

The Scottish Parliament  
Pàrlamaid na h-Alba

## **Rural Affairs and Environment Committee**

**11th Report, 2009 (Session 3)**

**Stage 1 Report on the Marine  
(Scotland) Bill**

**Volume 1: Report**

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(Scotland) Bill**

**Volume 1: Report**

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## Rural Affairs and Environment Committee

### 11th Report, 2009 (Session 3)

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The Scottish Parliament  
Pàrlamaid na h-Alba

## **Rural Affairs and Environment Committee**

### **Remit and membership**

#### **Remit:**

To consider and report on agriculture, fisheries and rural development and other matters falling within the responsibility of the Cabinet Secretary for Rural Affairs and the Environment.

#### **Membership:**

Karen Gillon  
Liam McArthur  
Alasdair Morgan  
Elaine Murray  
Peter Peacock  
John Scott (Deputy Convener)  
Maureen Watt (Convener)  
Bill Wilson

#### **Committee Clerking Team:**

##### **Clerk to the Committee**

Peter McGrath

##### **Senior Assistant Clerk**

Roz Wheeler

##### **Assistant Clerk**

Lori Gray





The Scottish Parliament  
Pàrlamaid na h-Alba

## **Rural Affairs and Environment Committee**

**11th Report, 2009 (Session 3)**

### **Stage 1 Report on the Marine (Scotland) Bill**

#### **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

The Committee reports to the Parliament as follows—

#### **General principles of the Bill**

The Committee welcomes the general principles of the Bill as we consider that it will, if implemented following adequate consultation and resourcing, help improve the governance and sustainability of Scotland's seas. (Paragraph 41)

#### **Marine Scotland**

The Committee invites the Cabinet Secretary to clarify the reasons for establishing Marine Scotland as a Scottish Government directorate rather than proposing in the Bill to establish it as a statutory body, at arms length from the Scottish Government. The Committee also invites the Minister to explain what governance arrangements he proposes to put in place in order to ensure the independence of scientific advice provided to the Scottish Ministers as to the exercise of their functions under the Bill. (Paragraph 14)

#### **Policy memorandum**

The Committee invites the Cabinet Secretary to note our observations on the lack of detail or proper discussion in parts of the policy memorandum. (Paragraph 37)

#### **The state of Scotland's seas**

The Committee invites the Cabinet Secretary to clarify whether he considers current enforcement provisions on marine littering are sufficiently robust, and whether he considers there are sufficient resources for them to be applied effectively. (Paragraph 50)

The Committee recommends that the Bill place a duty on the Scottish Ministers and all relevant public bodies, when exercising functions, to have regard to the

need to maintain and improve the health of the Scottish marine area. We recognise that, were this duty to be inserted into the Bill, there would be a need to provide indicators, whether in subordinate legislation or through guidance, as to the factors that constitute a healthy marine environment. The Marine Strategy Framework Directive, which sets out indicators of “good environmental status”, may provide some pointers. (Paragraph 55)

### **Shellfish industry concerns**

The Committee invites the Cabinet Secretary to note industry concerns as to the status of the pacific oyster in the course of preparing the forthcoming Bill on wildlife and the natural environment. (Paragraph 57)

The Committee would encourage the Cabinet Secretary and SEPA to continue to engage in dialogue with the Scottish shellfish growers’ industry as to the latter’s concerns over the replacement of the Shellfish Waters Directive in 2013. We invite the Cabinet Secretary to press for clarification from the European Commission as to whether there will be any diminution in the legal protection afforded to growers once the new regime under the Water Framework Directive is in place, and to indicate whether he would do so before Stage 2. (Paragraph 63)

### **The Scottish marine area and the meaning of “sea”**

The Committee is content with the definitions used in Part 1. (Paragraph 65)

### **The national marine plan**

The Committee suggests that it would reflect the national, and indeed international, importance of climate change mitigation and adaptation if it were expressly included in the list of objectives in section 3(3) that a national marine plan may set out. (Paragraph 80)

The Committee recommends that the Bill expressly sets out a minimum time period for Parliamentary consideration of a draft national marine plan. The Committee proposes that this be set at 40 sitting days. (Paragraph 82)

### **Marine planning partnerships**

The Committee largely supports the flexible approach to the membership and governance of marine planning partnerships proposed in the Bill. (Paragraph 104)

The Committee considers that MPPs should be diverse bodies, drawing their membership from a wide selection of local stakeholders, and should not be dominated by narrow sectoral interests. It follows that we find it almost impossible to envisage circumstances where a single public authority would be an appropriate “partnership” and suggest that the provision enabling this to happen be removed from the Bill. (Paragraph 105)

On the other hand, the Committee would make the practical observation that any policy-determining body with too large a membership risks being unwieldy and may lack the momentum to drive through timeous agreement of a marine plan. As this may mean that not every local stakeholder group that wants to be on an MPP will end up being on one, Marine Scotland should consider drawing up good practice guidelines on ensuring that views can be fed in to MPPs in other ways. The forums held by advisory groups for river basin management planning appear to be one possible approach to follow. (Paragraph 106)

The Committee supports each individual MPP having discretion to determine its own working practices. However approaches should not be so flexible as to lead to national objectives being unrealised or good practice not being shared. To that end, the Committee considers that Marine Scotland's experience and expertise will be crucial for the effective running of all MPPs. The Committee would expect that Marine Scotland would take the lead role in administering MPPs. (Paragraph 107)

The Committee also expects that it would be a Marine Scotland representative who would chair most MPPs, although there may be instances where it would be more appropriate for the representative of a locally-based organisation (most obviously a local authority) to take the chair. In all cases, however, the Committee considers that it should be for the Cabinet Secretary to appoint the chair of an MPP. (Paragraph 108)

### **Conformity between the national marine plan and regional plans**

The Committee invites the Cabinet Secretary to consider concerns that the requirement in section 3(5) that regional marine plans conform to the national plan "unless relevant considerations indicate otherwise" is broad, and that "relevant considerations" should be defined in the Bill or explained in guidelines. (Paragraph 109)

### **Marine region boundaries**

The Committee expects that the Scottish Ministers will consult widely, including with the Parliament, before designating Scottish marine regions under section 3(4). (Paragraph 115)

The Committee supports the principle of taking an ecosystem-based approach to designation but recognises that the waters surrounding Scotland cannot be broken down into discrete clearly-defined ecosystems, and that accordingly it is legitimate to take other considerations into account. (Paragraph 116)

We consider that there is a reasonably clear-cut case for the major firths and for the seas surrounding Orkney, Shetland and the Western Isles to be considered discrete marine regions. Making the major firths marine regions would also have the advantage of enabling a partial integration of river basin management plans and regional marine plans. (Paragraph 117)

The Committee considers that the case for treating the Solway Firth, as much as is practicable, as a single area for marine planning purposes is clear. Major planning decisions about matters such as sites for renewable energy projects should always

be taken having regard to stakeholder views on both sides of the Firth, and the necessary legal or administrative arrangements should be in place to ensure that this is the case. (Paragraph 123)

The Committee recognises that the Marine (Scotland) Bill cannot, of itself, produce a solution. There should be action at a UK level too and we hope that the UK Bill will not be enacted in such a way as to place obstacles in the way of effective cross-border working in the Solway area. The Committee seeks assurances from the Cabinet Secretary that he has made representations to his UK counterpart to this effect. (Paragraph 124)

### **Appeals against marine plans**

The Committee notes that, whilst a marine plan will be an important document, it will not impose justiciable rights or duties on persons. In particular, the Bill will enable public authorities, exceptionally, to depart from marine plans in making decisions affecting the marine environment. The Committee is therefore reasonably satisfied with the restriction of appeals against a marine plan to technical objections to the plan. This does however underline the importance of plans being properly consulted upon, with all stakeholders, including the Scottish Parliament, having adequate opportunity to consider proposals before the Scottish Ministers sign any plan off. (Paragraph 130)

### **Marine planning and the complexity of the current law**

The Committee notes that the Bill will not create a hierarchy of legal rights and duties, but hopes that the marine planning process will put legal rights and duties within a particular marine area in context enabling stakeholders to make more informed decisions about the use of the marine environment. (Paragraph 141)

However, the Committee invites the Cabinet Secretary to note witnesses' concerns that the law of the sea has become too complex, and to investigate whether this can be addressed, for instance through consolidation or codification of legal rights and duties, or through instructing Marine Scotland to provide guidance on the lawful use of the sea tailored to particular stakeholder groups. In doing so, the Committee recognises that much of the law emanates from international sources over which the Scottish Government has no direct control. (Paragraph 142)

### **Marine planning, integrated coastal zone management, and inshore fisheries groups**

The Committee supports the application of relevant principles of integrated coastal zone management to marine planning and notes that the role of ICZM groups will evolve and possibly reduce following implementation of the Bill and the establishment of marine planning partnerships. (Paragraph 149)

The Committee recognises the need for effective local management of inshore fisheries. We note that inshore fisheries groups are new bodies that need more time to settle into their role. However, the Committee considers that there is a strong case for re-examining the role, membership, or indeed existence of IFGs in

around three or four years' time, once the Bill, if enacted, is being implemented and marine planning partnerships have been set up, and once any reforms arising from the European Commission's green paper on reform of the common fisheries policy have become clear. Until this re-examination takes place, it is vital that there be effective co-operation between IFGs and MPPs. (Paragraph 150)

### **Relationship between marine planning and decisions by public authorities**

The Committee considers that section 11 is one of the key provisions of the Bill since it is the link between marine planning and the taking of decisions by public authorities. It is therefore important that its meaning is properly understood. The Committee does not object in principle to a policy of allowing public authorities – exceptionally – to take a decision that is not in accordance with a marine plan. However more clarity and certainty is needed as to the circumstances where this would be permissible than is provided by the phrase “unless relevant considerations indicate otherwise”. The Committee recommends that the Bill make provision for the Scottish Ministers to issue guidance as to what would amount to “relevant considerations” permitting a public authority to depart from a marine plan. (Paragraph 153)

### **Marine licensing and simplification**

The Committee notes that a number of stakeholders are not persuaded that the Bill will lead to a simplification of the marine licensing system. Whether the problem has simply been a failure to communicate the effect of Part 3 clearly is not apparent. If the Government considers that the Bill will enable an integrated approach to marine licensing, including the likelihood of a “one stop shop”, there is a need for the Cabinet Secretary to state the case more clearly. (Paragraph 165)

The Committee also seeks clarification that the combined effect of sections 16 and 17 will neither create a legal overlap, where both Marine Scotland and another body have the right to authorise the same type of marine activity, nor create uncertainty as to the legal status of pre-existing authorisation powers apparently superseded by sections 16 and 17 but not expressly repealed. (Paragraph 166)

### **Marine licensing and decommissioning**

The Committee considers that a rigorous approach to decommissioning based on leaving the sea bed in as close to its original state as possible should continue to be the norm. However, Marine Scotland should avoid taking an inflexible approach, if that were, for example, to prevent research into the effect of artificial reefs on marine biodiversity. In particular, the Committee notes that the creation of a Demonstration and Research Marine Protected Area around a marine structure could amount to a potential “win-win” situation for industry, science, and conservation. In this connection, the Committee notes section 23 of the Bill which would enable the Scottish Ministers to vary an existing marine license because of increased scientific knowledge relating to the environment, and invites the Cabinet

Secretary to clarify whether this power would be available on the application of the licensee. (Paragraph 171)

The Committee invites the Cabinet Secretary to clarify whether a decommissioning arrangement that would allow all or part of a marine structure to be laid on the sea bed would be dealt with under the Bill as a condition of the original license or as a marine activity requiring a further license application. (Paragraph 172)

The Committee invites both the Cabinet Secretary and the Crown Estate to note concerns that the Bill should not lead to the creation of a new decommissioning regime running in parallel with that already imposed by the Crown Estate under leasing arrangements, without serving any additional purpose. The Committee invites Marine Scotland and the Estate to work jointly to address these concerns in their future work. (Paragraph 174)

### **Provision to modify marine licensing requirements**

The Committee agrees with the Subordinate Legislation Committee that the power to vary the list of licensable activities in section 17(1) should specify more clearly the criteria the Scottish Government may use to determine whether a particular activity should be added to or removed from the list. (Paragraph 178)

### **Activities not requiring a marine license**

The Committee notes the lack of clarity currently as to what the minimum environmental threshold will be for registering, rather than licensing, marine activity. As this will be of considerable practical concern to stakeholders, the Committee considers that the Cabinet Secretary should outline his preliminary thinking on this issue during the passage of the Bill, giving an indication of what this would mean in practice to stakeholders. (Paragraph 181)

### **Marine licensing: appeals process**

The Committee recommends that the Bill be amended to set out the fundamental elements of an appeals procedure against a marine licensing decision and against the issuing of a notice concerning a marine license. (Paragraph 183)

### **Marine licensing and aquaculture**

The Committee acknowledges the vital importance of there being local input to decisions about whether, where, and under what circumstances to authorise a marine fish farm. The Committee<sup>1</sup> considers that adequate provision could be made for this, at a strategic level, by ensuring local input into decisions made by MPPs about what areas should be deemed appropriate for fish farming. We propose that the Bill should allow local authorities to apply to the Scottish Ministers to handle applications for licenses. The Scottish Ministers should be empowered to

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<sup>1</sup> Liam McArthur MSP dissenting

allow any such application on cause shown, subject to their reaching a service level agreement with the authority on how license applications are to be dealt with. (Paragraph 195)

Where this happens, the Committee proposes<sup>2</sup> that the Cabinet Secretary should seek to ensure that there is a consistency of approach towards licensing aquaculture within each marine region, for instance by providing that, in a region bordering two or more local authority areas, only one authority will handle applications. (Paragraph 196)

### **Dredging and marine licensing**

The Committee is reassured to note the Cabinet Secretary's comments that accepted forms of dredging with recognised minimal environmental impacts are likely to be exempted. Clearly stakeholders in shipping and ports would appreciate having sight of the detail of any proposed exemptions well in advance of the Bill's implementation. The Committee also invites the Cabinet Secretary to consider the merits of three-year rather than one-year dredging licenses, which would apparently bring Scotland into line with the rest of the UK. (Paragraph 202)

### **Remediation and marine licensing**

The Committee notes the Cabinet Secretary's intention to introduce an amendment clarifying that a remediation notice may require restoration of a damaged site. We call on the Cabinet Secretary to ensure that shipping and port interests, as well as environmentalist groups, have the opportunity to consider the proposed approach. (Paragraph 206)

### **Designation of marine protected areas**

The Committee notes that Scotland is under international obligations to create an ecologically coherent and representative network of marine protected areas and therefore has some concerns that the power to create MPAs under the Bill is discretionary. The Committee considers that the Bill should impose a duty on the Scottish Ministers to create such a network, as this would both help ensure compliance with our international obligations and guarantee further protection of the marine ecosystem. (Paragraph 217)

The Committee is not persuaded that there is a need for a formal process in the Bill entitling communities to propose an MPA, especially if the process is to be predominantly scientifically driven. However, it is vital that there are open channels within Government to enable communities to propose MPAs for consideration, and that this is well known at a local level, so that communities feel engaged in the process. Marine Scotland should have a clear advocacy role in this regard. MPAs will work best where local communities feel that have enjoyed ownership over the process of helping create them. (Paragraph 220)

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<sup>2</sup> Liam McArthur MSP dissenting

### **Relevance of socioeconomic factors etc in relation to marine protected areas**

The Committee agrees with the Scottish Government that the process for designating Nature Conservation MPAs should be mainly science driven. However, the Committee recommends that provision be inserted into the Bill requiring the Scottish Ministers, when drawing up a marine conservation order for an MPA under section 74 to have regard (a) to social and economic factors, and (b) the desirability of mitigating climate change. (Paragraph 237)

### **Relationship between marine protected areas and national marine plan**

The Committee invites the Cabinet Secretary to clarify the extent to which, under the Bill, there is sufficient linkage between the marine planning process and the process of designating MPAs, and whether there is any risk of national objectives set out in the national plan (for instance on economic activity or climate change) failing to integrate with the designation of a network of MPAs under Part 4. (Paragraph 238)

### **Monitoring of marine protected areas**

The Committee recommends that the Cabinet Secretary consider the merits of the Bill requiring MPAs to be regularly monitored and reviewed following designation. (Paragraph 242)

### **Fisheries and marine protected areas**

The Committee notes the discussion at Scottish and UK Governmental level on the question of whether fishing activity in MPAs requires additional protection under the Bill, and looks forward to being notified of the outcome. However the Committee is not convinced that this additional protection is necessary. (Paragraph 248)

### **Seal management plans**

The Committee recommends that the Cabinet Secretary consider putting into the Bill a requirement to set up seal management plans in all areas of Scotland where there is a perceived difficulty in the interaction between seals, angling, and fish farms. (Paragraph 269)

### **Offence of harassing seals**

The Committee invites the Cabinet Secretary to consider including on the face of the Bill an offence of intentionally or recklessly harassing seals, whilst recognising that careful drafting would be required to address the complexities surrounding the issue, including the risk of unintended consequences. (Paragraph 277)

### **Seal licenses: group applications**

The Committee supports the licensing system being sufficiently flexible to allow for the issuing of licenses on a group or individual basis as appropriate, recognising that there are some practical issues that may need to be ironed out where a group license is issued. This approach should go hand in hand with the setting up of regional seal management groups, so as to encourage an open and cooperative approach to seal management within a particular area. (Paragraph 290)

### **Seal licenses: marksmanship etc**

The Committee considers that the list of conditions that may be specified in a license (as set out in section 100(3)) should include the skill of the marksman, the type of firearm used, and the marksman's proximity to the target. Committee members consider that there is a case to be made for some or all of these conditions being mandatory for any license. (Paragraph 294)

### **Seal licenses: “no satisfactory alternative”**

The Committee sees no reason in principle why the requirement that the Scottish Ministers may only issue a license to kill or take a seal if there is “no satisfactory alternative” to doing so should not apply in all areas, rather than just in seal conservation areas as the Bill presently provides. At the same time, the Committee seeks clarification from the Government as to what deterrent or combination of deterrents could be used to satisfy Ministers that there is ‘no satisfactory alternative’ to issuing a licence. (Paragraph 307)

The Committee recommends that the Scottish Government consider making it a condition of granting a licence to shoot a seal that, if the farm is not fitted with anti-predator nets, the applicant provide an explanation of why this is so. (Paragraph 308)

### **Reporting on licensed seal kills**

The Committee recommends that the Cabinet Secretary set out reporting standards in guidance. The Committee suggests that there should be a requirement on a licensee to report the taking or killing of a seal at least quarterly. (Paragraph 314)

### **General enforcement powers**

The Committee seeks clarification as to whether it is intended that port authorities should be compensated for the exercise of the power to direct a ship to port set out in section 135 in a manner which has caused them financial loss. (Paragraph 329)

## **Financial issues**

The Committee notes and agrees with the views of the Finance Committee and invites the Cabinet Secretary to respond to them, whilst recognising that costs falling on the Scottish Government as a result of the UK Marine and Coastal Access Bill are not directly a matter for consideration in respect of the Marine (Scotland) Bill. (Paragraph 335)

Concerns have been raised as to the adequacy of data-gathering on the marine environment, especially in view of the huge marine planning responsibility that will be placed on public authorities, Marine Scotland in particular. The Committee is considering this issue separately through its scrutiny of the 2010-11 budget. (Paragraph 336)

## INTRODUCTION

### **Lead Committee**

1. The Marine (Scotland) Bill<sup>3</sup> was introduced to the Parliament on 29 April 2009. The Rural Affairs and Environment Committee was designated the lead Committee on the Bill. No secondary committees were designated to report to the lead Committee.

### **Overall aim of Bill**

2. The Bill's policy memorandum explains the backdrop to the Bill, and its main policy aims—

“Increasingly there are competing demands on Scotland's marine environment from fisheries, aquaculture, shipping, ports and harbours, recreational activity, conservation, dredging, oil and gas extraction and renewable energy. Some of these activities are controlled through licensing while fisheries are managed through the EU Common Fisheries Policy. However, there is little strategic overview of the use of the marine environment: licensing is designed to control the environmental impact of certain activities but it does not and cannot address conflicts that may arise between marine activities. The provisions in this Bill create a framework to manage the growing and competing demands for the use of marine resources in the seas around Scotland, integrating environmental and socio-economic considerations to maximise economic growth within sustainable environmental limits.”<sup>4</sup>

3. In other words, most of the Bill is intended to fill something of a policy vacuum in the governance of the Scottish marine area, rather than to replace existing law. Existing legal obligations in respect of the marine environment, whether they arise from international convention, EU law, domestic legislation, or common law, will continue to apply, although the intention is that the planning system provided for under the Bill will enable these obligations to be managed more effectively, thus reducing conflict or confusion, and maximising sustainable development.

4. The Bill is the product of an extensive and iterative process of policy-making involving the Scottish Parliament, the current and previous administrations, and the many stakeholders in the Scottish marine environment. In 2007, this Committee's predecessor in the last session of Parliament, the Environment and Rural Development Committee (ERDC), published its report<sup>5</sup> on the marine environment. The report called for more effective management of Scotland's seas, recommending a new system of marine planning, a more integrated regulatory system for marine

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<sup>3</sup> Marine (Scotland) Bill Available at <http://www.scottish.parliament.uk/s3/bills/25-MarineScot/b25s3-introd.pdf>

<sup>4</sup> Marine (Scotland) Bill, Policy Memorandum, paragraph 2. Available at <http://www.scottish.parliament.uk/s3/bills/25-MarineScot/b25s3-introd-pm.pdf>

<sup>5</sup> Environment and Rural Development Committee Report on Inquiry into the Marine Environment <http://www.scottish.parliament.uk/business/committees/environment/reports-07/rar07-04-00.htm>

<sup>5</sup> <http://www.scotland.gov.uk/Topics/Environment/16440/AGMACS>

activities, the creation of marine protected areas, and an expansion of research. The report also called for a marine management organisation to simplify governance and not add to bureaucracy. It is interesting to note the extent to which the Bill now seeks to put into place those recommendations.

5. The previous Scottish administration also appointed the Advisory Group on Marine and Coastal Strategy (AGMACS), a marine stakeholder group, to report to them<sup>6</sup> on the application of sustainable development principles in a coastal and marine context. Then, in January 2008, the Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead, convened the Sustainable Seas Task Force, representing a diversity of marine interests including fishing, aquaculture, conservation, industry, shipping and leisure, to build on this work, in order to develop policy on a future marine Bill. The Task Force published its consultation paper, *Sustainable Seas for All*<sup>7</sup>, in July 2008. Responses received fed into Government deliberations on the content of the Bill as introduced.

6. The Bill has been introduced at around the same time as the introduction of the Marine and Coastal Access Bill<sup>8</sup> in the UK Parliament. What is proposed under the two Bills working together is a three-tiered system for managing the marine environment. The highest tier would be the UK Marine Policy Statement, as provided for in the UK Bill. The UK Bill gives the governments of the devolved administrations the option of signing up to the statement.

7. In evidence to the Committee, the Cabinet Secretary stated that “the objective is that we will agree that” [ie the Marine Policy Statement], and that he was “hopeful”<sup>9</sup> that this would be the case. If there were to be failure to reach agreement, Mr Lochhead explained that the Scottish Government’s policy for the wider seas around Scotland would be set out in the policy statement within the national marine plan (for which see below).

8. The Marine (Scotland) Bill sets out the remaining two layers. First, it empowers the Scottish Ministers to prepare a national marine plan, which is to “state the Scottish Ministers’ policies ... for and in connection with the sustainable development of [the Scottish marine area].”<sup>10</sup>

9. Additionally, the Bill empowers the Scottish Ministers to prepare regional marine plans, the third and most local tier of management being proposed. They are further empowered to delegate any aspect of the preparation of such plans to others, and it is the current administration’s policy that this is what should happen in practice. The current administration intends that this role should be taken on by Marine Planning Partnerships (MPPs); bodies created to draw up plans for particular parts of the

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<sup>6</sup> <http://www.scotland.gov.uk/Topics/Environment/16440/AGMACS>

<sup>7</sup> Scottish Government (2008) *Sustainable Seas for All: a consultation on Scotland's first marine bill*. Scottish Government. Available at <http://www.scotland.gov.uk/Publications/2008/07/11100221/17> [Accessed 29 September 2009]

<sup>8</sup> For more details on the UK Bill, and on similarities and differences between the Scottish and UK Bills see SPICe briefing: A comparison of the UK and the Scottish Marine Bills, <http://www.scottish.parliament.uk/business/research/date/index.htm> [Accessed 6 October 2009]

<sup>9</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009, Col 1887.

<sup>10</sup> Marine (Scotland) Bill, Section 3(2)(a)

Scottish marine area. As discussed later, the membership and governance structures of MPPs, as well as the boundaries of the areas they should cover, are still being considered at Governmental level, but the intention is that they should be bodies that bring together a wide range of stakeholders in the management of Scotland's marine resources – cultural, environmental and economic – and that they should closely involve in their work the communities living around the coast of the area they manage.

10. Under the Bill, regional marine plans must conform with the national plan, and it is also intended that the national marine plan should not be in conflict with any UK Marine Planning Statement in force at the time that the Scottish Government has signed up to, thus helping to ensure that all three tiers of planning dovetail. As discussed later, one of the recurring themes of evidence-taking at Stage 1 has been the question of the extent to which local plans should be a mechanism for implementing national priorities identified by the Scottish Ministers.

11. Two other main aims of the Bill are to reform the marine licensing and consents system, the underlying aim being to streamline the regulatory burden, and to establish a new regime for designation of marine protected areas (MPAs) under more flexible circumstances than the law currently allows for. In tandem with these proposals, the Bill provides for the appointment of “marine enforcement officers”, empowered to ensure compliance with the new marine licensing regime and the protection of the marine environment. The underlying intention is to harmonise enforcement powers within the Scottish marine area (see definition below) with enforcement powers elsewhere in UK waters.

12. Finally, the Bill reforms current legislation on the protection and management of seals.

### *Marine Scotland*

13. Under the UK Marine and Coastal Access Bill, a new statutory body is to be set up to deal with most of the new governance arrangements created under that Bill. *Sustainable Seas for All* proposed the establishment of a new structure, Marine Scotland, to “deliver sustainable seas” and invited views on the proposition that this body “should form part of Scottish Government with appropriate safeguards for science and the appeals process.” Responses split almost exactly 50:50 for and against Marine Scotland existing within Government. The Scottish Government then decided to establish Marine Scotland as a Directorate within Government, and to do so, on 1 April, ahead of the Bill's introduction. Marine Scotland brings together various bodies exercising operational responsibilities in respect of the Scottish marine area within one corporate structure. As the creation of Marine Scotland was an administrative exercise, there is no mention of the body in the Bill. However, the current Scottish administration intends that Marine Scotland should have everyday operational responsibility for most of the powers and functions that the Bill confers on the Scottish Ministers, although the power to delegate responsibilities to a more local level (discussed below) is likely to be exercised in some key areas. The Bill's policy memorandum briefly discusses Marine Scotland<sup>11</sup> but does not elaborate on the “appropriate safeguards” the Scottish Ministers envisaged putting in place to ensure the integrity of scientific advice.

