the foreshore. The Faculty of Advocates, the Lands Tribunal for Scotland and the Law Society of Scotland reinforced our initial belief<sup>18</sup> that although the determination of tides is technically complex it has led to little difficulty in practice in identifying the foreshore. Scottish Natural Heritage also noted that the foreshore can migrate more rapidly than changes experienced in river tidelines. A statutory definition of the foreshore linked to the Ordnance Survey map may therefore quickly become out of date and inaccurate. For these reasons we do not think it would be appropriate to tie a definition of the foreshore to the Ordnance Survey map.

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<sup>12</sup> 1991 SLT 166; 1990 SCLR 484.

<sup>13</sup> See discussion paper, para 3.5.

<sup>14</sup> *Fisherrow Harbour Commissioners v Musselburgh Real Estate Co Ltd* (1903) 5F 387 per Lord Low at p 393-4.

<sup>15</sup> Paras 2.19-2.24.

<sup>16</sup> See Pt 3 of our report for commentary on the practice of purporting to exercise the public rights over such areas and our recommendation for reform at para 3.17.

<sup>17</sup> See discussion paper, para 2.25.

<sup>18</sup> *Ibid*, para 2.19.

2.11 Indeed, on further reflection, we do not consider that it is desirable to have a statutory definition of the foreshore which would have general effect. Such a definition could have unexpected consequences as regards other enactments. In the absence of standard rules for the construction of deeds conveying ownership of the foreshore,<sup>19</sup> the extent of the foreshore conveyed under a particular deed may be different from the definition in the draft Bill. Another definition of the extent of the foreshore may be used in relation to land which is held under udal tenure: here the grant of land including the foreshore is commonly described as "down to the lowest low-water mark",<sup>20</sup> as opposed to the low water mark of ordinary spring tides, and is thus more extensive. Therefore our proposed statutory definition of the foreshore is limited to the purposes of the draft Bill, ie to determine the extent of the public rights on the foreshore and the statutory restatement of the rules as to ownership by the Crown.

### **Public rivers**

2.12 It is well settled that the legal definition of a public river is a river to the extent that it is tidal.<sup>21</sup> However, there is no settled method of determining whether waters are tidal for this purpose. Consequently, the extent of public rivers on which the public rights may be exercised may not be clearly identifiable.<sup>22</sup>

2.13 We believe that there should be a simple and accessible method by which members of the public can identify the extent of tidal waters. For this reason, the discussion paper rejected adopting a scientific method of determining tidality.<sup>23</sup> As an alternative we proposed linking a statutory definition of tidality to the Ordnance Survey map. The definition would be a statutory presumption that to the extent that the Ordnance Survey map indicates the presence of Mean High-Water or Mean Low-Water Spring Tides in respect of a river, its waters are tidal.

2.14 There was unanimous support among consultees for a statutory definition of tidality as the legal criterion for a public river. Nevertheless, there was some concern about the suitability of the Ordnance Survey map for this purpose and in particular which Ordnance Survey product would form the basis for the statutory definition.

2.15 We understand that only the large-scale mapping derived from the Ordnance Survey National Topographic Database<sup>24</sup> ("NTD") will show the necessary detail. However, the products offered by the Ordnance Survey have a finite life cycle and we do not consider it appropriate to specify a particular product which may be superseded in time. Instead, the statutory definition will be tied to the base survey from which all Ordnance Survey products are extracted.<sup>25</sup>

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<sup>19</sup> See paras 6.6-6.7 below.

<sup>20</sup> *Smith v Lerwick Harbour Trs* (1903) 5F 680. See also Derek J McGlashan, "Udal Law and Coastal Land Ownership", 2002 *Juridical Review* 251 at p 257.

<sup>21</sup> *Colquhoun's Trs v Orr Ewing & Co* (1877) 4R 344; (1877) 4R (HL) 116. See discussion paper, para 2.8.

<sup>22</sup> Public rights of navigation can exist in relation to private, ie non-tidal, rivers but the public right to fish for white fish exists only in relation to public rivers. See Pt 3 for a more detailed discussion on the extent of the public rights.

<sup>23</sup> See discussion paper, paras 2.12-2.13.

<sup>24</sup> The database from which all Ordnance Survey maps are extracted.

<sup>25</sup> This is the approach taken in the Land Registration (Scotland) Act 1979 which simply refers to the "Ordnance map". "Ordnance map" is defined in Sch 2 to the Scotland Act 1998 (Transitory and Transitional Provisions)

2.16 Some consultees expressed a preference for the use of Admiralty Charts but we are not persuaded by this approach. Admiralty Charts are primarily designed as navigational information for mariners and do not provide complete coverage of tidal waters. The Ordnance Survey provides a more comprehensive<sup>26</sup> and accessible service. At present, members of the public can only obtain the appropriate large-scale Ordnance Survey products from a limited number of specialist agencies.<sup>27</sup> However, we understand that the Ordnance Survey currently provides both the Scottish Executive and all local authorities in Scotland with access to the data available on the NTD. The terms of that arrangement include a licence to download and publish the data. We therefore envisage that there may be a role for local authorities in providing public access to the NTD in exchange for an appropriate charge. We believe this would fall within the broader remit of local authorities, particularly in the light of the more extensive role they will play in relation to the 2003 Act<sup>28</sup> and under our proposals for the regulation and enforcement of the public rights.<sup>29</sup>

2.17 There was also considerable divergence of opinion among consultees on whether the statutory presumption should be rebuttable. Our preliminary view was that, given the difficulties in defining the nature of the evidence which would be required to rebut the presumption, the Ordnance Survey map should be treated as definitive.<sup>30</sup> However, in the light of consultation, and useful discussions with the Ordnance Survey, we have reconsidered our position.

2.18 We now propose that the presumption should be rebuttable. In determining the nature of the evidence required to rebut the presumption, it is important to consider both the scientific accuracy of the Ordnance Survey map and its currency. Tidalities are a 'soft feature', ie a feature which is subject to continuous change depending on a number of external factors. There cannot therefore be the same degree of accuracy in tidal measurements as exists with 'hard features' such as bridges or buildings. Therefore a certain level of tolerance is built into the position indicated on the Ordnance Survey map. Minor variations within the accepted level of tolerance should not, in our view, be capable of rebutting the presumption.

2.19 Although the Ordnance Survey undertakes a constant programme of updating the NTD,<sup>31</sup> it is possible that at any particular moment it will not reflect the current ground position in respect of tidalities even taking the appropriate level of tolerance into account, ie the NTD may not yet have been updated to reflect changes of a major nature. Therefore the presumption should be capable of being rebutted if it can be shown that the Ordnance Survey map does not reflect the current position within the appropriate range of tolerance.

2.20 A simplified form of procedure by way of summary application in the sheriff court is available for the determination of the existence and extent of access rights under the 2003 Act. In the interests of convenience and consistency, we recommend that a similar procedure should be available in relation to the determination of the extent of tidal waters.

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(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, SI 1999/1379 as "a map made under powers conferred by the Ordnance Survey Act 1841".

<sup>26</sup> The Ordnance Survey map depicts the normal tidal limits of tidal rivers throughout the Scottish mainland and all the islands.

<sup>27</sup> There are currently 5 such stockists in Scotland; located in Glasgow, Edinburgh, Dunfermline, Kelso and Largs.

<sup>28</sup> See Chs 4 and 5.

<sup>29</sup> See paras 3.31-3.33 below.

<sup>30</sup> See discussion paper, paras 2.14-2.16.

<sup>31</sup> *Ibid*, para 2.16.

However, ordinary actions in the sheriff court and actions in the Court of Session would remain competent and indeed would be necessary where the remedy sought could not be granted on summary application eg interdict. Where a declarator has been obtained which rebuts the presumption we suggest that the clerk of the relevant court should intimate it to the Ordnance Survey. The declarator would then define the extent of tidal waters, until the Ordnance Survey map were revised. The costs of any court action would be borne by the pursuer and we do not intend that there should be a statutory duty on the Ordnance Survey to update the currency of the NTD. We understand, however, that in practice the Ordnance Survey welcomes information about the currency of the NTD and this will be acted upon if appropriate, either in response to a declarator in cases of significant change or during the normal map revision process.

2.21 While it is intended that the presumption should only define tidal waters for the purpose of the extent of the public rights, an action of declarator raised in order to rebut the presumption could affect proprietary interests. We therefore propose that such actions should be served on the proprietor of the bed of any waters which may be affected by the declarator. Given the possible effect of a declarator on the Land Register, we also propose that any successful declarator should be intimated to the Keeper.

2.22 In the light of consultation and our discussions with the Ordnance Survey, we recommend that:

2. (i) **There should be a rebuttable presumption that to the extent that the Ordnance Survey map indicates the presence of Mean High and Low Water Spring Tides in respect of a river, its waters are tidal.**
- (ii) **In addition to existing procedures, a simplified form of procedure in the sheriff court should be available in which the presumption may be rebutted.**
- (iii) **Any court declarator that rebuts the presumption should be intimated to both the Ordnance Survey and the Keeper.**

(Draft Bill, sections 11 and 12)



# Part 3 Public Rights

## Introduction

3.1 At common law the public enjoy rights over the sea, sea bed and foreshore. These are a right to fish,<sup>1</sup> a right to navigate and a right of recreation. The public also enjoy a common law right of navigation in inland waters. However, the 2003 Act gives everyone<sup>2</sup> general statutory rights of access over land ("access rights"). As explained in Part 1,<sup>3</sup> this consists of the right to be on land for recreational and educational purposes<sup>4</sup> and for limited commercial purposes.<sup>5</sup> It also includes the right to cross land.<sup>6</sup> The 2003 Act provides<sup>7</sup> that the "existence or exercise of access rights does not diminish or displace any public rights under the guardianship of the Crown in relation to the foreshore", and for the purpose of the Act "land" is defined as including the foreshore.<sup>8</sup> "Land" also includes inland waters<sup>9</sup> but not the sea or sea bed. As a consequence, there is an overlap between access rights and the common law public rights in relation to the foreshore and navigable inland waters.<sup>10</sup> Tidal lochs and rivers, the sea and the sea bed, however, are not subject to access rights.

3.2 Where land is subject to public rights as well as access rights, confusion may arise. The common law rights are more extensive than access rights. For example, access rights do not allow hunting, fishing or shooting or use of a motorised vehicle or vessel (other than for disabled use) and there is no right to be on land to take away anything for commercial purposes or for profit.<sup>11</sup> Yet these would all appear to be aspects of the public rights at common law.<sup>12</sup> The position is made worse by the fact that the full extent of the common law rights remains uncertain.

## The nature and extent of public rights

3.3 **Options for reform.** In the discussion paper<sup>13</sup> we suggested three possible ways to alleviate the difficulties outlined above. The first was to exclude the foreshore from the definition of land in the 2003 Act, allowing the foreshore to be subject to the common law public rights but not access rights. This no longer seems a viable option. The discussion paper was published at an early stage in the legislative progress of the 2003 Act and the

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<sup>1</sup> Including a right to gather shellfish.

<sup>2</sup> S 1(1).

<sup>3</sup> See para 1.6 above.

<sup>4</sup> Ss 1(2)(a), 1 (3)(a) and (b).

<sup>5</sup> S 1(3)(c).

<sup>6</sup> Ss 1(2)(b) and 1(4)(b).

<sup>7</sup> S 5(4).

<sup>8</sup> S 32.

<sup>9</sup> Ie any inland, non-tidal loch, river (to the extent that it is non-tidal), lake or reservoir, whether natural or artificial and whether navigable or not, and includes the bed and the shores or banks thereof, s 32.

<sup>10</sup> The public rights under the guardianship of the Crown exercisable on the foreshore are specifically preserved, 2003 Act, s 5(4). The public right of passage in inland waters is unaffected by access rights, s 5(3).

<sup>11</sup> 2003 Act, s 9(c),(e) and (f).

<sup>12</sup> For a full discussion, see Pt 4 of the discussion paper.

<sup>13</sup> Paras 4.40-4.45.

Scottish Parliament was well aware of our concerns.<sup>14</sup> However, it soon became clear that as a matter of policy Parliament intended that access rights should apply to the foreshore. Moreover, there would still have been a potential overlap between access rights and the common law public rights in respect of navigable inland waters.

3.4 The second option was to place the common law public rights on a statutory footing and to equate them with access rights. There would then be one statutory regime. But, unless the content of access rights under the 2003 Act was widened, there would be a significant diminution in the rights that the public would enjoy in respect of the sea bed and foreshore. In these circumstances, there was little support for this option among consultees.

3.5 The third option was to place the common law rights on a statutory footing but to preserve their present extent. We also asked whether the statutory public rights should be subject to a regulatory scheme along similar lines to that proposed by the 2003 Act for access rights.

3.6 **Consultation.** Consultees were divided. There was a fear that the public rights could become ossified if put on a statutory basis. It was also thought that they might be undermined if they were subject to regulatory machinery similar to that laid down for statutory access rights in the 2003 Act. Others considered that a statutory statement was necessary given the uncertainty surrounding the nature and extent of the rights. Nevertheless, all consultees who considered the issue were agreed that the way that the public rights were traditionally enforced and defended through proceedings brought by the Lord Advocate had become ineffectual.

3.7 **Proposals for reform.** We have taken the view that it is desirable to place the public rights on a statutory basis. The common law public rights would be abolished and replaced by statutory public rights in respect of the sea, sea bed, foreshore, shore<sup>15</sup> and inland waters. When considered together with access rights, the statutory public rights would be as extensive as the common law rights but would be held directly by the public rather than under the guardianship of the Crown. There would be non-exhaustive definitions of the rights and limitations on their exercise would be prescribed. Such non-exhaustive definitions retain an element of flexibility to allow the extent of the rights to be interpreted so as to reflect changes in public activity. At the same time, however, the uncertainty surrounding the position at common law would be removed. Moreover, it would become possible to regulate effectively the relationship between the statutory public rights and access rights. The opportunity to provide new procedures for the determination and enforcement of the statutory public rights would also arise.

3.8 We therefore recommend that:

3. **The common law public rights should be abolished and replaced by statutory public rights.**

(Draft Bill, section 3)

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<sup>14</sup> Our response to the public consultation on the Land Reform (Scotland) Bill is available for public inspection at the Scottish Executive Central Library. The Stage 1 evidence on the Bill was published on 15 March 2002 and is available at [www.scottish.parliament.uk/official\\_report/cttee/just2-02/j2r02-02-vol02-01.htm](http://www.scottish.parliament.uk/official_report/cttee/just2-02/j2r02-02-vol02-01.htm).

<sup>15</sup> See para 3.11 below.

