ENVIRONMENTAL CRIME AND JUSTICE

ALSO

Albie Sachs and Andrew Coyle on prisoner voting
Interview with former Cabinet Secretary for Justice Kenny MacAskill MSP
IT TOOK JUST A WEEK. On the lumpy grey water of a Scottish west coast sea loch, the skipper of a twin-rigged trawler towed weighted nets across the seabed for prawns for six days. As a result, two fishermen, fishing in the same area for the same prawns, lost several thousand pounds worth of gear: creel pots, buoys and ropes snagged in the trawler's net and towed away, most probably to 'ghost fish' for over a year. Within months the two creel fishermen decided not to replace their gear and soon gave up fishing, and so in a village that in recent memory supported over a dozen local boats, only five now remain. No-one was prosecuted or compensated for what happened.

This is not an isolated incident. 300 fishermen responding to a recent survey, the first of its kind in Scotland, collectively declared annual financial costs amounting to £1.2m as a result of what is known within the industry as ‘gear conflict’ (Riddington et al., 2015).

Inshore complexity

It’s a complicated problem. Fishermen are competing for space and often for the same target species. Scotland’s inshore waters (0-12 nautical miles) are fished using many different gear types. ‘Mobile’ fishermen, such as demersal whitefish trawlers, prawn trawlers and scallop dredgers, use gear that is actively moved across the seabed or through the water column. ‘Static’ fishermen use gear such as shellfish pots, creels or baited lines deployed in fixed positions on the seafloor.

Over two-thirds of the 2,020 active fishing boats in Scotland are small boats (under 10m in length) and the majority (88%) of these deploy static methods of fishing (Scottish Government, 2014). However, the mobile fleet accounts for the majority of fishing power. With fewer boats Scotland’s mobile fleet catches many times the volume of prawns landed by static fishermen although much is of unmarketable size and discarded; creel-caught prawns command a higher market value. Nonetheless ‘gear conflict’ takes a variety of forms. Although the majority of reported incidents in 2012 were ‘mobiles’ damaging ‘static’ gear (58%), some of the damage was caused by static-on-static (21%) or static-on-mobile (16%) conflict. The conflict ranges from accidental snagging of gear that forces fishermen to damage nets and ropes when disentangling, to accusations of deliberate vandalism, such as mobile boats raking through areas already known to contain fixed creels to access scallop beds and areas rich in prawn burrows.

In the past 30 years there has not been a single successful prosecution for actions relating to gear conflict

Limits of the criminal law

This conflict has affected the Scottish inshore fishery for decades and yet successive administrations have failed to resolve it: in the past 30 years there has not been a single successful prosecution for actions relating to gear conflict.

One reason is that gear conflict is not a fisheries offence. The best-known fisheries crimes, such as the notorious ‘blackfish’ cases (successfully prosecuted in 2012), involved breaches of well-drafted fisheries legislation designed to prohibit landings of non-quota fish. It enabled Marine Scotland Compliance, the government agency responsible for fisheries enforcement, to pursue those fiddling the supply chain, including one processor that siphoned off £47m of illegal profits (HMA v Shetland Catch Ltd, 2012). Although Fishing Orders penalties are limited, the elaborate scams involved such large sums that further fines and confiscation orders were issued under the Proceeds of Crime (Scotland) Act 1995.

Gear conflict cases are different. Deliberate damage to fishing gear - vandalism and theft - are common law crimes, not fisheries offences, so redress must be sought via Police Scotland. Eye-witness accounts from different positions on the shore are
difficult to corroborate and there is no statutory provision for a strict liability offence that covers the range of actions that lead to damage of fishing gear. Non-specialist investigating officers do not have the expertise and resources to gather admissible evidence for a watertight case. In the majority of reported incidents, the Procurator Fiscal has no choice but to drop proceedings. The very few cases that do progress to court have faltered due to insufficient evidence or deficiency of knowledge about fishing in Scottish summary courts.