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<sup>11</sup> Marine (Scotland) Bill, Policy Memorandum, Paragraphs 15 to 17

14. **The Committee invites the Cabinet Secretary to clarify the reasons for establishing Marine Scotland as a Scottish Government directorate rather than proposing in the Bill to establish it as a statutory body, at arms length from the Scottish Government. The Committee also invites the Minister to explain what governance arrangements he proposes to put in place in order to ensure the independence of scientific advice provided to the Scottish Ministers as to the exercise of their functions under the Bill.**

#### **Devolution, the “Scottish marine area”, and the international dimension**

15. The Bill applies to the area of sea, including the bed and subsoil of the sea, within the Scottish marine area. Under the Bill, the “Scottish marine area” is deemed to be that part of the territorial sea adjacent to Scotland, which, in line with international convention,<sup>12</sup> means the sea out to 12 nautical miles from the Scottish coast, except in waters less than 24 miles from Northern Ireland, the Isle of Man, and England (ie around the North Channel and Solway Firth), where the median line between Scotland and those jurisdictions is followed.

16. “Sea” is defined as including any area submerged at mean high water spring tide and any estuarial waters so far as the tide flows at mean high spring water tide, except in relation to the provisions of the Bill on marine protected areas, where a slightly more restricted definition is applied in relation to estuarial waters.

17. As discussed in more detail elsewhere,<sup>13</sup> the seas around Scotland are subject to a complex mix of reserved and devolved regulatory powers and rights. In general, the Scottish Parliament enjoys competence in relation to waters out to the 12 nautical mile limit. However, the UK Government continues to hold reserve powers in relation to matters such as defence, shipping, border control, and oil and gas.

18. The Scottish Ministers have recently been given devolved administrative responsibility for waters between 12 miles and 200 miles from the Scottish coast in relation to matters such as fisheries and the licensing of renewable energy, although the Scottish Parliament has no corresponding legislative competence over these matters.

#### *The Crown Estate*

19. The Crown Estate owns most of the seabed out to 12 nautical miles. Anyone wishing to make use of the seabed, or place a structure on or over it, must usually enter into a leasing arrangement with the Estate. (There are instances of a body such as a port authority having purchased the seabed from the Estate but these are relatively rare). The Estate also has the right to license marine renewable projects out to 200 miles, and has historic rights in relation to various discrete matters (eg ownership of native mussel beds). The Crown Estate’s marine property ownership means that it exercises an important and sensitive role in communities around Scotland’s coastline. Previous work undertaken by the Committee<sup>14</sup> has underlined that the Estate has had lessons to learn about effective local engagement when managing some of its Scottish assets, both terrestrial and maritime. We also noted,

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<sup>12</sup> UN Convention on Law of the Sea (1982)

<sup>13</sup> Scottish Parliament Information Centre briefing: Marine (Scotland) Bill (10 June 2009)

<sup>14</sup> Rural Affairs and Environment Committee, *Official Report*, 24 October 2007.

and welcomed, some recent improvements in its methods of communication, partly in response to increased scrutiny. It is to be hoped that this encouraging trend will continue, particularly in the context of marine regional planning, which requires effective partnership between the key players if it is to be successful.

*European law and international conventions*

20. European law has become increasingly important in a maritime context.<sup>15</sup> Since 1983, Scotland, along with the rest of the UK, has been subject to the common fisheries policy, which determines how most commercial fisheries within EU territorial waters are to be managed. There is also the Water Framework Directive,<sup>16</sup> which applies to water in the natural environment, including estuaries and coastal waters, and requires member states to protect, enhance and restore all bodies of surface and ground water, with the aim of achieving good surface water status by 2015. In addition, since 2007 there has been an Integrated Maritime Policy for the European Union, which aims to deliver sustainable development for Europe's seas. The policy is at an early stage but can be increasingly expected to influence matters such as maritime transport, climate change and pollution, and maritime research. There is also the EU Marine Strategy Framework Directive,<sup>17</sup> which member states must have transposed into domestic law by 2010. This requires member states to maintain "good environmental status" for their seas, or to have achieved it by 2020.

21. The UK has also, since 1972, been a signatory to the OSPAR Convention, an international accord on the protection of the marine environment of the north-east Atlantic. Decisions of OSPAR are legally binding on the contracting parties. Amongst the most important agreements reached by member states was that of July 1998 "to promote the establishment of a network of marine protected areas to ensure the sustainable use and protection and conservation of marine biological diversity and its ecosystems"<sup>18</sup>. This agreement, and the work that followed it, lie behind Part 4 of the Bill.

22. Over and above international law and policy, there is the simple fact that neither marine ecosystems nor ocean currents sit neatly within notional boundaries. Nor does pollution. Cooperation at both the UK and international level is vital to ensure that Scotland has a healthy marine environment.

*Inshore fisheries groups*

23. Inshore fisheries groups' role is to improve the management of commercial fisheries within the twelve mile limit.<sup>19</sup> IFGs are in the process of being set up all around Scotland's inshore waters. According to the Scottish Government, the bodies "aim to improve the management of Scotland's inshore fisheries and to give commercial inshore fishermen a strong voice in wider marine management

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<sup>15</sup> For a more detailed discussion, see the Scottish Parliament Information Centre briefing, European Dimensions of the Marine Environment.

<http://www.scottish.parliament.uk/business/research/date/index.htm> [Accessed 6 October]

<sup>16</sup> Transposed into Scots law by the Water Environment and Water Services (Scotland) Act 2003

<sup>17</sup> EU Marine Strategy Framework Directive. Available at:

[http://www.semide.net/media\\_server/files/l/q/EU\\_MarineStrategy.pdf](http://www.semide.net/media_server/files/l/q/EU_MarineStrategy.pdf) [Accessed 6 October 2009]

<sup>18</sup> [http://www.ospar.org/content/content.asp?menu=00700302210000\\_000000\\_000000](http://www.ospar.org/content/content.asp?menu=00700302210000_000000_000000) [Accessed 6 October 2009]

<sup>19</sup> The common fisheries policy applies within all EU waters but management of the CFP within the twelve-mile limit remains with national or, as the case may be (eg Scotland) devolved authorities.

developments.”<sup>20</sup> The membership of IFGs, which are non-statutory bodies, are entirely composed of commercial fishing interests.

24. Under the UK Marine and Coastal Access Bill, IFGs’ English equivalents are being reconstituted as statutory bodies named “inshore fisheries and conservation groups”, and will be required to ensure that their membership includes representatives from outside the fishing industry. This approach is not being taken in Scotland. The Scottish Government has no immediate plans either to reform or abolish IFGs following the enactment of the Marine (Scotland) Bill and the creation of MPPs.

*Integration of marine plans with coastal zone and terrestrial land management*

25. Marine ecosystems within the twelve mile limit not only border each other; they also border the coast. A key consideration of any proposal for the governance of the marine environment is to consider how well it coheres with governance arrangements for the coast and for land where it abuts the coast.

26. Integrated coastal zone management is a process for the management of the coast, using a coherent approach that has regard to all aspects of the coastal zone in an effort to achieve sustainability. The principles of ICZM were agreed at the Earth Summit in Rio de Janeiro in 1992. The Scottish Government has been pursuing an approach based overtly on ICZM principles since 1996, with the setting up of the Scottish Coastal Forum. A further development was the publication of a national strategy for ICZM strategy in 2004.<sup>21</sup> Local partnerships dedicated to putting ICZM into practice now cover most of Scotland’s coastline.

27. The Scottish Government intends that ICZM should itself integrate with marine planning, but that the two processes should remain separate. A similar approach is proposed for terrestrial planning, which is of course a statutory process.

**Outline of Stage 1 scrutiny**

28. The Committee issued a call for views on the general principles of the Bill and received 63 responses.<sup>22</sup> Two public petitions<sup>23</sup> were also treated as evidence on the Bill. Evidence at Stage 1 was taken at five meetings, the last including evidence-taking from the Cabinet Secretary for Rural Affairs and the Environment.<sup>24</sup> All of these meetings took place at the Parliament, except the 22 June meeting, which was held in Kirkcudbright.

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<sup>20</sup> <http://www.scotland.gov.uk/Topics/Fisheries/Sea-Fisheries/InshoreFisheries/IFGsMap> [Accessed 1 October 2009]

<sup>21</sup> Scottish Government. A Strategy for Scotland’s Coast and Inshore Waters (July 2004). Available at <http://www.scotland.gov.uk/Publications/2004/07/19639/40165>

<sup>22</sup> These are set out at Annexe E.

<sup>23</sup> These were Petition 1047 from Mark Carter on behalf of the Hebridean Partnership and Petition 1081 from Ronald Guild. Petition 1047 called for the Scottish Parliament to consider and debate the failure of the existing coastal and marine national park/marine environmental protection process and the extent to which such failure is due to pressure from individuals and industries with a vested affiliated or commercial interest. Petition 1081 called for the Scottish Parliament to urge the Scottish Executive to seek a UK-wide reappraisal of all government, local authority and NGO maritime and maritime air space responsibilities and organizations, taking into account EU and International Maritime Organization contexts and world-wide best practice.

<sup>24</sup> The Minute extracts at Annexe C provide a full list of all those who provided evidence in person.

29. In addition to taking formal evidence, committee members made three fact-finding visits on the Bill:

- on 18 and 19 May, members went to Aberdeenshire, visiting Peterhead Port Authority and Marine Scotland's laboratories at Torry, as well as taking part in a conference on European maritime matters at Boddam organised by Aberdeenshire Council and the European Commission in Scotland;
- on 1 June, members visited the Firth of Lorne, where they made a journey by boat to inspect an SSSI<sup>25</sup> for the conservation of Harbour Seals and an area subject to a pilot marine spatial plan. Members then alighted at the Scottish Association of Marine Science at Dunstaffnage, where they took part in a discussion on issues of local concern such as seal management (to address predation of fish farms); marine conservation, and bio-energy projects;
- finally, on 22 June, on the morning of their meeting in Kirkcudbright, members made a visit to the nearby Mersehead RSPB reserve, where local stakeholders discussed the marine management challenges facing the Solway Firth, including cross-border issues.

30. On 2 September at the Parliament, members of the Clyde Scottish Sustainable Marine Environment Initiative made an informal presentation to some Committee members on their work piloting the preparation of a marine plan for the Firth of Clyde.

31. The Committee is grateful to all those who gave of their time to provide evidence to the Committee or to brief members on our visits.

32. The Finance Committee has reported<sup>26</sup> to the Committee on the Bill's financial memorandum, while the Subordinate Legislation Committee<sup>27</sup> reported on delegated power provisions found in the Bill. Comments and recommendations of those reports are noted at appropriate points in this one.

### **Policy memorandum**

33. Under Rule 9.6.3 of the Scottish Parliament's Standing Orders, the lead committee must consider and report on the policy memorandum accompanying any Government Bill, as part of its Stage 1 scrutiny.

34. The Committee's view is that, for a Bill of this length and importance, the policy memorandum was at times lacking in detail first as to how the Bill had come to take the form that it did, and secondly as to how it would be implemented.

35. In the former case, there is, for example, no discussion as to the decision that led to Marine Scotland being established as a Government Directorate rather than as a statutory body. Nor is there any discussion of the decision not to include provisions pertaining to science and research, which had been suggested in *Sustainable Seas for All*.

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<sup>25</sup> Site of Special Scientific Interest

<sup>26</sup> See Annexe B

<sup>27</sup> See Annexe A.

36. In the latter case, the Committee fully appreciates that much of the detail of implementation requires to be worked out. However, the memorandum could usefully have said more about matters such as how decommissioning would be handled under the Bill or how the licensing appeals process is expected to work, which might have helped address concerns or misconceptions that arose at Stage 1.

**37. The Committee invites the Cabinet Secretary to note our observations on the lack of detail or proper discussion in parts of the policy memorandum.**

#### KEY THEMES EMERGING FROM STAGE 1 EVIDENCE

##### **Overall views on the Bill**

38. The Bill has been broadly welcomed. In general, witnesses agreed that Scotland's seas would benefit from more coherent marine governance, from both an environmental and an economic perspective. However, most also expressed some concerns with the Bill. Most of these have arisen from uncertainty as to how it would be implemented. For the most part, the Bill creates a framework, enabling the Scottish Ministers to set up management processes, but leaving the detail of policy to future subordinate legislation, to guidance, or to the content of marine plans that may not be finalised for some years. On a number of significant matters, such as the membership of marine planning partnerships or the details of marine licensing, the Scottish Government has candidly stated that it has not yet come to a concluded view. Whilst this candour is to be welcomed, it has given rise to uncertainties as to the future direction of policy, with one respondent to the Committee's call for views remarking that "the lack of detail makes it genuinely difficult for consultees to analyse and comment on the proposals in many areas that could be of critical importance."<sup>28</sup> This has been the Committee's experience as well, which, at times, has limited our ability to analyse the Bill's likely impact.

39. Other concerns relate to the financing of commitments imposed by the Bill, to uncertainty as to how conflicts between national and local priorities will be managed, to a perceived lack of data and as to how the precautionary principle should therefore be applied, and to the possibility of the Bill increasing rather than reducing bureaucracy, for instance in relation to licensing matters.

40. Finally, in relation to seal conservation and management – relatively speaking a small part of the Bill but a matter on which strong views are understandably held – a considerable number of witnesses considered that the Bill did not go far enough in seeking to safeguard seals' welfare by ensuring that culling is a last resort.

41. Notwithstanding these concerns, it is important to commence detailed scrutiny of the Bill's provisions by noting once again that witnesses have generally welcomed the Bill, a view with which the Committee concurs. In doing so, the Committee notes that the Bill builds on the work undertaken by our predecessor Committee and by successive administrations. **The Committee welcomes the general principles of the Bill as we consider that it will, if implemented following adequate consultation and resourcing, help improve the governance and sustainability of Scotland's seas.**

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<sup>28</sup> Seafish. Written submission to the Environment and Rural Affairs Committee.

## The state of Scotland's seas, the availability of data, and the precautionary principle

42. An issue not addressed directly in the Bill, but hugely germane to its subject matter, and therefore much discussed both in the Government's pre-introductory consultation and at Stage 1, has been the level of scientific knowledge about the seas around Scotland, and what effect this knowledge – or the absence of it – should have on decisions on the use of the sea. A consensus emerged both from evidence-taking and from more informal information gathering that, notwithstanding ground-breaking work being carried out at Scottish institutions, which we observed on some of our visits, there is still a dearth of data in many important areas of marine research, whether that relates to ecology, geology or archaeology. As one witness with experience of working on both sides of the border argued, England is well ahead in gathering data relating to coastal issues such as sea-level rises, and Scotland needed to “catch up”<sup>29</sup>, whilst an archaeologist specialising in submerged historic sites cautioned that in this area Scotland “lags behind the rest of the UK, Europe and the world.”<sup>30</sup>

43. Another over-arching issue at Stage 1 has been the state of Scotland's seas. Several witnesses expressed concerns about there being a degree of complacency about this issue. For instance, written evidence from the Community of Arran Seabed Trust (COAST) argued that the Bill failed to acknowledge “the dire state of Scotland's seas”, and described the environmental recovery provisions in the Bill as “poor, with no ambition to improve or recover the ecological status of Scotland's seas beyond the boundaries of marine protected areas.” Ian Burrett of the Scottish Sea Angling Conservation Network argued that the Bill—

“should be a new opportunity for our oceans. Its starting premise is that the environmental status of most seas around Scotland is currently good or excellent, but that is not what we find. The UK Government's consultation on a marine bill said that the seas are generally healthy and biologically diverse. Our members find that that is not true either: on the west coast of Scotland, 20 species either have disappeared or are now found only as juveniles.”<sup>31</sup>

44. Mr Burrett argued that the degraded state of the marine environment, combined with a relative lack of data, meant that the precautionary principle<sup>32</sup> should be set out in the Bill<sup>33</sup>.

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<sup>29</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1773.

<sup>30</sup> Caroline Wickham-Jones. Written submission to the Rural Affairs and Environment Committee.

<sup>31</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1753

<sup>32</sup> There is no one internationally accepted definition of the precautionary principle but it proceeds from the belief that caution should be exercised in pursuing a course of action where there is reason to believe that it may cause damage to the environment or human health. The European Commission Communication on the Precautionary Principle (2 February 2000) enunciates it as follows: “The precautionary principle applies where scientific evidence is insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen by the EU.”

45. Lloyd Austin of Scottish Environment Link expanded on this point, arguing that since a paucity of data had not prevented commercial exploitation of the seas, in matters such as energy, fisheries, and aquaculture, from going ahead, then by the same token, an insufficiency of data should not preclude decisions being made on conservation grounds.<sup>34</sup>

46. Others disagreed, with Patrick Stewart of the Scottish Fishermen's Federation arguing that the term "precautionary principle" lacked an objective meaning.<sup>35</sup> Professor Phil Thomas of the Scottish Salmon Producers' Organisation argued that the principle was much misunderstood; it did not mean doing nothing because of a lack of data, but proceeding with caution. He argued that there was no need to make express reference to the principle in the Bill because the Marine Strategy Framework Directive would provide sufficient protection in that regard<sup>36</sup>.

47. Representatives of the marine renewables industry pointed out the dangers, as they saw it, of applying the precautionary principle too rigorously. Jeremy Sainsbury of Scottish Renewables conceded that the burden of proof in assessing the environmental impact of a major marine project should lie with the developer, but also argued—

"Pressure will arise because we need renewable energy now. We have extremely challenging targets for 2020. The Bill will involve the setting up of marine protected areas, but the science that will enable us to do that comprehensively will not be available for between six and 10 years. We cannot afford to wait six to 10 years."<sup>37</sup>

#### *Marine littering*

48. The problem of marine littering was also noted during evidence-taking. Pam Taylor of the Solway Firth Partnership described it as—

"a massive problem that needs to be tackled on several levels, from the amount of packaging that is used for everyday items to discards from fly-tipping of industrial or public waste. A tremendous amount can be done to tackle the problem at local level. We work with community groups, which are keen to go out and get involved on their own beaches. The issue needs resourcing, and an organisation needs to be prepared to take responsibility. Marine Scotland and the UK marine management organisation might want to take that up."<sup>38</sup>

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<sup>33</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1754.

<sup>34</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1755.

<sup>35</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1756.

<sup>36</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Cols 1756-1757

<sup>37</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1795

<sup>38</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1786

49. Ms Taylor went on to suggest that there was potential to address the problem through regional planning, as that would “provide a way, in which local communities can actively engage, of managing the area”.

**50. The Committee invites the Cabinet Secretary to clarify whether he considers current enforcement provisions on marine littering are sufficiently robust, and whether he considers there are sufficient resources for them to be applied effectively.**

51. Given this evidence, the Cabinet Secretary was invited to comment on whether there was merit in the Bill placing an over-riding duty on the Scottish Ministers to have regard to the health of the seas as the primary objective in all activity carried out in the marine environment. He remarked that this question went “to the core of the issue”—

“The role of the Government in this, as well as that of everyone else who uses our seas, is to ensure that we have healthy seas for the future. We are already committed to that and we are already signed up to obligations under European legislation to achieve that. Those obligations mean that we have to work through established networks of MPAs, through elements in the Marine (Scotland) Bill and through international commitments to achieve a healthy status for our seas in the years ahead. That does not just apply to Scotland—that is European Union policy.”<sup>39</sup>

52. In subsequent correspondence, Mr Lochhead further clarified that—

“we are in parallel working with the UK Government to transpose the Marine Strategy Framework Directive which will require us to achieve good environmental status in Scottish waters. Also Scottish Ministers are already under a duty to further the conservation of biodiversity at sea under the terms of the Nature Conservation Act 2004. In those circumstances I am not convinced that a specific duty on the health of the marine environment would be very meaningful.”<sup>40</sup>

53. It is helpful of the Cabinet Secretary to draw the Committee’s attention to the 2004 Act, which requires any public body and officer holder, in exercising its functions, “to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.” A marine environment rich in biodiversity is an extremely important marker of a healthy sea, but it may not be the only one. There might also conceivably be circumstances where there is a short but crucial time-lag between an observable decline in the health of one aspect of the marine environment and a collapse in marine biodiversity.

54. One way to seek to address this would be to make express reference to the precautionary principle on the face of the Bill, as some witnesses have suggested. Given the lack of consensus as to the definition and application of the principle, the Committee does not consider that this is the best way forward.

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<sup>39</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1901

<sup>40</sup> Scottish Government. Correspondence from The Cabinet Secretary for Rural Affairs and the Environment dated 16 September 2009.

55. However, the state of Scotland's seas is a serious concern. Domestic or international obligations imposed in recent years do not appear to have rectified the situation. The Marine (Scotland) Bill provides an opportunity to strengthen the legal position. Accordingly, **the Committee recommends that the Bill place a duty on the Scottish Ministers and all relevant public bodies, when exercising functions, to have regard to the need to maintain and improve the health of the Scottish marine area. We recognise that, were this duty to be inserted into the Bill, there would be a need to provide indicators, whether in subordinate legislation or through guidance, as to the factors that constitute a healthy marine environment. The Marine Strategy Framework Directive, which sets out indicators of "good environmental status", may provide some pointers.**<sup>41</sup>

*Non-native species*

56. The presence of invasive non-native species in Scottish waters is another indicator of the health of our seas. A number of international and domestic laws and conventions require the control or eradication of invasive non-native species. Perhaps because of stakeholder awareness of a forthcoming Bill on wildlife and the natural environment, this issue, with one exception, did not arise during Stage 1 consideration. The exception was concerns from shellfish growers as to the possibility of the pacific oyster, the mainstay of the commercial oyster industry, being re-designated as an invasive non-native species, as has been proposed by the UK Technical Advisory Group on the Water Framework Directive.<sup>42</sup> It is not for the Committee to adjudicate on the science behind this proposal, but it is clearly a matter of concern to the entire oyster industry.

**57. The Committee invites the Cabinet Secretary to note industry concerns as to the status of the pacific oyster in the course of preparing the forthcoming Bill on wildlife and the natural environment.**

*Water quality, shellfish and the Water Framework Directive*

58. As noted, one of the most important legal drivers of high environmental standards is the Water Framework Directive. The main focus of the directive relates to river basins and other fresh water, but the requirement to achieve good ecological status for surface waters extends to coastal waters three miles out from the shoreline. The directive is in the process of being implemented across Europe, which will include it superseding another European legal instrument, the Shellfish Waters Directive, by 2013. That directive empowers competent domestic authorities (SEPA in the case of Scotland) to designate areas of water as shellfish growing waters if they are found to meet the requisite high environmental standards.

59. These current arrangements appear to have provided certainty and reassurance to shellfish growers about where they can site their farms. Their replacement in 2013 appears to have raised alarm within the industry as to what consequences this will have.<sup>43</sup>

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<sup>41</sup> In this connection, the Committee notes that the Scottish Government proposes to report on the state of Scotland's seas, having regard to the obligations imposed under the Directive, in 2010: <http://www.scotland.gov.uk/News/Releases/2008/04/09100100> [accessed 7 October 2009].

<sup>42</sup> Walter Speirs. Written submission. Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1854.

<sup>43</sup> Walter Speirs. Written submission. Scottish Parliament Rural Affairs and Environment Committee.

60. Both SEPA and the Cabinet Secretary sought to reassure the industry. Andy Rosie of SEPA said that “the requirement to carry on the designation process will carry into the water framework directive and a similar approach will be applied.”<sup>44</sup> The Cabinet Secretary pointed out that it is a requirement of the Water Framework Directive that it provide “at least equivalent designated protection to waters currently protected under the Shellfish Waters Directive” and that in Scotland “shellfish growing waters will still be protected, even if not designated as previously.”<sup>45</sup> He advised that he had instructed SEPA to make this information more transparent in their draft river basin management plans, to be published this coming December.

61. This does not appear to have been sufficient to have satisfied the industry representative from whom the Committee heard, who argued that the current designation “provides something tangible to protect us”<sup>46</sup> and that giving protection equivalent to a designation was not legally the same as providing a designation.

62. It is important to stress that this issue is not directly to do with anything currently in the Bill, but is rather an apparently unintended consequence of the European Union attempting to tidy up its own laws. It should also be made clear that the Committee is in no position to adjudicate on the technical and narrow question of whether the legal protection provided to shellfish growers under the Water Framework Directive will be as good as that currently provided under the Shellfish Water Directive, much of which appears to hinge on the meaning of the word “equivalent.” It is clear to us, however, that the Cabinet Secretary has genuinely sought to provide assurances on this issue, but that concerns still remain. As the current designation regime will not come to an end for some time yet, we are hopeful that there is sufficient time for concerns to be addressed.

**63. The Committee would encourage the Cabinet Secretary and SEPA to continue to engage in dialogue with the Scottish shellfish growers’ industry as to the latter’s concerns over the replacement of the Shellfish Waters Directive in 2013. We invite the Cabinet Secretary to press for clarification from the European Commission as to whether there will be any diminution in the legal protection afforded to growers once the new regime under the Water Framework Directive is in place, and to indicate whether he would do so before Stage 2.**

#### **Part 1 of the Bill: the Scottish marine area and the meaning of “sea”**

64. Part 1 of the Bill has the sole purposes of defining the “Scottish marine area” and “sea” (see discussion above). A letter from the Cabinet Secretary explains why a slightly more restricted definition of the sea is applied in Part 4 of the Bill, dealing with marine protected areas—

“The definition in section 57 for the purposes of Part 4 limits “sea” to the fresh water limit of estuarial waters ie it excludes waters upstream of the fresh water

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<sup>44</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1769

<sup>45</sup> Scottish Government. Letter from Cabinet Secretary to Rural Affairs and Environment Committee dated 16 September 2009.

<sup>46</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1854

limit. The intention is that the Marine Protected Area provisions will not apply up river in fresh water. Sites of Special Scientific Interest powers are available to protect inland areas, including rivers, and it was therefore considered unnecessary to make MPA provisions available for upstream areas. In effect we would wish use of the Marine Protected Area powers to be focused on the marine area as much as possible.”<sup>47</sup>

65. No major issues with the definitions used arose during Stage 1 scrutiny.<sup>48</sup> **The Committee is content with the definitions used in Part 1.**

## **Part 2 of the Bill: Marine planning**

66. Part 2 of the Bill, together with schedule 1, concerns marine planning, including the power to draw up plans at national and regional levels, the procedure for doing so, and the status of such plans.

67. Section 3 empowers the Scottish Ministers to prepare and adopt a national marine plan and regional marine plans. Either type of plan must state the Scottish Ministers’ policies “for and in connection with the sustainable development of the area to which the plan applies”<sup>49</sup> and may also set out “economic, social and marine ecosystem objectives”<sup>50</sup> – these presumably being referred to for the avoidance of doubt, since any sustainable development policy for the seas around Scotland could be expected to encompass such matters.

68. Importantly, section 3 also provides that a regional marine plan must conform to the current national marine plan “unless relevant considerations indicate otherwise”.<sup>51</sup>

69. Schedule 1 sets out the procedure for preparing marine plans before they can be published and come into effect. Key points are that relevant planning authorities (ie local authorities acting in their capacity as terrestrial planners) must be informed of an intention to prepare a marine plan; that the Scottish Ministers must publish a statement of public participation in relation to any proposed plan and a consultation draft of any plan; and that any national plan may not be published unless a final draft has been laid before the Scottish Parliament.