## Land subject to both access and public rights

3.9 Where land is currently subject to access rights, we propose that the statutory public rights are to be additional to those rights. It is therefore unnecessary to list as public rights those rights which are already enjoyed by the public as access rights. Thus, for example, in relation to the foreshore, there would no longer be a public right to cross the foreshore as that is an access right already conferred by the 2003 Act.<sup>16</sup> Where, however, the public right is more extensive than the access right, the public right would prevail. So, for example, while there is an access right to cross inland waters in a non-motorised vessel,<sup>17</sup> the statutory public right of navigation would apply to all vessels: accordingly, in respect of navigable waters, the public right would prevail and any type of vessel could cross the water. Where, in exceptional cases, the foreshore or shore has been exempted from access rights under section 11<sup>18</sup> or section 12<sup>19</sup> of the 2003 Act, the relevant public rights should also be suspended as these are ancillary in nature to access rights. In this way potential conflicts between access rights and public rights should be kept to a minimum. On the other hand, the public right of navigation should not be suspended even if inland waters have been exempted from access rights. Before the public right arises, navigation must have taken place, otherwise than by permission, for a period of at least twenty years.<sup>20</sup> In these circumstances we do not think that the right of navigation should be suspended merely because a stretch of inland waters has been exempted from access rights. This approach is consistent with the position taken by the 2003 Act where byelaws made by a local authority cannot interfere with the public right of navigation.<sup>21</sup>

3.10 We therefore recommend that:

4. (i) **Statutory public rights should be in addition to the access rights conferred by the Land Reform (Scotland) Act 2003.**
- (ii) **With the exception of the public right of navigation in inland waters, statutory public rights should not be exercisable in relation to any land in respect of which access rights under the Land Reform (Scotland) Act 2003 are not exercisable.**

(Draft Bill, sections 3, 4(6) and 6 )

## Public rights in respect of the shore and foreshore

3.11 It is often not understood that the common law public rights of recreation and fishing can only be exercised on the foreshore as legally defined. Instead, it is believed that they can be exercised on the shore landward of the high water mark of ordinary spring tides. Where the shore is in public ownership,<sup>22</sup> its use for recreational purposes or fishing may be lawful. But where the shore is privately owned, such rights cannot be exercised there. Yet

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<sup>16</sup> S 1(2)(b).

<sup>17</sup> 2003 Act, s 9(f).

<sup>18</sup> Power of a local authority to exempt land from access rights by order: the exemption can last up to two years but may be renewed.

<sup>19</sup> Power of a local authority to make byelaws which *inter alia* can prohibit rights of access: such byelaws cannot interfere with the public right of navigation, s 12(3)(a).

<sup>20</sup> For discussion, see paras 3.21-3.22 below.

<sup>21</sup> 2003 Act, s 12(3)(a).

<sup>22</sup> Eg by a local authority.

access rights apply in respect of such land. Although we did not consult on this issue, we take the view that the statutory public rights should also apply: in so doing, the law would reflect social reality. This can be done by providing that the statutory rights should apply to the shore as well as the foreshore. We propose that the shore be defined as any area of sand, gravel, stones or rock contiguous to, and above or to the landward of, the foreshore ie landward of the high water mark of ordinary spring tides. Consistent with the principle discussed above<sup>23</sup> the public rights would not be exercisable if the shore in question has been exempted from the exercise of access rights. This would avoid problems in relation to, for example, private beaches which constitute the "garden" of a house or hotel. Here, of course, the statutory public rights may still be applicable to the foreshore in the strict sense unless it too has been exempted from the exercise of access rights.

3.12 The statutory public rights in respect of the shore and foreshore would consist of the right to use them for recreation, the right to fish therefrom (including the right to gather shellfish), and the right to use them for purposes ancillary to the public rights in relation to the sea and sea bed.<sup>24</sup> The common law public rights also included the right to shoot wildfowl on the foreshore.<sup>25</sup> Consistent with our policy that the statutory public rights should be as extensive as the common law public rights,<sup>26</sup> we consider that such a right should be included.

3.13 In the draft Bill the right of recreation has been defined to take account of the activities currently enjoyed by the public on the shore. We therefore include: bathing, swimming and sunbathing; making sandcastles and playing games; having picnics, lighting fires and cooking food; and beachcombing. Beachcombing involves the collection of small inanimate objects including the driftwood which has traditionally been used to light fires for picnics. Such objects must have been washed up by the sea, be of negligible value and capable of being carried away by hand. In addition, they must have been abandoned by their owner and therefore be ownerless but for the rule that such property belongs to the Crown. Thus, for example, the right of beachcombing would not apply to fish boxes left on the shore but not abandoned. Given that property which may be collected when beachcombing belongs to the Crown, we have provided that the beachcomber becomes the owner on exercising the statutory right. The list of recreational rights is non-exhaustive and such rights are additional and ancillary to the access rights in respect of the shore and foreshore conferred by the 2003 Act.

3.14 As defined in the draft Bill, the statutory right to fish is the right to fish for sea fish other than salmon; included is the right to engage in ancillary activities, for example, drying nets. It also includes the right to gather shellfish, including shells. It is settled that the Crown can grant an exclusive right to gather mussels and native oysters and that the common law public right does not include the right to gather such shellfish.<sup>27</sup> While we accept that it would be unlawful for the public to gather them from beds which are subject to an exclusive right, we do not see why the public should be prevented from gathering native oysters and mussels from parts of the sea bed which have not been subject to such a grant. If native oysters or mussels are or become endangered species, they can be protected under

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<sup>23</sup> Para 3.9 above.

<sup>24</sup> See paras 3.18-3.19 below.

<sup>25</sup> *Hope v Bennewith* (1904) 6F 1004.

<sup>26</sup> See para 3.7 above.

<sup>27</sup> *Parker v Lord Advocate* (1902) 4F 698, affd (1904) 6F (HL) 37.

conservation legislation.<sup>28</sup> We therefore propose that the statutory public right should include the right to gather mussels and native oysters. This would not allow the public to gather mussels or native oysters where an exclusive right to gather the shellfish has been granted by the Crown. While the Crown would continue to be entitled to grant exclusive rights to gather these shellfish, we do not anticipate many such grants being made in the future. The statutory public right would also be subject to any other legislative powers and therefore the Scottish Ministers would continue to be able to grant rights of several fishery in respect of such shellfish under the Sea Fisheries (Shellfish) Act 1967.<sup>29</sup> There is no reason in principle why the public right should not be exercised for commercial purposes or profit.<sup>30</sup>

3.15 Consistent with our policy that the statutory public rights should be no less extensive than the rights recognised at common law,<sup>31</sup> we have taken the view that a right to shoot wildfowl should be included in the statutory public right. At common law, this is the right to shoot from the foreshore wildfowl which are on or over the foreshore or the sea. While we propose that the statutory right of recreation should extend to the shore as well as the foreshore, we consider that the right to shoot wildfowl should not be so extended. Access rights do not include a right to shoot<sup>32</sup> and consequently to give such a right in respect of the shore would go beyond the policy of the 2003 Act. Unlike the other recreational activities which constitute the statutory public right, shooting is not a recreational activity commonly encountered on the shore. Moreover, the right should remain restricted to shooting wildfowl that are on or over the foreshore or the sea. If a wildfowl is shot on or over private land (other than the foreshore) or inland waters but from the foreshore, the statutory right of access does not allow the shooter to enter the land or inland waters to retrieve the bird.<sup>33</sup> Indeed, given that the bullet would have entered into the landowner's airspace without his permission, this would amount to trespass. For these reasons we consider that the statutory public right should not extend to shooting wildfowl from the foreshore which are on or over private land (other than the foreshore) or inland waters. There is no reason why this right should not be exercised for commercial purposes or profit.<sup>34</sup>

3.16 Finally, as at common law, the draft Bill includes a right to use the foreshore for purposes which are ancillary to the public rights of fishing and navigation in the sea. These ancillary rights include, for example, embarking and disembarking, loading and unloading, drying nets and gathering bait. Consistent with the principle discussed above,<sup>35</sup> we consider that this right should also apply to the shore. Again the list of ancillary rights we propose is non-exhaustive and additional to access rights.

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<sup>28</sup> For example, Fife Council recently secured an interdict preventing the removal of cockles from Pettycur Beach. This is a council-owned beach designated by the EU as a Site of Special Scientific Interest. There was concern that cockle harvesting was threatening wildlife in the area. See *The Scotsman*, 1 March 2003 "Our Shellfish Society".

<sup>29</sup> S 1.

<sup>30</sup> However, in practice commercial activities must be licensed under legislation concerning food safety.

<sup>31</sup> See para 3.7 above.

<sup>32</sup> 2003 Act, s 9(c).

<sup>33</sup> *Ibid.*

<sup>34</sup> By virtue of s 8 of the draft Bill the public rights may only be exercised in a lawful manner. Accordingly, any statutory restrictions relating to shooting game apply. See para 3.24 below.

<sup>35</sup> Para 3.11 above.

3.17 We therefore recommend that:

5. (i) **Statutory public rights should apply to the shore as well as the foreshore.**
- (ii) **There should be a statement of the statutory public rights which apply in respect of the shore and foreshore.**
6. **The statutory public right to gather shellfish on the shore and foreshore should include the right to gather mussels and native oysters unless there has been an exclusive grant of the right to gather such shellfish.**
7. **The public right to shoot from the foreshore wildfowl which are on or over the foreshore, or the sea should be retained as a statutory public right but not extended to the shore.**

(Draft Bill, section 4)

### **Public rights in respect of the sea and sea bed**

3.18 In terms of the draft Bill, the statutory public rights in respect of the sea and sea bed consist of the right of navigation, the right to fish and the right to use the sea and sea bed for recreational purposes. This does not innovate on the rights recognised at common law.

3.19 As at common law, the proposed statutory right of navigation includes a right of passage from one point to another and a right to do anything of a temporary nature for or ancillary to the exercise of the right of passage. Consistent with our policy that the statutory public rights should be no less extensive than the rights recognised at common law,<sup>36</sup> unlike access rights in inland waters,<sup>37</sup> the statutory right of navigation can be exercised in any type of craft or vessel and can be used for commercial as well as recreational purposes.<sup>38</sup> The right to fish is the right to fish in the sea and on the sea bed for sea fish other than salmon. It also includes the right to gather shellfish on the sea bed. At common law, the right to gather mussels and native oysters is excluded, but for the reasons discussed above,<sup>39</sup> we recommend that the statutory public right should include such a right. There is no reason why the right should not be exercised for commercial purposes or profit. We propose that the opportunity should be taken to provide an express statutory right of recreation on or in the sea and sea bed, which we believe was implicit in the common law decisions on the right of recreation on the foreshore. This right would include bathing, swimming, yachting, canoeing, surfing and diving.

3.20 We therefore recommend that:

8. **There should be a statement of the statutory public rights which apply in respect of the sea and sea bed.**

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<sup>36</sup> See para 3.7 above.

<sup>37</sup> 2003 Act, s 9(f) restricts the right to non-motorised vessels (other than for disabled use).

<sup>38</sup> 2003 Act, s 9(e) prohibits crossing inland waters for the purpose of taking away, for commercial purposes or for profit, anything in or on the waters. While it is difficult to understand the meaning of this provision, it might be capable of being construed as prohibiting shipping for commercial reasons.

<sup>39</sup> Para 3.14 above.

9. **The right to gather shellfish on the sea bed should include the right to gather mussels and native oysters unless there has been an exclusive grant of the right to gather such shellfish.**
10. **The right of recreation in or on the sea and sea bed should be expressly recognised.**

(Draft Bill, section 5)

### **Public rights in respect of inland waters**

3.21 At common law, the only public right in respect of inland waters is the right of navigation. Before it arises the waters must in fact be navigable. In this context, "navigable" means that the waters can be traversed in a safe and normal way by a craft or vessel of the type in question. Moreover, navigation must have in fact taken place over the waters, otherwise than by permission, for a continuous period of forty years.<sup>40</sup> The right includes a right of passage from one point to another and a right to do anything of a temporary nature ancillary to the reasonable exercise of the right of passage. The right of navigation can be exercised in any type of craft or vessel and for commercial as well as recreational purposes.

3.22 We take the view that there should be a statutory public right of navigation in respect of inland waters similar in content to the right at common law. However, we consider that the public right of navigation is analogous to public rights of way, and should be acquired in a similar manner.<sup>41</sup> Accordingly, we propose that the right should arise if the waters are in fact navigable as described above and navigation has taken place, otherwise than by permission, openly, peaceably and without any judicial interruption for a continuous period of twenty years or more. We also propose to adopt the principles contained in section 14 of the Prescription and Limitation (Scotland) Act 1973 for the purposes of calculating the twenty year period. Time occurring before the commencement of the draft Bill will be reckonable towards the twenty year period but treated as less than that period. This rule, together with the proposed three month interval between Royal Assent to and commencement of the draft Bill, would give the owner of inland waters time to challenge the exercise of such a right should he wish to do so.

3.23 We therefore recommend that:

11. (i) **There should be a statement of the statutory public right of navigation in inland waters.**
- (ii) **The public right of navigation should be acquired in a similar way to a public right of way.**

(Draft Bill, section 6)

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<sup>40</sup> *Wills' Trs v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30; discussion paper, paras 4.11ff.

<sup>41</sup> Prescription and Limitation (Scotland) Act 1973, s 3(3).

## The exercise of the public rights

3.24 The common law public rights cannot be exercised when it would be unlawful to do so. Thus, for example, the right to fish commercially is subject to EU law relating to quotas,<sup>42</sup> and fishing vessels require to be licensed.<sup>43</sup> Similarly, they may be restricted by conservation measures in relation to particular species under the Wildlife and Countryside Act 1981.<sup>44</sup> It is axiomatic that the exercise of the proposed statutory public rights must also be lawful. Therefore the statutory public rights would not be capable of being exercised where and to the extent that their exercise would be prohibited or restricted by or under any other enactment. In addition, as in the case of the common law public rights, we propose that the statutory public rights may be restricted by byelaws.<sup>45</sup> The important point is that the statutory public rights would continue to be subject to these controls with inevitable restrictions on where and how the public rights can be exercised.

3.25 As we have seen,<sup>46</sup> while the Crown may grant exclusive rights in relation to the sea bed and foreshore, the grant must not constitute a material interference with the exercise of the common law public rights, particularly the right of navigation.<sup>47</sup> If the exercise of the public right is rendered impossible, the public right prevails over the private right.<sup>48</sup> However, the courts have held that there is no material interference with the public right merely because an exclusive grant renders the exercise of the public right more difficult or less convenient.<sup>49</sup> Therefore in practice the common law public rights are not exercised if this would conflict with the exercise of an exclusive right,<sup>50</sup> always provided that the public right can in fact be exercised in another way which does not involve interference with the exclusive right.