Not only do potential victims consequently have little confidence in the court system, there is anecdotal evidence of ‘under-reporting’ due to a culture of intimidation. In smaller coastal communities where people know each other’s business, the prospect of visible police enquiries at the quayside can be enough to dissuade some from reporting. The author is aware of instances where fishermen have chosen not to report an incident, fearing retaliatory acts of gear vandalism.

**Taking a more civil route?**

The Scottish Government established a Gear Conflict Task Force in 2013: recommendations include exploring vessel tracking technologies; targeted surveillance and time or spatial management in gear conflict black spots; and to consider voluntary codes of practice being integrated into the fisheries licensing system (Scottish Government, 2014a). The devil will be in the delivery detail: licensing routes could lead to a three-strikes-and-out approach to infringements, with complainants accepting the ruling of an internal panel judging incidents on a balance-of-probabilities test, as compared to proof ‘beyond reasonable doubt’ in criminal courts. Powers of Marine Scotland Compliance to temporarily revoke access to fishing grounds would likely have a strong deterrent effect. Provisions under the Inshore Fisheries (Scotland) Act 1984 could deliver more straightforward closures. In any event, these solutions would start to “bring the matter within the scope of Marine Scotland’s enforcement and compliance remit” and start plugging the justice system’s competency gap.

With just three fishery protection vessels and two aircraft, it remains to be seen whether the Scottish Government is able to collect evidence required to meet even civil standards of proof. Consideration of innovative technologies will be vital to the enforcement of any spatial management proposed.

The report contends that any solutions should be proportionate to the scale of the problems being experienced. This is a valuable observation, because the extent of the problem is simply not known. There has been no systematic attempt to record instances of gear conflict anywhere in Europe (Kaiser, 2014), and the Scottish survey’s low response rate leaves it susceptible to criticisms of response-bias.

Furthermore, the problem has been assessed in a very basic way, with no analysis of the impact such conflict (and in all probability crime) is having on the health of already low-margin businesses, or indeed the local economies in which they operate. Fishermen invest a significant proportion of their outlays in gear and are unable to insure it against theft or damage, so when gear is lost, without reparative damages through the court, the cost is borne directly by operators.

A few boats going out of business can have cascade effects for a whole community. Tackling the problems identified by the task force’s report could therefore be more urgent than currently assumed. Gear conflict can no longer be treated as a ‘neighbourhood dispute.’

**The bigger picture**

The taskforce also recommends that Marine Scotland should “not look at gear conflict in isolation.” Gear conflict is a symptom of a much bigger problem: the management and underlying health of the inshore fishery. Once booming with mixed whitefish stocks, the inshore fishery is now prosecuted mainly for its shellfish - the scallops and prawns which are targeted by both static and mobile methods. Amidst debate about the multiple causes of the whitefish decline, few deny that fishing itself played a contributing role.

Towing heavy, bottom-weighted nets and toothed rakes along the seabed has undoubtedly damaged seabed habitats that sustain all fishermen. One consequence is that creel fishing has moved further out and trawling has moved further in creating more competition for ground.

Encouragingly, damage to the seabed is increasingly recognised as a problem. Later this year activities that once constituted legitimate fishing activity will become illegal in certain Marine Protected Areas (MPAs). Under the Marine (Scotland) Act 2010, Scottish Ministers have a duty to use MPAs to protect marine features, including seabed habitats, from pressures such as mobile fishing gear. Fishermen, the majority of whom recognise the need to look after the seabed, have been cautiously supportive of these conservation measures.

Yet MPAs are no substitute for fisheries management measures: some fishermen are concerned that MPAs may displace fishing and increase gear conflict elsewhere. A more fundamental revision of management involving spatial separation, as practiced in equivalent Scandinavian countries, is therefore likely required to properly tackle gear conflict.

The Lord Advocate has in the past urged for careful consideration of the public interest when pressed on gear conflict. The real ‘crime’ in Scotland’s fisheries will be to allow the status quo to prevail.

**Nick Underdown** is marine policy and engagement officer for Scottish Environment Link. Any opinions expressed or implied are not those of his employers or member organisations.