70. Section 8 is the provision that enables the Scottish Ministers to delegate regional planning. The delegate may be a single public authority or a group of persons nominated by the Scottish Ministers or a public authority. As noted, the policy intention of the current administration is that the delegates be so-called marine

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<sup>47</sup> Scottish Government. Letter from the Cabinet Secretary for Rural Affairs and the Environment to the Rural Affairs and Environment Committee dated 8 September 2009.

<sup>48</sup> The Scottish Government may, however, wish to note two technical issues raised in written submissions. SCAPE (Scottish Coastal Archaeology and the Problem of Erosion) noted that soft coastlines, such as the machair of the Western Isles, can be highly dynamic, and that if Ordnance Survey maps are used to determine the extent of mean high water spring tide, the information found on those maps could quickly become outdated. Jamie Grant of MacRoberts Solicitors noted that the definition would include uninhabited islets not covered by mean high water spring tide and queried whether this would mean that if marine work affected such an islet, permission would be needed under both terrestrial planning and marine licensing.

<sup>49</sup> Marine (Scotland) Bill, Part 2 Section 3 (2)(a)

<sup>50</sup> Marine (Scotland) Bill, Part 2 Section 3 (3)

<sup>51</sup> Marine (Scotland) Bill, Part 2 Section 3 (5)

planning partnerships, comprising groups of stakeholders in the marine environment, but “marine planning partnership” is not a term found anywhere in the Bill.

71. Section 11 provides that a public authority must make any authorisation or enforcement decision in relation to the Scottish marine area in accordance with the appropriate marine plans, “unless relevant considerations indicate otherwise”<sup>52</sup>, in which case it must state its reasons for so doing. In practice, this means that licensing decisions under Part 3 of the Bill, amongst other things, are expected to be in accordance with a marine plan. Section 11 therefore seeks to ensure a degree of integration between marine planning and marine licensing.

72. Section 12 requires the Scottish Ministers or, as the case may be, the person(s) delegated to prepare a regional marine plan; to keep the effectiveness of the marine plan under review; to report on the plan at least once every five years, and, following such a report, to decide whether to amend or replace the plan. This is intended to help ensure that plans remain fit for purpose in response to environmental changes, including climate change, social changes, and technological advancement.

### **Key themes arising from scrutiny of Part 2**

73. Part 2 is in many respects the core of the Bill, since many operational decisions – such as what activities to license or exempt under part 3 or what areas to declare as marine protected areas under Part 4 – might be expected to flow from the higher-level strategic decisions taken at the marine planning stage. It is no surprise, therefore, that Part 2 was perhaps the most discussed part of the Bill during the Committee’s Stage 1 scrutiny.

#### *What is a marine plan?*

74. Perhaps the most fundamental issue considered by the Committee in relation to Part 2 was what form a marine plan would actually take and how it would be used. Would it be a tangible document that could be picked up and read by a layperson? Would it be predominantly a spatial plan or a set of enunciated principles or policies? Is it helpful or misleading to compare the terrestrial planning system with marine planning, both in the form plans take and the way they are to be used?

75. The answer has thus far not been entirely easy to ascertain. In anticipation of the new planning regime to come into force following enactment of the Bill, four pilot projects have been set up around the coast of Scotland – in Berwickshire, Shetland, the Sound of Mull and the Firth of Clyde, with groups of stakeholders in those areas working together to produce marine plans. Members of two of those groups – the Clyde and Sound of Mull Sustainable Marine Environment Initiatives (SSMEIs) – have met with Committee members during Stage 1 to explain their work.

76. Whilst this has been very useful, it is fair to say that this probably taught Members more about the planning process itself, rather than the content and format of marine plans, especially since neither group has yet produced a concluded plan. However we were left with the clear impression that the ultimate aim was to produce a spatial plan that the layperson could be expected to be able to interpret, albeit one

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<sup>52</sup> Marine (Scotland) Bill, Part 2 Section 11(1)

augmented by a large number of technical appendices that would be more difficult for the non-expert to interpret.

77. As for the planning process, the main conclusion that can be drawn is that it has the potential to be lengthy and complex, although those who have taken part in the pilots to whom we spoke were convinced that it was ultimately worthwhile and useful and would help make management of the coast and seas more effective

*The national marine plan*

78. The Scottish Government's policy is that the national plan should set out key national objectives for the Scottish marine area. In furtherance of this, section 3(3) states that "a national plan may in particular include economic, social and marine ecosystem objectives".<sup>53</sup>

79. Some witnesses noted the absence of express reference to climate change mitigation<sup>54</sup> anywhere in the Bill as a key objective for the plan. The Cabinet Secretary told the Committee—

"I am not sure whether we need to add "climate change mitigation" to the list, but I am happy to reflect on that and I will wait to hear the committee's view. It is inconceivable that the national marine plan would not refer to the country's climate change objectives in the context of the marine environment. I assure the committee that the issue will be reflected in the national marine plan."<sup>55</sup>

**80. The Committee suggests that it would reflect the national, and indeed international, importance of climate change mitigation and adaptation if it were expressly included in the list of objectives in section 3(3) that a national marine plan may set out.**

81. The Cabinet Secretary went on to argue that the emphasis in the provisions on the national marine plan to powers rather than duties, and the comparative absence of references to matters that must be included in the plan, was deliberate, as he considered it imperative to take a flexible approach. He argued that pointers as to what should be included in the national plan, and in regional plans, would emerge through effective consultation.<sup>56</sup>

82. The Committee broadly accepts the Cabinet Secretary's view that the Bill should allow the Scottish Ministers to take a flexible approach towards the drawing up of a national plan, in view of the need to respond to stakeholders' views and changing circumstances. However, it follows from this that there must be a proper opportunity to consider and debate the merits of any proposed national plan, the Scottish Parliament being the most appropriate forum. This is already partly provided for in the Bill, in paragraph 13 of schedule 1, but the Committee is concerned to note that the power to determine the length of the period for Parliamentary consideration

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<sup>53</sup> Marine (Scotland) Bill, section 3(3)

<sup>54</sup> Eg Scottish and Southern Energy. Written submission to the Rural Affairs and Environment Committee.

<sup>55</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1881.

<sup>56</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1884

lies with the Scottish Ministers. Whilst we would hope that sufficient time would always be provided, the Committee considers that this is too important a matter to be left to the good faith of current and future administrations. Accordingly, **the Committee recommends that the Bill expressly sets out a minimum time period for Parliamentary consideration of a draft national marine plan. The Committee proposes that this be set at 40 sitting days.**

*Membership and governance of marine planning partnerships*

83. MPPs look likely to have a vital role in marine planning at regional level. However it was repeatedly stressed at Stage 1 that the Scottish Government has a very open mind as to what form these bodies are likely to take.

84. Professor Phil Thomas of the Scottish Salmon Producers Organisation voiced concerns that the current proposals for the partnerships were “almost casual”—

“We need a clear and identified leadership and, in particular, support function. In some way, the composition of the bodies needs to be balanced and limited in scale, because otherwise they will become totally unmanageable. They must be given a clear remit within the overall framework, otherwise they will not deliver what is required for marine planning, locally or nationally.”<sup>57</sup>

85. Not all witnesses were quite as concerned as to the lack of detail at this stage. Lloyd Austin of Scottish Environment Link, for instance, stressed the importance of taking a flexible approach depending on local circumstances.<sup>58</sup> But there was consensus as to the importance of MPPs being effectively led and their governance arrangements being clear and workable.

86. Evidence was sought as to whether there were any groups currently in existence which could serve as an example to MPPs. Drawing on her experience as a member of the Solway Firth Partnership, which seeks to put integrated coastal zone management into practice, Pam Taylor suggested that MPPs pursue a layered approach to governance, which would minimise the risk of their agreeing plans that lacked sufficient detail to be useful or which fudged controversial issues—

“In practice, the planning partnership will need to be built on several levels. There could be a core group to deal with strategic matters and focus groups to consider particular sectoral or geographical issues. Those levels will have to be meshed together to get the integrated planning system that we want to achieve, but not everything will be done in one forum.”<sup>59</sup>

87. Lloyd Austin of Scottish Environment Link made parallels with area advisory groups set up under river basin management planning, which were chaired by SEPA, suggesting that these had worked well. Andy Rosie of SEPA argued that these bodies had been able to work effectively with around 25 members, made up of representatives of all of the main stakeholders. If wider input were sought, advisory

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<sup>57</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1735.

<sup>58</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1736.

<sup>59</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1774

groups could hold forums in different localities, inviting members of the public and other interested parties to offer their views. He suggested that this approach might minimise the difficulties that could arise if more people wanted to be represented on a partnership than was manageable.<sup>60</sup>

88. Mr Rosie explained—

“There are opportunities to align—and possibly, to realign—the advisory groups that we have set up with marine planning partnerships, so that both pieces of businesses can be dealt with by the same characters. Forum fatigue is an issue, as the same people are required to sit around many tables. We have an opportunity to simplify the process. The area advisory groups already deal with aspects of the marine environment up to the 3-mile limit, so we are already involved in discussions about coastal waters, setting objectives and identifying what must be done to meet them.”<sup>61</sup>

*Leadership of marine planning partnerships*

89. Mr Rosie argued that, if there were such “alignment” between MPPs and area advisory groups under river basin management planning, this would allow SEPA and Marine Scotland to “swap chairs”<sup>62</sup> when switching from river basin to marine management. Other witnesses agreed that there would be merit in Marine Scotland chairing or leading MPPs. Patrick Stewart of the Scottish Fishermen’s Federation proposed that—

“thought should perhaps be given to consistency in the leadership of the groups. That could come from central Government rather than locally—there is an argument that that would achieve the consistency that the committee is concerned about.”<sup>63</sup>

90. Not everyone agreed. For instance, George Hamilton of Highland Council indicated that the council itself might prefer to be the body playing the “lead role”<sup>64</sup> in any future MPP encompassing the seaboard of the council. For Gordon Mann of the Solway Firth Partnership, the question of whether Marine Scotland should lead all MPPs was less important than ensuring that MPPs were truly representative<sup>65</sup> and that they were adequately resourced<sup>66</sup>, the latter being a point taken up in a number of written submissions.

91. John Eddie Donnelly of the Clyde SSMEI (one of the four groups currently piloting marine planning around Scotland) told the Committee that—

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<sup>60</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1767

<sup>61</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1764

<sup>62</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1765

<sup>63</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1737

<sup>64</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1765

<sup>65</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1775

<sup>66</sup> Solway Firth Partnership. Written Submission to the Rural Affairs and Environment Committee.

“The approach that we took is interesting in that there was no lead body. We took a consensual approach; we got agreement around the table from a vast range of different stakeholders [there were 28 bodies on the group], such as RSPB Scotland, the Clyde Fishermen's Association, Scottish Natural Heritage and the Scottish Environment Protection Agency. That was an interesting way of developing a plan, but it is something that we could move forward with within the Firth of Clyde to ensure that most stakeholders have their views put forward and we get the most sustainable way of developing different activities in the Clyde.”<sup>67</sup>

92. The Cabinet Secretary told the Committee that he proposed—

“to reflect on the comments that have been made to the committee in relation to our future thinking on the composition of marine planning partnerships. [...] The sector is diverse—fisheries are diverse, never mind the wider marine environment. There are no simple answers. I am sure that there will be debates in some parts of the country about who should be in marine planning partnerships. [...] The question facing the Government is the extent to which membership of local partnerships might be pre-empted. There will certainly be some obvious candidates. Because the marine regions and the planning partnerships will be established by secondary legislation, that will all be consulted on at the time.”<sup>68</sup>

93. He further clarified that he was open to the idea of providing a clearer framework for the governance of MPPs, whilst leaving some flexibility for local areas to adapt working practices to suit their circumstances.<sup>69</sup> He was unwilling to be drawn on how matters such as voting procedures would be drawn up at this stage.

#### *National priorities and regional plans*

94. Questions over the governance of MPPs, and in particular whether Marine Scotland should lead or chair them, relate closely to another important issue that arose at Stage 1 – the extent to which regional plans should execute national priorities identified during the preparation of the national plan. For instance, if the national plan identifies tidal energy as a priority, how much discretion should an MPP have to determine that tidal energy generation should not be prioritised within its marine region?

95. Whilst all witnesses would probably agree on the need for a balanced approach, clear differences of emphasis did emerge. On one side, Captain Nigel Mills of Orkney Council argued that—

“surely there must be areas where the regional plan can deviate; otherwise, the regional plan becomes a photocopy of the national plan. Our diverse regions must have the ability to personalise their plans in some way. The marine environment is not geographically consistent, and even water temperature and

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<sup>67</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1873

<sup>68</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1890

<sup>69</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1890

salinity are diverse. The North Sea and the Atlantic are completely different water bodies. We cannot allow a national plan just to spill out throughout Scotland and say that we will all do the same.”<sup>70</sup>

96. However, the Scottish Coastal Forum suggested in written evidence that Marine Scotland should be empowered to “drive”<sup>71</sup> regional plans. The Forum’s Captain Jim Simpson elaborated that Marine Scotland should “set the parameters”<sup>72</sup> within which MPPs should operate to prevent them “going off at a tangent”.<sup>73</sup>

97. Gordon Mann of the Solway Firth Partnership described provision in the Bill requiring regional plans to conform to the national plan unless (in the language of the Bill) “relevant considerations indicate otherwise” as “a nice fit” and expressed optimism that the requirement for Marine Scotland to approve the plan would ensure that plans could be agreed relatively quickly rather than dragging on through a failure to reach agreement on contentious issues.<sup>74</sup>

98. Expanding renewable energy, including at sea, has been seen as a national priority by successive Scottish Governments. Yet major projects are inevitably controversial at local level. One of the first such projects was the Robin Rigg windfarm in Solway Firth, now partly operational, which proceeded following Government approval and the passing of an enabling Act by the Scottish Parliament. Mr Mann was asked if anything different would have happened had regional marine planning along the lines envisaged by the Bill been in place. He said that he did not know what the difference would have been but added that—

“It is right and proper that the Government should make such difficult balancing decisions, but local people seem almost to have been excluded from the process when they need to be included.

On the process that the bill envisages for preparation of a marine plan, an area might come forward and say, “Offshore wind farms are not for us.” Clearly, that does not fit with national priorities, or with the national need to secure renewable energy targets, so there is an opportunity for the plan to be amended. However, it would be being amended deliberately and positively, and because a democratically-elected Parliament had taken the view that in this circumstance, renewable energy was a higher priority than landscape, and the impact on that landscape of any development.”<sup>75</sup>

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<sup>70</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1860

<sup>71</sup> Scottish Coastal Forum. Written submission to the Rural Affairs and Environment Committee.

<sup>72</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1742

<sup>73</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1742

<sup>74</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1775. In this connection, Mr Mann cited a sustainable cockle fishery, visited by Members that morning, in respect of which it had taken ten years to reach agreement.

<sup>75</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1784

99. Mr Mann further clarified that he was comfortable with that hierarchy – it was acceptable that there should be a final say at national level, and he did not consider that it would prevent effective partnership working at local level.<sup>76</sup>

100. The Cabinet Secretary remarked—

“There will be a close relationship between Marine Scotland and all the marine planning partnerships. Marine Scotland will be the champion of Scotland's seas and the champion of the legislation, so a close relationship is inevitable. It would be nice to think that Marine Scotland will not have to chair some marine planning partnerships to get them going, but I have no fixed view on such suggestions.”<sup>77</sup>

101. The Scottish Association for Marine Science was amongst the organisations to express some concern as to the drafting of section 3(5) – concerns along very similar lines to those pertaining to the fit between marine planning and marine licensing set out in section 11(1)—

“A regional marine plan must be in conformity with any national marine plan, unless relevant considerations indicate otherwise. What is the definition of “relevant considerations”? This is quite broad and should be clearly defined as it could negatively influence implementation of regional plans and national consistency.”<sup>78</sup>

### *Conclusions*

102. It is clear from this survey of the evidence, that there is a diversity of views on who should be on MPPs, how they should be run, and who should chair or lead them. If witnesses were agreed on one thing, it was that no two MPPs should be selected and run in exactly the same way. This indicates that the Bill has probably got it right in allowing for a flexible approach. The Committee does not therefore consider that it would be helpful to issue recommendations on MPPs' membership and governance of an especially specific nature.

103. As regards the fit between regional and national plans, the view of most witnesses, shared by the Committee, is that the Bill has again probably got it broadly right. The key issue is balance between securing national priorities, especially in growing renewable energy and reducing Scotland's carbon footprint, are ensuring meaningful devolution of decision-making in marine planning. Whilst the arrangements in the Bill are flexible – and concerns over the meaning of “relevant considerations” in section 3(5) do merit further consideration – the Committee notes that, under the Bill, the Scottish Ministers do retain final authority over the content of

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<sup>76</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1785

<sup>77</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1892

<sup>78</sup> Scottish Association for Marine Science. Written Submission to the Rural Affairs and Environment Committee.

regional marine plans even where they delegate their preparation to marine planning partnerships.<sup>79</sup>

**104. The Committee largely supports the flexible approach to the membership and governance of marine planning partnerships proposed in the Bill.**

**105. The Committee considers that MPPs should be diverse bodies, drawing their membership from a wide selection of local stakeholders, and should not be dominated by narrow sectoral interests. It follows that we find it almost impossible to envisage circumstances where a single public authority would be an appropriate “partnership” and suggest that the provision enabling this to happen be removed from the Bill.**

**106. On the other hand, the Committee would make the practical observation that any policy-determining body with too large a membership risks being unwieldy and may lack the momentum to drive through timeous agreement of a marine plan. As this may mean that not every local stakeholder group that wants to be on an MPP will end up being on one, Marine Scotland should consider drawing up good practice guidelines on ensuring that views can be fed in to MPPs in other ways. The forums held by advisory groups for river basin management planning appear to be one possible approach to follow.**

**107. The Committee supports each individual MPP having discretion to determine its own working practices. However approaches should not be so flexible as to lead to national objectives being unrealised or good practice not being shared. To that end, the Committee considers that Marine Scotland’s experience and expertise will be crucial for the effective running of all MPPs. The Committee would expect that Marine Scotland would take the lead role in administering MPPs.**

**108. The Committee also expects that it would be a Marine Scotland representative who would chair most MPPs, although there may be instances where it would be more appropriate for the representative of a locally-based organisation (most obviously a local authority) to take the chair. In all cases, however, the Committee considers that it should be for the Cabinet Secretary to appoint the chair of an MPP.**

**109. The Committee invites the Cabinet Secretary to consider concerns that the requirement in section 3(5) that regional marine plans conform to the national plan “unless relevant considerations indicate otherwise” is broad, and that “relevant considerations” should be defined in the Bill or explained in guidelines.**

*Number and size of marine regions*

**110. Setting the boundaries of marine regions is another important matter on which the Scottish Government has not yet reached a concluded view, with the Cabinet Secretary being drawn no further than indicating that there were likely to be between**

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<sup>79</sup> As confirmed by the Cabinet Secretary: Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1889.

5 and 15 regions.<sup>80</sup> The Committee has heard informal indications that a marine region of the scale of the Sound of Mull pilot is probably smaller than what the Government now has in mind and that the Firth of Clyde pilot may offer a more likely template.

111. Most witnesses appeared relatively relaxed that, at this stage, there was an absence of detail as to the boundaries of future marine regions, although a joint submission from all three island councils argued that each should be considered as a separate marine region. Some witnesses saw Scotland's main firths as natural marine regions.<sup>81</sup> Otherwise, there was a consensus that there should be a flexible approach tailored to local circumstances.

112. However there was a slight difference of opinion as to the underlying principles that should apply when determining boundaries. Lloyd Austin of Scottish Environment Link argued for an ecosystem-based approach—

“it should be the size of the natural ecosystem that determines the size of the area to be considered. In the firths, a firth-wide approach would be logical; and in the northern isles, an island group approach, whether Shetland or Orkney, would be logical. Around the rest of the coast, there are ways of dividing areas, as has been done with inshore fisheries groups. Indeed, there is logic to having a division along similar lines, so that the two processes can come together and coalesce.

The key thing is to take an ecosystem approach to management. The "Sustainable Seas for All" consultation paper suggested that there would be a duty to take such an approach in planning and in managing protected areas. However, that has not emerged in the bill. We would like there to be a specific requirement on Marine Scotland to take such an approach and to ensure that ecosystem objectives are built into planning processes.”<sup>82</sup>

113. Mr Austin further argued that this approach should have the advantage of allowing “a kind of zipping of integrated coastal zone management, involving river basin management plans and terrestrial planning systems.”

114. Phil Thomas of the Scottish Salmon Producers' Organisation cautioned against going too far down the road of taking an ecosystem approach if that were to result in there being too many marine regions, making it difficult for industry to engage with the system. He considered the areas covered by the inshore fisheries groups to be about the right scale. Any smaller and the planning approach risked being “piecemeal.”

**115. The Committee expects that the Scottish Ministers will consult widely, including with the Parliament, before designating Scottish marine regions under section 3(4).**

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<sup>80</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col, 1883

<sup>81</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1776

<sup>82</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1740

**116. The Committee supports the principle of taking an ecosystem-based approach to designation but recognises that the waters surrounding Scotland cannot be broken down into discrete clearly-defined ecosystems, and that accordingly it is legitimate to take other considerations into account.**

**117. We consider that there is a reasonably clear-cut case for the major firths and for the seas surrounding Orkney, Shetland and the Western Isles to be considered discrete marine regions. Making the major firths marine regions would also have the advantage of enabling a partial integration of river basin management plans and regional marine plans.**

*Cross-border issues*

118. In at least one part of the Scottish marine area – the Solway Firth – effective cross-border co-operation is likely to be vital if a success is to be made of marine planning, and indeed licensing. Whilst witnesses could not be expected to be expert on the complex interplay between the UK and Scottish Bills, most seemed to take the view that there was no reason why stakeholders on both sides of the Firth could not make a success of managing it, provided there were effective communication structures and a willingness on both sides to engage. It was crucial, however, that the Bills going through both Parliaments enabled this to happen. Gordon Mann of the Solway Firth Partnership explained—

“Our concern is that the national boundary that is drawn down the middle of the Solway could lead to our work disintegrating rather than integrating. Our argument is that a firth such as the Solway should be the subject of a single plan. [...]

The section that allows the delegation of functions relating to a regional plan will allow Marine Scotland to delegate its part of the Solway to a third party. We need the same level of provision in the United Kingdom Marine and Coastal Access Bill to enable one organisation to carry out the stakeholder consultation, the research and other work to prepare a single plan. Each marine organisation can then approve the plan for its own interest and the normal consenting process by the different Administrations can then take place, but that will be based on a single agreed plan.

As we have heard, terrific efforts were made right at the start to ensure that there were single, cross-border management plans for those European marine sites that straddle borders, and the water framework directive is being implemented on a cross-border basis. The idea that we could not have a single plan for the Solway would appal me.<sup>83</sup>

119. His colleague Pam Taylor agreed with the proposition that it would be useful if the Scottish Bill imposed a duty on an MPP encompassing the Scottish part of the Solway Firth to have regard to any marine plan for the English part—

“We want joint planning. If we cannot get full joint planning, we want well-integrated planning. The legislation to implement the water framework directive

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<sup>83</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1776

places a duty on the Environment Agency and SEPA to work together jointly. Irrespective of any tensions or issues that might come into play, such as pressures on timescales, the organisations are bound to work together to prepare a plan. A guarantee that there would be an integrated process would be helpful.”<sup>84</sup>

120. Another issue that Mr Mann identified as a possible impediment to effective cross-border working was the differing status of Marine Scotland and the NDPB set up under the UK Bill as its rough equivalent. He said that it had apparently been difficult to arrange discussion about joint working at official to official level because—

“it would be difficult for an NDPB set up under the UK bill to co-operate with Marine Scotland, which is an executive arm of the Scottish Government. That seems to be an artificial and somewhat bureaucratic response. To date, all the evidence suggests that co-operation is going to be very difficult.”<sup>85</sup>

121. Witnesses from the Solway Firth Partnership also pointed towards the importance of enforcement in a cross-border context so as to prevent the illegal or undesirable activities being displaced to north of the border.<sup>86</sup> The aim of harmonising enforcement powers under the Bill as much as possible with those set out in the UK Bill ought to mitigate this, provided resources allocated towards enforcement are roughly equivalent on both sides of the border.

122. The Cabinet Secretary told the Committee—

“Currently, we are taking an administrative approach to the future management of the Solway. It is worth bearing it in mind that the UK Marine and Coastal Access Bill is different from the Marine (Scotland) Bill in a number of ways. For example, our bill will give ministers the opportunity to delegate planning powers to regional marine planning partnerships, whereas there is no such power in the UK bill, so it is difficult to identify a vehicle for setting up a specific plan for the Solway.

The Scottish Government and the UK Government have agreed to work closely to address such issues, in particular in relation to the Solway. I have full confidence that we will get round the issue. It has been suggested to the UK Government that a joint forum should bring together representatives from north and south of the border. That seems to be a sensible approach, but we might find an alternative one.

It is perhaps too early to say what will happen, given that we will consult in Scotland on factors to do with the Scottish marine regions, such as how many regions there should be. No doubt the future management of the Solway will feature in the debate. It will be perfectly possible to come up with an

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<sup>84</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1779

<sup>85</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1778

<sup>86</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1788

administrative arrangement with the UK Government that ensures that we have the best possible arrangements for the Solway Firth.”<sup>87</sup>

**123. The Committee considers that the case for treating the Solway Firth, as much as is practicable, as a single area for marine planning purposes is clear. Major planning decisions about matters such as sites for renewable energy projects should always be taken having regard to stakeholder views on both sides of the Firth, and the necessary legal or administrative arrangements should be in place to ensure that this is the case.**

**124. The Committee recognises that the Marine (Scotland) Bill cannot, of itself, produce a solution. There should be action at a UK level too and we hope that the UK Bill will not be enacted in such a way as to place obstacles in the way of effective cross-border working. The Committee seeks assurances from the Cabinet Secretary that he has made representations to his UK counterpart to this effect.**

*Appeals against marine plans*

125. The Bill allows for a national or regional marine plan to be challenged in the Court of Session on the ground that a procedural requirement has not been complied with, or that the plan is ultra vires, and for the Court to quash the plan or remit it to the Scottish Ministers for remediation if they agree with the challenge.<sup>88</sup> However, there is no right of appeal as such against the content of a national or regional plan. Written evidence to the Committee suggested that this might put the Scottish Government in breach of the Aarhus Convention on access to information, etc, in environmental matters, to which the UK is a signatory.