3.26 Given that this is in fact the position which is taken by the courts in relation to the common law public rights, we have taken the view that the statutory public rights should not be exercised where that would conflict with or interfere with an exclusive right. Conversely, we recommend below an obligation on the owners of land which are subject to statutory public rights to respect these rights and not to discourage their exercise.<sup>51</sup> In so doing, we consider that an appropriate balance can be struck in the event of a conflict between an owner of an exclusive right and a person seeking to exercise a statutory public right, so as to allow a means of exercising the statutory public right without interference with the exclusive right.

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<sup>42</sup> See Fisheries Act 1981, s 30(2) and The Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures) (Scotland) Order 2003, SSI 2003/88.

<sup>43</sup> Sea Fish (Conservation) Act 1967, s 4.

<sup>44</sup> The range of statutory controls affecting the sea bed and foreshore is described in Appendix 1 of the discussion paper.

<sup>45</sup> For example when the foreshore is used for military purposes or the purposes of civil aviation: see discussion paper, Pt 5.

<sup>46</sup> Para 1.9 above.

<sup>47</sup> *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174; *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156.

<sup>48</sup> *Walford v David* 1989 SLT 876.

<sup>49</sup> *Ibid.*

<sup>50</sup> Eg an exclusive right of port and harbour, an exclusive right to establish or operate a fish farm, or an exclusive right to gather or fish for shellfish.

<sup>51</sup> See para 3.29 below.



3.27 Where the common law public right has been prohibited or restricted by order or byelaw,<sup>52</sup> it cannot lawfully be exercised or can only be exercised lawfully if in accordance with the restriction in the byelaw or order. Clearly this should also be the position in respect of the statutory public rights.

3.28 By analogy with access rights,<sup>53</sup> the statutory public rights should be exercised responsibly. Again, following the 2003 Act, a right is exercised responsibly when it is exercised in a way which is lawful and reasonable, taking proper account of the rights and interests of other people and the features of the land or waters in respect of which the right is exercised. Such a restriction - if it can be regarded as a restriction - was probably inherent in the lawful exercise of public rights at common law.

3.29 Conversely, and again following the 2003 Act, there should be a duty on the owners of land subject to the statutory public rights not to discourage their exercise. The most important owner of land for this purpose is, of course, the Crown. As many of our consultees observed, it is ironic that at common law the Crown is the guardian of the public rights yet as owner of the foreshore and sea bed may be the person actively inhibiting the exercise by the public of their rights over the property. By analogy with access rights,<sup>54</sup> the owner should be under a duty to use and manage the land in a responsible way, that is taking proper account of the rights and interests of persons exercising or seeking to exercise the public rights. It should be provided expressly that the owner must not do anything, or grant any lease or licence which would enable anyone else to do anything, which would amount to a material interference with the statutory public right of navigation. In addition, the owner should not be allowed to prevent or deter the public from exercising their rights by for example putting up signs or notices, erecting obstructions or impediments, or taking or failing to take any other action.

3.30 We therefore recommend that:

12. **The statutory public rights should only be exercisable in a way that is lawful and reasonable and takes proper account of the rights of others and the features of the land and water over which they are exercised.**

(Draft Bill, section 8(1))

13. **The owner of land that is subject to statutory public rights should have a duty to use and manage the land and conduct the ownership of the land in a way which is lawful and reasonable and takes proper account of the rights and interests of persons exercising or seeking to exercise the public rights over the land.**
14. **The owner of land that is subject to statutory public rights must not do anything, or grant a lease or licence which would enable anyone else to do anything, which would interfere to a material extent with the public right of navigation.**

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<sup>52</sup> See paras 3.31-3.32 below.

<sup>53</sup> 2003 Act, s 2.

<sup>54</sup> *Ibid*, s 3.

15. **The owner of land that is subject to the statutory public rights must not act or fail to act for the purpose of preventing or deterring any person from exercising the public rights.**

(Draft Bill, section 9)

### **The functions of local authorities**

3.31 Local authorities currently have power to make byelaws in respect of the foreshore.<sup>55</sup> Under the 2003 Act, local authorities have been given an important role in upholding and regulating access rights.<sup>56</sup> It would be in the interests of clarity and consistency if local authorities were given analogous duties and powers in respect of the statutory public rights. Accordingly we consider that local authorities should be under a statutory duty to assert and protect the public rights. This duty would replace the duty of the Lord Advocate to protect the common law public rights which will be rendered obsolete with the abolition of those rights.<sup>57</sup> In order to fulfil this obligation local authorities should be able to institute and defend legal proceedings and take such other steps as they consider appropriate. In addition, we propose that local authorities should have similar power to make byelaws in respect of the statutory public rights to those they hold under the 2003 Act in relation to access rights. These byelaws would provide for the responsible exercise of the rights, the responsible use and management of any land or waters over which public rights are exercisable, the preservation of public order and safety, the prevention of damage, the prevention of nuisance or danger and the conservation or enhancement of natural or cultural heritage. Given these extended powers to make byelaws we recommend the repeal of the existing powers to do so under the Civic Government (Scotland) Act 1982.<sup>58</sup>

3.32 Again by analogy with access rights<sup>59</sup> we think that local authorities should have the power to exempt by order a particular area of the sea or sea bed from the exercise of the statutory public rights.<sup>60</sup> This would only be for a temporary period. Such an order could be useful, for example, if a regatta were to be held. We anticipate that it would only be used in exceptional circumstances. However, as it involves a potentially serious inroad into the exercise of the public rights, we have adopted the procedural safeguards from the parallel provisions of the 2003 Act.<sup>61</sup> Any order which would exempt the land or water in question for six days or more cannot be made until the local authority has consulted the owner and given the public notice of the intended purpose of the proposed order, inviting objections. Such an order also has to be confirmed by the Scottish Ministers before it becomes enforceable. The maximum period of the exemption is two years in the first instance.

3.33 In the exercise of its powers and the fulfilment of its duties, the local authority would be responsible for the sea adjacent to the area of the local authority. The local authority

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<sup>55</sup> See in particular the Civic Government (Scotland) Act 1982, s 121.

<sup>56</sup> Chs 4 and 5.

<sup>57</sup> See paras 3.35-3.36 below.

<sup>58</sup> Ss 120-122.

<sup>59</sup> 2003 Act, s 11.

<sup>60</sup> Such power already exists in relation to the exemption of the foreshore, shore and inland waters from access rights under the 2003 Act: the statutory public rights exercisable thereon (other than the right of navigation) being ancillary to access rights are therefore also affected by the exemption. See para 3.9 above.

<sup>61</sup> S 11.

would have jurisdiction to the limits of the sea contiguous to its area.<sup>62</sup> Where local authority areas are separated by a tidal river, firth or estuary, each area should be regarded as "adjacent" only to the waters up to the median line of the river, firth or estuary measured from the low water marks of ordinary spring tides.<sup>63</sup> In this way any potential conflict of jurisdiction between two or more local authorities could be avoided.

3.34 Therefore we recommend that:

- 16. Local authorities should be under a duty to assert and protect the statutory public rights.**

(Draft Bill, section 10(1))

- 17. Local authorities should have the power to institute and defend legal proceedings and generally take such steps as they think expedient for the performance of their duties.**

(Draft Bill, section 10(3))

- 18. (i) Local authorities should have the power to make byelaws in order to regulate the exercise of the statutory public rights in the same terms as provided in respect of access rights under the Land Reform (Scotland) Act 2003.**

- (ii) The power to make byelaws in respect of the seashore and adjacent waters contained in the Civic Government (Scotland) Act 1982 should be repealed.**

(Draft Bill, sections 10(4) and 17 and Schedules 2 and 4)

- 19. Local authorities should have power to make an order exempting a particular area of the sea or sea bed from being subject to the statutory public rights for a temporary period.**

(Draft Bill, section 7 and Schedule 1)

### **Judicial determination of the existence and extent of the public rights**

3.35 In theory at least, the Crown is obliged to protect the common law public rights over the foreshore and sea bed. The role of guardian is undertaken by the Lord Advocate. However, this power has rarely, if ever, been used in modern times. In these circumstances it is not surprising that many of our consultees took the view that the role of the Lord Advocate had become anachronistic. Moreover there remains the potential conflict between the Crown's interest as the owner of the foreshore and sea bed and its role as guardian of the public rights exercisable thereon.

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<sup>62</sup> Cf Civic Government (Scotland) Act 1982, s 123 which for the purpose of passing byelaws currently restricts adjacent waters to waters within a distance of the low water mark of ordinary spring tides of 1000 metres or less.

<sup>63</sup> See s 18(3) of the draft Bill.

3.36 We have recommended<sup>64</sup> that the common law public rights should be abolished and replaced by statutory public rights. We also consider that local authorities should be under a duty to assert and protect the statutory public rights<sup>65</sup> in the same way that they must uphold access rights.<sup>66</sup> Thus the Lord Advocate's historical role as the guardian of the common law public rights would disappear. We do not propose that the Lord Advocate should have a duty to assert and protect the statutory public rights which would replace the common law rights.

3.37 Accordingly we recommend that:

**20. The common law duty of the Lord Advocate to defend or uphold the public rights in respect of the foreshore, sea, sea bed or inland waters should not be extended to the statutory public rights.**

(Draft Bill, section 13)

3.38 In addition to the Lord Advocate's role, an individual can seek to enforce the public rights in an *actio popularis* in the sheriff court or the Court of Session.<sup>67</sup> It is important that there should continue to be a simple procedure available to such a person. A majority of our consultees who responded to this issue considered that the sheriff court was the appropriate forum. As we have seen<sup>68</sup> this is consistent with the position in respect of access rights.

3.39 Accordingly, in addition to existing remedies<sup>69</sup> we take the view that the sheriff should have jurisdiction to determine on summary application whether or not the land or waters specified in the application are subject to statutory public rights.<sup>70</sup> The sheriff should also have jurisdiction to determine whether a person has exercised a public right responsibly and whether the owner of the land<sup>71</sup> has used, managed or conducted the ownership responsibly given that the land is subject to public rights.<sup>72</sup> Where a person seeking the declarator is not the owner of the land, the application should be served on the owner. In many cases this will be the Crown Estate Commissioners as the managers of the Crown Estate. Further, we propose that summary application for such a declarator should also be served on the relevant local authority and, where the application affects the sea, on the Crown Estate Commissioners. This recognises the interests of both the Crown and local authorities in the existence and exercise of the public rights. Although we recommend that the Lord Advocate's common law duty to protect the public rights should not be extended to the statutory public rights,<sup>73</sup> like any other person he would have title to seek a determination of the existence and extent of statutory public rights in the sheriff court.

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<sup>64</sup> Para 3.8 above.

<sup>65</sup> See para 3.31 above.

<sup>66</sup> 2003 Act, s 13.

<sup>67</sup> See for example, *Walford v David* 1989 SLT 876.

<sup>68</sup> Para 2.20 above.

<sup>69</sup> An ordinary action in the sheriff court or an action in the Court of Session would remain competent and would be necessary where the remedy sought could not be granted on summary application eg interdict.

<sup>70</sup> For the extent of the maritime jurisdiction of the sheriff, see Sheriff Courts (Scotland) Act 1907, s 4.

<sup>71</sup> Including, in respect of inland waters and the sea, land under those waters.

<sup>72</sup> For discussion of the duty incumbent on the owner of such property, see para 3.29 above.

<sup>73</sup> Para 3.37 above.

3.40 Therefore we recommend that:

21. **In addition to existing procedures, the sheriff court should have jurisdiction on summary application to determine the existence and extent of the statutory public rights.**

(Draft Bill, section 11 and Schedule 3)

### **Prescription and the public rights**

3.41 It is not clear whether the common law public rights can be extinguished through the operation of prescription. Such rights are not specified by name in the list of imprescriptible rights contained in Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").<sup>74</sup> While it is possible that public rights fall within the scope of Schedule 3 of the 1973 Act as *res merae facultatis*<sup>75</sup> (some sources cite "walking upon the seashore, or sailing upon the sea, or on any navigable river" as examples of such rights),<sup>76</sup> the position is far from certain.<sup>77</sup> The discussion paper invited views on whether Schedule 3 to the 1973 Act should be amended explicitly to include public rights as imprescriptible rights.

3.42 The public right of navigation in inland waters has to be established by immemorial user.<sup>78</sup> It remains controversial whether or not public rights acquired through immemorial user are, or ought to be, lost through the operation of the long negative prescription under the 1973 Act. In order to clarify the position we asked whether public rights acquired through immemorial user should also be imprescriptible and therefore added to Schedule 3.<sup>79</sup>

3.43 There was strong support for the inclusion of all public rights within Schedule 3 of the 1973 Act.

3.44 We therefore recommend that:

22. **Public rights should not be extinguished through non-use over a period of time.**
23. **Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 should be amended expressly to include public rights.**

(Draft Bill, sections 14 and 17(2))

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<sup>74</sup> See discussion paper, paras 4.46-4.53.

<sup>75</sup> "Such a right is one which may or may not be exercised at the pleasure of him who holds it; and such rights were never lost by their non exercise for any length of time, because it is of their essential character that they may be used or exercised at any time."; *Stair Memorial Encyclopaedia*, vol 16, para 2126.

<sup>76</sup> Trayner, *Latin Maxims and Phrases* (4th edn) (1894).

<sup>77</sup> We identified cases where it has been claimed that public rights may be treated as extinguished by implication in terms of statute in the discussion paper at para 4.48.

<sup>78</sup> Such as rights of navigation over private waters, which are established through at least 40 years use; *Wills' Trs v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30. But see our recommendation 11(ii) above at para 3.23.

<sup>79</sup> See discussion paper, para 4.54.

## The effect of change in the nature of land or waters on public rights

3.45 The physical boundaries of the foreshore and sea bed may change through natural movement<sup>80</sup> or human intervention.<sup>81</sup> Under the existing law it is not clear whether the common law public rights are extinguished in relation to land or water which ceases to be foreshore, sea bed or inland waters.<sup>82</sup> In relation to the foreshore, while the opinions of the Lord President (Kinross) and Lord Kinnear in *Smith v Lerwick Harbour Trustees*<sup>83</sup> suggest that the public rights are extinguished, their comments are *obiter*.

3.46 In the discussion paper we therefore proposed that the position should be clarified and asked whether public rights over the foreshore should be extinguished where the nature of the foreshore changes.<sup>84</sup>

3.47 The majority of consultees who commented on this matter agreed that public rights should be extinguished where land ceases to be foreshore. It was noted that public rights will exist over any new areas of foreshore that have been created. We agree with this approach. It can logically be extended to the sea bed and areas of water over which other public rights may be exercised. In most, if not all, cases changes in the land or water will make the exercise of the public rights physically impossible.

### Procedure for extinguishing the public rights

3.48 The discussion paper then proceeded to ask whether in such cases public rights should be extinguished automatically or whether they should only be extinguished on application to the Lands Tribunal for Scotland or some other body.<sup>85</sup> Consultees were divided on this issue, but we believe that the most logical and clear solution would be for the public rights to be extinguished automatically by the operation of law. To require an administrative procedure would involve delay and incur expense for no purpose.