126. Government officials disagreed, arguing that the convention requires only public participation and that this was provided for in the Bill. Stuart Foubister stated—

“Appeals generally have the connotation of an appeal before a court or an independent tribunal. Such appeals would be quite difficult with plans, which do not deal with individuals' rights. Who, for example, would be the appellant in such a situation? At the end of the day, a plan is a statement of policy, not a legal judgment, and it would be quite difficult to present public rights as rights of appeal in connection with it.”<sup>89</sup>

127. This explanation did not entirely satisfy some witnesses, with Lloyd Austin of Scottish Environment Link saying that the issue was a legal grey area and that it could be argued that the Government would be in breach of the Aarhus Convention. Patrick Stewart of the Scottish Fishermen's Federation argued that to allow appeals against a marine plan only on procedural grounds was too restrictive in a democratic society.<sup>90</sup>

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<sup>87</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1882

<sup>88</sup> Marine (Scotland) Bill, Sections 13 and 14

<sup>89</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 27 May 2009. Col 1705

<sup>90</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1745

128. The Cabinet Secretary, in a letter to the Committee, noted that—

“Discussion on appeals has focused on a need for greater detail and on third party rights of appeal. I accept the need for greater detail and I’m happy to commit to consulting on the fully worked up appeals process in due course. I have difficulties with the proposed third party right of appeal. In my opinion this would prolong the decision making process unnecessarily, open the door to vexatious appeals and damage Scotland’s competitive position. Our proposals already increase the opportunities for stakeholders to be involved in decision making in the marine environment through consultation requirements and inquiries both in terms of planning and licensing. Adding a post decision review would add delay and bureaucracy.”<sup>91</sup>

129. In the Committee’s view, these comments implicitly acknowledge that the main debate about decision affecting the marine environment is likely to take place at the licensing and authorisation stage, rather than following the publication of a marine plan setting out strategic objectives for a marine region and making proposals as to how particular parts of the region should be used.

**130. The Committee notes that, whilst a marine plan will be an important document, it will not impose justiciable rights or duties on persons. In particular, the Bill will enable public authorities, exceptionally, to depart from marine plans in making decisions affecting the marine environment. The Committee is therefore reasonably satisfied with the restriction of appeals against a marine plan to technical objections to the plan. This does however underline the importance of plans being properly consulted upon, with all stakeholders, including the Scottish Parliament, having adequate opportunity to consider proposals before the Scottish Ministers sign any plan off.**

*Bureaucracy, legal complexity and the “hierarchy” of maritime rights and duties*

131. Concerns frequently arose at Stage 1 that the Bill provisions on planning might increase bureaucracy rather than achieving its stated aim of reducing it. Similar concerns also arose in relation to the provisions on licensing. Whilst these concerns overlap – the intention behind the Bill is to have planning and licensing systems that cohere and are not contradictory – there is a separate discussion of whether the licensing system will reduce complexity in the discussion under Part 3 of the Bill.

132. Patrick Stewart of the Scottish Fishermen’s Federation described marine governance as—

“a bit of a jungle at the moment and I see no sign of the rainforest being cleared. We are making a new start and should do so as simply as we can, with one planning authority for the marine environment. Obviously there must be arrangements at the shore, to zip together the terrestrial and marine systems, but everything that can be done within the competence of the Scottish Parliament to plan in the marine environment should be in one body, with one set of rules. I would be interested to hear an argument for making the system more complicated than that, which the bill does. For example, it says that local

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<sup>91</sup> Scottish Government. Correspondence from Cabinet Secretary for Rural Affairs and the Environment dated 8 September 2009.

authorities may retain the terrestrial planning system that applies to marine fish farms. In our view, that is utter nonsense. We are making a new start—let us start as we mean to go on, with a sensible, straightforward system.”<sup>92</sup>

133. A recurring and related issue was whether or not the Bill would help sort the various rights and duties that can exist over the sea into a “hierarchy” so as to clarify which duties are pre-eminent and which subservient. It is clear that there is a degree of confusion amongst stakeholders on this point, and an appetite for greater clarity as to what rights and duties apply and for the opportunity to be taken to make the legal position far more clear.

134. Rob Hastings of the Crown Estate told the Committee—

“My interpretation is that, with regard to marine matters in Scotland, the Marine (Scotland) Bill has to be the priority. Clearly, other things, which will always be there, have to be considered in the execution of that—in managing and delivering a plan.”<sup>93</sup>

135. Walter Speirs of the Association of Scottish Shellfish Growers added—

“So many different designations are now being applied to bodies of water. You can have one loch with several different designations, which is protected, governed or regulated by different regulators. This is the opportunity to see whether we can clear all that up. There has to be a system whereby there is a ranking of seniority of legislators or directives; otherwise, there will be continual conflict.”<sup>94</sup>

136. Orkney and Shetland councils are subject to particular legislation concerning matters such as harbours, planning and certain licenses. For instance, under this legislation, Orkney and Shetland are deemed to be the harbour authority for all of their respective areas, whereas this is not the case on the mainland. The Bill will not repeal this legislation. This too has led to uncertainty. Captain Nigel Mills of Orkney Council explained—

“With regard to the bill, we are concerned to ensure that there will be no conflict between the council, which believes that it has primacy over certain provisions, and NGOs and Marine Scotland, which may effectively take over those provisions.”<sup>95</sup>

137. The Cabinet Secretary was invited to respond to some of these views—

“First, it is worth bearing it in mind that the reason why we have a Marine (Scotland) Bill is that there is in effect no planning at sea. There is cross-party

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<sup>92</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1746. Mr Stewart’s observations on fish-farming, which concerns planning but is predominantly a licensing issue, are discussed further below.

<sup>93</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1859

<sup>94</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1859

<sup>95</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1846

support and support across Scotland for the proposal that we should have plans for our waters and seas. There is a recognised need for planning at sea, so there will be new plans for the sea—that is the purpose of the bill.

We have been careful throughout the process to minimise any new bureaucracy and there are steps within the bill to reduce bureaucracy. The process, particularly for industries that want to apply for consents to carry out activities at sea, will be dramatically streamlined, which will cut the level of bureaucracy for industries that want to carry out such activities.

There will be an opportunity to review the fact that we currently have coastal forums and that all kinds of bodies and forums are in existence. Once the regional marine planning partnerships are up and running we can take stock of what exists and establish whether there is a need for them all because of the new forum and the new focus for marine planning on a regional basis throughout Scotland. An important point is that they are marine planning partnerships; they are bringing existing bodies together and are not creating new bodies. We have been careful to ensure that that is the case.”<sup>96</sup>

138. Evidence from Scottish Government officials indicated that they did not see any clash between the Acts for Orkney and Shetland and the Bill. Orkney and Shetland would continue to be able to exercise the powers conferred on them within the wider framework of marine planning.<sup>97</sup>

139. Witnesses’ uncertainties about hierarchies of rights and duties may point to a misunderstanding of the purpose of the Bill and of the current law, with which the Committee sympathises. The Bill seeks to rationalise the marine licensing process (which includes, for instance, repealing parts of the Coast Protection Act 1949 dealing with licensing). However, it is not our understanding of the Bill that it seeks to create any “hierarchy” of rights or duties. Legal rights that currently exist and which are not either repealed or superseded by provisions in the Bill will continue to exist and be binding on those to whom they apply. This means, for instance, that a fisherman taking his boat into a particular area may have to take into account various legal provisions that apply to him – all of them, as it were, equally legal.

140. Where there is potential to move forward within the Bill is to use marine planning to make sense of the legal rules, as well as the environmental or socio-economic factors applying within the Scottish marine area, or a particular marine region, to help stakeholders see through the “jungle”<sup>98</sup> described by Mr Stewart. It is to be hoped that this will enable them to go on to make more informed decisions about what actions to take. But this should not be confused with sorting legal rules into a hierarchy of importance.

**141. The Committee notes that the Bill will not create a hierarchy of legal rights and duties, but hopes that the marine planning process will put legal rights and**

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<sup>96</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1887

<sup>97</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Cols 1892-1893.

<sup>98</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1746

**duties within a particular marine area in context enabling stakeholders to make more informed decisions about the use of the marine environment.**

142. However, the Committee invites the Cabinet Secretary to note witnesses' concerns that the law of the sea has become too complex, and to investigate whether this can be addressed, for instance through consolidation or codification of legal rights and duties, or through instructing Marine Scotland to provide guidance on the lawful use of the sea tailored to particular stakeholder groups. In doing so, the Committee recognises that much of the law emanates from international sources over which the Scottish Government has no direct control.

*De-cluttering the seascape: inshore fisheries groups and integrated coastal zone management groups*

143. A related issue is whether the Bill might provide the opportunity to reduce duplication in the administration of the marine environment. This would appear pertinent, given the ongoing and wide-ranging debate as to the "de-cluttering" of the administrative landscape in Scotland. The integration of various agencies and inspectorates into one Scottish Government directorate, Marine Scotland, could be seen as part of that process of de-cluttering, although it will be how efficiently Marine Scotland works in its everyday operational activities that will determine whether genuine simplification has been achieved. Discussion of this process did not arise much at Stage 1,<sup>99</sup> although there was some consideration of the future direction of integrated coastal zone management groups and inshore fisheries groups.

144. In relation to IFGs, the discussion related both to their membership and their continuing purpose. In written evidence, the Scottish Sea Angling Conservation Network expressed concerns that conservation would be a far lower priority for IFGs than for their English counterparts now being put on a statutory footing by the UK Bill. This point was picked up by Howard Wood of COAST who argued that Scottish IFGs were totally skewed towards commercial fishing interests.<sup>100</sup>

145. Pam Taylor of the Solway Firth Partnership commented—

"In England, there is a long history of sea fisheries committees, which were established in the 1800s. In Scotland, we are just starting out with inshore fisheries groups. To get the support of the fishing community, it may be best for the moment if membership of the groups is limited. This morning we discussed the difficulties of finding agreement among different sectors of the fishing community; it can be quite a challenge. Over time, inshore fisheries groups may acquire wider memberships and become more like the inshore fisheries and conservation authorities that are being established in England. The fact that the two systems are different is not necessarily a huge problem, but it is important

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<sup>99</sup> Some witnesses did, however, complain about the number of regulators that they had to deal with, eg Walter Speirs, Scottish Shellfish Growers' Association, *Official Report*, 1 September 2009. Col 1852

<sup>100</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1874

that they work to similar objectives. That should happen through the wider regional marine plan within which the fisheries plans will sit.”<sup>101</sup>

146. The Cabinet Secretary acknowledged that there was an ongoing debate about the purpose and membership of inshore fisheries groups, and that a different approach was being taken in the UK Bill. He was reluctant to commit to the proposition that membership might be open to a wider group of stakeholders in the future (sea anglers and charter boats having been cited)—

“We have set up the inshore fisheries groups in the past year or two, and there has been a lot of heated debate about the membership of those groups. We have set down the membership at the moment because it was important to move the groups forward. Environmental organisations have the opportunity to provide input to the groups, although they are not members of the executive committees. [...]

In all issues such as this, the question is where we draw the line. If we set something up to give commercial fisheries the opportunity to introduce fisheries instruments to manage their local fisheries, that is clear and understood. If we start expanding the role of inshore fisheries groups, they become different beasts and it gets incredibly complicated. I am sure that all of us around the table know that even within inshore fisheries groups, debates are taking place, and that there are complications from time to time. To compound that is not an attractive option.”<sup>102</sup>

147. The debate as to the future of ICZM groups following enactment of the Bill has been less heated. Gordon Mann of one such group, the Solway Firth Partnership, explained that there had been “a long and not terribly helpful debate” about the relationship between marine and coastal planning. However, he took the optimistic view that the very fact of the setting up of integrated marine planning under the Bill, and with it, hopefully, improved or more coherent research into the marine environment would in itself lead to greater integration between coastal and marine management.<sup>103</sup>

148. The Cabinet Secretary indicated to the Committee that he had an open mind as to whether there would be the same need for coastal partnerships once the Bill was enacted.<sup>104</sup>

**149. The Committee supports the application of relevant principles of integrated coastal zone management to marine planning and notes that the role of ICZM groups will evolve and possibly reduce following implementation of the Bill and the establishment of marine planning partnerships.**

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<sup>101</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1767

<sup>102</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1901

<sup>103</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1773.

<sup>104</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1891.

150. **The Committee recognises the need for effective local management of inshore fisheries. We note that inshore fisheries groups are new bodies that need more time to settle into their role. However, the Committee considers that there is a strong case for re-examining the role, membership, or indeed existence of IFGs in around three or four years' time, once the Bill, if enacted, is being implemented and marine planning partnerships have been set up, and once any reforms arising from the European Commission's green paper<sup>105</sup> on reform of the common fisheries policy have become clear. Until this re-examination takes place, it is vital that there be effective co-operation between IFGs and MPPs.**

*Taking a decision in conflict with a marine plan*

151. As noted, the purpose of section 11 is to provide that there is consistency between marine plans and decisions taken by public authorities, including licensing decisions by Marine Scotland under Part 3 of the Bill. But a public authority may decide not to take a decision in accordance with a marine plan if "relevant considerations indicate otherwise."<sup>106</sup>

152. Some evidence<sup>107</sup> has raised concerns as to the lack of definition of the "relevant considerations" that would entitle a public authority to depart from a marine plan. These concerns are understandable. The problem is not so much the overall policy – there may be times when the plan, has got something wrong or become outdated and so should not be followed – as the lack of clarity.

153. **The Committee considers that section 11 is one of the key provisions of the Bill since it is the link between marine planning and the taking of decisions by public authorities. It is therefore important that its meaning is properly understood. The Committee does not object in principle to a policy of allowing public authorities –, exceptionally – to take a decision that is not in accordance with a marine plan. However more clarity and certainty is needed as to the circumstances where this would be permissible than is provided by the phrase "unless relevant considerations indicate otherwise". The Committee recommends that the Bill make provision for the Scottish Ministers to issue guidance as to what would amount to "relevant considerations" permitting a public authority to depart from a marine plan.**

### **Part 3 of the Bill: marine licensing**

154. Part 3 of the Bill sets out a new licensing regime for activities within the Scottish marine area. Fairly detailed provision, much of it concerned with the process of applying for a license, is set out in the Bill and accordingly only the main provisions are set out below.

155. The starting point, under section 16, is that no person may carry out a licensable marine activity, or cause another person to do so, except in accordance with a marine license. It is for the Scottish Ministers to issue marine licenses,

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<sup>105</sup> European Commission. Green Paper on the Reform of the Common Fisheries Policy, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0163:FIN:EN:PDF>

<sup>106</sup> The Marine (Scotland) Bill, Section 11(1)

<sup>107</sup> Eg Marine Conservation Society. Written submission to the Rural Affairs and Environment Committee.

although they may delegate that role to another person, or group of persons. The present administration's policy is that Marine Scotland will have operational responsibility for licensing under Part 3.

156. Section 17 goes on to list those matters deemed licensable marine activities. These include activities such as dumping objects or substances, scuttling, or carrying out construction or alteration of structures, dredging, and incineration.

157. The Bill goes on to provide two important qualifications. First, section 24 enables the Scottish Ministers to specify by regulations particular activities that do not require licensing or which do not require licensing provided certain conditions are satisfied. Secondly, section 25 entitles the Scottish Ministers to provide, again by regulations, that licensable marine activities falling below "a specified threshold of environmental impact"<sup>108</sup> should be registered rather than licensed.

158. Most witnesses appeared broadly content with the policy laid out in Part 3 and with the list set out in section 17.<sup>109</sup> However, some did express concerns as to whether or not particular activities that are not currently licensable might become so once the Bill is enacted. Concerns were also expressed about the effect of taking a regulatory approach that would turn out to be less light-touch than those of our neighbours – and rivals. For instance, David Whitehead of the British Ports Authority cautioned Members that the creation of two or more substantively different regulatory regimes within UK waters could have consequences for the renewables industry in which there was "fierce competition."<sup>110</sup>

#### *Licensing and the "one stop shop"*

159. The Cabinet Secretary told the Committee that—

"one of the successes of the bill is that it will streamline the licensing system. I will explain the position using the example of a renewable energy company that wishes to develop in our seas. Currently, as a first stage, the developer has to identify the consents that are required and apply to the relevant bodies, which involves making applications under the Food and Environment Protection Act 1985, the Electricity Act 1989 and the Coast Protection Act 1949, and often securing a wildlife licence. That process will be replaced with the requirement to submit one application to Marine Scotland. I hope that the committee appreciates that that will streamline the system significantly, as opposed to making it less coherent.

There have also been efforts to identify situations in which licenses will not be required, which will result in exemptions. There are numerous examples of that. Marine Scotland will deal with the various aspects of those matters internally."<sup>111</sup>

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<sup>108</sup> Marine (Scotland) Bill, Section 25(1)

<sup>109</sup> Eg Andy Rosie, SEPA: Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1761.

<sup>110</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1799.

<sup>111</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1894.

160. A number of witnesses doubted this however. In particular, there were doubts that the Bill would lead to there being a “one stop shop” in which all the consents necessary for a marine project could be obtained at once. Morna Cannon of Scottish Renewables explained to the Committee—

“As well as making an application under section 36 of the Electricity Act 1989, developers would need to apply for a licence under the bill. Our concern is that it is unclear what that licence will replace. It has long been assumed that the licence under the bill will replace the FEPA and CPA licences<sup>112</sup> ... but it is not clear from the bill that the requirement for those licences will be repealed and that they will be replaced by the licence under the bill. That is what we expect, but we would appreciate it if it was made clear.

Even if that point was clearly stated in the bill, however, there would still be some uncertainty in the industry about the application process. Will only one application be required, or will two applications need to be made separately? If only one application is required, which part of the Scottish Government will be responsible for dealing with it? It would probably be either the energy consents unit that currently deals with section 36 consents or some branch of Marine Scotland, but it is unclear which would be the relevant department.

That level of detail is not needed in the bill itself. We recognise that the bill will be around for a long time, so the detailed process should not be pinned down in it but would be better placed in secondary legislation. [...] We would simply like some clarity about which licences will be replaced by the licence under the bill. We also want the results of the marine energy spatial planning group's work to be published as soon as possible so that people have clarity and certainty.”<sup>113</sup>

161. Similar concerns came from the port and shipping industry. David Whitehead of the British Ports Authority told the Committee—

“The bill and the documents that surround it say the right things about making the licensing system better and so forth, but that just refers to the licensing system that Marine Scotland can deliver. There are also harbour revision orders, which are a very important part of the whole system and which will continue to be handled by the ports section of the Scottish Government. There are two bits there, and it is the harbour revision order bit that is usually very slow because there are not enough people dealing with that matter. The provisions in the bill on licensing deliver only part of the solution.”<sup>114</sup>

162. Jeremy Sainsbury of Scottish Renewables explained that the root problem was that pieces of legislation had been enacted over time to deal with specific users of the sea in specific ways, leading to a piecemeal approach to licensing—

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<sup>112</sup> I.e. licenses under the Food and Environment Protection Act 1985 and the Coast Protection Act 1949

<sup>113</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1804

<sup>114</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1806

“When a project is proposed that involves not only placing structures in the sea bed but connecting them with cables, a new beast is brought to the environment. Managing the process requires separate applications, and we have to ensure that conditions run in parallel. There are several sets of administration during the project's development, and the process becomes complicated and unwieldy because the system was designed to deal with other things.

If there is to be a new way forward and a proper spatial plan is created that can be administered by a single licensing regime, proposals will be able to be considered and given consent in an holistic way, against an holistic plan. That is a perfectly logical approach, and the committee should not allow it to evaporate before its eyes—it is an important concept of the whole process.”<sup>115</sup>

163. Lloyd Austin of Scottish Environment Link, however, pointed to section 11 of the Bill, which requires that any enforcement or authorisation decision taken by a public authority must be in accordance with a marine plan. He considered that this would help ensure a more all-encompassing and holistic approach to marine planning provided the marine plan itself is comprehensive.<sup>116</sup>

164. In written evidence, Jamie Grant of MacRoberts Solicitors pointed out the risk of sections 16 and 17, which are quite broadly drafted, creating a duplication of legal responsibilities. He noted that it was not clear what marine licensing under Part 3 of the Bill was intended to replace, pointing out, in particular, the need for clarification as to what effect the provision would have on current legal provisions requiring harbour authorities to consent to certain activities.<sup>117</sup>

**165. The Committee notes that a number of stakeholders are not persuaded that the Bill will lead to a simplification of the marine licensing system. Whether the problem has simply been a failure to communicate the effect of Part 3 clearly is not apparent. If the Government considers that the Bill will enable an integrated approach to marine licensing, including the likelihood of a “one stop shop”, there is a need for the Cabinet Secretary to state the case more clearly.**

**166. The Committee also seeks clarification that the combined effect of sections 16 and 17 will neither create a legal overlap, where both Marine Scotland and another body have the right to authorise the same type of marine activity, nor create uncertainty as to the legal status of pre-existing authorisation powers apparently superseded by sections 16 and 17 but not expressly repealed.**

#### *Decommissioning marine structures*

167. The Bill does not expressly refer to decommissioning. This has led to Members picking up some concerns that the Bill does not deal with the issue, and that this too

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<sup>115</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1808

<sup>116</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1749

<sup>117</sup> Jamie Grant, MacRoberts Solicitors. Written submission to the Rural Affairs and Environment Committee.

might threaten the creation of a one-stop shop for licensing. In fact, it does deal with it, albeit not in great detail, this being another issue in relation to which much will depend on implementation. Section 22(1)(a) entitles the Scottish Ministers, when granting a marine license to attach conditions, and section 22(3)(d) then goes on to state that this might include conditions as to the removal of objects or work at the end of a specified period.

168. The Bill therefore would appear to allow decommissioning to be dealt with as part within a single licensing arrangement, even where a project is expected to run for 20 years or more, as may be the case with some Crown Estate leasing arrangement for use of the seabed.<sup>118</sup>

169. At the same time, evidence from some stakeholders indicates that it would not, in their eyes, represent progress if a one-stop shop approach to licensing routinely involved conditions being issued requiring a total removal of marine structures. Scottish and Southern Energy argued that matter called for—

“detailed debate and consideration as a blanket condition of this kind would not be a pragmatic approach (e.g. removal of structures below seabed level), nor would it necessarily yield the best environmental result (e.g. removal of buried subsea cables). This area is interwoven with obligations under international maritime law for which there are a number of precedents with respect to removal (or not) of maritime structures, cables, pipelines and other infrastructure.”<sup>119</sup>

170. This reflects evidence that the Committee has picked up from visits, for instance, to the Scottish Association from Marine Science near Oban, where an artificial reef has been laid offshore using granite blocks from the nearby Glensanda quarry, and from witnesses in meetings<sup>120</sup> that there might occasionally be ecological benefit in leaving structures in the sea. A blanket approach of imposing strict removal conditions in all cases would therefore appear to be inappropriate. Conversely, it is not clear to the Committee from the Bill what would happen were the Scottish Ministers to decide to allow a structure to sink or be scuttled to form a reef. Under the Bill, it would appear that this could be dealt with either as a condition of the license or as a “marine activity” under section 16 and 17 requiring a separate license.

**171. The Committee considers that a rigorous approach to decommissioning based on leaving the sea bed in as close to its original state as possible should continue to be the norm. However, Marine Scotland should avoid taking an inflexible approach, if that were, for example, to prevent research into the effect of artificial reefs on marine biodiversity. In particular, the Committee notes that the creation of a Demonstration and Research Marine Protected Area around a marine structure could amount to a potential “win-win” situation for industry, science, and conservation. In this connection, the Committee notes section 23**

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<sup>118</sup> No upper limit for the “specified period” is set out in the Bill. If circumstances changed over the life of a lengthy marine project, there would be scope to revise the conditions attached to the licenses under section 23.

<sup>119</sup> Scottish and Southern Energy, written evidence. (Response to *Sustainable Seas for All*, forwarded to the Committee for Stage 1 scrutiny purposes.)

<sup>120</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Jeremy Sainsbury, Col 1793

**of the Bill which would enable the Scottish Ministers to vary an existing marine license because of increased scientific knowledge relating to the environment, and invites the Cabinet Secretary to clarify whether this power would be available on the application of the licensee.**

**172. The Committee invites the Cabinet Secretary to clarify whether a decommissioning arrangement that would allow all or part of a marine structure to be laid on the sea bed would be dealt with under the Bill as a condition of the original license or as a marine activity requiring a further license application.**

173. Decommissioning was another area in which concerns as to bureaucratic duplication arose. Jeremy Sainsbury of Scottish Renewables noted that international conventions, together with the rigorous conditions of a Crown Estate lease, required decommissioning to be done to a high standard. He warned of the danger of the Bill leading to the creation of “a new regime that does not replace or harmonise existing regimes”.<sup>121</sup> adding that—

“The Crown Estate lease requires very detailed plans to be drawn up and revised every five years. I think that what happens on land, with landowners and planning bodies reaching an agreement that forms the decommissioning of an on-land project, is a fair reflection of what should be considered for offshore projects.”<sup>122</sup>

**174. The Committee invites both the Cabinet Secretary and the Crown Estate to note concerns that the Bill should not lead to the creation of a new decommissioning regime running in parallel with that already imposed by the Crown Estate under leasing arrangements, without serving any additional purpose. The Committee invites Marine Scotland and the Estate to work jointly to address these concerns in their future work.**

*The power to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities*

175. The Subordinate Legislation Committee has expressed concerns about section 17(3), allowing the Scottish Ministers, by order to add or remove any licensable marine activity from the list in section 17(1).<sup>123</sup> The Scottish Government’s Delegated Powers Memorandum<sup>124</sup> explained that this power was needed in order to respond to developmental needs which are likely to change over time. The DPM does not otherwise explain why the power is open to permit any additions to or deletions from the list or why no criteria for making such changes are specified. The Subordinate Legislation Committee sought an explanation from the Scottish Government.

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<sup>121</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1809

<sup>122</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1809

<sup>123</sup> Scottish Parliament Subordinate Legislation Committee. Report, 2009 (Session 3). Report on Marine (Scotland) Bill, paragraph 6.

<sup>124</sup> Marine (Scotland) Bill. Delegated Powers Memorandum, paragraph 13. Available at <http://www.scottish.parliament.uk/s3/bills/25-MarineScot/b25s3-introd-dpm.pdf>

176. The Scottish Government responded that because there might be any number of reasons for making changes it would not be useful to specify criteria for the exercise of the power.<sup>125</sup>

177. The Subordinate legislation Committee's report<sup>126</sup> said that it accepted that circumstances will change over time and that it might be necessary to make changes to the licensing regime. Nevertheless the exercise of the power in section 17(3) is of significance as the inclusion of an activity on the list of licensable marine activities will result in that activity being brought into the marine licensing regime. Inclusion in the regime will have a significant effect on the people involved in that activity. It therefore drew to the attention of this Committee that the power is unqualified and does not specify any criteria for making changes to section 17(1).

**178. The Committee agrees with the Subordinate Legislation Committee that the power to vary the list of licensable activities in section 17(1) should specify more clearly the criteria the Scottish Government may use to determine whether a particular activity should be added to or removed from the list.**

*The threshold for registration*

179. Clearly, the setting by the Scottish Ministers of an environmental impact threshold is likely to be of considerable practical concern to stakeholders with a commercial interest in marine activity, as well as environmental groups. Not much direct discussion on this point took place at Stage 1. Discussion instead tended to focus on whether particular activities would be treated as exempt.

180. Colin Galbraith of Scottish Natural Heritage, however, welcomed the provision as contributing towards the streamlining of the licensing process. He called for a realistically-timed consultation process to allow SNH and others to comment on proposals. However SNH did not at this stage have any concluded views on what the threshold should be.<sup>127</sup>

**181. The Committee notes the lack of clarity currently as to what the minimum environmental threshold will be for registering, rather than licensing, marine activity. As this will be of considerable practical concern to stakeholders, the Committee considers that the Cabinet Secretary should outline his preliminary thinking on this issue during the passage of the Bill, giving an indication of what this would mean in practice to stakeholders.**

*Appeals against licensing decisions*

182. Section 29 requires the Scottish Ministers, by regulations, to make provision to allow appeals against licensing decisions. Some evidence expressed concerns about the absence of detail on the face of the Bill as to what sort of appeals procedure there would be.<sup>128</sup> These concerns were also picked up by the Subordinate Legislation Committee, which reported to this Committee that "the fundamental

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<sup>125</sup> Scottish Parliament Subordinate Legislation Committee. Report, 2009 (Session 3). Report on Marine (Scotland) Bill, paragraph 7.

<sup>126</sup> Scottish Parliament Subordinate Legislation Committee. Report, 2009 (Session 3). Report on Marine (Scotland) Bill.

<sup>127</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1762

<sup>128</sup> Eg Scottish Renewables. Written submission to the Rural Affairs and Environment Committee.

elements of an appeals process should appear on the face of the Bill.”<sup>129</sup> The Subordinate Legislation Committee also noted that the same observation could be made in respect of section 52(1) regarding appeals against notices issued in relation to a marine license.

183. The Committee agrees and **recommends that the Bill be amended to set out the fundamental elements of an appeals procedure against a marine licensing decision and against the issuing of a notice concerning a marine license.**

*Marine aquaculture*

184. Finfish and shellfish farmers made frequent representations that the Bill risked making the licensing regime more rather than less complicated. As introduced, the Bill represents a compromise position between two viewpoints. One is that licensing decisions concerning fish farms should remain with local authorities acting as planning authorities, as has been the case since 1997. The other is that the Bill should take the opportunity to subject fish farms to the same system of licensing and registration as other marine activities so as to reduce inconsistency of treatment. A number of local authorities take the former viewpoint; whilst the Scottish Salmon Producers’ Organisation, the Crown Estate, and the Association of Scottish Shellfish Growers were among those to call for a more centralised approach.<sup>130</sup>

185. Professor Phil Thomas of the SSPO described the current regulatory system for fish-farming as “horrendous” but commented that the Bill had “snatched defeat from the jaws of victory” because it made the position even more complex—

“If the bill is passed in its current form, everything in the marine environment will come under a licensing system of marine planning. The exception is fish farming, which will sit with local authorities, under town and country planning procedures. The two are incompatible. Even worse, responsibility for fish farming may revert to Marine Scotland, as local authorities will be able to opt out of the town and country planning arrangements. There is the potential for two entirely different planning and licensing systems to operate in one marine region—in the same stretch of water. I suspect that that would happen quite quickly in some areas. [...]

The system that is proposed at the moment is horrendous. It is logical to bring everything into a single marine licensing system, to streamline the system—which is the objective of the bill—and, if the Government is concerned about local democracy and returning activities to the control of local authorities, to devolve the relevant elements of the licensing system.

Some island councils and island operators—the best examples are in Shetland and, to a lesser degree, the Western Isles—are concerned about anything that

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<sup>129</sup> Scottish Parliament Subordinate Legislation Committee. 4 September 2009, Session 3. Report on *Marine (Scotland) Bill*.

<sup>130</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1768. SEPA also have an interest in the regulation of aquaculture by way of its responsibilities under river basin management planning, which give it regulatory responsibilities for river water quality out to three nautical miles from the coast. SEPA’s Andy Rosie told the Committee that the regulatory approach it had practiced had worked well for aquaculture and that SEPA wished to retain its functions.

looks as though it is simply sitting in Edinburgh, if I can use that terminology. We must be sensitive to that. The solution that the bill comes up with is entirely intellectually incoherent and illogical, as it gives us a mixture of systems operating in the same area. That is an impossible situation.”<sup>131</sup>

186. In response to suggestions that decisions about licensing fish farms were best taken at a local level, Professor Thomas argued that it was “illogical” to have different licensing systems operating in different parts of the country. If a degree of local control were considered desirable, he argued that this could be done by allowing local authorities to operate the licensing process locally, whilst maintaining Marine Scotland as the overall licensing authority.<sup>132</sup>

187. Rob Hastings of the Crown Estate expressed similar views—

“The notion of centralising licensing [for fish farming] as a planning function is attractive. In our experience, the common issues in these sorts of development activities make centralisation practical and pragmatic. There may be an opportunity to delegate some responsibilities locally; as the Crown Estate is not a regulator, we would stand by and support that if it was absolutely necessary.”<sup>133</sup>

188. The suggestion that local authorities should, as a compromise, be allowed to operate a licensing system the rules of which have been laid down centrally, does however leave open the question of whether they would have much meaningful discretion in practice.

189. Walter Speirs of the Shellfish Growers’ Association linked the licensing issue back to the national marine plan—

“When the Crown Estate was responsible for allocating leases, we had one authority that took the same view for the whole of Scotland. For 10 years now, we have had a very unsatisfactory interim procedure that has involved great uncertainty for the future of our industry in knowing whether consent will be granted. We have had differences of opinion from different planning authorities. Without doubt, Shetland has been the shining example of the development of the aquaculture industry—those of us in other areas are slightly jealous of that—but that does not mean that all areas should not come up to the same speed. What is missing is a national strategy, which perhaps existed when the Crown Estate was in charge.”<sup>134</sup>

190. Remarks along similar lines but with respect to regional planning were made by George Hamilton of Highland Council. He made clear that Highland Council wished to retain control over the licensing of aquaculture. However, if the Council were to be

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<sup>131</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1747.

<sup>132</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1747.

<sup>133</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1849.

<sup>134</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1850

made a member of the relevant local MPP or MPPs, he suggested that the work it currently undertakes producing aquaculture framework plans could be subsumed into the preparation of aquaculture policies within the regional marine plan.<sup>135</sup> Presumably this would not only reduce the risk of duplication of effort but also help ensure consistency between planning and licensing.

191. Nigel Mills of Orkney Council put the argument in favour of local authorities retaining control, arguing that it benefited both the industry and the local area—

“Perhaps I can give some practical examples of why local influence, attention and planning powers are paramount. Recently, I met representatives of a local fish farming company in the harbour office prior to an application being submitted to the planning authority. Such applications can cost thousands of pounds to prepare, but people can currently come to see the planning authority, which in this case was the port authority because the proposed farm was to be positioned in Scapa Flow. By working through a range of different scenarios that could have affected the licence application, we were able to point the company in the right direction to ensure that the work that it undertook would result, as far as we could see, in a positive result without the application being objected to. That saved that company tens of thousands of pounds. If we had not been able to exert such influence, the company could have spent an awful lot of time and effort on the application without getting anything up and running.

At the other end of the spectrum, some fish farm cages last for only three to four years and tend to be hauled out and left on beaches when they come to the end of their life. With all due respect to the Crown Estate, the owner might take no part in cleaning up the beach and the cages might simply be left there. The port authority—or, wearing my other hat, the local authority when the matter is outside the port—must then find ways to have the cages removed, either by using byelaws or by threatening the fish farmer that it will not renew his licence. That is sometimes the only way that we can get derelict and redundant fish farm equipment cleaned off beaches. Because of the expense involved, it is a lot easier for the farmer to haul the cages out on to his land and leave it on the beach for five or six years. That happens.

For Orkney, having the local plan and the ability to license and effect clean-up is very important. If that power was lost to a national body, I am not sure whether it would protect the islands.”<sup>136</sup>

192. The Cabinet Secretary acknowledged that aquaculture was “the odd one out”<sup>137</sup> as far as creating a more streamlined licensing process is concerned—

“As the committee will be aware, in recent years, in order to enhance local accountability, responsibility for consenting to aquaculture developments was transferred to local authorities under the Town and Country Planning (Scotland)

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<sup>135</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1766

<sup>136</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1849.

<sup>137</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1895

Act 1997. We have thought hard about the way forward. At the moment, we hope to give local authorities the power to delegate to Marine Scotland responsibility for consenting to aquaculture developments, which will streamline the process in those areas. However, a number of local authorities strongly take the view that local accountability can be protected only if they are allowed to keep their responsibility for consenting to aquaculture developments in their waters, and we respect that.

It is worth pointing out that amendments to the Town and Country Planning (Scotland) Act 1997 will mean that regional marine plans have to take account of terrestrial development plans and vice versa. It is my understanding that the Town and Country Planning (Scotland) Act 1997 will take precedence, although I will ask my legal colleague to clarify that. The granting of aquaculture consent will remain with the local authority, but the process will require it to pay regard to the marine plan. Likewise, the marine plan will have to pay regard to the 1997 act. It is hoped—it cannot be guaranteed—that that will prevent situations arising in which the marine plan says one thing for aquaculture and the local authority takes a different view when consents are applied for. It is no guarantee, but it is an attempt to ensure that some joined-up thinking is involved and that that is reflected by local authorities.”<sup>138</sup>

193. Mr Lochhead confirmed the evidence heard previously that the Bill left open the theoretical possibility of two or more licensing regimes for fish farming operating within the same marine region, where it crossed two or more council boundaries. However, he said that he did not consider that this would be any more complicated than the current situation where a licensing regime may differ from council to council. He also clarified that where there was a conflict of views between the terrestrial plan and the marine plan as to aquaculture, it would be the terrestrial plan that prevailed. This accords with the clarification by Government officials that a marine plan does not create rights – whereas a licensing decision by a planning authority would do. However in the Cabinet Secretary’s view this was not objectionable as it was an issue of local accountability.<sup>139</sup>

### *Conclusions*

194. The Committee considers that the case for treating marine aquaculture as an exception to the holistic marine planning and licensing system proposed under the Bill has not been made.<sup>140</sup> Allowing some local authorities to retain responsibilities for marine aquaculture under terrestrial planning law is, as the Cabinet Secretary himself appeared to acknowledge, contrary to the overall philosophy of the Bill. A majority of the Committee fears that the provisions in the Bill currently are a recipe for confusion, as well as being difficult to reconcile with the existence of a national strategy for aquaculture, which was devised in view of the industry’s national importance. In so doing, we note the views of the Subordinate Legislation Committee, which noted that the provision could give rise to “considerable confusion as different criteria for

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<sup>138</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1895

<sup>139</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1896

<sup>140</sup> Liam McArthur MSP dissented from this view.

development could apply from one area to another with different procedural rules and different rights of appeal.”<sup>141</sup>

**195. The Committee acknowledges the vital importance of there being local input to decisions about whether, where, and under what circumstances to authorise a marine fish farm. The Committee<sup>142</sup> considers that adequate provision could be made for this, at a strategic level, by ensuring local input into decisions made by MPPs about what areas should be deemed appropriate for fish farming. We propose that the Bill should allow local authorities to apply to the Scottish Ministers to handle applications for licenses. The Scottish Ministers should be empowered to allow any such application on cause shown, subject to their reaching a service level agreement with the authority on how license applications are to be dealt with.**

**196. Where this happens, the Committee proposes<sup>143</sup> that the Cabinet Secretary should seek to ensure that there is a consistency of approach towards licensing aquaculture within each marine region, for instance by providing that, in a region bordering two or more local authority areas, only one authority will handle applications.**

#### *Dredging*

197. Representatives of port authorities expressed worries that the Bill could impose a more restrictive regime on dredging. David Whitehead of the British Ports Association sought to put the matter in context, remarking that Scottish ports, handling around 100 million tonnes of cargo a year “absolutely depend on the ability to dredge – we cannot have ports without dredging”. He argued that since dredging was a much repeated exercise with known consequences and impacts and rigorous environmental monitoring, this ought to enable the agreement of an approach under the Bill that would please all sides of the debate. However, he argued that—

“There is a bit of a mixed message in the bill: on the one hand, it extends the licensing regime to dredging activity itself and to hydrodynamic dredging,<sup>144</sup> on the other, it suggests that realistic consideration will be given to exemptions and perhaps a system of registration, neither of which approaches is explained in great detail. Implementation is therefore key”<sup>145</sup>

198. British Ports Association representatives called for the opportunity to be taken, in implementing the Bill, to make three-year licenses for the disposal of dredged materials available to Scottish ports. This would bring Scottish and English licensing on disposal of dredged materials into line. Similarly, whilst not objecting to hydrodynamic dredging becoming a licensable activity, they wanted a three-year license to be available for all dredging activity so as to reduce paperwork and reduce

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<sup>141</sup> Scottish Parliament Subordinate Legislation Committee. Report, 2009 (Session 3). Report on Marine (Scotland) Bill, paragraph 30.

<sup>142</sup> Liam McArthur MSP dissenting

<sup>143</sup> Liam McArthur MSP dissenting

<sup>144</sup> I.e., the agitation (for instance, by raking) of soft sediment in the sea bed, which results in the sediment being suspended in the water column and being displaced, or partly displaced by water currents.

<sup>145</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1789

the risk of inconsistencies.<sup>146</sup> They further clarified that it would be acceptable if licenses for maintenance dredging (ie maintaining the navigability of an existing port channel) could run for up to three years, but licenses for capital dredging (ie dredging for new berths) run for one year only, in view of the need to check the effects on the environment of dredging in a new area.

199. The Cabinet Secretary told the Committee—

“Our current thinking is that we do not want to stand in the way of accepted techniques for dredging, so we are considering what exemptions could be provided for existing activities. Dredging per se will be included in licensing, but we will ensure that there are exemptions for appropriate dredging that has been taking place for a long time.”<sup>147</sup>

200. In subsequent correspondence, the Cabinet Secretary clarified that the likely basis for charging for dredging requiring a license would be cost recovery. He noted that—

“The discussion in committee centred around the possibility of a double licence fee covering the licence fee and a payment for a sea bed lease from the Crown Estate. These 2 payments are different and are for different things much in the same way that council tax payments and house rents are different. In addition it is my understanding that the Crown Estate does not levy a lease charge where dredging and disposal of dredge spoil is undertaken, though it may levy a charge if the dredge spoil is put to “beneficial” use.”<sup>148</sup>

201. This accords with evidence from the Crown Estate that it charges for dredging activities (rather than requiring a license for them) and that this will not be affected by the Bill.<sup>149</sup>

**202. The Committee is reassured to note the Cabinet Secretary’s comments that accepted forms of dredging with recognised minimal environmental impacts are likely to be exempted. Clearly stakeholders in shipping and ports would appreciate having sight of the detail of any proposed exemptions well in advance of the Bill’s implementation. The Committee also invites the Cabinet Secretary to consider the merits of three-year rather than one-year dredging licenses, which would apparently bring Scotland into line with the rest of the UK.**

#### *Remediation*

203. Section 35 of the Bill entitled the Scottish Ministers may issue a “remediation notice”<sup>150</sup> to a person who has breached the terms of a license and, in so doing, has caused harm.

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<sup>146</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1790

<sup>147</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1897

<sup>148</sup> Scottish Government. Letter from the Cabinet Secretary for Rural Affairs and the Environment to the Rural Affairs and Environment Committee dated 16 September 2009.

<sup>149</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1864.

204. At Stage 1, the Committee invited the Cabinet Secretary to consider whether the wording of the provision would be sufficient to allow the Scottish Ministers to require restoration of a damaged site. A similarly worded clause in the UK Bill, intended to enshrine much the same policy had been considered defective and had been amended.

205. In a letter to the Committee, the Cabinet Secretary confirmed that similar amendments to section 35 were now being considered.

**206. The Committee notes the Cabinet Secretary's intention to introduce an amendment clarifying that a remediation notice may require restoration of a damaged site. We call on the Cabinet Secretary to ensure that shipping and port interests, as well as environmentalist groups, have the opportunity to consider the proposed approach.**

#### **Part 4: marine protected areas**

207. The purpose of Part 4 is to enable the Scottish Ministers to designate marine protected areas (MPAs) within the Scottish marine area. The policy memorandum explains<sup>151</sup> that these powers have been taken because of an emerging consensus that current powers to designate marine areas requiring protected status are insufficiently broad. Under both European law and the OSPAR Convention, Scotland is required to designate a network of MPAs, although the Bill goes slightly further than our international obligations in allowing MPAs to be designated other than for purely environmental reasons.

208. Under the Bill, there would be three types of MPA:

- Nature Conservation MPAs (for the purpose of conserving marine flora or fauna or for conserving marine habitats or features of geological or geomorphological interest);
- Demonstration and Research MPAs (for the purpose of demonstrating sustainable methods of marine management or exploitation, or for researching into such matters); and
- Historic MPAs (for the purpose of preserving a marine historic asset – for instance a wreck or the remains of a human settlement – that is of national importance).<sup>152</sup>

209. Provision is made to seek to ensure that the Scottish Ministers consult adequately before making an order designating an MPA. It would also be expected that the Scottish Ministers would, as a matter of good practice, take relevant scientific advice before designating a Nature Conservation or Demonstration and Research MPA, although this is framed as discretionary rather than mandatory in the Bill itself.

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<sup>150</sup> Marine (Scotland) Bill, Section 35(2)

<sup>151</sup> Marine (Scotland) Bill. Policy Memorandum, paragraph 46.

<sup>152</sup> Marine (Scotland) Bill. Policy Memorandum, paragraph 52. The policy memorandum states that this accords with the Valletta Convention on the protection of archeological heritage.

210. The Bill sets out the effect of an area being designated as a MPA. These are various but include the following:

- a public authority must seek to exercise its functions so as to further the objectives of an MPA. Where the authority is unable to exercise its functions without hindering those objectives, it must inform the Scottish Ministers and, as appropriate Scottish Natural Heritage. Similar provision applies in respect of determinations made by a public authority;
- once an area is designated, the Scottish Ministers may make orders (Marine Conservation Orders) in respect of it. Such an order might make provision to restrict or prohibit movement within the area, or the taking or disturbing of plants or animals in the area, or the removal or dumping of objects or substances within the area. In practice, it is the making of a Marine Conservation Order that determines the main impact of the designation, since it is the Order that will clarify permitted and prohibited activity within the MPA;
- various offences are created. Contravention of a marine protection order is a crime as is intentionally or recklessly carrying out an act which hinders the conservation objectives of a protected area.

211. As with marine licensing, few if any witnesses objected to the underlying aim of seeking to provide particular parts of the marine environment with additional legal protection in recognition of their significance. Any concerns arose from uncertainties as to how the provisions would apply in practice rather than to objections to the overall policy. In particular, there were concerns about particular activities being prohibited where that might cause economic detriment.

*The basis of designation*

212. The Committee is clear that the designation of Nature Conservation or Demonstration and Research MPAs is intended to be a scientifically-driven process. However, the Bill provides that the power to designate an MPA is discretionary. The Committee was interested to seek views from witnesses as to how they thought the process of identifying sites under the Bill would work in practice and whether they considered the process to be satisfactory.

213. Colin Galbraith of SNH told the Committee that, as a likely consultee on designation, SNH would—

“from a classic scientific perspective ... go down the route of looking at rarity, but rarity would be only one aspect. We would look at typicalness—what is typical of a Scottish marine environment—and we would probably want to look at representative samples from those areas.

In recent years there has been much greater consideration of the ecosystem on a global scale, and, behind that, of the processes that are involved and what the environment gives to us, whether that is in relation to fisheries or energy capacity. We would want to examine the ecosystem processes—the example that I used was nursery areas for fisheries—as well as considering the need to

represent rarity and typicalness. That would lead to a discussion about numbers and scale in relation to any one site.”<sup>153</sup>

214. The OSPAR Convention requires member states to work towards the designation of “an ecologically coherent network of marine protected areas.”<sup>154</sup> A similar obligation requiring the creation of “coherent and representative” areas arises in European law under Article 13 of the Marine Strategy Framework Directive. The designation of MPAs under the Bill is, however, framed in discretionary terms. Once a prospective MPA has crossed the threshold of being considered suitable, in scientific terms, it is then for the Scottish Ministers to decide whether or not to designate it. The Marine Conservation Society<sup>155</sup> was among the bodies to express concerns that there was no duty on the Scottish Ministers.

215. The Cabinet Secretary explained—

“We have very much not taken the view that we must achieve certain targets and percentages of closed areas. Such a view is being taken elsewhere, and some people may think that it is valid, but I do not. I think that we should start from the need and the case, and not simply say that we want to find 30 per cent of our seas to close, or whatever. We should start from the bottom up. For that reason, we have avoided going down the route of duties which, by their very nature, are prescriptive. To impose a duty would mean that it would be incumbent on ministers to go out and identify areas of sea or the marine environment, and protect them if they met certain criteria.”<sup>156</sup>

216. David Mallon of the Scottish Government also explained<sup>157</sup> that the Government was developing guidelines on the basis for designation in co-operation with SNH and the Joint Nature Conservation Committee. These would take account of international principles and guidelines such as those found in the OSPAR Convention relating to the establishment of ecologically coherent networks of protected sites based on representativeness, connectivity, replication and resilience.

**217. The Committee notes that Scotland is under international obligations to create an ecologically coherent and representative network of marine protected areas and therefore has some concerns that the power to create MPAs under the Bill is discretionary. The Committee considers that the Bill should impose a duty on the Scottish Ministers to create such a network, as this would both help ensure compliance with our international obligations and guarantee further protection of the marine ecosystem.**

*Community involvement in designating MPAs*

218. Some witnesses argued that communities should have a strong role in deciding which areas should be designated as MPAs, but expressed concerns that the Bill did

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<sup>153</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 10 June 2009. Col 1760.

<sup>154</sup> Recommendation 2003/3.

<sup>155</sup> Marine Conservation Society. Written submission to the Rural Affairs and Environment Committee.

<sup>156</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1903

<sup>157</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1904

not readily enable this.<sup>158</sup> Gordon Mann of the Solway Firth Partnership, however, said that he did not see that anything in the Bill would hinder such community involvement. He considered that under the Bill it would be easier for communities to propose an MPA than it is now under the current designation process for protected sites.<sup>159</sup>

219. The Cabinet Secretary also disputed this argument—

“There is a route for communities. They can go to the marine planning partnerships and propose any area that they think should be a candidate to be a marine protected area. If the local community in the form of the marine planning partnership agrees with that, it can contact Marine Scotland, which would set the proposed area against the criteria and do the necessary investigations to see whether the science exists to back up the proposal. It is extremely important to give communities an avenue. Lamlash bay is already subject to regulation through other means, which is obviously of direct interest to COAST. It is important for communities to have a say over their local waters. On the other hand, although we want to put that in place, we also want to ensure that objective criteria exist for any designation, along with the appropriate science.”<sup>160</sup>

**220. The Committee is not persuaded that there is a need for a formal process in the Bill entitling communities to propose an MPA, especially if the process is to be predominantly scientifically driven. However, it is vital that there are open channels within Government to enable communities to propose MPAs for consideration, and that this is well known at a local level, so that communities feel engaged in the process. Marine Scotland should have a clear advocacy role in this regard. MPAs will work best where local communities feel that have enjoyed ownership over the process of helping create them.**

*Designation and socioeconomic factors*

221. Written evidence from the Western Isles Council reflects concerns heard more generally that designating an area as an MPA could have detrimental social or economic effects on the communities adjacent to it. The Council stated that it was “strongly opposed to the introduction of additional Marine Protected Areas in the seas surrounding the Outer Hebrides if they would impose restrictions on economic activities.”<sup>161</sup>

222. The Solway Firth Partnership, the remit of which includes economic development, was asked if it shared this view. Gordon Mann replied that—

“The simple answer is no. I hope that we have been able to demonstrate today the incredible importance of the Solway Firth—in terms of the value of the asset—locally, regionally and internationally. The challenge for us is to ensure

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<sup>158</sup> Eg Dr Sally Campbell and COAST. Written submissions to the Rural Affairs and Environment Committee.

<sup>159</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1782

<sup>160</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1899

<sup>161</sup> Comhairle nan Eilean Siar. Written submission to the Rural Affairs and Environment Committee.

that we use the resources wisely and sustainably over the longer term for the purposes of renewable energy, fishing and tourism and in a way that allows healthy communities to live beside, and to enjoy, the shores of the sea. That involves both a negative and a positive: we need to protect the areas that are sensitive and important while we encourage development where it will not damage or destroy.”<sup>162</sup>

223. These comments reflect a view that deciding whether to designate an MPA may involve balancing ecological considerations against social or economic ones. However, the Bill would appear to partially limit this approach. Under the Bill, three different approaches are taken, depending on what type of MPA is being considered:

- If the proposal is for an Historic MPA, it would appear from the Bill that it would not be competent to take socioeconomic factors into account;
- If the proposal is for a Nature Conservation MPA, socioeconomic factors may be taken into account only “where the Scottish Ministers consider the desirability of designating 2 or more areas may be equal;”<sup>163</sup>
- If the proposal is for a Demonstration and Research MPA, the Scottish Ministers may have regard to socioeconomic factors and this does not appear to be limited in any way.

224. The limited provision to take socioeconomic factors into account when considering a designation for a Nature Conservation MPAs came in for criticism from some witnesses. Rob Hastings of the Crown Estate, which decides whether to give marine renewable projects the go-ahead, commented—

“The Crown Estate’s general position on where the socioeconomic input comes into the decision-making process is pretty consistent—our position is the same for whichever piece of legislation we are considering. If the objective is sustainability or sustainable development, three things have to be considered in parallel. Environmental objectives are clearly the primary driver, but without giving due consideration to the social and economic impacts of the decision, it is quite difficult to get a measure of its relative value from an economic conservation perspective.

The bill says that the provision in section 59(5)<sup>164</sup> would be the tiebreaker rule that could be brought into play, and that is why we suggest that the socioeconomic perspective has to be considered as the tiebreaker. However, for all cases, and for a true sustainability argument to be presented, all three things have to be considered. An environmental objective might lead the process but unless the other two have been considered, it is difficult to get a

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<sup>162</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1780

<sup>163</sup> Marine (Scotland) Bill, Section 59(5)

<sup>164</sup> I.e., the provision applying for Nature Conservation MPAs

measure of relativity in relation to the environmental objective that is being set out.”<sup>165</sup>

*MPAs: the effect of designation and “presumption of use”*

225. Scottish Renewables’ written evidence expressed worries that the level of protection afforded to MPAs under the Bill could inhibit the development of a competitive marine renewable industry, arguing that “this level of protection [ie the provision made in sections 71 and 72 as to the duties of public authorities] is too high if the purpose of the introduction of Marine Protected Areas is to increase management of nationally important features.”<sup>166</sup> Scottish and Southern Energy’s written evidence went further, questioning whether the power to designate MPAs is required at all. If MPAs were designated, they argued that they should not become “no-go areas for marine renewables.”<sup>167</sup> SSE sought comfort that there would continue to be a “presumption of use” in areas designated as MPAs.