3.49 Several consultees responding to this question raised the possibility of using the planning system to determine the extent of public rights exercisable on developed land which was formerly foreshore. Having carefully considered this proposal we conclude that the planning system would not be an appropriate forum for the protection of the public rights. In particular there is no legal requirement within the planning system to notify the Lord Advocate (or under our proposals local authorities as the bodies representing the public interest) of proposed developments which may affect the public rights.

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<sup>80</sup> Alluvion, avulsion or erosion.

<sup>81</sup> Usually through reclamation.

<sup>82</sup> We highlighted this problem in the discussion paper at para 4.51, where we gave the example of the development of car parks at Helensburgh and Tobermory on land reclaimed from the foreshore and sea, rendering the status of the public rights uncertain.

<sup>83</sup> (1903) 5F 680 at p 689 and p 691.

<sup>84</sup> Para 4.54.

<sup>85</sup> Discussion paper, paras 4.52-4.54.

3.50 We recommend that:

24. **The statutory public rights over the shore, foreshore, sea, sea bed or inland waters should be automatically extinguished where the land or water in question ceases to be classified as such.**

(Draft Bill, section 15)

# Part 4 Crofting and Udal Land

## Crofting

4.1 **Introduction.** Questions about the nature of crofters' rights to undertake activities on the foreshore had arisen in the consultation responses submitted to the LRPG.<sup>1</sup> In the discussion paper we concluded that where these rights arise, they do so as a pertinent of the tenancy of the croft and not as a specific example of a public right or by virtue of the statutory law regulating crofting.<sup>2</sup> The LRPG's consultation responses suggested that some members of the public do not understand the legal source of these rights. In the interests of clarifying matters, the discussion paper examined two particular issues.

4.2 **A general right to gather seaweed.** The LRPG's responses indicated that there is a particular interest in the right to gather seaweed on the foreshore given its value as fertiliser both for use on the croft itself and for commercial purposes. In the discussion paper we therefore considered whether, in the interests of consistency, all crofters should be given a statutory pertinent right to gather seaweed on the foreshore.

4.3 Various difficulties were identified with such a scheme.<sup>3</sup> Not all crofts are adjacent to or have access to the foreshore. Those crofters who have a pertinent right to gather seaweed at present pay for this right through their rent.<sup>4</sup> To extend a general right to all crofters could have the effect of increasing a crofter's rent even where he does not wish to exercise the right to take seaweed. We concluded that there was no legal justification for the extension of such rights to all crofters, but invited consultees' views.

4.4 Some consultees emphasised the importance of seaweed as a readily available, organic and environmentally sound resource. However, we remain of the view that there are no convincing grounds, within the context of this law reform project, to introduce for all crofters a general statutory right to take seaweed from the foreshore.

4.5 For the above reasons we are therefore of the opinion that a general right to gather seaweed should not be introduced for all crofters. The availability of the right should continue to depend upon a landlord's ability to grant it, and contractual negotiation between the landlord and crofter.

4.6 **Use of seaweed for the purposes of the croft.** Where rights to gather seaweed exist, the extent of such rights, and in particular whether the right can be exploited for commercial purposes, is a source of conflict between landlords and crofters. As a general rule a pertinent right exists for the benefit of the property to which it pertains and cannot be used for other purposes. Logically, therefore, unless crofters have a specific right to take seaweed

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<sup>1</sup> See paras 1.4ff above.

<sup>2</sup> Para 6.23.

<sup>3</sup> See discussion paper, paras 6.15-6.16.

<sup>4</sup> See Crofters (Scotland) Act 1993, s 6(4). If asked to determine a fair rent, the Land Court requires to take into consideration all the circumstances of the case.



for commercial purposes, their right is restricted to what is required for the reasonable purposes of the croft.

4.7 Consultation did not suggest any legal reasons why the general rule which applies to pertinents should not also apply to crofts. Some commentators noted that the harvesting of seaweed provided valuable seasonal employment in places where such opportunities are scarce. Our proposal would not, however, restrict this traditional activity. While such a rule would make clear the extent to which existing rights may be exercised, it would not prevent crofters from entering into separate agreements to harvest seaweed in excess of their pertinent right.

4.8 Having considered consultees' comments we therefore recommend that:

25. **Unless otherwise stated, it should be made clear that a crofter's right to gather seaweed should be restricted in extent to what is necessary for the reasonable purposes of the croft.**

(Draft Bill, section 16)

## **Udal tenure**

4.9 The discussion paper raised two questions relating to udal tenure and the foreshore.

4.10 **Priority of udal titles and titles deriving from the Crown.** Crown ownership of land in Orkney and Shetland (where the underlying system of land holding is udal) is a sensitive subject. The Crown's interest in the foreshore of these islands is particularly controversial and the legal basis of its rights often not fully understood. The Crown's interest is not derived from its position as paramount superior under the feudal system of landholding (which only applies to some parts of Orkney and Shetland).<sup>5</sup> Rather the Crown's right to the foreshore of these islands is derived from the Crown's prerogative right to ownerless property and therefore applies to any area of land for which no valid udal title exists. Conversely, where the foreshore is held under a valid udal title, the Crown has no claim to the foreshore.<sup>6</sup> The legal principles which apply are in fact well settled, but with a view to increasing understanding of the legal position, we suggested in the discussion paper that there should be a statutory explanation of the priority of competing udal and Crown based titles. Many consultees agreed that this would be helpful, although it was recognised that the law was clear.

4.11 In Part 2 we examined the general concept of Crown ownership of the foreshore. We believe that it is sensible to incorporate the nature of the Crown's interest in foreshore which has been subject to udal tenure within our recommended statutory statement on Crown ownership. We therefore recommend that:

26. **Statutory provision should make clear that the Crown only owns foreshore in Orkney and Shetland to which no udal title can be established.**

(Draft Bill, section 1(1))

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<sup>5</sup> The feudal system of landholding and the paramount superiority will be abolished on the appointed day; Abolition of Feudal Tenure etc. (Scotland) Act 2000, s 1.

<sup>6</sup> *Smith v Lerwick Harbour Trs* (1903) 5F 680.

4.12 **Pertinent rights ancillary to the foreshore under udal law.** Some commentators suggest that ownership of the foreshore under udal tenure brings with it special ancillary pertinent rights not recognised elsewhere under Scots law. These include bait within the ebb and hunting seal.<sup>7</sup> However, the extent of any such rights is not clear and there is no recognised authority in support of their existence.

4.13 With the imminent introduction of land registration to Orkney and Shetland,<sup>8</sup> it seemed important to try and establish whether such rights in fact existed and could be claimed for entry on the title sheet. If so, udal foreshore proprietors would hold different rights from proprietors of foreshore in the rest of Scotland. It would also have the effect of differentiating between the rights of proprietors of foreshore within Orkney and Shetland according to whether their title was udal or derived from the Crown.

4.14 In the discussion paper we provisionally concluded that, in the absence of persuasive authority, such ancillary pertinent rights should not be recognised. However, we remained open to views to the contrary and anticipated that practical evidence of the existence of such rights might emerge in the course of our consultation exercise. The majority of respondents on this question were against our suggestion that such rights should not be recognised. However, no new evidence was put forward in support of their existence.

4.15 Given our lack of practical information about udal titles we undertook a survey of titles to areas of foreshore in Orkney and Shetland, the majority of which appeared to be held on udal tenure.<sup>9</sup> We are aware that pertinents, by their nature, are often not specifically referred to in transfers of ownership. Where they are referred to they are customarily included in an all-embracing clause transferring "the parts and pertinents". We recognised therefore, that we could not disprove the existence of distinctively udal pertinents by finding no reference to them in the deeds we examined.

4.16 In many of the titles where pertinent rights were specifically included these conformed to those recognised under Scots law, most commonly, the right to take seaware,<sup>10</sup> the right to peat and the right to water. However, rights to "privileges of Admiralty wrecks, weath, whales, fishings great and small and other privileges pertaining to the said subjects" were found in three of the deeds examined.<sup>11</sup> These pertinents are not commonly recognised in Scots law and may therefore be peculiarly udal in origin.<sup>12</sup>

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<sup>7</sup> See *Stair Memorial Encyclopaedia*, vol 24, para 314.

<sup>8</sup> The Land Register will become operational in these counties on 1 April 2003: The Land Registration (Scotland) Act 1979 (Commencement No 16) Order 2002, SSI 2002/432.

<sup>9</sup> Titles to 95 properties were examined. Titles were selected at random in order to cover as wide a geographical area as possible. We are grateful to Registers of Scotland for their assistance with this work.

<sup>10</sup> See discussion paper, para 6.21.

<sup>11</sup> Disposition by Peter H Marcus in favour of Geoffrey Popplewell and Ethel Popplewell recorded GRS Orkney and Zetland 4 March 1977; Disposition by John George Byers in favour of Robert Byers and Mrs Mary Jean Garson or Byers recorded GRS Orkney and Zetland 7 August 1978; Disposition by Margaret Jane Miller or Drever in favour of Philip Haydn Whiteley recorded GRS Orkney and Zetland 27 September 1985.

<sup>12</sup> Compare pertinent rights under other systems of udal landholding; see *Stair Memorial Encyclopaedia*, vol 24, para 314.

4.17 Despite quite extensive efforts we are unable to state categorically whether or not a separate system of pertinent rights attaches to the foreshore under udal law. We therefore do not make any recommendation regarding the recognition or otherwise of a system of ancillary rights pertaining to ownership of the foreshore under udal tenure.

## Part 5 Harbours

### Introduction

5.1 In the discussion paper we reviewed the interaction of the legal theory behind the Crown's proprietary interest in the foreshore and sea bed and the separate legal tenement of a right of port and harbour.<sup>1</sup> We concluded that while there was some dissatisfaction with the practical results of the present law, the law was theoretically sound and settled.

5.2 Nevertheless, one of the purposes of our review is to set out the law in this area in a clear and accessible way. We therefore invited views on whether it would be useful to clarify that, in the absence of an express statement to the contrary, the grant of a right of port and harbour does not include a conveyance of the sea bed of the harbour.<sup>2</sup>

### Consultation

5.3 There was a mixed response to this question. Some consultees felt that the law was well settled and that a statutory restatement was unnecessary. We agree that the law is clear. However, in the context of this project, which aims in part to set out clearly the nature and extent of the Crown's interest in the foreshore and sea bed and the corresponding obligations for which it is accountable, we believe that the statement which we proposed is a helpful part of that process.

5.4 Many consultees, mainly representing port and harbour authorities, opposed our proposed statement because they were opposed to the policy behind the existing law. It was suggested to us that clarifying the legal position would not help ports that find the current relationship with the Crown as owner of the sea bed inflexible and potentially detrimental to their development. There is a general view that it is anomalous that a port authority has no absolute right of control over the sea bed and moorings within the area for which it is administratively responsible. There is considerable hostility towards the Crown Estate Commissioners and their management policy which seeks to maximise commercial gain from the use of its marine estate.

5.5 As we have already noted, the commercial policies applied in the management of the foreshore and sea bed fall outwith the scope of our remit. From a law reform perspective we believe that there is merit in clarifying the scope of grants of port and harbour. The majority of respondents who accepted the limitations of this project agreed. The Keeper, in particular, thought that such a statement would be helpful.

5.6 We do not wish to make any changes to the present law. Grantees who hold rights to the foreshore and sea bed ancillary to their right of port and harbour will not be affected.

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<sup>1</sup> See discussion paper, Pt 7.

<sup>2</sup> Ibid, para 7.8.

5.7 Therefore, having taken into account the views of consultees, we recommend that:

27. **There should be a statutory statement that, unless the grant provides otherwise, the grant of a right of port and harbour does not include a conveyance of foreshore or sea bed.**

(Draft Bill, section 1(2))

## Part 6 Property and Conveyancing Problems

### Reclamation

6.1 In the discussion paper we noted that it was unclear whether the ownership of land which was formerly foreshore or sea bed was altered by deliberate reclamation. We concluded that it would be consistent with the doctrines of alluvion and avulsion if ownership of the land in question was not affected by reclamation.<sup>1</sup> We therefore asked whether there should be a statutory rule to this effect.

6.2 There was general support for such a proposal. One respondent requested that the rule be framed so as to encompass all land/water boundaries. However, the scope of this project is limited to land and waters which are subject to public rights. Our recommendation is therefore similarly restricted in its extent.

6.3 The Law Society of Scotland proposed that an exception be made to the general rule in respect of the reclamation of land which had been lost previously due to natural erosion. In such circumstances, it was suggested that ownership of the reclaimed land should automatically revert to the original proprietor (or his successor in title) without the need for a reconveyance.

6.4 We are not persuaded by this approach. First, the reclamation works would in any event require the consent of the owner of the foreshore or sea bed as the case may be and if consent is required there is no reason why there should not also be a conveyance. Second, without a conveyance there would be no public record of the passing of title on the property register.

6.5 Having taken account of the views of consultees we therefore recommend that:

- 28. The ownership of foreshore or sea bed should not be affected by deliberate reclamation.**

(Draft Bill, section 2)

### Standard rules of construction of deeds

6.6 In the discussion paper we noted that judicial interpretation of descriptions of seaward boundaries in deeds had created a collection of seemingly arbitrary rules of construction. We considered whether there was any merit in creating a consistent system of such rules to apply to the seaboard boundaries of lands. Our provisional conclusion was that there was insufficient evidence of any great need for reform. A number of technical

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<sup>1</sup> See discussion paper, para 8.6.

difficulties with such an approach was also identified.<sup>2</sup> However, we invited consultees' views on whether there was scope for such a proposal.

6.7 Most consultees agreed that there were difficulties with such a proposal. Our doubts as to whether the present law caused significant difficulties were also confirmed. Accordingly, we make no recommendation for reform of the law in this area.

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<sup>2</sup> Ibid, para 8.10.

## Part 7 List of Recommendations

1. The present extent of the Crown's ownership of the foreshore and the sea bed adjacent to Scotland should be defined by statute.

(Paragraph 2.7)

2.
  - (i) There should be a rebuttable presumption that to the extent that the Ordnance Survey map indicates the presence of Mean High and Low Water Spring Tides in respect of a river, its waters are tidal.
  - (ii) In addition to existing procedures, a simplified form of procedure in the sheriff court should be available in which the presumption may be rebutted.
  - (iii) Any court declarator that rebuts the presumption should be intimated to both the Ordnance Survey and the Keeper.

(Paragraph 2.22)

3. The common law public rights should be abolished and replaced by statutory public rights.

(Paragraph 3.8)

4.
  - (i) Statutory public rights should be in addition to the access rights conferred by the Land Reform (Scotland) Act 2003.
  - (ii) With the exception of the public right of navigation in inland waters, statutory public rights should not be exercisable in relation to any land in respect of which access rights under the Land Reform (Scotland) Act 2003 are not exercisable.

(Paragraph 3.10)

5.
  - (i) Statutory public rights should apply to the shore as well as the foreshore.
  - (ii) There should be a statement of the statutory public rights which apply in respect of the shore and foreshore.

6. The statutory public right to gather shellfish on the shore and foreshore should include the right to gather mussels and native oysters unless there has been an exclusive grant of the right to gather such shellfish.

7. The public right to shoot from the foreshore wildfowl which are on or over the foreshore, or the sea should be retained as a statutory public right but not extended to the shore.

(Paragraph 3.17)



8. There should be a statement of the statutory public rights which apply in respect of the sea and sea bed.
9. The right to gather shellfish on the sea bed should include the right to gather mussels and native oysters unless there has been an exclusive grant of the right to gather such shellfish.
10. The right of recreation in or on the sea and sea bed should be expressly recognised.

(Paragraph 3.20)
11.
  - (i) There should be a statement of the statutory public right of navigation in inland waters.
  - (ii) The public right of navigation should be acquired in a similar way to a public right of way.

(Paragraph 3.23)
12. The statutory public rights should only be exercisable in a way that is lawful and reasonable and takes proper account of the rights of others and the features of the land and water over which they are exercised.
13. The owner of land that is subject to statutory public rights should have a duty to use and manage the land and conduct the ownership of the land in a way which is lawful and reasonable and takes proper account of the rights and interests of persons exercising or seeking to exercise the public rights over the land.
14. The owner of land that is subject to statutory public rights must not do anything, or grant a lease or licence which would enable anyone else to do anything, which would interfere to a material extent with the public right of navigation.
15. The owner of land that is subject to the statutory public rights must not act or fail to act for the purpose of preventing or deterring any person from exercising the public rights.

(Paragraph 3.30)
16. Local authorities should be under a duty to assert and protect the statutory public rights.
17. Local authorities should have the power to institute and defend legal proceedings and generally take such steps as they think expedient for the performance of their duties.
18.
  - (i) Local authorities should have the power to make byelaws in order to regulate the exercise of the statutory public rights in the same terms as provided in respect of access rights under the Land Reform (Scotland) Act 2003.
  - (ii) The power to make byelaws in respect of the seashore and adjacent waters contained in the Civic Government (Scotland) Act 1982 should be repealed.

19. Local authorities should have power to make an order exempting a particular area of the sea or sea bed from being subject to the statutory public rights for a temporary period.

(Paragraph 3.34)
20. The common law duty of the Lord Advocate to defend or uphold the public rights in respect of the foreshore, sea, sea bed or inland waters should not be extended to the statutory public rights.

(Paragraph 3.37)
21. In addition to existing procedures, the sheriff court should have jurisdiction on summary application to determine the existence and extent of the statutory public rights.

(Paragraph 3.40)
22. Public rights should not be extinguished through non-use over a period of time.
23. Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 should be amended expressly to include public rights.

(Paragraph 3.44)
24. The statutory public rights over the shore, foreshore, sea, sea bed or inland waters should be automatically extinguished where the land or water in question ceases to be classified as such.

(Paragraph 3.50)
25. Unless otherwise stated, it should be made clear that a crofter's right to gather seaweed should be restricted in extent to what is necessary for the reasonable purposes of the croft.

(Paragraph 4.8)
26. Statutory provision should make clear that the Crown only owns foreshore in Orkney and Shetland to which no udal title can be established.

(Paragraph 4.11)
27. There should be a statutory statement that, unless the grant provides otherwise, the grant of a right of port and harbour does not include a conveyance of foreshore or sea bed.

(Paragraph 5.7)
28. The ownership of foreshore or sea bed should not be affected by deliberate reclamation.

(Paragraph 6.5)

# Appendix A

## Sea, Shore and Inland Waters (Scotland) Bill [DRAFT]

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### CONTENTS

Section

#### **PART 1**

##### OWNERSHIP OF FORESHORE AND SEA BED

- 1 Crown rights
- 2 Effect of reclamation operations

#### **PART 2**

##### PUBLIC RIGHTS

- 3 General effect of this Part
- 4 Public rights in respect of the shore and foreshore
- 5 Public rights in respect of the sea and sea bed
- 6 Public right of navigation in inland waters

#### **PART 3**

##### GENERAL PROVISIONS RELATING TO THE PUBLIC RIGHTS

- 7 Exempt areas
- 8 Restrictions on exercise
- 9 Reciprocal duties of owners
- 10 Functions of local authorities
- 11 Judicial determination of existence and extent of public rights
- 12 Presumptions as to tidal waters
- 13 Role of Lord Advocate
- 14 Effect of time
- 15 Effect of physical change

#### **PART 4**

##### CROFTERS' RIGHTS IN RELATION TO SEAWEED ON THE FORESHORE

- 16 Crofters' rights to gather seaweed on foreshore

## PART 5

### GENERAL

- 17 Repeals and amendments
- 18 Interpretation
- 19 Short title, Crown application and commencement

---

Schedule 1 —Further provisions as to orders under section 7  
Schedule 2 —Further provisions as to functions of local authorities  
Schedule 3 —Further provisions as to judicial proceedings  
Schedule 4 —Repeals

# Sea, Shore and Inland Waters (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make provision on the ownership of the foreshore and sea bed; on public rights in relation to the shore, foreshore, sea, sea bed and inland waters; on crofters' rights in relation to seaweed on the foreshore; and for connected purposes.

## PART 1

### OWNERSHIP OF FORESHORE AND SEA BED

#### 1. Crown rights

- (1) The Crown owns so much of the foreshore and sea bed as is not owned (whether as a result of Crown grant, prescription, udal title or otherwise) by any other person.
- (2) A grant by the Crown, whenever made, of a right of port and harbour does not include a conveyance of foreshore or sea bed unless the grant provides otherwise.

#### NOTE

Subsection (1) re-states, but does not change, the existing law regarding Crown ownership of the foreshore and sea bed. See paragraphs 2.1 to 2.7 and 4.10 to 4.11 of the report. Except where the Crown has granted title to the foreshore or sea bed or such a title has been obtained by prescription or is held on a valid udal title, all the foreshore and the sea bed adjacent to Scotland is owned by the Crown. The Crown's proprietary rights in the foreshore and sea bed derive from the Crown's prerogative rights to ownerless property and not from its position as ultimate superior of the feudal system. Subsection (1) implements recommendations 1 and 26.

The right of port and harbour is an incorporeal separate tenement, ie it can be enjoyed separately from the ownership of the land and sea bed which constitute the port and harbour. It is also one of the *regalia minora*, ie a right pertaining to the Crown which is capable of alienation by way of a Crown grant. However, a right of port and harbour does not carry with it automatically a real right of property in the land and sea bed to which it relates. Subsection (2), which implements recommendation 27, clarifies the existing common law rule that if a right of ownership of the foreshore or sea bed is to be transferred, the grant must include wording sufficient to effect a conveyance of that land. The rule applies to Crown grants of the right of port and harbour made before or after commencement of the Bill. See Part 5 of the report.

#### 2. Effect of reclamation operations

The ownership of any part of the foreshore or sea bed is not changed merely because that part has been converted by deliberate reclamation operations into land which is not foreshore or sea bed as the case may be.

## NOTE

This section concerns the ownership of land which was formerly foreshore and sea bed but has changed in nature as a result of deliberate reclamation operations. Deliberate reclamation is treated as avulsion, ie where land boundaries change as a result of a violent alteration involving the detachment and redeposit of a distinct body of land. It is well settled that avulsion has no property consequences; see paragraphs 6.1 to 6.2 of the report. This section, which implements recommendation 28, clarifies that such reclamation does not affect ownership of the reclaimed land.

## PART 2

### PUBLIC RIGHTS

#### 3. General effect of this Part

The rights conferred by sections 4 to 6 ("the public rights") —

- (a) are in addition to the access rights conferred by the Land Reform (Scotland) Act;
- (b) replace any public rights under the guardianship of the Crown in respect of the foreshore, sea, sea bed and inland waters; and
- (c) are subject to the restrictions and limitations in this Act.

## NOTE

Part 2 confers on the public certain rights in respect of the shore, foreshore, sea, sea bed and inland waters. It requires to be read in conjunction with the Land Reform (Scotland) Act 2003 ("2003 Act") which confers on the public certain access rights in respect of "land", as defined in section 32 of that Act. For the purposes of this Bill, "land" includes the shore, foreshore, sea bed and inland waters but does not extend to the sea.

Section 3 sets out the general effect of Part 2. It provides that the new statutory rights will be known as the public rights.

Paragraph (a) provides that the public rights are additional to the access rights conferred by the 2003 Act. See paragraph 3.9 of the report and recommendation 4(i).

At present the public have certain common law public rights in respect of the foreshore, sea, sea bed and inland waters. Paragraph (b) abolishes these common law public rights and replaces them with the statutory public rights. This implements recommendation 3. See paragraph 3.7 of the report. Statutory public rights have been defined so that, when combined with access rights, their scope is at least as extensive as that of the public rights at common law. The statutory public rights are held directly by the public and not held in trust on their behalf by the Crown.

Paragraph (c) provides that the public rights are not absolute rights but are subject to the various restrictions and limitations set out in the Act, for example, the requirement to exercise the public rights responsibly contained in section 8.

#### 4. Public rights in respect of the shore and foreshore

- (1) Everyone has the right to use the shore and foreshore for the purposes of recreation, including —
  - (a) bathing, swimming and sunbathing;
  - (b) making sandcastles and playing games;
  - (c) having picnics, lighting fires and cooking food; and
  - (d) beachcombing.
- (2) Everyone has the right—
  - (a) to gather shellfish on the shore and foreshore;
  - (b) to fish for sea fish from the shore and foreshore; and
  - (c) to do anything on the shore and foreshore, including gathering bait, ancillary to the exercise of those rights.
- (3) Everyone has the right—
  - (a) to shoot wildfowl from the foreshore where the wildfowl are on or over the foreshore or sea; and
  - (b) to do anything on the foreshore ancillary to the exercise of that right.
- (4) Everyone has the right to use the shore and foreshore for purposes (including launching, landing, embarking, disembarking, loading and unloading, drying nets or gathering bait) ancillary to the public rights of navigation, fishing and recreation conferred by section 5.
- (5) Where a person has, in relation to an object, lawfully exercised the right conferred by subsection (1)(d) that person becomes the owner of the object.
- (6) The rights conferred by this section are not exercisable in relation to any land in respect of which access rights under the Land Reform (Scotland) Act are not exercisable.

#### NOTE

This section sets out the public rights which are exercisable on the shore and foreshore. It implements recommendation 5(ii). See paragraphs 3.11 to 3.16 of the report. At common law the public rights of recreation, fishing and gathering shellfish were restricted to the foreshore and did not extend to the shore; see paragraph 3.11 of the report and recommendation 5(i). By virtue of section 18(1), "shore" includes areas of gravel, stones and rock and not just sand. However, such areas must be contiguous to the foreshore; for example, they cannot be separated from the foreshore by a road and they must also be above or to the landward of the foreshore. This enables members of the public to exercise their public rights, for example, the right to fish, from rocks or sandbanks directly above the foreshore and which may not actually be landward of the foreshore.

Subsection (1) confers a general right of recreation and provides a non-exhaustive list of recreational activities. This right includes the right of beachcombing which is restricted in scope by the definition given in section 18(1). See paragraph 3.13 of the report.

Subsection (2) gives the public the right to gather shellfish on and fish for sea fish from the shore and foreshore. This includes the right to gather native oysters and mussels unless there has been an exclusive grant of the right to gather such shellfish; see section 8(2)(iii). This implements recommendation 6. The right to gather such shellfish was previously excluded from the common law public right; see paragraph 3.14 of the report. The right does not extend to a right to fish for salmon as this is a separate legal tenement, often in private ownership; see the definition of "sea fish" in section 18(1). The right of fishing and gathering shellfish includes the right to do anything which is ancillary to the exercise of those rights.

Subsection (3) gives the public the right to shoot wildfowl from the foreshore but not the shore. This also includes the right to do anything ancillary to the exercise of that right. However, the wildfowl must be on or over the foreshore or sea when they are shot. This implements recommendation 7. See paragraph 3.15 of the report.

Subsection (4) gives the public the right to use the shore and foreshore for any purpose which is ancillary to the exercise of the rights of navigation, fishing and recreation exercisable on the sea and sea bed under section 5. See paragraph 3.16 of the report.

Subsection (5) makes provision as to the ownership of objects which are acquired when beachcombing under subsection(1)(d). If the right of beachcombing has been lawfully exercised, the beachcomber becomes the owner of the object and so will not have committed theft. It should be noted that the only objects capable of being beachcombed are those owned by the Crown under the rule that ownerless property belongs to the Crown; see section 18(1). Therefore, this subsection will not affect the ownership of property on the shore or foreshore which is owned by a person other than the Crown. See paragraph 3.13 of the report.

Subsection (6) provides that the public rights may only be exercised if access rights may be exercised on the land in question. Access rights may be restricted for reasons of privacy or safety; see sections 6 and 7 of the 2003 Act. As the public rights on the shore and foreshore are ancillary to access rights, where such a restriction exists in respect of a particular part of the shore or foreshore, the public rights are similarly restricted. This implements recommendation 4(ii). See paragraph 3.9 of the report.

## **5. Public rights in respect of the sea and sea bed**

- (1) Everyone has a right of navigation on the sea in or on a craft or vessel of any kind and for any purpose.
- (2) The right of navigation conferred by subsection (1) includes—
  - (a) a right of passage from one point to another; and
  - (b) a right to do anything of a temporary nature ancillary to the exercise of the right of passage.
- (3) Everyone has the right to fish for sea fish in the sea and on the sea bed and to do anything on the sea or sea bed ancillary to the exercise of that right.
- (4) Everyone has the right to use the sea and sea bed for purposes of recreation, including bathing, swimming, yachting, canoeing, surfing and diving.



## NOTE

This section, which implements recommendation 8, sets out the public rights of navigation, fishing and recreation which are exercisable in respect of the sea and the sea bed. See paragraphs 3.18 to 3.19 of the report. The "sea" means the territorial sea and tidal waters; see section 18(1). It should be noted that the 2003 Act does not apply to the sea or sea bed.

Subsection (1) gives the public a general right of navigation on the sea which applies to any type of craft or vessel. This reflects the position at common law.

Subsection (2) clarifies that the right of navigation includes a right of passage from A to B and anything ancillary to the right of passage, eg a right to drop anchor. The ancillary right must be of a temporary nature. Thus, for example, it would allow temporary but not permanent moorings.

Subsection (3) gives the public the right to fish for sea fish in the sea and on the sea bed and the right to do anything ancillary to the exercise of that right. Sea fish include all fish except salmon which are owned as a separate tenement; see section 18(1). Sea fish also include shellfish, including native oysters and mussels, unless there has been an exclusive grant of the right to gather such shellfish; see section 8(2)(iii). This implements recommendation 9.