226. Scottish Renewables pointed out that there could be circumstances where there was complementarity between conservation and energy production objectives, such as evidence from the oil industry that the deployment of rigs had led to an increase in fish populations. They did, however, concede that the issue was complex and that it would be legitimate to carry out an environmental assessment.<sup>168</sup>

227. Rob Hastings of the Crown Estate stressed the importance of providing potential developers with clarity from the outset—

“in a conservation area, it must be made clear what the conservation objectives are for the area. Those may be obvious, but it is important to state them from the outset. If it is assumed that there is an opportunity to do something in line with those objectives, it is important for a developer to have a line of sight to understand what hurdles they need to get over. At the outset, that becomes their risk and, if it is clear what the objectives are and what the developer has to do to satisfy those objectives, they can set about a plan to achieve that.”<sup>169</sup>

228. Mr Hastings also cautioned that an over-precautionary approach to activity within a Nature Conservation MPA could be counter-productive, as it can take a developer being allowed into an area to conduct investigations to allow sufficient data to be made available to clarify conservation objectives.

229. Pam Taylor of the Solway Firth Partnership argued that difficulties could be avoided at an earlier stage if renewable opportunities were identified effectively in the marine planning process.<sup>170</sup> Gordon Mann agreed, suggesting that the marine plan should be thought of “not as something that prevents things from happening but as

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<sup>165</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1861

<sup>166</sup> Scottish Renewables. Written evidence to the Rural Affairs and Environment Committee.

<sup>167</sup> Scottish and Southern Energy. Written evidence to the Rural Affairs and Environment Committee

<sup>168</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1794

<sup>169</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1863.

<sup>170</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1781.

something that helps us to make the best use of resources.”<sup>171</sup> He considered that it would be an improvement if proposals for renewable projects arose from marine planning rather than at the initiative of the Crown Estate, with stakeholders then having to react to them—

“We need to move to a position in which marine plans are established in places where we think there is potential for wind farms or other renewable energy. That should be starting point, after which the projects can be considered in more detail. At this stage, we are all running to catch up, but the need for renewable energy projects is so important that we need to bring projects on stream much more quickly than we have done in the past.”<sup>172</sup>

230. The Cabinet Secretary acknowledged that the question of allowing economic activity within MPAs was about finding the right balance. He too pointed to marine planning as the primary means of making important statements about national priorities, which would have practical effects further down the line.<sup>173</sup> On whether a “presumption of use” within MPAs should be reflected in relevant provisions in the Bill, Mr Lochhead offered to—

“reflect and come back to the committee on the matter, but my instinct is that putting something like presumption of use in the bill will affect the balance that we are trying to strike. If it is set out as a policy, we can say that we hope it will be achieved with the tools in the bill. We have to draw the line somewhere.”<sup>174</sup>

231. The Cabinet Secretary expanded on these points in subsequent correspondence—

“The Bill would provide a range of possible management tools for MPAs – from reliance on marine plans and licensing of marine activities to the introduction of conservation orders and management schemes. Considering the management requirements of individual MPAs will help determine whether an MPA needs a more tailored approach as provided by conservation orders or management schemes. Even where this more tailored approach is considered necessary I anticipate that only a small number of the activities taking place in a MPA will need to be restricted and that in most cases social and economic uses are likely to be compatible with the protection of features for which a site is selected. As I said at committee the presumption of use is covered in the policy memorandum and I remain of the view that is sufficient.”<sup>175</sup>

### *Conclusions*

232. In evidence, two discrete arguments emerged concerning MPAs and the relevance of socioeconomic factors. One related to whether the Bill had got the

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<sup>171</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1781.

<sup>172</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1784.

<sup>173</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1905.

<sup>174</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1906.

<sup>175</sup> Scottish Government. Letter from the Cabinet Secretary for Rural Affairs and the Environment to the Rural Affairs and Environment Committee dated 16 September 2009.

balance right in the relatively limited way it allows socioeconomic factors to be taken into account *prior* to the designation of an MPA. This is a difficult issue with compelling arguments on both sides, but the Committee's view is that the Bill has largely got the balance right. The process for declaring a Nature Conservation MPA should primarily be science driven, and if the science shows that an area is of exceptional, and perhaps international, importance for its biodiversity or because of its importance for conservation purposes, then socioeconomic factors should not ordinarily stand in the way of its designation.

233. This however should certainly not mean that the area should then automatically become closed off to any marine activity. It was in this area that the second argument focussed, with a number of witnesses calling for there to be a "presumption of use" in any MPA.

234. Clearly the designation of an area as an MPA must have legal consequences. Otherwise the whole of Part 4 of the Bill would be ineffectual. At times, this might include activity within an MPA being restricted, and perhaps severely restricted. The Committee sees no reason why this should be the norm, however. As the evidence made clear, there are plenty of circumstances where the objective of conserving an historic asset, or an ecosystem or species of animal or plant, could take place in harmony with economic activity. Indeed, as witnesses noted, there can be complementarity between the two, as where preparatory work for a marine project gathers valuable data that can be used for conservation purposes.

235. In addition, there are only a finite number of marine locations that are likely to be optimum for the exploitation of marine renewables. It may well be that some of these are also likely sites for an MPA. To close off such areas to any renewable energy projects for reasons of conservation may risk missing the bigger picture.

236. Stakeholders with an economic interest in the sea, the renewables industry in particular, are looking for assurances. Whilst we have no reason to doubt the Scottish Government's good faith, the Committee considers that, given the economic importance of the sea, and, in particular, the importance of mitigating climate change, it would be appropriate to provide such assurance on the face of the Bill. Whether this is best done by inserting "presumption of use" or some cognate phrase into a relevant provision within Part 4 is not clear to the Committee, as the legal meaning of that phrase would be uncertain. A better approach might be to look at inserting safeguards into the provision on marine conservation orders, which will in practice be key to determining what is and is not allowed within an MPA.

**237. The Committee agrees with the Scottish Government that the process for designating Nature Conservation MPAs should be mainly science driven. However, the Committee recommends that provision be inserted into the Bill requiring the Scottish Ministers, when drawing up a marine conservation order for an MPA under section 74 to have regard (a) to social and economic factors, and (b) the desirability of mitigating climate change.**

**238. The Committee also invites the Cabinet Secretary to clarify the extent to which, under the Bill, there is sufficient linkage between the marine planning process and the process of designating MPAs, and whether there is any risk of national objectives set out in the national plan (for instance on economic**

**activity or climate change) failing to integrate with the designation of a network of MPAs under Part 4.**

*Monitoring of MPAs*

239. Scottish Environment Link's written evidence noted that the Bill appears to contain no requirement for MPAs to be monitored. This was taken up by Morna Cannon of Scottish Marine Renewables, who argued that this was—

“an important point, as they should be monitored to check whether they are achieving the objectives that they were established to achieve. In talking about monitoring, it is important to make the point that the localised environmental impacts of wave and tidal energy projects are as yet unknown. It is important for that industry that a pragmatic deploy-and-monitor approach is taken.”<sup>176</sup>

240. The information gathered from this monitoring could then be used, she argued, to feed into future environmental impact assessments.

241. This appears to the Committee to be a reasonable point, given the evidence referred to earlier about gaps in marine data. Additionally, since provision is expressly made in the Bill to require national and regional marine plans to be reviewed. It would seem appropriate to make roughly equivalent provision for MPAs.

**242. The Committee recommends that the Cabinet Secretary consider the merits of the Bill requiring MPAs to be regularly monitored and reviewed following designation**

*Fishing within MPAs*

243. Concerns have been expressed about section 85(2) of the Bill which provides a defence to contravening a marine conservation order or causing damage within an MPA, where the person charged was engaged at the time in sea fishing and the effect of the act “could not reasonably have been avoided.”

244. Howard Wood of COAST told the Committee—

“Section 85 is extremely important to the bill and I am worried that if it remains, Scotland will become the laughing stock of the world. No other country has an exception that gives fishermen an excuse to be in an MPA.”<sup>177</sup>

245. However John Eddie Donnelly of the Firth of Clyde SSMEI argued that—

“This kind of provision is necessary because if it is not in the bill, all activities will be excluded from an MPA. After all, there will always be some activities that do not damage these protected areas and not having the provision will make it difficult for planners to plan such activities.”<sup>178</sup>

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<sup>176</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1797

<sup>177</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1875

<sup>178</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1875

246. Concerns were also raised that the defence in section 85(2) might, in any case, be technically redundant, or near-redundant, in that, in relation to two out of the three offences created in relation to MPAs, provision is already made to limit the circumstances where an offence is committed (eg no offence is committed “where the act was the incidental result of a lawful operation” – section 83(3)).

247. In a letter to the Committee, the Cabinet Secretary explained—

“Section 85(2) provides a specific defence for fishing activities over and above the more general defences provided by sections 83(3) and 84(3). It is possible to think of situations which would be covered by the section 85(2) defence but which would not fall within whichever of section 83(3) or 83(4) was relevant. The overall intention is not to criminalise fishermen acting legally and section 85(2) seeks to strike a balance by providing a defence that is proportionate, reasonable and appropriate. Taken together I believe sections 85(2)(a) and 85(2)(b) achieve that balance but I am aware that there has been debate at Westminster on the equivalent provisions in the UK Bill. I understand that UK Ministers are considering the options. My officials are liaising with UK Government interests on that and considering whether it would be useful to propose an amendment to the Marine (Scotland) Bill to ensure consistency on this point inside and outside 12nm in the seas around Scotland.”<sup>179</sup>

**248. The Committee notes the discussion at Scottish and UK Governmental level on the question of whether fishing activity in MPAs requires additional protection under the Bill, and looks forward to being notified of the outcome. However the Committee is not convinced that this additional protection is necessary.**

## **Part 5 – Conservation of seals**

### *Provisions in the Bill*

249. Part 5 of the Bill seeks to update legislation on the conservation of seals, proposing provisions to replace the Conservation of Seals Act 1970 which is widely perceived to be outdated. Work undertaken to inform the policy behind these provisions included the establishment of a stakeholder group, the Scottish Seals Forum, which developed proposals set out in the consultation *Sustainable Seas for All*. The resulting provisions are broadly intended to provide additional protection for seals in comparison to the 1970 Act. The Bill creates a new offence of killing, injuring or taking a live seal (intentionally or recklessly) whilst allowing the killing or taking of seals under licence.

250. Repeal of the 1970 Act also means the repeal of the so-called netsman’s defence; providing that it is not a crime to kill or take a seal in the vicinity of fishing nets or tackle where this is done to protect the equipment or any fish caught in it. (It is legally possible, however, that a condition along the lines of the defence could be inserted in a license granted under the Bill.)

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<sup>179</sup> Scottish Government. Letter from the Cabinet Secretary for Rural Affairs and the Environment to the Rural Affairs and Environment Committee dated 16 September 2009.

251. The Bill permits the killing or taking of seals without a licence but only in order to alleviate suffering.

*Seal species and populations*

252. Two species of seal breed in Scottish waters; the common (or harbour) seal and the grey seal.

253. The Scottish Government has stated that the revised laws set out in the Bill are, amongst other things, a response to a recent decline in the common seal population. The evidence session on Part 5 commenced with an overview of recent population trends from Ian Boyd of the Sea Mammals Research Unit. Professor Boyd commented that the grey seal population had—

“been increasing quite rapidly for the past few decades, but there is strong evidence of a decline in the rate of increase and of the population numbers approaching stabilisation on the west coast and Orkney...In the North Sea, the numbers continue to increase.”<sup>180</sup>

254. On common seals, he explained that less is known—

“because they are much more difficult to survey. ... Despite their name, there are fewer of them than grey seals.<sup>181</sup> We think that there are 140,000-odd grey seals in the United Kingdom, 90 per cent of which are in Scottish waters. We think that there are about 40,000 to 50,000 common seals, about 30,000 of which are in Scottish waters...They are also smaller than grey seals, and they are more coastal. [...]

The surveys of common seals that we carried out until the early 2000s suggested that the common seal population was roughly stable. However, about three years ago, our survey suggested that there had been an extremely rapid decline—considering how slowly the animals are able to reproduce—in Orkney and Shetland in particular but also to some extent down some of the North Sea coast. The decline that was observed was equivalent to all the pups that were born in the population every year not surviving. It is too early to say what the cause of that decline has been. We will probably never know.”<sup>182</sup>

*Why is seal management considered necessary?*

255. Not all countries with seal populations permit them to be managed by culling. The Scottish Government considers it is necessary to retain some sort of licensed seal management scheme. Section 98 of the Bill sets out a number of grounds on which the Scottish Ministers may grant a license to kill or take seals. These include for research or conservation purposes or to preserve public health. However, the vast majority of the discussion at Stage 1 has focussed on just one of the grounds listed; to prevent serious damage to fisheries or fish farms, as this is likely to be the main reason for a license being granted.

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<sup>180</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1814

<sup>181</sup> Globally, however, common seals are thought to be more common than greys. Globally, Scottish waters are amongst the most important breeding areas for grey seals.

<sup>182</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1815.

256. The question of the extent to which seals threaten commercial fish stocks is controversial. There is no doubt that seals predate wild stocks but the scale of this activity, particularly in relation to commercial fishing, are disputed, as is the effectiveness of seal culling as a fisheries management tool. Either way, no evidence was led at Stage 1 that the Scottish Government plans to issue licenses on this ground. However, the Committee did hear clear evidence as to the potentially serious effect of seal predation on wild salmon stocks in and around salmon river mouths, and it is anticipated that licenses might on occasion be issued for this reason.

257. There is no dispute that, given the opportunity, seals will predate fish farms and can cause considerable damage if they are able to break through. Professor Phil Thomas of the Scottish Salmon Producers' Organisation explained that—

“both types of seals are attracted to fish farms, but what distinguishes them is the size of the animals. By and large, common seals cannot break nets in a significant way, as they do not have the power to break through things. A large grey seal is a big animal, so it has the power to cause significant destruction to a net if it wants to. If there is a hole or a clever way of getting into a cage, common seals can do that but, by and large, they are much easier to deter with screen netting than greys are.”<sup>183</sup>

#### *Evidence taking*

258. Evidence received by the Committee, together with information gathered on visits has made the sensitivities surrounding this issue abundantly clear. For a number of groups, the only acceptable approach would be a complete ban on killing, except to prevent suffering.

259. Although the Committee does not consider that a complete ban would be practicable, we respect such opinions, which are based on the understandable view that it is inhumane to cull seals. We particularly commend those organisations and individuals who, without compromising on their principled opposition to the approach proposed in the Bill, have been willing to engage in the scrutiny process, and to enter into public debate and discussion with the fish-farming industry, in order to help ensure that, even if the Parliament largely endorses the policy set out in Part 5, the licensing process will be as rigorous and humane as possible. The evidence session involving Advocates for Animals and the Scottish Salmon Producers' Organisation demonstrated the scope for organisations with very different viewpoints to share information, to agree civilly to disagree on some matters, and to reach a compromise on others. It is to be hoped that this bodes well for the future implementation of Part 5.

#### *Seal management plans*

260. According to the Policy Memorandum, "A successful pilot scheme in Moray Firth has provided a framework for the Bill proposals for the management of seals. This is based on cooperation by the District Salmon Fishery Boards."<sup>184</sup>

261. The Association of Salmon Fishery Boards' submission states that—

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<sup>183</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1817

<sup>184</sup> Marine (Scotland) Bill, Policy Memorandum, paragraph 63.

“The Moray Firth Seal Management Plan was launched in 2004 and involved a wide range of partners. ... The Plan is viewed as a successful template for considering how seal and salmon interactions can be analysed so that, amongst other things, impacts on salmon can be minimised whilst at the same time the conservation status of seals (where applicable) can be considered.”<sup>185</sup>

262. The plan created seal management areas; known bottleneck areas around river estuaries where seals predate on salmon. Within these areas, seals could be managed by shooting or scaring. Under the plan, licences to kill seals in these zones were to be issued on a group basis. Limits set on the number of seals that could be killed under each licence were based on reproduction rates to ensure that the numbers killed did not exceed a level which could impact on the stability of the overall seal population in the area.

263. Given the apparent importance that the Government has placed on the Moray Firth Seal Management Plan in informing the Bill’s provisions, the Committee was keen to explore the basis for the assessment that it had been a success, as well as whether the approach adopted in the Moray Firth could be applied elsewhere.

264. The Seal Protection Action Group queried the evidence base for the claim that the plan had reduced local seal shooting by 60% suggesting that “there is no information provided to support this statement or indicate it will reverse the decline in common seals in the area.”<sup>186</sup> Professor Boyd of the Sea Mammal Research Unit responded that—

“The Moray Firth’s seal population has been roughly stable since the plan was introduced, whereas most of the seal populations in the surrounding areas have declined. The evidence suggests, therefore, that the act of management in that region has been successful. Whether the population would have declined if there had been no management is an open question, of course, but the Moray Firth is, at least, bucking the trend.”<sup>187</sup>

265. Libby Anderson of Advocates for Animals acknowledged that the plan had some strengths but highlighted the limitations of applying the model elsewhere. She pointed out, for example, that there were only three fish farms in the area during the pilot.<sup>188</sup>

266. Brian Davidson of the Association of Salmon Fisheries Group explained that the pilot had helped build up an evidence base on seal predation—

“we have learned about the behaviour of very small numbers of specialist seals that come into rivers and predate salmon. As Professor Boyd indicated, although the numbers of such seals are very small, they have developed the

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<sup>185</sup> Association of Salmon Fishery Boards. Written submission to the Rural Affairs and Environment Committee.

<sup>186</sup> The Seal Protection Action Group. Written Submission to the Rural Affairs and Environment Committee.

<sup>187</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1822

<sup>188</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1822

expertise to remove valuable salmon, which can have quite a devastating effect on the economy and on fisheries. We have started to piece together some useful parts of the jigsaw on the interplay between seals and salmon. The key strength of the model is that it gathers together data and asks people who want to be involved in control measures to report those data in a transparent and clear way to the relevant agencies so that everyone can learn from the process and it can be transferred to other areas with some degree of success."<sup>189</sup>

267. Whilst the evidence does not clearly and compellingly show that the Moray Firth Seal Management Plan has helped with the conservation of common seals, the Committee considers that there is sufficient anecdotal evidence to judge the pilot a partial success pilot that is well worth repeating elsewhere. In doing so, the Committee recognises that the Moray Firth is somewhat atypical having relatively many salmon rivers and relatively few salmon farms compared to other areas where seals and humans have come into conflict. So different approaches would have to be taken.

268. The pilot has undoubtedly demonstrated the merit of sharing information about seal behaviour, prevalence, and distribution within a particular area. It also helped show up gaps in recorded data where more work was needed. Most importantly, there does appear to be a view that it has been beneficial in managing interactions between seals and fish. And, as discussed below, the existence of a seal management plan and the data that flows from it may make it easier to set realistic, tailored licensing conditions.

**269. The Committee recommends that the Cabinet Secretary consider putting into the Bill a requirement to set up seal management plans in all areas of Scotland where there is a perceived difficulty in the interaction between seals, angling, and fish farms.**

#### *Harassment of seals*

270. Advocates for Animals suggested that there was a gap in Part 5 in that it did not make it an offence to molest or disturb seals. This offence could be made to apply in all Scottish waters or only in seal conservation areas as designated under section 104.<sup>190</sup>

271. Similarly, Tara Seal Research suggested that the Bill should set out an additional offence of “disturbing or harassing seals, or of obstructing access to their haul-out sites”. They argued that—

“at present the law protecting animals from disturbance in the UK is fragmentary and disorganised – being incorporated into conservation legislation for some species but not others, and for seals in some parts of the UK, but not others...At present animal species in Sch. 5 (protected species) of the Wildlife and Countryside Act 1981 – throughout Great Britain - are protected against deliberate disturbance or interfering with places of rest or refuge (Annex 1). Sch. 5 includes, among marine mammals, bottlenose dolphins, common

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<sup>189</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1822

<sup>190</sup> Advocates for Animals. Written Submission to the Rural Affairs and Environment Committee.

dolphins, harbour porpoises and otters, but does not include seals. However, the legislation in Northern Ireland and the Isle of Man to enact the 1981 WCA provisions in those regions (Annex 1) does include both common and grey seals in the schedule of protected species. In Northern Ireland and the Isle of Man, therefore, seals are legally protected against disturbance and harassment.”<sup>191</sup>

272. Professor Boyd of the Sea Mammals Research Unit responded that he—

“would broadly support such a provision. A possible consequence of tighter management could be that harassment becomes a tool that is used in certain quarters for trying to reduce the number of seals in a particular area. Repeated harassment of animals at haul-out sites could be a problem in the future.”<sup>192</sup>

273. A letter to the Committee from the Cabinet Secretary noted the evidence received on harassment and advised—

“A power to protect seals from disturbance or harassment, which was suggested by some, already exists under paragraph 28 of the Conservation (Natural Habitats etc) Regulations 1994 in relation to European sites.” This protection applies to European sites designated on land, such as breeding sites, as opposed to European marine sites. Therefore, any harassment of seals in water, for example around a fish farm or in a river estuary near a fishery, would not be covered by these Regulations.”<sup>193</sup>

274. The Regulations state that local authorities may make byelaws for the protection of nature reserves which, amongst other things, can “protect or restrict the killing, taking, molesting or disturbance of living creatures of any description in the site.”<sup>194</sup> In other words, the protection of seals from disturbance only applies following the passing of a byelaw in an area already designated as a European site.

275. The Committee recognises the force of the argument that seals should be no less protected from harassment than other marine animals. At the same time, the issue is complex. There is a risk of people being deemed to have harassed seals when their intentions were innocent; for example, tourists going on boat trips near haul-out sites or people walking on beaches where seal colonies are based and unintentionally frightening seals away. If such an offence were to make the statute book, it is to be hoped that common sense would be applied on the enforcement side. More fundamentally, it goes without saying that only intentional or reckless behaviour should be criminalised.

276. A perhaps more tricky issue from a drafting point of view would be to ensure that acts intended only to deter seals from causing damage to fisheries or fish farms,

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<sup>191</sup> Tara Seal Research. Written Submission to the Rural Affairs and Environment Committee.

<sup>192</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1844.

<sup>193</sup> Scottish Government. Letter from Cabinet Secretary for the Rural Affairs and the Environment to the Rural Affairs and Environment Committee dated 8 September 2009.

<sup>194</sup> The Conservation (Natural Habitats, &c.) Regulations 1994, section 28 (3)(b).

and therefore to avoid a resort to shooting, were not criminalised as harassment, which would clearly be a perverse outcome.<sup>195</sup>

**277. The Committee invites the Cabinet Secretary to consider including on the face of the Bill an offence of intentionally or recklessly harassing seals, whilst recognising that careful drafting would be required to address the complexities surrounding the issue, including the risk of unintended consequences.**

*Licensing conditions-provisions in the Bill*

278. Sections 99 and 100 specify conditions that the Scottish Ministers must impose in granting a license to kill or take a seal. These include the method of killing or taking, the maximum number of seals that may be killed or taken, and a requirement to report back to the Scottish Ministers. Provision is also made allowing the Scottish Ministers to impose further conditions. These may include, but are not limited to, conditions about the area where seals may be killed or taken or the circumstances in which they may be killed or taken.

*Individual seal behaviour and licensing*

279. Evidence at Stage 1 made clear that seal behaviour varies widely. Whilst all seals are fundamentally opportunist predators, many appear to show little or no interest in predating fish farms or salmon rivers. It is a small minority of perhaps unusually adaptive “rogue seals”, as some witnesses described them, exhibiting learned behaviour, that cause disproportionate damage. It clearly follows that if it is considered necessary to manage seals in an area by shooting it is this minority that should be targeted. Randomly shooting a number of seals is not only inhumane and potentially damaging to seal conservation, but also likely to be ineffective.

280. However, a number of clear practical objections arose at Stage 1 to the proposal that licenses be tailored to apply only to particular seals. These include the time delay between a seal getting into a fish farm or fishery and an individual licence being issued, and the challenge of identifying the correct individual seal once it has left the area.

281. Professor Thomas of the Scottish Salmon Producers’ Organisation explained—

“The notion that someone would have to apply for one licence for a particular seal is an utterly unworkable proposition. Think about the analogy of the fox in the hen-coop. A seal is attacking salmon, and we have to pick up the phone to Edinburgh to apply for a licence. The licence might come through in due course, but by that time the problem would be over because the fish would all be dead. We must take on board the way in which the licensing system would have to work. Some block or upper limit would be required—that is an idea in the Moray Firth plan—and that would allow the population of seals to be maintained. When a seal is attacking a net, people must be able to take action there and then to do something about it.”<sup>196</sup>

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<sup>195</sup> Professor Galbraith of SNH referred to seal harassment possibly forming part of a “harassment strategy” for a fish farm: Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1845

<sup>196</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1828

282. The Association of Salmon Fishery Boards' evidence also supported this approach—

“We believe seal control should be operated on a regional level (as per current arrangements in Moray Firth) with an agreed pre-set allocation for each area that can be conducted at the discretion of the District Salmon Fishery Board to provide effective control as and when necessary.”<sup>197</sup>

283. The Committee agrees that the most workable way to encourage a highly selective approach to seal culling would be to impose an upper limit on the number of seals that may be taken within a particular area. This ought to help incentivise the targeting only of seals whose behaviour is recognised as problematic. Of course care would have to be taken to set a number within a particular area that is neither too high nor too low. Continually updated research on regional seal populations and behaviour, such as is carried out by the Sea Mammal Research Unit and other bodies, is vital in this regard. So too would be any work carried out in future by seal management groups, which the Committee, as already stated, would support being established under the Bill.

284. Other conditions imposed on the granting of a license, for instance, a requirement that a seal only be shot at when it is within a particular distance from the fish farm being predated, may also help raise the probability of the “right” seal being targeted.

*Issuing licenses on an individual or group basis*

285. If imposing upper limits on seal kills within a particular marine area is seen as desirable as part of an overall licensing regime, it might seem to follow that licenses should also be issued on a group basis. It would then be for the licensees, as a group, to decide how to manage seal predation in that area. As well as being likely to reduce the bureaucracy associated with multiple licensing applications, this approach would arguably make it easier to monitor the impact of such licences on a particular area. It may also make reporting shootings less demanding if one farm assumes responsibility for reporting all shootings under a group licence (the timescales for reporting shootings is considered further below).

286. On the other hand, the Committee recognises that the approach is not without its disadvantages. For instance, fish farms within a particular area may often be commercial rivals, which may provide a disincentive to cooperate unless some sort of binding working arrangement can be reached.

287. Government policy appears to be supportive of licensing on a regional group basis. The Policy Memorandum notes that “Scottish Ministers expect to introduce this [ie licensing] on a group basis following the model of the Moray Firth pilot to limit bureaucracy.”

288. The Cabinet Secretary told the Committee—

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<sup>197</sup> Association of Salmon Fishery Boards. Written submission to the Rural Affairs and Environment Committee.

“My understanding is that the plan has promoted the concept of licences for groups. We would be keen to take that forward as an option, so the licences could be for either groups or individuals.”<sup>198</sup>

289. The Committee is not clear whether this means that the Cabinet Secretary is currently undecided as to whether licenses should be issued on a regional group basis or to individuals, or whether he considers that there should be an option to apply either individually or as a group.