Subsection (4) gives the public the right to use the sea and sea bed for recreational purposes and provides a non-exhaustive list of such recreational activities. This implements recommendation 10.

## 6. Public right of navigation in inland waters

- (1) Everyone has a right of navigation, in or on a craft or vessel of any kind and for any purpose, over inland waters where, and to the extent that—
  - (a) the waters are capable of being navigated in a safe and normal way by a craft or vessel of the type in question; and
  - (b) members of the public have so navigated them, otherwise than by permission, openly, peaceably and without any judicial interruption, for a continuous period of 20 years or more.
- (2) The right of navigation conferred by subsection (1) includes—
  - (a) a right of passage from one point to another; and
  - (b) a right to do anything of a temporary nature ancillary to the exercise of the right of passage.
- (3) For the purposes of this section—
  - (a) "judicial interruption" in relation to navigation has the same meaning as it has in section 4 of the Prescription and Limitation (Scotland) Act 1973 (c.52) in relation to possession of a public right of way; and

- (b) section 14 of the Prescription and Limitation (Scotland) Act 1973 (c.52) applies to the computation of the 20 year period mentioned in subsection (1)(b) above as it applies to the computation of a prescriptive period for the purposes of Part I of that Act, with the modification that the reference to the commencement of Part I of that Act is to be read as a reference to the commencement of this Act, and with any other necessary modifications.

#### NOTE

This section confers on the public a right of navigation in inland, ie non-tidal, waters; see the definition of "inland waters" in section 18(1). This implements recommendation 11(i). See paragraphs 3.21 to 3.22 of the report. The extent of the right of navigation is the same as that in section 5 but before the right arises the waters must be capable of being navigated in a safe and normal way; see paragraph 3.21 of the report. Navigation must also have taken place by the public otherwise than by permission, openly, peaceably and without any judicial interruption for a continuous period of at least 20 years. This is consistent with the manner in which a public right of way is acquired under section 3(3) of the Prescription and Limitation (Scotland) Act 1973; see paragraph 3.22 of the report and recommendation 11(ii).

Subsection (3)(a) provides that "judicial interruption" has the same meaning as in section 4 of the 1973 Act.

Subsection (3)(b) applies section 14 of the 1973 Act. Time occurring before the commencement of the Bill will be reckonable towards the 20 year period but at least one day of the prescriptive period must run after commencement. Section 19(3) of the Bill allows a period of 3 months after Royal Assent before commencement. Therefore sufficient time is allowed for a proprietor of the bed of inland waters to raise an action to stop the prescriptive period from running.

### PART 3

#### GENERAL PROVISIONS RELATING TO THE PUBLIC RIGHTS

#### 7. Exempt areas

- (1) The local authority may (whether on application made to them or not) by order under this section made in respect of a particular area of the sea or sea bed specified in the order exempt it for a particular purpose specified in the order from the public rights which would otherwise be exercisable in respect of it during such times as may be specified in the order.
- (2) Schedule 1 makes further provision as to orders under this section.

#### NOTE

Subsection (1) gives local authorities the power to make orders exempting a particular area of the sea or sea bed from the public right of recreation. It implements recommendation 19. See paragraph 3.32 of the report. The power does not affect the public right of navigation or commercial fishing; see Schedule 1, para 9.

This mirrors the power to exempt land (including the shore and foreshore) from access rights contained in section 11 of the 2003 Act which applies to the public rights exercisable on the shore or foreshore by virtue of section 4(6) of this Bill.

Subsection (2) applies the rules set out in Schedule 1 to orders made under this section.

## **8. Restrictions on exercise**

- (1) A public right conferred by sections 4 to 6 is restricted to a right to act responsibly - that is to say, in a way which is lawful and reasonable and takes proper account of the rights and interests of others and of the features of the land or waters in respect of which the right is exercised.
- (2) In particular, such a public right may not be exercised where, and to the extent that—
  - (a) the exercise of the right would conflict with, or interfere with the exercise of—
    - (i) an exclusive right of port and harbour;
    - (ii) an exclusive right to establish or operate a fish farm; or
    - (iii) an exclusive right to gather or fish for shellfish or any type of shellfish; or
  - (b) the exercise of the right is otherwise prohibited or restricted by or under any enactment.

### **NOTE**

This section provides that the public rights must be exercised responsibly. It is consistent with section 2 of the 2003 Act in respect of access rights. It should be read in conjunction with section 9 which places a duty on owners of land to use and manage land so as to take proper account of the public rights.

Subsection (1) places a general duty on those exercising the public rights to do so lawfully and reasonably and taking proper account of the rights and interests of others. It implements recommendation 12. See paragraphs 3.24 to 3.28 of the report.

Subsection (2)(a) provides that the public rights are not exercisable where they would interfere with certain exclusive rights. Again, however, this must be read alongside section 9. In practice the effect of the two sections reflects the current approach of the courts. Where there is a conflict between the two rights, private rights will be respected provided the public rights can be exercised in another way. See paragraphs 3.25 to 3.26 of the report.

Subsection 2(b) provides that the public rights cannot be exercised where they are prohibited or restricted by any other enactment. For example, the right to shoot wildfowl in section 4(3) cannot be exercised in contravention of conservation legislation or game laws. See paragraph 3.24 of the report.

## **9. Reciprocal duties of owners**

- (1) It is the duty of the owner of any land in respect of which, or in respect of waters over which, any of the public rights is exercisable—
  - (a) to use and manage the land; and

(b) otherwise to conduct the ownership of it,

in a way which, as respects those rights, is responsible - that is to say, in a way which is lawful and reasonable and takes proper account of the rights and interests of persons exercising or seeking to exercise those rights.

- (2) In particular, the owner of any such land must not do anything, or grant any lease or licence which would enable anyone else to do anything, which would interfere to a material extent with any public right of navigation.
- (3) The owner of any such land must not, for the purpose of, or for the main purpose of, preventing or deterring any person entitled to exercise the right from doing so—
  - (a) put up any sign or notice;
  - (b) erect any obstruction or impediment; or
  - (c) take or fail to take any other action.

#### NOTE

This section, which implements recommendations 13, 14 and 15, places a reciprocal requirement to act responsibly on the owners of land subject to the public rights. See paragraph 3.29 of the report. It is consistent with section 3 of the 2003 Act. By virtue of section 18(1), the owner of the land includes the person who is in natural possession of the land.

Subsection (1) places a general duty on the owners of land to act responsibly. Responsible ownership is defined in the same way as responsible exercise of the public rights in section 8(1). Therefore, land subject to the public rights must be managed responsibly with regard to the public rights. This includes land owned by the Crown; see section 19(2).

Subsections (2) and (3) provide examples of behaviour which would not constitute responsible ownership. Subsection (2) expressly provides that the owner must not take action which would materially interfere with the public right of navigation. This reflects the position at common law. See paragraphs 3.25 to 3.26 of the report.

Subsection (3) prevents owners from doing certain things for the purpose or main purpose of preventing or deterring the exercise of the public rights. Paragraphs 8 to 11 of Schedule 2 give local authorities the power to penalise owners who contravene this subsection.

## **10. Functions of local authorities**

- (1) It is the duty of the local authority to assert and protect the public rights.
- (2) A local authority is not required to do anything in pursuance of the duty imposed by subsection (1) which would be inconsistent with the carrying on of any of the authority's other functions.
- (3) The local authority may, for the purposes set out in subsection (1), institute and defend legal proceedings and generally take such steps as they think expedient.

- (4) The local authority may, in relation to the public rights, make byelaws providing for—
- (a) the responsible exercise of the rights;
  - (b) the responsible use, management or conduct of any land in respect of which, or in respect of waters over which, any of the rights is exercisable;
  - (c) the preservation of public order and safety;
  - (d) the prevention of damage;
  - (e) the prevention of nuisance or danger;
  - (f) the conservation or enhancement of natural or cultural heritage.
- (5) Schedule 2 makes further provision as to the functions of local authorities in relation to the public rights.

#### NOTE

This section confers on local authorities certain powers and duties in relation to the public rights. These are consistent with the powers and duties conferred on local authorities by Chapters 4 and 5 of the 2003 Act in relation to access rights.

Under subsection (1) the local authority has a duty to assert and protect the public rights. This implements recommendation 16. See paragraph 3.31 of the report. This is modified by subsection (2) which provides that this duty does not conflict with the exercise of any other local authority function. Subsection (3) gives the local authority wide powers to take any steps they consider appropriate, including legal proceedings, to fulfil their duty. This implements recommendation 17.

Subsection (4) sets out the local authority's power to make byelaws regulating the exercise of the public rights, the conduct of owners of land in respect of which public rights are exercisable or which are otherwise in the general public interest. Paragraphs 1 to 7 of Schedule 2 set out the procedure for making byelaws. This power reflects a similar power under the 2003 Act in respect of access rights and replaces the powers currently available under sections 120 to 122 of the Civic Government (Scotland) Act 1982 which are repealed by Schedule 4. It implements recommendation 18. See paragraph 3.31 of the report.

Schedule 2 sets out in more detail the powers and duties of the local authorities in relation to the public rights.

### **11. Judicial determination of existence and extent of public rights**

- (1) It is competent, on summary application made to the sheriff, for the sheriff—
- (a) to declare that any land or area of water specified in the application is or, as the case may be, is not land or an area of water in respect of which any of the public rights is exercisable;
  - (b) to declare—

- (i) whether a person who has exercised or purported to exercise any such public right has done so responsibly for the purposes of section 8(1);
  - (ii) whether the owner of land in respect of which, or in respect of waters over which, any of the public rights is exercisable is using, managing or conducting the ownership of the land in a way which is, for the purposes of section 9(1), responsible.
- (2) This section is without prejudice to any remedy otherwise available in respect of the public rights.
- (3) Schedule 3 applies to proceedings under this section.

NOTE

Subsection (1)(a) gives the sheriff jurisdiction to determine on summary application whether or not the land or waters specified in the application are subject to the public rights. Subsection (1)(b) gives the sheriff jurisdiction to determine whether a person has exercised a public right responsibly, as required by section 8(1), or whether the owner of the land has fulfilled his reciprocal obligation to act responsibly under section 9(1). This provides a simplified form of procedure for such actions and is adopted so as to be consistent with section 28 of the 2003 Act relating to access rights. It implements recommendation 21. See paragraphs 3.38 to 3.39 of the report.

Subsection (2) specifically preserves any other judicial remedy available in respect of the public rights. It will still be competent to raise an ordinary action in the sheriff court eg for interdict or an action in the Court of Session.

Schedule 3 makes further provision as to any applications made under this section.

**12. Presumptions as to tidal waters**

- (1) For the purposes of this Act—
- (a) waters are presumed to be tidal to the extent that the relevant Ordnance map indicates the presence of Mean High and Low Water Springs in relation to those waters; and
  - (b) waters are presumed to be non-tidal to the extent that the relevant Ordnance map does not so indicate.
- (2) The presumption under subsection (1) may be rebutted by evidence that, notwithstanding what is shown on the relevant Ordnance map, waters are non-tidal or tidal, as the case may be.
- (3) Where, on the basis of such evidence, a declarator is granted that waters are non-tidal or tidal, as the case may be, the clerk of court must intimate the declarator to the Ordnance Survey and to the Keeper of the Registers of Scotland.
- (4) In this section "the relevant Ordnance map" means the most up to date large-scale Ordnance map for the area.

## NOTE

The public rights conferred by section 5 are exercisable in tidal waters; see the definition of "sea" in section 18(1). This section introduces a rebuttable presumption as to the extent of tidal waters for this purpose. It implements recommendation 2(i). See paragraphs 2.12 to 2.21 of the report. Subsection (1) provides that waters are to be regarded as tidal where the Ordnance Survey map indicates the level of mean high water and mean low water spring tides. Subsection (4) specifies that for this purpose the current large scale Ordnance map is to be used.

Subsection (2) clarifies that the presumption may be rebutted if appropriate evidence is brought before the court. This implements recommendation 2(ii). See paragraphs 2.17-2.19 of the report.

Where a declarator is granted which rebuts the presumption in subsection (1), subsection (3) provides that the Ordnance Survey and the Keeper of the Registers of Scotland are to be notified. This implements recommendation 2(iii). The Ordnance Survey are not under a statutory duty to take any action if the Ordnance map is found to be inaccurate; the notification is for information purposes only. The Keeper is notified on account of his responsibility for the Land Register which is based on the Ordnance map.

### **13. Role of Lord Advocate**

Any duty of the Lord Advocate to defend or uphold public rights in respect of the foreshore, sea, sea bed or inland waters is abolished.

## NOTE

At present, the Crown holds the common law public rights in trust for the public. The Crown, in the person of the Lord Advocate, is in theory the guardian of the common law public rights and protects them. However, this rarely occurs. This section makes clear that the Lord Advocate has no duty to defend or uphold the statutory public rights which replace the common law public rights. It implements recommendation 20. See paragraphs 3.35 to 3.36 of the report.

Local authorities, which by virtue of section 10 are under a duty to assert and protect the public rights, will take over the role of guardian. Any interested person, including the Lord Advocate, is also entitled to obtain a judicial determination of the existence and extent of the public rights under section 11.

### **14. Effect of time**

The public rights are not extinguished by lapse of time or by non-use for any period of time.

## NOTE

This section, which implements recommendation 22, provides that the existence of the public rights, once they are established, is not dependent on their being exercised and therefore will not be extinguished by non-use. It should be read in conjunction with section 17(2) which makes a consequential amendment to Schedule 3 to the Prescription and Limitation (Scotland) Act 1973.

## **15. Effect of physical change**

A public right conferred by sections 4 to 6 lasts only so long as the land or water in question is of the type mentioned in the section conferring the right.

### NOTE

The physical boundaries of land or waters may change through time, either naturally or as a result of human intervention, for example, through deliberate reclamation operations. This section clarifies that the public rights in respect of the shore, foreshore, sea, sea bed and inland waters will automatically be extinguished if the land or waters in question lose their character as such. It implements recommendation 24. See paragraphs 3.45 to 3.49 of the report. Conversely, if land or waters become shore, foreshore, sea, sea bed or inland waters, the public rights will be exercisable on such land or waters by virtue of sections 4 to 6.

## **PART 4**

### **CROFTERS' RIGHTS IN RELATION TO SEAWEED ON THE FORESHORE**

## **16. Crofters' rights to gather seaweed on foreshore**

- (1) Any right of a crofter to gather seaweed on the foreshore under the terms, express or implied, of the tenancy of the croft is to be regarded, unless there is express provision to the contrary, as a right to gather seaweed on the foreshore for the reasonable purposes of the croft, including reasonable operations on any land in which the crofter has, whether alone or in common with others, a right of pasture or grazing.
- (2) Common grazings regulations may not extend or restrict the effect of subsection (1).

### NOTE

Crofters may have a right to gather seaweed on the foreshore under the terms of the tenancy of their croft. Such rights may be express or implied by long usage. There is no general right to take seaweed; see paragraphs 4.1 to 4.5 of the report. Subsection (1) clarifies the extent of the contractual rights. Unless there is express provision to the contrary, a crofter's right to gather seaweed is limited to that required for the reasonable purposes of the croft, ie it cannot be exploited for commercial purposes. This implements recommendation 25. See paragraphs 4.6 to 4.7 of the report. It is consistent with section 52(9) of the Crofters (Scotland) Act 1993 which empowers the Crofters Commission to regulate the use of seaweed on crofts in certain circumstances and specifies that such use must be for the reasonable purposes of the croft. It is also consistent with the general law applicable to pertinent rights; see paragraph 4.6 of the report. Subsection (1) will not affect the crofter's ability to enter into separate agreements to gather seaweed in excess of the rights they may have under the tenancy.

Sections 48 and 49 of the 1993 Act allow regulations to be made for the collection of seaweed on common grazings, ie land to which the crofter may have rights of use. Subsection (2) provides that such regulations do not affect the provisions of subsection (1).



## PART 5

### GENERAL

#### 17. Repeals and amendments

- (1) The enactments mentioned in schedule 4 to this Act are repealed to the extent specified in the second column of that schedule.
- (2) Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 (c.52) is amended by inserting after paragraph (b)—

"(bb) any public right conferred by sections 4 to 6 of the Sea, Shore and Inland Waters (Scotland) Act 2003".
- (3) Section 67(2) of the Civic Government (Scotland) Act 1982 (c.45) is amended by inserting after paragraph (d)—

"(e) anything gathered in the lawful exercise of the right conferred by section 4(1)(d) of the Sea, Shore and Inland Waters (Scotland) Act 2003."
- (4) Section 9(f) of the Land Reform (Scotland) Act is amended by inserting after "land" the words "(other than land in respect of which there are public rights under section 4 of the Sea, Shore and Inland Waters (Scotland) Act 2003)".

#### NOTE

This section makes provision as to the repeal and amendment of other enactments as a consequence of the provisions contained in this Act. The repeals are listed in Schedule 4, as introduced by subsection (1).

Subsection (2), which implements recommendation 23, amends the Prescription and Limitation (Scotland) Act 1973 to clarify that the public rights conferred by Part 2 fall within the list of imprescriptible rights contained in Schedule 3 to that Act. This is a consequential amendment following on from section 14. See paragraphs 3.41 to 3.43 of the report.

Subsection (3) amends section 67(2) of the Civic Government (Scotland) Act 1982 to provide that the duties imposed on the finder of lost or abandoned property by section 67(1) of that Act do not apply to objects which are lawfully beachcombed under section 4(1)(d) of this Bill. By virtue of section 4(5), such objects become the property of the beachcomber.

Subsection (4) amends section 9(f) of the Land Reform (Scotland) Act 2003 to provide that the public can exercise their public rights to be on or cross the shore or foreshore in a motorised vehicle or vessel. At present, the use of such vehicles or vessels under that Act is restricted to the disabled. The existing common law public right to be on or cross the foreshore is not restricted in this way and therefore this subsection ensures that although this right is now derived from the 2003 Act, its extent is not reduced.

## 18. Interpretation

(1) In this Act, unless the context otherwise requires—

"beachcombing" means finding and gathering any driftwood or other inanimate object which—

- (a) has been washed up by the sea;
- (b) would be ownerless but for the rule that otherwise ownerless property belongs to the Crown;
- (c) is of negligible value; and
- (d) is capable of being carried away by the finder without mechanical or other assistance;

"canals" has the same meaning as in Part 1 of the Land Reform (Scotland) Act;

"croft", "crofter" and "common grazings regulations" have the same meanings as in the Crofters (Scotland) Act 1993 (c.44), and "croft" includes any land or right deemed by section 3(4) or (5) of that Act to be a croft or part of a croft;

"cultural heritage" includes structures and other remains resulting from human activity of all periods, traditions, and ways of life and the historic, artistic and literary associations of people, places and landscapes;

"fishing boat" has the same meaning as in section 19(1) of the Sea Fisheries Act 1968 (c.77);

"foreshore" means the land lying between the high and low water marks of ordinary spring tides;

"inland waters" means any inland, non-tidal loch, river (to the extent that it is non-tidal), lake or reservoir, whether natural or artificial and whether navigable or not, and includes the bed and the shores or banks thereof;

"land" includes—

- (a) bridges and other structures built on or over land;
- (b) inland waters;
- (c) canals; and
- (d) any land forming part of the foreshore or sea bed;

"Land Reform (Scotland) Act" means the Land Reform (Scotland) Act 2003 (asp 2);

"local authority" in relation to any specific land or waters in respect of which any of the public rights is or might be exercisable means—

- (a) where the land is, or the waters are, on the day on which this section comes into force, within an area designated as a National Park under the National Parks (Scotland) Act 2000 (asp 10), the National Park authority for that National Park; and

- (b) in any other case, the council (being a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39) whose area includes that land or is adjacent to those waters;

"Ministers" means the Scottish Ministers;

"natural heritage" includes, in relation to land or waters, their flora and fauna, their natural features, and their natural beauty and amenity;

"owner", in relation to land, means—

- (a) the owner of the land; and
- (b) where the owner is not in natural possession of the land, the person who is entitled to such natural possession,

but this definition does not affect the references to owning and ownership in section 1;

"public rights" means the rights conferred by sections 4 to 6;

"sea" means the territorial sea and any tidal waters lying landward of any baseline from which the breadth of the territorial sea adjacent to Scotland is measured;

"sea bed" means the land, not being foreshore, under the sea adjacent to Scotland;

"sea fish" means fish of any description found in the sea, other than fish of the salmon species, and includes shellfish;

"shellfish" includes crustaceans and molluscs of any kind and also includes the shell and any other part, and any developmental stage, of such crustaceans or molluscs;

"shore" means any area of sand, gravel, stones or rock contiguous to, and above or to the landward of, the foreshore;

"statutory undertaker" has the same meaning as in Part 1 of the Land Reform (Scotland) Act;

"territorial sea" is to be construed in accordance with section 1 of the Territorial Sea Act 1987 (c.49) and any provision made, or having effect as if made, under that section;

"wildfowl" means any wild duck or wild goose, or any other wild bird which is commonly shot for food.

- (2) Any rules on when any waters are to be treated as adjacent to Scotland for the purposes of the Scotland Act 1998 (c.46) apply also for the purposes of this Act.

- (3) Where local authority areas are separated by a tidal river, firth or estuary, each such area is regarded as adjacent only to the waters up to the median line of such river, firth or estuary measured from the low water marks of ordinary spring tides.
- (4) Any reference in this Act to purposes of recreation includes a reference to anything done by a person—
  - (a) for the purposes of furthering that person's understanding of the natural or cultural heritage or enabling or assisting other persons to further their understanding of the natural or cultural heritage; or
  - (b) for the purposes of carrying on, commercially or for profit, an activity which the person could carry on otherwise than commercially or for profit.

#### NOTE

This section gives the definition of certain terms used in the Act. In many cases, they are given the same definition as in section 32 of the 2003 Act. Only definitions which require further explanation are mentioned below.

*beachcombing.* This definition has the effect of restricting the right of beachcombing in section 4(1)(d). In particular, it should be noted that only abandoned property which belongs to the Crown may be beachcombed.

*fishing boat.* Orders made under section 7 and byelaws made under section 10 may not interfere with any right to fish for sea fish from or by means of a fishing boat. This is given the same definition as in section 19(1) of the Sea Fisheries Act 1968, ie any vessel for the time being employed in fishing operations or any operations ancillary thereto.

*foreshore.* This definition is a restatement of the existing law. See paragraph 2.8 of the report.

*sea fish.* This is defined as in section 22(2) of the Sea Fisheries (Shellfish) Act 1967.

*shellfish.* This definition includes natural oysters, mussels and other crustaceans of any kind. It also includes the shells of shellfish thus allowing seashells to be gathered on the shore and foreshore under section 4(2)(a).

This Act only applies to waters which are adjacent to Scotland. Subsection (2) applies the same rules for determining when waters are to be treated as adjacent to Scotland as apply in the Scotland Act 1998.

The definition of local authority in subsection (1) includes a council whose area is adjacent to waters in respect of which public rights are exercisable. Subsection (3) prevents more than one local authority having jurisdiction over the same area of water by providing that where local authority areas are separated by a stretch of tidal water, for example, Lothian and Fife separated by the Firth of Forth, the local authority only has jurisdiction up to the median line of the waters as measured from the low water marks of ordinary spring tides on each side. See paragraph 3.33 of the report.

Subsection (4) provides that the public right of recreation in sections 4 and 5 includes being on the land to carry on an educational activity, for example, guides and teachers. It also includes being on the land for limited commercial purposes. Thus, for example, a commercial photographer can be on the shore to take pictures or a professional coach can use the shore to train another person in a sport for a fee. It is consistent with sections 1(3) and (5) of 2003 Act.

**19. Short title, Crown application and commencement**

- (1) This Act may be cited as the Sea, Shore and Inland Waters (Scotland) Act 2003.
- (2) This Act binds the Crown.
- (3) This Act comes into force at the end of the period of three months beginning with the date of Royal Assent.

NOTE

Subsection (1) gives the short title of the Bill. Subsection (2) provides that it applies to the Crown. Subsection (3) provides that it will come into force 3 months after it is given the Royal Assent.

## SCHEDULE 1

### FURTHER PROVISIONS AS TO ORDERS UNDER SECTION 7

*(introduced by section 7)*

#### *Prior consultation and notice*

- 1 Before making an order under section 7 which would have effect for a period of six or more days, the local authority must—
  - (a) consult the Crown Estate Commissioners, the owners of the land or land under the waters to which the order would relate (if that land is not owned by the Crown), and such other persons as they think appropriate; and
  - (b) give public notice of the intended purpose and effect of the proposed order, inviting objections to be sent to them within such reasonable time as is specified in the notice; and must consider any such objections and any other representations made to them.

#### *Role of Ministers*

- 2 An order under section 7 which would have effect for a period of six or more days requires confirmation by Ministers.
- 3 It is the duty of the local authority to send to Ministers—
  - (a) copies of any objections made in response to the invitation under paragraph 1; and
  - (b) any other representations made to them,in relation to an order requiring such confirmation.
- 4 Ministers—
  - (a) must not confirm such an order without considering any objections or representations sent to them under paragraph 3; and
  - (b) may cause an inquiry to be held for the purpose of enabling them to decide whether to confirm the order.
- 5 Subsections (2) to (13) of section 265 (local inquiries) of the Town and Country Planning (Scotland) Act 1997 (c.8) apply to an inquiry held under paragraph 4(b) as they apply to one held under that section.

- 6 Ministers may—
- (a) confirm the order, with or without modifications; or
  - (b) refuse to confirm it.

*Revocation, amendment or re-enactment*

7 The power of a local authority to make an order under section 7 includes a power to revoke, amend or re-enact any such order.

8 Where a revoked, amended or re-enacted order would—

- (a) but for the revocation or amendment; or, as the case may be
- (b) by virtue of the amendment or re-enactment,

have effect for a period of six or more days beginning on or after the date on which it is revoked, amended or re-enacted, paragraphs 1 to 6 apply in relation to the revocation, amendment or, as the case may be, re-enactment.

*Effect of orders*

9 An order under section 7 must not interfere with, and is of no effect to the extent that it purports to interfere with, the exercise of—

- (a) any public right of navigation;
- (b) the functions of a statutory undertaker; or
- (c) any right to fish for sea fish from or by means of a fishing boat.

10 An order under section 7 takes effect—

- (a) where the order does not require to be confirmed by Ministers, from the date on which it is made or such other date as may be specified in it for the purpose; or
- (b) where the order requires to be so confirmed, from such date as is specified in it for the purpose or such other date as Ministers may direct when confirming it.

11 An order under section 7 has effect, subject to the following paragraph—

- (a) for the period of two years beginning on the day on which the order takes effect;

- (b) where the order specifies that it is to cease to have effect after such shorter period as may be specified in the order, for that shorter period; or
  - (c) where the order is revoked with effect from a day which falls before the end of that period or, as the case may be, that shorter period, until that day.
- 12 If, at any time before an order under section 7 ceases to have effect, the local authority which made the order re-enacts it, the order continues to have effect after that time as if it were a new order which takes effect from the date when the order would otherwise have ceased to have effect.

#### NOTE

Schedule 1 makes further provisions as to the making of orders under section 7 exempting a particular area of the sea or sea bed from the public rights. See paragraph 3.32 of the report.

Paragraphs 1 to 6 set out the procedure for making the orders. This is consistent with sections 11(2) to (7) of the 2003 Act. In particular, it should be noted that where the order will have effect for 6 or more days, paragraph 1 requires local authorities to consult the Crown Estate Commissioners, or where the owner of the land or land under the waters in question is not the Crown, the owner of the land.

Paragraphs 7 and 8 give local authorities the power to revoke, amend or re-enact orders. The procedure set out in paragraphs 1 to 6 will apply to such orders if they have effect for 6 or more days. This is consistent with sections 11(10) and (11) of the 2003 Act.

Orders made under section 7 may not interfere with the statutory public rights of navigation or commercial fishing, or with any of the functions of a statutory undertaker; see paragraph 9.

Paragraphs 10 to 12 set out when and for how long orders have effect. This is consistent with sections 11(8), (12) and (13) of the 2003 Act.



## SCHEDULE 2

### FURTHER PROVISIONS AS TO FUNCTIONS OF LOCAL AUTHORITIES

*(introduced by section 10)*

#### *Byelaws*

- 1 Byelaws made under section 10 may, in particular,—
  - (a) prohibit, restrict or regulate the exercise of any of the public rights;
  - (b) facilitate the exercise of any of the public rights;
  - (c) so as to protect or further the interests of persons who are exercising or who might exercise any of the public rights, prohibit or regulate—
    - (i) the use of vehicles or vessels;
    - (ii) the taking place of sporting or recreational activities;
    - (iii) the conduct of any trade or business;
    - (iv) the depositing or leaving of rubbish or litter; and
    - (v) the lighting of fires and the doing of anything likely to cause a fire,on the land or waters in respect of which the public rights are exercisable.
- 2 Byelaws made under section 10 must not interfere with, and are of no effect to the extent that they purport to interfere with, the exercise of—
  - (a) any public right of way or navigation;
  - (b) the functions of a statutory undertaker; or
  - (c) any right to fish for sea fish from or by means of a fishing boat.
- 3 Sections 202 to 204 (byelaws) of the Local Government (Scotland) Act 1973 (c.65) apply to byelaws made under section 7 as they apply to byelaws made under that Act, but with the following modifications and further provisions.
- 4 The references to one month in subsections (4), (5) and (7) of section 202 are to be read as references to such period of not less than 12 weeks as the local authority may determine.
- 5 The local authority must, at the same time as they first make the proposed byelaws open to public inspection, consult the persons and bodies mentioned in paragraph 6 on the proposed byelaws.