**290. The Committee supports the licensing system being sufficiently flexible to allow for the issuing of licenses on a group or individual basis as appropriate, recognising that there are some practical issues that may need to be ironed out where a group license is issued. This approach should go hand in hand with the setting up of regional seal management groups, so as to encourage an open and cooperative approach to seal management within a particular area.**

*Licensing and marksmanship*

291. Advocates for Animals said it should be a condition of any licenses granted to kill seals that they—

“require marksmanship and competency to be demonstrated by applicants; prohibit shooting in water or from unstable platforms; and require applicants to ensure that if a seal is shot, it is actually killed outright. These issues have already been addressed by legislation in a number of other countries”

292. Professor Boyd indicated sympathy for these proposals and highlighted the importance of shooting within a range of 50m with a properly zeroed rifle to minimise the chance of a seal being injured, and suffering unnecessarily as a result, rather than being killed outright.<sup>199</sup>

293. The Cabinet Secretary was invited to respond to suggestions that mandatory licensing conditions along these lines be set out on the face of the Bill—

“The licence conditions can be varied. The bill explains to some extent the kind of factors that could be taken into account. It is perfectly possible to take into account marksmanship or training and so on as part of the licence conditions. We are considering where to go with that.”<sup>200</sup>

**294. The Committee considers that the list of conditions that may be specified in a license (as set out in section 100(3)) should include the skill of the marksman, the type of firearm used, and the marksman’s proximity to the target. Committee members consider that there is a case to be made for some or all of these conditions being mandatory for any license.**

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<sup>198</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1907

<sup>199</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1835

<sup>200</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1907

*Killing as a last resort*

295. Industry representatives and seal protection organisations alike made clear in evidence that they consider that shooting should be a last resort. Professor Thomas said that “the driving force is to shoot a seal only if there is no alternative”.<sup>201</sup>

296. To ensure that this is the case, Advocates for Animals argued that licensing conditions should “mitigate that solution as much as possible for animal welfare”,<sup>202</sup> and that the process of considering a license application should include considering whether all other eventualities have been explored and ruled out before granting a licence. Similarly, the Seal Protection Action Group stated in written evidence—

“We believe the Bill should prescribe that best available non-lethal deterrent measures must be used, and have demonstrably failed, before consideration is given to granting a seal licence, to ensure that killing seals is not simply viewed as a cheaper solution.”<sup>203</sup>

297. An approach along the lines proposed above is, in fact, being taken in the Bill but only in respect of seals in certain areas. Section 105 states that “The Scottish Ministers must not grant a seal licence authorising the killing or taking of seals in a seal conservation area unless they are satisfied (a) that there is *no satisfactory alternative way* [emphasis added] of achieving the purpose for which the licence is granted,”

298. The Committee accepts that detailing what constitutes the best non-lethal deterrent measures on the face of the Bill would be impractical, as the list would be likely to become outdated relatively quickly. An alternative option would be to list the measures in subordinate legislation as this can be more readily updated.

299. There may be a more fundamental problem, however. Industry representatives have suggested that there never could be one authoritative list of measures, because some measures will work well in some circumstances but not others, whilst some may work but would not be permitted in particular areas. And some devices may work, to a greater or lesser extent, but may have undesirable side-effects depending on the nature of the surrounding marine environment, which would make it inadvisable to use them.

300. In relation to wild fisheries, the development of effective acoustic scarers within rivers is being explored as part of a Seal and Salmon Research Programme. The Moray Firth Seal Management Plan<sup>204</sup> suggests that such technology has successfully reduced common seal predation in the Puntledge River, British Columbia. It also points out its limitations, for example the scarers cannot be used in areas where they may impact on other species such as dolphins, and they do not deter all seals effectively, meaning that “shooting remains the only viable method of reducing seal-salmon conflict.”

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<sup>201</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1828

<sup>202</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1818

<sup>203</sup> Seal Protection Action Group. Written submission to the Rural Affairs and Environment Committee.

<sup>204</sup> Moray Firth Seal Management Plan. Paragraph 3.6.4

301. Professor Thomas set out the salmon farming industry's view—

“The difficulty is that, for reasons that no one is entirely sure of, some methods work much better in some places than in others. The notion that we should prescribe a single method is impractical because it would not always work as well in different areas... For example, acoustic deterrent devices are extremely effective in some areas, but in other areas it is a condition of the fish farm's licence that they cannot be used because of concerns about cetaceans in the same area.”<sup>205</sup>

302. This explanation was not entirely accepted by animal rights groups. Libby Anderson of Advocates for Animals responded that—

“farms tend to use the solutions that are available and those that are convenient to use. They do not necessarily use the most expensive solution—the fully tensioned anti-predator net at the appropriate distance from the cage. To avoid further disagreement, we would have to say that there is a lack of knowledge about what is actually being used out there, and the industry and the Government need to explore that when they are considering the terms of licences.”<sup>206</sup>

303. Advocates for Animals were also among a number of stakeholders who cited anti-predator nets as the most effective way of preventing seal attacks on fish farms, and who suggested that in most instances there was no reason (other than the extra cost to the fish farm) why they should not be used.

304. Animal Concern and Save our Seals' joint submission stated that—

“Fish farmers can protect their stock from seal attack by installing and maintaining high strength, anchored and tensioned anti-predator nets to stop seals getting near the farm cages. Fish farmers who argue that their farm site is not suitable for the installation of anti-predator nets are actually admitting that they have chosen a site which is not suitable for a fin fish farm.”<sup>207</sup>

305. The Seal Protection Action Group made a similar point, implying that farms that failed to install adequate anti-predatory nets might be in breach of the law. Anti-predator nets, they argued—

“would also meet criteria set under the Animal Health and Welfare (Scotland) Act 2006 that requires farmers to protect their stock from suffering or injury.”<sup>208</sup>

306. The Committee recognises that this is a complex area. Whilst we recognise that it may be hard to impose solutions on the face of the Bill, we are not yet satisfied that the Bill does all it could to ensure that culling seals is a last resort.

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<sup>205</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1831.

<sup>206</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1832.

<sup>207</sup> Animal Concern and Save Our Seals. Joint written submission to the Rural Affairs and Environment Committee.

<sup>208</sup> Seal Protection Action Group. Written Submission to the Rural Affairs and Environment Group.

**307. The Committee sees no reason in principle why the requirement that the Scottish Ministers may only issue a license to kill or take a seal if there is “no satisfactory alternative” to doing so should not apply in all areas, rather than just in seal conservation areas as the Bill presently provides. At the same time, the Committee seeks clarification from the Government as to what deterrent or combination of deterrents could be used to satisfy Ministers that there is ‘no satisfactory alternative’ to issuing a licence.**

**308. The Committee recommends that the Scottish Government consider making it a condition of granting a licence to shoot a seal that, if the farm is not fitted with anti-predator nets, the applicant provide an explanation of why this is so.**

*Reporting*

309. Section 100 states that a seal licence must require the licensee to report to the Scottish Ministers “as soon as reasonably practical” after killing a seal.

310. The Scottish Salmon Producers’ Organisation argued that an annual reporting cycle of seal kills (rather than of each individual kill) would reduce bureaucracy and that “publication only of aggregate annual data relating to Seal Licences”<sup>209</sup> would protect fish farm personnel from threats or actions from some “seal activists in the UK who have shown a willingness to engage in direct and, in some cases, extreme measures”.<sup>210</sup> Professor Thomas described this to the Committee as a practical and proportionate approach.<sup>211</sup>

311. The Sea Mammal Research Unit disagreed, stating that it supports “rigorous reporting procedures” to enable effective monitoring. The Unit argued that “In the past, poor information about the number of seals being shot has reduced the quality of management advice we have been able to give.”

312. The RSPB argued that to be compliant with the EU Habitats Directive “...the Bill must ensure that shooting can only occur as a last resort, by licensees, within strict guidelines, and that all killings are accurately reported to the Scottish Government.”<sup>212</sup>

313. The Cabinet Secretary was invited to respond to suggestions that “as soon as reasonably practical” is open to a wide interpretation and requires to be clarified—

“I ask members to bear in mind that the starting point is that we do not have such information...we will certainly reflect on whether the phrase “as soon as reasonably practical” requires to be tightened.”<sup>213</sup>

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<sup>209</sup> Scottish Salmon Producers’ Organisation. Written submission to the Rural Affairs and Environment Committee dated 11 June 2009.

<sup>210</sup> Scottish Salmon Producers’ Organisation. Written submission to the Rural Affairs and Environment Committee dated 11 June 2009

<sup>211</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 1 September 2009. Col 1843

<sup>212</sup> RSPB. Written submission to the Rural Affairs and Environment Committee.

<sup>213</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1908

**314. The Committee recommends that the Cabinet Secretary set out reporting standards in guidance. The Committee suggests that there should be a requirement on a licensee to report the taking or killing of a seal at least quarterly.**

*Enforcement*

315. The Bill increases the penalties for offences against seals in line with those set out in the Wildlife and Countryside Act 1981. The Bill makes provision in relation to the apprehension of offenders, powers of search and seizure, forfeitures, entry upon land, and the giving of notices to ensure enforcement is made.

316. Written evidence drew the Committee's attention to a number of concerns about enforcement of the existing legislation, including the perceived overuse of the so-called netsman's defence, where a seal "in the vicinity" of fishing nets or tackle is killed to prevent damage to them. Whilst the removal of this provision has been welcomed in a number of submissions, there is an underlying concern that without effective enforcement, the new provisions may prove as limited as the existing ones. The Seal Protection Action Group argued that—

"there is no explanation [in the Bill] of how effective monitoring and enforcement can be achieved given that most incidents take place in remote areas."<sup>214</sup>

317. Advocates for Animals provided a number of examples of reported shootings which were not prosecuted, including as a result of the difficulties in policing remote areas. For example, Tayside Police investigated culls of seals at the Bell Rock lighthouse off the Angus coast in 2001 and 2006. Advocates for Animals noted that "the lighthouse is at least 12 miles from the nearest salmon nets, and police officers voiced their concern that policing such a remote location in the North Sea was almost impossible, permitting no check on the shooting of seals during the breeding season."<sup>215</sup>

318. The Cabinet Secretary noted that there have been successful prosecutions under existing legislation—

"Therefore, it is clear that there is enforcement...but my understanding is that, given the nature of such activities, there is a lot of local intelligence in some of the communities in which such offences take place, as members can imagine. I am therefore confident that the provisions can be enforced."<sup>216</sup>

319. Mr Lochhead also indicated that he intends to amend the bill to provide that—

"the common enforcement powers in Part 6 of the Bill be extended to include offences relating to seals. Although I expect most, if not all, enforcement of seals legislation to be taken forward by the police, it remains possible that

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<sup>214</sup> Seal Protection Action Group. Written submission to the Rural Affairs and Environment Committee.

<sup>215</sup> Advocates for Animals. Supplementary written submission to the Rural Affairs and Environment Committee.

<sup>216</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 9 September 2009. Col 1909

Marine Scotland officers could occasionally become involved in such cases and I intend to amend the Bill to ensure they have the necessary powers.”<sup>217</sup>

320. This amendment is to be welcomed as, amongst other things, it will presumably increase the human resources available to monitor the implementation of provisions under Part 5. Given this additional responsibility being placed on Marine Scotland, the Committee would expect that the funds provided to the organisation for enforcement under Part 6 would be increased to enable it to carry out this new duty effectively.

321. The Financial Memorandum states that Marine Scotland is expected to extend its compliance activities to cover monitoring of licensing and conservation from 2010, but does not provide a total expected figure for such activities. Without a baseline figure, it will be difficult to ascertain how much additional funding Marine Scotland receives for enforcement and monitoring in relation to Part 5 as a result of the Cabinet Secretary’s proposed amendment.

322. The 2010-11 draft budget proposes that Marine Scotland’s budget be reduced from £75.5 million in 2009-2010 to £65.3 million in 2010-2011. The Committee notes that this reflects start-up costs for the new organisation, which was established in April 2009. There would be concern if this reduction resulted in more limited funds for enforcement, especially given the inherent challenge of monitoring and enforcement in remote areas. The Committee is following up this concern in our scrutiny of the 2010-11 budget.

### **Part 6 – enforcement powers**

323. Part 6 sets out enforcement powers. In large part, these are intended to help ensure that any new duties imposed, in particular, under Parts 3 (licensing) and 4 (marine protected areas) of the Bill are adhered to. Scottish Government officials explained that the main policy behind these provisions was to ensure that enforcement powers were largely consistent within and without the Scottish marine area.<sup>218</sup>

324. For the most part, these provisions aroused no great controversy at Stage 1, although one issue was raised.

#### *Directing a vessel to port*

325. Section 132 empowers persons appointed as marine protection officers under the Bill to direct a vessel or marine installation to port under certain circumstances. In evidence to the Committee, the British Port Authority did not express opposition to this provision, which they described as an “extension” of an existing, and rarely-used, power. However, they were concerned about the potential effect that the provision could have on ports. David Whitehead of the BPA commented—

“We are concerned about the impact of the provision on ports. The bill does not seem to say anything about how the port will be contacted, arrangements for

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<sup>217</sup> Scottish Government. Letter from the Cabinet Secretary for Rural Affairs and Environment to the Rural Affairs and Environment Committee dated 16 September 2009.

<sup>218</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 27 May 2009. Col 1722

dealing with disruption to trade, oil spills and so forth or even how the provision relates to the powers of the secretary of state's representative for maritime salvage and intervention [SOSREP], who has the power to direct into port ships that are being salvaged. We are flagging up the issue as a bit of an unknown area in which consideration of the port side seems to have been left out."<sup>219</sup>

326. Mr Whitehead pointed out that where SOSREP directs a vessel to port, the UK Government bears the responsibility for any financial repercussions, but that the Bill was silent on whether this applied in the case of direction under section 132.

327. In a letter to the Committee, the Cabinet Secretary said—

“My understanding is that the SOSREP ... role is limited to salvage operations - essentially a ‘command and control’ function which allows SOSREP to intervene and take charge of salvage operations where there is a risk of pollution. The powers of SOSREP in relation to Safety directions come under section 108A and Schedule 3A of the Merchant Shipping Act 1995 as inserted by the Marine Safety Act 2003. These powers are somewhat different to the enforcement powers in the Marine Bill. They relate to ships where an accident has happened to or in the ship, the accident has created a risk to safety or a risk of pollution by a hazardous substance and the direction is necessary to remove or reduce the risk.

In enforcement operations it is often necessary to direct a vessel to port to carry out investigations and necessary enquiries for a number of reasons. It may be that any necessary tests or investigations require to be conducted in a stable environment, or it could require all or part of the cargo to be discharged to allow it to be properly examined, or the investigations may require the involvement of shore-based services or experts. These powers are generally only available when enforcement officers have reasonable grounds to suspect that the vessel concerned is involved in the commission of an offence and are not exercised lightly given the associated practical considerations. These powers are therefore distinct from the role played by SOSREP in marine salvage operations, an activity which is un-connected with enforcement.”<sup>220</sup>

328. The Committee is grateful for this explanation, which clarifies some issues. However it does not address the issue of compensation.

**329. The Committee seeks clarification as to whether it is intended that port authorities should be compensated for the exercise of the power to direct a ship to port set out in section 135 in a manner which has caused them financial loss.**

#### FINANCIAL MATTERS

330. The Finance Committee reported to this Committee on the Bill. The Finance Committee reported that it welcomed the detailed cost information available in the

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<sup>219</sup> Scottish Parliament Rural Affairs and Environment Committee. *Official Report*, 22 June 2009. Col 1802

<sup>220</sup> Scottish Government. Letter from the Cabinet Secretary for Rural Affairs and Environment to the Rural Affairs and Environment Committee dated 16 September 2009.

Financial Memorandum. The Committee acknowledged that was bound to be variation in the estimates of some costs, depending on, for example, the detailed implementation experience of local marine planning, or the timing of designation of marine protected areas. However, the Committee recommended that the Scottish Government should consider how the presentation of information and the consultation on financial implications could be improved so as to avoid the misunderstandings (for instance from local authorities) which were raised in evidence.

331. The Finance Committee also recommended that the costs summary for the whole Bill set out at Table F could usefully have separately identified the total expected one-off set-up costs (albeit that these are spread over several financial years), and the total annual running costs once the Bill is fully implemented.

332. The Committee expressed concern at the way in which the costs associated with the 'third tier' of marine planning (integration of management of Scottish waters with the UK, EU and international contexts) have been expressed. No cost information for activities to implement this third tier is mentioned in the Financial Memorandum. Officials said that a cost of about £1 million per year associated with this had been described in the Financial Memorandum of the UK Marine and Coastal Access Bill and in the corresponding Legislative Consent Memorandum (LCM) to the Scottish Parliament.

333. However, the Finance Committee noted that the LCM was not clear that any costs from marine planning at this level will fall on the Scottish Government. Paragraph 34 of the LCM states that designating nine additional marine protected area sites in the offshore zone may cost around £1 million, but is not clear that this cost is to fall on the Scottish Government. The Statement of Funding Policy between the UK Government and the devolved administrations states that, "where...decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust for such costs, the body whose decision leads to the additional cost will meet that cost."<sup>221</sup>

334. Given that officials stated clearly in evidence that this cost would have to be met from the Scottish Government's budget, the Finance Committee expressed concern that it appeared to have no opportunity to scrutinise whether the assumptions behind this estimate were appropriate. They are not described in the Financial Memorandum. This led the Committee to note that the status, and appropriate route for scrutiny, of the costs of this third tier of planning are unclear. The Committee accordingly recommended that the lead committee seeks clarification from the Scottish Government on this situation.

**335. The Committee notes and agrees with the views of the Finance Committee and invites the Cabinet Secretary to respond to them, whilst recognising that costs falling on the Scottish Government as a result of the UK Marine and Coastal Access Bill are not directly a matter for consideration in respect of the Marine (Scotland) Bill.**

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<sup>221</sup> HM Treasury: Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: Statement of Funding Policy Paragraph 3.2

336. As noted earlier, **concerns have been raised as to the adequacy of data-gathering on the marine environment, especially in view of the huge marine planning responsibility that will be placed on public authorities, Marine Scotland in particular. The Committee is considering this issue separately through its scrutiny of the 2010-11 budget**

## **ANNEXE A: SUBORDINATE LEGISLATION COMMITTEE REPORT**

### **Marine (Scotland) Bill**

## **SUBORDINATE LEGISLATION COMMITTEE REPORT**

### **Marine (Scotland) Bill**

The Committee reports to the lead committee as follows—

#### **Introduction**

1. At its meetings on 23 June<sup>222</sup>, and 1 September<sup>223</sup> 2009 the Subordinate Legislation Committee considered the delegated powers provisions in the Marine (Scotland) Bill at Stage 1. The Committee submits this report to the Rural Affairs and Environment Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.<sup>224</sup>
3. The Committee's correspondence with the Scottish Government is reproduced in the Appendix.

#### **Delegated powers provisions**

4. The Committee considered each of the delegated powers provisions in the Bill.
5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 3(4), 18(1)(b), 20(4)(a), 20(7), 21(2), 25(1), 27(1), 37(1), 39(1), 42(1), 45(2), 45(3), 68(2), 74(1), 77(6), 79(2), 93, 102(1) and 148(1).

#### **Section 17(3) - Powers to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities**

6. This power allows the Scottish Ministers, by order to add or remove any licensable marine activity from the list in section 17(1). The Delegated Powers Memorandum ("DPM") explains this power is needed in order to respond to changing developmental needs which are likely to change over time. While flexibility is thought important, the DPM does not explain why the power is open to permit any additions to or deletions from the list or why no criteria are specified for before such changes can be made. The Scottish Government was asked to explain why the power was open and what criteria would be applied.

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<sup>222</sup> Official Report 23 June

<sup>223</sup> Official Report 1 September

<sup>224</sup> Delegated Powers Memorandum ('DPM')

7. The Scottish Government response advises that because there may be any number of reasons for making changes it would not be useful to specify criteria for the exercise of the power.

8. The Bill does not expressly set out the objectives of the licensing regime, but these may be inferred from matters to which the Scottish Ministers must have regard in determining an application for a marine licence. These are set out at section 20(1): the need to protect the environment, to protect human health and to prevent interference with legitimate uses of the sea and such other matters as the Scottish Ministers consider relevant. However, the Committee notes that there is no link between the power to alter the scope of the regime and its objectives as described in the matters specified in section 20(1).

9. The Committee accepts that circumstances will change over time and it may be necessary to make changes to the activities of the marine licensing regime. Nevertheless the exercise of the power in section 17(3) is of significance as the inclusion of an activity on the list of licensable marine activities will result in that activity being brought into the marine licensing regime. Inclusion in the regime will have a significant effect on the people involved in that activity.

10. The Committee also acknowledges that affirmative procedure affords a high level of scrutiny over the exercise of the power. However, the provision of flexibility is not inconsistent with the provision of a limitation (by reference to objectives, criteria or otherwise) on how a power may be exercised.

**11. The Committee therefore draws to the attention of the lead committee that the power is unqualified and does not specify any criteria on the basis of which the Scottish Government may determine that a particular activity should be added to or removed from the list.**

#### **Section 24(1) - Power to specify activities which will not need a marine licence**

12. A marine licence is required for the activities specified in section 17(1). Section 24(1) provides that the Scottish Ministers may by order specify activities which do not require a marine licence or don't require a licence if specified conditions in the order are satisfied. The Scottish Ministers are required to consult such persons as they consider appropriate in advance of making any order.

13. This would allow for exemptions within the classes of licensable activity and for such exemptions to be permitted subject to compliance with set conditions. The Committee's comments in relation to section 17(1) apply equally here.

14. While the Committee understands the need for the power and agrees with the power in principle, it notes that it is not qualified in any way and no criteria are specified on the basis of which the Scottish Ministers may determine that an activity should be specified under section 24(1). Also, as with the power under section 17(3), there is no link between the power and the apparent objectives of the regime.

15. Whether or not an activity is to require a licence and thereby come within or be excluded from the marine licensing regime is a matter of considerable significance for those involved in the activity.

16. This power is broadly the same as the power under section 7(1) of the Food and Environment Protection Act 1985, although an order under section 7(1) was subject to negative procedure. There is, however, a significant difference between the two powers with respect to consultation. Section 7 requires a licensing authority to consult the Food Standards Agency as to any proposed order under section 7(1). Section 24(4) provides only a general requirement that the Scottish Ministers must consult such persons as they consider appropriate.

17. The Food Standards Agency therefore no longer has a specified or compulsory role in the order-making process. The consultation requirement has been watered down and there is no explanation of or justification for this significant change. However, the Committee does acknowledge that affirmative procedure provides a greater level of scrutiny than before.

**18. The Committee draws to the attention of the lead committee the Government's control as to consultation prior to the exercise of the power and that the power does not specify any criteria on the basis of which the Scottish Government may determine that a particular activity should be specified as not requiring a licence or not requiring a licence if specified conditions are satisfied.**

**Section 29(1) - Power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22**

**Section 52(1) - Power to make provision for any person to whom a notice listed in subsection (2) is issued to appeal against that notice**

19. These powers are very similar and the underlying issue is the same in each case, as are the questions asked of the Scottish Government and the Scottish Government responses.

20. Part 3 establishes a regime for the licensing of the marine activities specified in section 17. Section 22 provides that when an application is made to the Scottish Ministers for a marine licence, the Scottish Ministers must grant the licence unconditionally, grant the licence subject to conditions as they consider appropriate, or refuse the application.

21. Section 29(1) provides that the Scottish Ministers must by regulations make provision for any person who applies for a marine licence to appeal against a decision under section 22.

22. There are various enforcement notices which the Scottish Ministers can issue under various provisions in Part 3, which are listed in section 52(2). Section 52 provides that the Scottish Ministers must by regulations make provision for any person to whom a notice listed in section 52(2) is issued, to appeal against that notice.

23. No details of the appeal mechanisms are given on the face of the Bill. The justification provided in the DPM for using subordinate legislation for the purpose of establishing an appeals mechanism is extremely brief.

24. The Committee accepts that it is not unusual to have the details of appeal procedures left to subordinate legislation provided that the core elements or outline of any appeal mechanism are established on the face of the Bill. It is understandable that details of appeals procedures may require to be adjusted over time in the light of experience. However, on the face of the Bill there is no substantive provision with respect to appeals, only a requirement for an appeals mechanism to be put in place by regulations. This, in the Committee's view, is neither sufficient nor appropriate.

25. While detailed rules of procedure need not be set out in primary legislation, the Committee would normally expect the appeal body to be specified on the face of the Bill. Provision should also be on the face of the Bill for matters such as the grounds of appeal, the legal consequences of an appeal being initiated and the powers of the appellate body. The Committee gives by way of example the extensive and comprehensive provisions for appeals in sections 131 and 132 of the Licensing (Scotland) Act 2005.

**26. The Committee informs the lead committee that, notwithstanding the powers to make provision for appeals under sections 29(1) and 52(1) of the Bill, no substantive provision with respect to appeals is made on the face of the Bill and that the Committee expects the fundamental elements of an appeal procedure should appear on the face of the Bill.**

**Section 54(3)(1) - Power to provide for marine fish farming not to constitute 'development'**

27. 'Marine fish farming' is development for the purposes of the Town and Country Planning (Scotland) Act 1997 ('the 1997 Act') and accordingly requires planning consent from the local planning authority. Section 54 of the Bill inserts a new provision (section 26AB) in the 1997 Act. This gives the Scottish Ministers power to provide by order that the establishment of a fish farm in the waters specified in the order does not constitute 'development' in terms of the 1997 Act. In that event the fish farm would not require planning permission, but would fall to be regulated by and require to be licensed under the marine licensing regime established by the Bill (because it would fall within the list of licensable activities).

28. The reason for a power to transfer marine fish farming between the planning regime and the marine licensing regime and the reason for doing so on an area by area basis was not explained. The change from one regime to another on an area by area basis could result in a lack of uniformity across the country and could give rise to considerable confusion as different criteria for development could apply from one area to another with different procedural rules and different rights of appeal. The Committee therefore sought clarification from the Scottish Government.

29. It appears from the response that the Scottish Ministers are uncertain whether aquaculture developments should fall under the terrestrial planning or the

marine licensing regime. The policy objective appears to allow for marine fish farming to be removed from the terrestrial planning regime and to fall within the marine licensing regime on an area basis if the relevant local planning authority wishes that to be done. The need for this power is therefore understandable if that policy objective is to be achieved. However, the potential for confusion and inconsistency in the statutory control of this activity remain. The Committee notes that the affirmative procedure provides a significant degree of Parliamentary scrutiny of any proposal for change.

**30. The Committee draws to the attention of the lead committee that the effect of the power is to permit local authorities to determine whether, in respect of their particular area, marine fish farming is to be in the terrestrial planning regime or in the marine licensing regime. The Committee also draws to the attention of the lead committee that the exercise of the power on an area by area basis could result in a lack of uniformity across the country which may give rise to considerable confusion as different criteria for development could apply from one area to another with different procedural rules and different rights of appeal.**

**Section 58(1) – Power to designate any area of the Scottish marine protection area as a nature conservation marine protected area, a demonstration and research marine protected area or a historic marine protected area.**

**Section 64 – Power to amend or revoke a designation order under section 58**

31. Section 58(1) provides that the Scottish Ministers may by order designate any area of the Scottish marine protection area as of one of three types of marine protected area ('MPA') namely, a Nature Conservation MPA, a Demonstration and Research MPA or an Historic MPA. Section 64 provides that a designation order made under section 58(1) may be amended or revoked by a further such order (under section 58(1)).