- 6 Those persons and bodies are—
- (a) every community council whose area includes an area to which, or to waters adjacent to which, the proposed byelaws would apply;
  - (b) the owners of land to which, or to waters over which, the proposed byelaws would apply;
  - (c) such persons as appear to them to be representative of the interests of those who live, work, carry on business or engage in recreational activities on any land or waters affected by the proposed byelaws;
  - (d) where the proposed byelaws relate to land in respect of which access rights under the Land Reform (Scotland) Act are exercisable, the local access forum established under that Act;
  - (e) where the proposed byelaws relate in whole or in part to the sea, the Crown Estate Commissioners;
  - (f) every statutory undertaker which carries on its undertaking on land to which the proposed byelaws would apply;
  - (g) Scottish Natural Heritage; and
  - (h) such other persons as they think fit.
- 7 The local authority are, for the purposes of paragraph 5, to be taken as having consulted a person of whom or a body of which they have no knowledge or whom or which they cannot find if they have taken reasonable measures to ascertain whether the person or body exists or, as the case may be, the person's or body's whereabouts.

*Powers in relation to signs, obstructions and impediments*

8 Where the local authority consider that anything has been done in contravention of section 9(3) they may, by written notice served on the owner of the land, require that any offending sign or notice be removed or that such other remedial action as is specified in the notice be taken by the owner of the land within such reasonable time as is so specified.

9 If the owner fails to comply with such a notice, the local authority may—

- (a) remove the offending sign or notice; or
- (b) take any other remedial action specified in the notice served under paragraph 8,

and, in either case, may recover from the owner such reasonable costs as they have incurred by acting under this paragraph.

- 10 An owner on whom a notice has been so served may, by summary application made to the sheriff, appeal against it.
- 11 Rules of Court are to provide—
- (a) for public notice of the making of summary applications for the purposes of paragraph 10;
  - (b) for enabling persons interested in the exercise of any of the public rights in respect of the land, or waters over the land, to which the application relates, and persons or bodies representative of such persons, to be parties to the proceedings;
  - (c) for limiting the number of persons and bodies who may be such parties.

*Measures for safety, protection, guidance and assistance*

- 12 The local authority may take such steps (which may include the putting up and maintenance of notices and fences) as appear to them appropriate—
- (a) to warn the public of and protect the public from danger on any land or waters in respect of which any of the public rights is exercisable;
  - (b) to indicate or give directions to, any land or waters in respect of which any of the public rights is exercisable; or
  - (c) where it is for the general public benefit, to enclose any land or waters in respect of which any of the public rights is exercisable but not so as to interfere with any public right of navigation or any right to fish for sea fish from or by means of a fishing boat.
- 13 Where the local authority consider that any fence, wall, jetty, pier or other erection is so constructed as to be likely to injure a person exercising any of the public rights, they may by written notice served on the owner of the land on which it is placed, require the owner to take within such reasonable time as is specified in the notice, such reasonable action as is so specified, being action calculated to remove the risk of injury.
- 14 Paragraphs 9(b), 10 and 11 of this schedule apply in respect of a notice served under paragraph 13 as they apply to a notice served under paragraph 8.
- 15 The local authority may install and maintain, on any land in respect of which, or in respect of waters over which, any of the public rights is exercisable, car parks, picnic tables, gates, stiles, moorings, launching sites, jetties, slipways, diving platforms or other means of facilitating the exercise of these rights, and seats, lavatories and other means of contributing to the comfort and convenience of persons exercising them.
- 16 The local authority may, in relation to any waters in respect of which any of the public rights is exercisable, provide staff for life saving and any boats or equipment which are appropriate for life saving.

- 17 In exercising their powers under paragraphs 12 to 16 the local authority must have regard—
- (a) to the extent to which there are existing facilities in their area for the purposes of assisting persons to exercise the public rights; and
  - (b) to the needs of persons with disabilities.
- 18 The local authority may carry out the operations authorised by paragraphs 12(c), 15 and 16 within the land in respect of which, or in respect of waters over which, the public right is exercisable only with the consent of the owner.

*Acquisition by local authority of land to enable or facilitate the exercise of the public rights*

- 19 Where it appears to the local authority to be necessary or expedient for the purpose of enabling or facilitating the exercise of any of the public rights in respect of any land, or in respect of the waters over or adjacent to any land, the authority may—
- (a) acquire the land by agreement (whether by purchase, lease or excambion); or
  - (b) with the consent of Ministers, acquire it compulsorily.
- 20 Paragraph 19 does not extend to land in respect of which public rights may not be exercised by virtue of an order made under section 7.
- 21 A local authority must hold and manage any land acquired by them under paragraph 19 so as best to facilitate the exercise of the public rights.
- 22 The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) applies in relation to a compulsory purchase under paragraph 19 as if that paragraph had been in force immediately before that Act.

*Power of entry*

- 23 Any person authorised by the local authority to do so may enter any land, or go on to waters over any land, for a purpose connected with the exercise or proposed exercise of any of the authority's functions under this Act.
- 24 Except in a case of emergency, a person so authorised may enter land, or go on to waters over land, only—
- (a) at a reasonable time; and
  - (b) on giving reasonable notice to the owner of the land.
- 25 A person may, on entering any land, or going on to any waters, by virtue of paragraph 23 take on to the land or waters any machinery, other equipment or materials required for the purpose for which the power of entry is being exercised.

## *Guidance*

- 26 Ministers may give guidance to local authorities on the performance of any of their functions under this Act.
- 27 Such guidance may be given generally or to a particular local authority.
- 28 A local authority to which guidance is given must have regard to it.
- 29 Before giving such guidance, the Ministers must—
- (a) consult the local authority, or each local authority, to whom they propose to give it; and
  - (b) lay a draft of the proposed guidance before the Scottish Parliament;
- and the guidance must not be given until after a period of 40 days beginning with the day on which the draft was so laid.
- 30 If, within that period, the Parliament resolves that the guidance proposed should not be given, Ministers must not give it.
- 31 In calculating any period of 40 days for the purposes of paragraphs 29 or 30, no account is to be taken of any time during which the Parliament is dissolved or is in recess for more than 4 days.

### NOTE

Schedule 2 makes further provisions as to the functions of local authorities in fulfilling their duty under section 10(1) to assert and protect the statutory public rights.

Paragraphs 1 to 7 set out the procedure for making byelaws under section 10(4). This is consistent with sections 12(2) to (8) of the 2003 Act. This procedure replaces that presently available under sections 120 to 122 of the Civic Government (Scotland) Act 1982. See paragraph 3.31 of the report.

Paragraph 1 provides that byelaws made under section 10 may prohibit, restrict, regulate or facilitate the exercise of the statutory public rights or prohibit or regulate certain activities which may affect the exercise of the statutory public rights. It should be noted that byelaws may not interfere with the statutory public rights of navigation or commercial fishing, or with any of the functions of a statutory undertaker; see paragraph 2. Local authorities are required to undertake proper consultation prior to making the byelaws; see paragraphs 3 to 7. In particular they are under a duty to consult the Crown Estate Commissioners where the proposed byelaws relate to the sea and the local access forum established by the 2003 Act where the proposed byelaws relate to land in respect of which access rights are exercisable.

Paragraphs 8 to 11 give local authorities certain powers to take remedial action against landowners who have contravened section 9(3), ie who have attempted to prevent or deter the exercise of the statutory public rights by putting up signs, obstructions or impediments. This is consistent with section 14 of the 2003 Act.

Paragraphs 12 to 18 enable local authorities to take certain measures for the safety, protection, guidance and assistance of those exercising the statutory public rights. This is consistent with section 15 of the 2003 Act. Paragraph 12(c) gives local authorities the power to enclose any land or waters in respect of which any statutory public rights are exercisable, for example to provide for a

natural swimming pool. However, such power can only be exercised with the consent of the owner; see paragraph 18. In addition it must be exercised for the general public benefit and must not interfere with the statutory public rights of navigation or commercial fishing. Paragraph 13 enables local authorities to require landowners to take remedial action in respect of structures posing a danger to persons exercising their statutory public rights. With the consent of the owner, local authorities may also install and maintain facilities relating to the public rights; see paragraphs 15, 16 and 18.

Paragraphs 19 to 22 enable local authorities to acquire land, either by agreement or compulsorily with the consent of Ministers, in order to enable or facilitate the exercise of the public rights. The statutory procedures governing the compulsory purchase of land in Scotland apply to any compulsory acquisition of land under this Act. This is consistent with section 16 of the 2003 Act.

Paragraphs 23 to 25 provide powers of entry to persons carrying out any of the local authority functions under this Act. This is consistent with section 26 of the 2003 Act.

Paragraphs 26 to 31 enable Ministers to give guidance to local authorities, either generally or to a particular local authority, on how to exercise any of their functions under the Act. The proposed guidance is subject to negative resolution procedure. Local authorities must have regard to any such guidance. This is consistent with section 27 of the 2003 Act.

## SCHEDULE 3

*(introduced by section 11)*

### FURTHER PROVISIONS AS TO JUDICIAL PROCEEDINGS

- 1 The proceedings for a declarator under section 11 are to take the form of proceedings for an action of declarator initiated by summary application to the sheriff.
- 2 A summary application for such a declarator is to be served on such of the following persons as is not the applicant—
  - (a) the owner of the land in question;
  - (b) the owner of any contiguous land likely to be affected by the declarator;
  - (c) the local authority; and
  - (d) where the application relates in whole or in part to the sea, the Crown Estate Commissioners.
- 3 Any person on whom the application is served is entitled to be a party to the proceedings for a declarator.
- 4 Rules of Court are to provide—
  - (a) for the circumstances in which (including any time periods within which) a summary application may be made for the purposes of section 11.
  - (b) for public notice of the making of a summary application for the purposes of section 11;
  - (c) for enabling persons interested in the exercise of any of the public rights in respect of the land, or waters over the land, to which the application relates, and persons or bodies representative of such persons, to be parties to the proceedings;
  - (d) for limiting the number of persons and bodies who may be such parties.

#### NOTE

Schedule 3 makes further provisions as to judicial proceedings under section 11 (judicial determination of the existence and extent of the public rights). See paragraphs 3.38 to 3.39 of the report. It is consistent with section 28 of the 2003 Act. Summary applications must be served on the Crown Estate Commissioners where the application relates in whole or in part to the sea and on the owner of any contiguous land likely to be affected by the declarator; see paragraph 2. All parties on whom the application is served have the opportunity to become parties to the action; see paragraph 3. By virtue of paragraph 4, Rules of Court are to supplement the proceedings governing such actions.

## SCHEDULE 4

*(introduced by section 17)*

### REPEALS

Enactment	Extent of Repeal
The Civic Government (Scotland) Act 1982 (c.45)	Sections 120 to 122.
The Local Government etc. (Scotland) Act 1994 (c.39)	Section 141.
The Land Reform (Scotland) Act 2003	Section 5(4).

### NOTE

Schedule 4 lists the repeals of other enactments required as a consequence of the provisions contained in this Act.

Sections 120 to 122 of the Civic Government (Scotland) Act 1982, as amended by the Local Government etc. (Scotland) Act 1994, give local authorities the power to make byelaws in respect of the seashore and adjacent waters. These powers are no longer required because of the more extensive powers to make byelaws conferred on local authorities by virtue of section 10(4).

Section 5(4) of the Land Reform (Scotland) Act 2003 provides that the existence or exercise of access rights does not diminish or displace any public rights under the guardianship of the Crown in relation to the foreshore. By virtue of section 3(b) of this Act, the public rights under the guardianship of the Crown in respect of the foreshore are abolished and replaced by the new statutory rights. Section 5(4) is therefore no longer required and is repealed.



# Appendix B

## List of those who Submitted Written Comments on Discussion Paper No 113

Anderson & Goodlad, Solicitors  
Mr Richard Anderson  
Association of Scottish Shellfish Growers  
Mr Michael Barton  
Mr J Bell  
Mrs Margaret Bennett  
British Association for Shooting and Conservation  
British Mountaineering Council  
British Ports Association  
Councillor John Flett Brown  
Bute Berthing Company  
Caledonian MacBrayne  
Centre for Research into Law Reform, University of Glasgow, School of Law  
P J L Corser  
Cove Harbour Conservation Limited  
Crofters Commission  
Cromarty Firth Port Authority  
Crown Estate  
Mr Graeme Dalby  
Mr Hamish Doull  
Elie and the Royal Burgh of Earlsferry Community Council  
Faculty of Advocates  
Mrs Margaret Flaws  
Forth Yacht Clubs Association  
Gardenstown Harbour Trustees  
Mr Jeremy Godwin  
Professor W M Gordon  
Mr Bruce Gorie  
Mr John Groat  
Mr John Harper  
Highland Council  
Ms Ann Hourston  
Mr T P Hughes  
Mrs R Joy  
Lands Tribunal for Scotland  
Law Society of Scotland  
Lerwick Port Authority  
MacArthur Stewart, Solicitors  
MacPhee & Partners, Solicitors  
Dr Geoffrey Marston, Sidney Sussex College, Cambridge  
Mr John Maxwell  
Mr David McGill  
Mr Derek J McGlashan, Department of Geography, University of Dundee  
Mr James Forbes McIlraith

Mr J Malcolm McMillan  
Mr John Meil  
Mountaineering Council of Scotland  
National Trust for Scotland  
Oban Community Council  
Orkney Islands Council  
Mr Claude Peace  
Ramblers Association  
Registers of Scotland  
Professor Colin T Reid  
Dr G L Riddington  
S & J D Robertson Group Ltd  
Mr Richard Rowland and Ms Dorota Rychlik  
Royal Institution of Chartered Surveyors  
Councillor Eoin Scott  
Scottish Canoe Association  
Scottish Coastal Forum  
Scottish Crofters Union  
Scottish Environment Protection Agency  
Scottish Executive Development Department, Transport Division 4  
Scottish Land Court  
Scottish Landowners' Federation  
Scottish Law Agents Society  
Scottish Natural Heritage  
Scottish Quality Salmon  
Scottish Rights of Way and Access Society  
Councillor Len Scoullar JP  
Scrabster Harbour Trust  
Shetland Islands Council  
Stornoway Pier and Harbour Commission  
Mr Roy Surtees  
Tarbert (Loch Fyne) Harbour Authority  
Ms Nan Traill Thomson  
United Kingdom Hydrographic Office  
Rev Dr Colin Wicker