32. Section 145(3) provides that an order under section 58(1) is not made by statutory instrument.

33. The designation of MPAs is one of the key elements of the Bill. However, as 'designation' is not exercised by legislative provision, the power is not listed or discussed in the DPM. Having regard to the number and nature of the considerations which may arise with respect to any decision on designation and to the fact that a number of areas may be designated, the Committee considered it appropriate to consider whether that 'designation' should be exercised by legislative provision.

**34. The Scottish Government's response has been helpful in explaining the approach adopted. Having regard to the context and background and the extent to which other elements of the MPA regimes and procedures are set out in the Bill, the committee does not consider that it is necessary for the power to designate a marine protected area under section 58(1) or the power to amend or revoke a designation to be exercised by statutory instrument.**

### **Section 77(1) - Power to make an urgent marine conservation order**

35. Section 77(1) provides that, where Scottish Ministers consider that there is an urgent need to protect an area in respect of which an MCO may be made through an MCO, then an MCO may be made without the need to follow the procedures otherwise required by section 76.

36. An urgent MCO remains in force for the period specified in the order, which must not exceed 12 months. The Scottish Ministers are required to publish notice of the making of the urgent MCO. Representations can be made about an urgent MCO (after it has been made) and the Scottish Ministers have power to revoke an urgent MCO.

37. The DPM does not comment on the power to make an urgent MCO, although it does comment on the power under section 77(6) to continue an urgent MCO.

38. The Committee appreciates the need for a power to take urgent action as well as the need for urgent MCOs to be time limited. It was not clear as to the intended effect of section 77(2)(a) which provides that an urgent MCO comes into effect on such date as is specified in it, as it is accepted that every SSI comes into force on the day specified in it for this purpose.

39. The Scottish Government appears to accept that there is no need for the provision in section 77(2), which it states is designed to make an order under section 77 more 'user friendly' than might otherwise be the case. The Committee does not agree with this approach and considers that it is not appropriate or advisable to make provision for something which is unnecessary, not least as a question may arise with respect to the effect if a similar provision is omitted elsewhere.

40. The Committee appreciates the need for this power and agrees with the power in principle. As far as procedure is concerned, the Committee considers that negative procedure is appropriate, and that there should be consistency of approach in the procedure proposed in respect of orders under section 74(1), urgent orders under section 77(1) and urgent continuation orders under section 77(6).

**41. The Committee considers that the proposed power is acceptable in principle and that negative procedure is appropriate. However, the Committee considers section 77(2)(a) to be unnecessary.**

### **Section 144(1) - Ancillary provision**

42. Section 144(1) provides that the Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of, or for giving full effect to, the Act or any provision of it. Section 144(2) provides that an order under this section may modify any enactment, instrument or document.

43. This is an example of the widest formula adopted in relation to ancillary powers. The Committee has previously expressed concern that non-textual modification of legislation may provide for significant legal effects and that accordingly textual amendment may not be the appropriate test to determine the appropriate level of Parliamentary scrutiny. The Committee has expressed the view that those ancillary powers which make permanent provision may be considered likely to have more significant effects. There should be a full consideration given by the Scottish Government to the procedure appropriate to ancillary powers in each Bill on a case by case basis. There is no significant assessment in the DPM explaining how the Scottish Government has reached its view here.

44. The Scottish Government's response to the questions posed by the Committee is very brief and does not address the question or add to what the Committee knows already. There is no explanation as to the Scottish Government's approach to the procedure proposed with respect to ancillary powers having regard to the provisions in this Bill.

45. The Committee is disappointed by the apparent unwillingness on the part of the Scottish Government to give much thought to the use of ancillary powers or to address the use of the individual elements within the powers, either in the DPM or in their response to the Committee's question.

46. There are six elements to the ancillary powers set out in section 144. The Scottish Government appears to treat the ancillary powers equally and to suggest that the use of all these ancillary powers is 'standard' in all Bills. The Committee does not agree with this approach. The appropriateness or otherwise of each of the different elements of an ancillary powers provision has to be considered separately in the context of a particular Bill. While the Committee accept that there may be thought to be nothing out of the ordinary in this Bill, it does not absolve the Scottish Government from its obligation to consider the provision of ancillary powers and to provide adequate justification for each element of the powers.

**47. The Committee finds the powers acceptable but reports that, in its view, the different elements of ancillary powers provision should be justified on a case by case basis by the Scottish Government in the context of each Bill.**

**Response from Scottish Government**

**Marine (Scotland) Bill at Stage 1**

**Section 17(3) - Powers to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities**

**The Committee asked the Scottish Government:**

- what is the justification for the power being completely open, in that it does not contain any limitation on the nature, scope or extent of any modification which may be made to the list of licensable marine activities?
- by reference to what criteria, if any, will the Scottish Government determine that a particular activity should be added to or removed from the list of licensable marine activities and could these be specified in the Bill?

**Scottish Government response:**

It is envisaged that activities will be added to the list of licensable marine activities if the Scottish Ministers consider that it would be appropriate for those activities to be subject to marine licensing. Activities would be deleted from the list if it is no longer appropriate for them to be subject to that system.

There could be any number of reasons (e.g. a change in other regulatory regimes, technological change and the development of new industries) for making a section 17(3) order and therefore determining criteria could not be usefully specified in the Bill.

**Section 20(7) – Power to make further provision as to the procedure to be followed in connection with applications for and the grant of licences**

**The Committee asked the Scottish Government:**

As the power in section 20(7) does not appear to be addressed in the DPM, the Scottish Government is asked for the justification for this power in accordance with rule 9.4A of Standing Orders.

**Scottish Government response:**

We apologise for the oversight that led to section 20(7) not being addressed in the DPM. The paragraphs set out in Annex A should have appeared in place of paragraphs 21 to 26 in the DPM.

**Section 24(1) - Power to specify activities which will not need a marine licence**

**The Committee asked the Scottish Government:**

- what is the justification for the power being completely open, in respect that it does not contain any limitation on the nature, scope or extent of activities which may be specified as not needing a licence or not needing a licence if conditions specified in the order are satisfied?
- by reference to what criteria, if any, will the Scottish Government determine that a particular activity should be specified in an order under section 24(1) and could this be set out in the Bill?

**Scottish Government response:**

Any order under section 24(1) will specify activities which the Scottish Ministers consider should not require to be licensed. There could be any number of reasons for making a section 24(1) order and therefore determining criteria could not be usefully specified in the Bill. There are existing long established exemptions with regards to licenses under the Food and Environment Protection Act 1985 and consents under the Coast Protection Act 1949 and it is likely that similar exemptions will be continued under the new licensing system after a full consultation process. There are existing exemptions for activities such as the deposit of fishing gear other than for the purpose of disposal and the deposit of cable and associated equipment (other than for the purpose of disposal) in the course of cable laying or cable maintenance.

**Section 25(1) - Power to allow licensable marine activities which fall below a specified threshold of environmental impact to be registered rather than licensed**

**The Committee asked the Scottish Government:**

Given that regulations made under section 25(1) will specify the threshold of environmental impact for the purpose of determining whether a particular licensable marine activity will not need a licence but will instead be registered, can the Scottish Government explain the need for the regulations to define or elaborate the meaning of 'specified threshold of environmental impact' and also 'fall below' and 'registered', as provided for in section 25(2) and how it is envisaged that this power may be exercised?

**Scottish Government response:**

It is felt that taking the power to be able to define or elaborate the meaning of the phrases in question in the regulations is a sensible approach and will help to avoid any confusion.

There are a large number of FEPA licences issued at present for small uncontroversial projects each year (e.g. the placing of single sewage outfall pipes

for discharge of treated sewage from septic tanks serving single dwellings). These sort of projects (although falling within being a licensable activity under section 17 of the Bill) may merit being registered in future rather than licensed.

The Scottish Ministers will define on the basis of research the ‘specified threshold of environmental impact’ where registration is appropriate. They will be able to use the experience gained through the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (SSI 2005/348) which includes a similar registration system. But the concept of a “specified threshold of environmental impact” is not a straightforward one and the exact meaning of the phrase may need elaborated in the regulations.

**Section 29(1) - Power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22**

**The Committee asked the Scottish Government:**

Given the importance of providing a Convention compliant appeals regime, to explain why it is considered necessary to use sub-leg for this purpose in this particular case.

**Scottish Government response:**

It is considered unexceptional to have the details of appeal procedures left to subordinate legislation, so as amongst other things to allow those details to be adjusted over time in the light of experience.

**Section 37(1) - Power to make provision about the imposition of fixed monetary penalties in relation to offences under Part 3; and**

**Section 39(1) - Power to make provision about the imposition of variable monetary penalties in relation to offences under Part 3**

**The Committee asked the Scottish Government:**

- what is the justification for 2 civil sanction regimes (fixed penalty and variable penalty)?
- on what basis or with regard to what criteria will the Scottish Ministers determine which regime to apply in a particular case?
- why is the maximum variable monetary penalty not specified on the face of the Bill?

**Scottish Government response:**

Fixed monetary penalties will be for low level, primarily technical offences which are not causing harm to the environment or human health or interfering with other legitimate uses of the sea. This could include failure to notify when works are to

commence or a failure to forward a return form to the licensing authority detailing the work that has taken place over the licensing period.

Variable monetary penalties will be for more serious breaches of licence conditions where it is not proportionate to prosecute. The breach may cause harm to the environment or human health or interfere with other legitimate uses of the sea. As the range of operations can vary from small to large-scale operations it is important that penalties can be varied to provide a proportionate response. They could be used to remove financial benefit resulting from the offence or to apply an additional deterrent element.

The penalty levels will be subject to consultation. The levels of fixed monetary penalty will be set down in regulations and any fixed penalty is not to exceed the fine for summary conviction for the offence in question.

A maximum variable monetary penalty is not specified on the face of the Bill as a maximum for the more serious offences would not be appropriate. The Scottish Ministers must be able to capture any financial benefit gained from non-compliance.

**Section 52(1) - Power to make provision for any person to whom a notice listed in subsection (2) is issued to appeal against that notice**

**The Committee asked the Scottish Government:**

Given the importance of providing a Convention compliant appeals regime, to explain why it is considered necessary to use sub-leg for this purpose in this particular case.

**Scottish Government response:**

Reference is made to the answer in paragraph 11 above.

**Section 54(3) - insertion of section 26AB into the Town and Country Planning (Scotland) Act 1997 - Power to provide for marine fish farming not to constitute 'development'**

**The Committee asked the Scottish Government:**

- what is the justification for the power i.e. what is the justification for moving aquaculture developments out of the normal planning system and into the marine licensing regime where different mechanisms and criteria will apply?
- what is the justification for moving aquaculture developments out of the normal planning system and into the marine licensing regime on a case by case (i.e. area by area) basis rather than by doing this all at once by an appropriate amendment to the relevant primary legislation, without the requirement for a power?

**Scottish Government response:**

During the consultation process leading up to the Bill, there was a mixed response as to who should be responsible for consents for aquaculture developments (that is, whether responsibility should be left with local authorities under the Town and Country Planning (Scotland) Act 1997 or whether the developments should constitute licensable activities under the Bill). The Scottish Ministers decided in light of this that the Bill should include a mechanism whereby any particular local authority could decide to give up its role under the 1997 Act in respect of aquaculture developments, with the result that in the area in question those developments would become licensable under the Bill. It is considered that the use of statutory instruments is the best and clearest way to effect the change in relation to any area where an authority chooses in due course to give up its 1997 Act role.

**Section 58(1) – Power to designate any area of the Scottish marine protection area as a nature conservation marine protected area, a demonstration and research marine protected area or a historic marine protected area.**

**The Committee asked the Scottish Government:**

Given the significance of designation as a Nature Conservation MPA, Demonstration and Research MPA or a Historic MPA and of the consequences and obligations which follow thereon, why does the Scottish Government consider that it is not necessary for the power to designate a marine protected area under section 58(1) to be exercised by statutory instrument?

**Scottish Government response:**

The use of an administrative rather than legislative process to establish MPAs is well paralleled in other legislation dealing with protected areas. For instance, “European sites” as defined in regulation 10 of the Conservation (Natural Habitats, &c.) Regulations 1994 (S.I. 1994/2716) are not set down in statutory instruments. Nor are sites of special scientific interest under Part 2 of the Nature Conservation (Scotland) Act 2004. For historic assets, the scheduling of monuments (Ancient Monuments and Archaeological Areas Act 1979) is also not effected by statutory instrument.

Under the Marine and Coastal Access Bill (currently before the Westminster Parliament), Scottish Ministers will also have responsibility for designating MPAs in the Scottish offshore region and this too will not fall to be done by statutory instrument. An administrative process for establishing MPAs in the inshore region will allow Scottish Ministers to follow through a similar designation process in the inshore and offshore regions.

Part 4 of the Bill contains a process for selecting MPAs and qualifies the grounds on which MPAs may be selected. It is thought appropriate that the Scottish Parliament be asked to agree to a circumscribed selection process rather than to approve each and every MPA designation.

### **Section 74(1) - Powers to make marine conservation orders ('MCOs')**

#### **The Committee asked the Scottish Government:**

To explain fully why negative procedure is considered sufficient scrutiny.

#### **Scottish Government response:**

It is considered that negative procedure is the appropriate procedure for an MCO. A parallel may be drawn with orders made under the Inshore Fishing (Scotland) Act 1984, which are also subject to annulment. While we have no intention of unnecessarily restricting marine activities, should we need to protect an MPA from fisheries related activities then that will be done by an order under the Inshore Fishing Act rather than by an MCO. From a practical point of view we consider it expedient that both sorts of orders should be subject to the same sort of instrument. This will especially be the case where the Parliament is asked to consider fisheries related and non-fisheries related restrictions simultaneously.

### **Section 77(1) - Power to make an urgent marine conservation order**

#### **The Committee asked the Scottish Government:**

What the intended effect of section 77(2)(a) is given that it is not necessary to specify this for negative SSIs?

#### **Scottish Government response:**

Section 77(2) provides clarity as to the period during which an urgent MCO is to remain in force. Whilst it is not necessary to provide that the order comes into force on such date as is specified in it, the terms of paragraph (a) help the reader to understand the reference in paragraph (b) to the period for which the order may remain in force.

### **Section 144(1) - Ancillary provision**

#### **The Committee asked the Scottish Government:**

To explain its approach to the procedure applicable to ancillary powers in more detail given that these are significant powers which should be tailored to the individual circumstances of the Bill in question.

#### **Scottish Government response:**

Section 144 is in fairly standard terms and provides the sort of general powers seen in most Scottish Parliament Bills. As far as procedure is concerned, a section 144 order will be subject to negative procedure unless it contains "provisions which add to, replace or omit any part of the text of an Act", in which case affirmative procedure will apply (section 145(5)(e)). We see no reason to extend affirmative procedure to any other category of order under section 144.



## ANNEXE B: FINANCE COMMITTEE REPORT

### Report on the Financial Memorandum of the Marine (Scotland) Bill

The Committee reports to the Rural Affairs and Environment Committee as follows—

#### INTRODUCTION

1. The Marine (Scotland) Bill (“the Bill”) was introduced in the Parliament on 29 April 2009. The Rural Affairs and Environment Committee has been designated as the lead committee for the Bill at Stage 1.

2. Under Standing Orders Rule 9.6, the lead committee at Stage 1 is required, among other things, to consider and report on the Bill’s Financial Memorandum. In doing so, it is required to consider any views submitted to it by the Finance Committee (“the Committee”).

3. At its meeting on 5 May 2009, the Committee agreed to adopt level two scrutiny in relation to the Bill on the basis that the Financial Memorandum indicates that the vast majority of anticipated costs are likely to fall on the Scottish Government.<sup>225</sup> At its meeting on 2 June, the Committee took evidence from the Scottish Government Bill Team, including a representative of Historic Scotland.

4. In addition, the Committee also received written evidence from—

- Angus Council;
- Argyll and Bute Council;
- Dumfries and Galloway Council
- Highland Council;
- North Ayrshire Council; and
- Shetland Islands Council,

and supplementary written evidence from the Scottish Government.

5. All written evidence received is published as the Appendix to this report. The *Official Report* of the oral evidence session on 2 June can be found on the Parliament’s website.<sup>226</sup>

#### THE BILL

6. The Bill aims to create a new legislative and management framework for the delivery of sustainable development in the marine environment, creating a new system of marine planning, reducing the regulatory burden and improving nature

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<sup>225</sup> Information on the Committee’s three-level system of scrutiny for Financial Memoranda is available at: <http://www.scottish.parliament.uk/s3/committees/finance/financialMemo.htm>

<sup>226</sup> Scottish Parliament Finance Committee, *Official Report*, 2 June 2009 available online at: <http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-1501.htm>

conservation. It thus aims to enhance the long-term viability and growth of the various marine industries.

7. The main themes in the Bill are:

- Part 2 creates a statutory framework for marine planning and coastal zone management
- Part 3 changes the current licensing system as a delivery mechanism for marine planning and nature conservation aims
- Part 4 revises marine nature conservation measures and provides powers to create marine protected areas
- Part 5 creates a new licensing system for seal management
- Part 6 creates common enforcement powers.

8. The Financial Memorandum states that delivery of these aims will be through Marine Scotland, which is a new body established within the Scottish Government on 1 April 2009 bringing together the Fisheries Research Service and the Scottish Fisheries Protection Agency. While the Financial Memorandum refers in one or two places to costs falling on Marine Scotland, the Memorandum does not include any broader policy costs associated with establishing the body as these are not considered to be directly resulting from the Bill. They are included in a Regulatory Impact Assessment for the new overall marine management process which will be published shortly.

9. Linkages with UK legislation (the Marine and Coastal Access Bill) have been agreed by Scottish Ministers.

#### SUMMARY OF COSTS AS OUTLINED IN THE FINANCIAL MEMORANDUM

10. The Financial Memorandum contains substantial cost information (derived from a consultant's report for the Scottish Government), and explanation of policy background and assumptions underpinning the cost estimates. Paragraphs 11-23 below provide a brief summary.

#### **Part 2 – Marine planning**

11. A new statutory marine planning framework is intended to cover all activities, constraints and obligations in the marine environment to the extent that they are within devolved competence, based on a 3-tier approach (regional level covering possibly 9-13 local plans; Scotland level; and Scottish waters within international context).

12. The Financial Memorandum (page 43, table A.1) estimates the costs of preparing 10 local plans (with two plans beginning each year from 2012-13) as building up to a total of £5.57 million per annum by 2018-19. It suggests that these are at the upper end of likely scenarios, and also provides costs based on there

being 5 or 15 local plans. It also provides costs based on a higher estimate of plan preparation costs. These local plan costs may not necessarily fall on local authorities, depending on whether a local authority is to become lead partner in a Scottish marine region and become heavily involved in delivery of the planning function. The Financial Memorandum states (para 242) that, in this event, the costs will be offset by a resource transfer from central government.

13. Preparation of a Scottish national plan is estimated to cost £754,000 (split across 2010-11 and 2011-12, and including the cost of a strategic environmental assessment), with a further £312,000 per annum ongoing administration costs. A review every five years will cost £490,000.

14. The Financial Memorandum also states that marine planning may lead to potential benefits for stakeholders, depending on whether the way it operates in practice can lead to reducing conflicts and delays. However, it also states that a planning system may impose restrictions on currently unregulated activities. These potential impacts are not costed, and there are no cost implications stated for the third tier of planning (integration of management of Scottish waters with the UK, EU and international contexts).

### **Part 3 – Licensing**

15. The Bill aims to simplify the various current licensing regimes (for activities such as renewable energy development and dredging, and other activities which are controlled or have environmental impact), seeking to integrate systems and reduce the number of applications required.

16. The Financial Memorandum estimates reductions in the costs to industry of making applications. Individual companies make relatively few applications and so efficiencies in the process may not result in measurable savings per company. Total savings to industry from amalgamating licences are estimated at between £58,000 and £88,000 per annum, and at £44,000 per development for the provision of an activity-based renewables licence. The Financial Memorandum (para 252) notes estimates that the introduction of a licence for hydrodynamic dredging techniques may increase costs to industry by between £487,000 and £1.2 million per annum. However, it suggests that this is not commonly used in Scotland and so the cost may be an over-estimate.

17. Reductions in the administrative costs to the Scottish Government as a result of streamlining licensing regimes are estimated at a net £57,000 per annum. Local authorities will have the option to delegate development consent functions for aquaculture to Marine Scotland, and so may have a net saving. However, the Financial Memorandum does not quantify this (or the offsetting cost to Marine Scotland).

### **Part 4 – Marine protection and enhancement**

18. The development of a marine nature conservation strategy is estimated to cost the Scottish Government £485,000 (based on the costs of an Irish Sea pilot project), and is expected to be incurred in 2009-10 and 2010-11.

19. The Financial Memorandum estimates the cost of establishing an inshore marine protected area as a one-off cost of £222,000, with 10 being created over 2010-11 and 2011-12. From 2013-14 onwards, a further 10 demonstration/local protected areas will be established, at the rate of one per year and at the same cost of £222,000 per site. Table C (page 50) shows the spread of set-up and annual running costs, indicating an annual cost to the Scottish Government varying from approximately £400,000 up to almost £1.2 million over the years to 2019-20.

20. Para 264 of the Financial Memorandum indicates that there may be some costs to businesses of complying with any specific management requirements associated with marine protected areas, and some potential benefits arising from improved nature conservation which may result in the areas.

21. The Bill aims to align safeguarding marine historic assets (such as historic shipwrecks) with the marine protected areas conservation powers. The cost to the Scottish Government of implementing a new system of historic site protected areas out to 12 nautical miles for sites of national importance is put at rising to an ongoing total of £495,000 per annum.

#### **Part 5 – Seals legislation**

22. The Bill introduces a new licensing and reporting system for management of seals, at a total initial cost to the Scottish Government in 2009-10 of £150,000. In 2010-11, costs of £400,000 are expected to arise in setting up a regional approach to seal management. Thereafter, ongoing costs are expected to be £25,000 per annum to deal with increased numbers of licence applications. The Financial Memorandum (para 280) is not able to quantify any costs or savings likely to arise for individuals and businesses as a result of the change of approach.

#### **Part 6 – Enforcement powers**

23. The Financial Memorandum states that the measures in the Bill will require regular compliance monitoring, with the core function being provided by Marine Scotland which has acquired the existing compliance resources. Marine Scotland is expected to extend its compliance activities to cover monitoring of licensing and conservation from 2010. In the longer term, the enforcement cost associated with marine protected areas is estimated at £12,000 per site per annum. The Financial Memorandum does not provide a total expected figure for enforcement. Costs would only fall on other individuals or bodies if they were in breach of the law and liable to fines.

### **SUMMARY OF EVIDENCE**

#### **General issues**

24. The Financial Memorandum indicates that costings are based on a report prepared by consultants. Scottish Government officials confirmed that, on some occasions where the consultants had provided a range of possible costs, the Financial Memorandum showed the lowest figure. This was particularly in the case of local marine planning, which is associated with the most substantial costs.

Officials had assumed that data collection costs would be spread over a longer period, and that costs for strategic environmental assessment and possible public inquiries would be lower than estimated by the consultants.<sup>227</sup>

25. There appeared to be some inconsistency in evidence over the extent to which consultation on the financial implications had taken place. Shetland Islands Council stated that it was not aware of the publication of the Regulatory Impact Assessment which was the basis for the costs in the Financial Memorandum, and had insufficient time to consider the financial implications of the Bill. Highland Council stated that there had been no consultation on the financial implications.

26. Officials confirmed that a consultation had been issued on a draft Regulatory Impact Assessment in December 2008, including to all local authorities. 17 responses were received, including from several local authorities. Officials did, however, acknowledge that what was expected of local authority partners in fulfilling the marine planning responsibilities under the Bill may not yet be clear and may have led to some concern. They said that, "More than 20 local authorities have a piece of coast, but the extent to which they are currently involved in managing marine aspects varies hugely."<sup>228</sup> There is experience of close engagement in different marine management roles in some parts of the country, such as Shetland and Argyll and Bute, but not in other coastal areas. At present, therefore, the role of local authorities in leading marine planning partnerships is still under discussion.

27. The Committee notes that the summary table of financial implications (Table F, page 56 of the Financial Memorandum) does not differentiate between one-off set-up costs and ongoing running costs in each of the years, although the information can be gleaned from other tables in the Financial Memorandum. Officials confirmed that the immediate costs identified in the Financial Memorandum are covered by an allocation of funds for the 2008-09 to 2010-11 period in the 2007 Spending Review, specifically earmarked for the new marine management responsibilities associated with the Bill. They also confirmed that, where a new function is being directed to a local authority, appropriate resources will be transferred.<sup>229</sup>

### **Marine planning**

28. The Financial Memorandum gives a range of costs for marine planning, depending on how many marine regions are identified, and also gives a further different option using a higher figure for plan preparation costs. Argyll and Bute Council estimated that a team for administering a regional marine plan requires at least four full-time professional staff. The Financial Memorandum (paragraph 241) seems to suggest provision for two staff per region. Local authorities with a considerable marine interest (such as Argyll and Bute and Highland Councils) also expressed concern that it is not yet clear what will be expected of councils.

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<sup>227</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Cols. 1344-5

<sup>228</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Col. 1348

<sup>229</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Cols. 1351-2

29. Officials emphasised that, while there has been some experience of non-statutory marine planning initiatives, local marine planning is a significant new challenge. They suggested that getting sufficient trained personnel in place for the Scottish Government's estimates of the staffing requirements would be very demanding and that an assumption of two officers per region is appropriate.

30. However, officials also said that the apparent difference with the estimate of Argyll and Bute Council was simply based on the fact that "we have unpacked it differently".<sup>230</sup> Officials stated that the provision in the Financial Memorandum for running costs for each partnership, implementation costs per region once the plan is in place, and the possibility of redeploying central staff to assist in local plans, "all adds up to substantially more than the four staff that Argyll and Bute is saying that it needs".<sup>231</sup> Local authorities do not appear to have been able to infer this clearly from the way that information is presented in Table 3 (page 41) and Table A.1 (page 43).

31. The Financial Memorandum states that a new planning system may impose restrictions on currently unregulated activities. However, the potential impacts of any restrictions are not costed. Officials confirmed that there are at present no plans to restrict any particular activities.<sup>232</sup>

32. The Committee noted that the Financial Memorandum described the 'third tier' of marine planning as integration of management of Scottish waters with the UK, EU and international contexts. However, no cost information for activities to implement this third tier is mentioned in the Financial Memorandum. Officials said that this is because the third tier "is a product of the UK Marine and Coastal Access Bill, which provides for the UK marine policy statement at the level above Scotland".<sup>233</sup> They said that a cost of about £1 million per year associated with this had been described in the Financial Memorandum of the UK Bill and in the corresponding Legislative Consent Memorandum to the Scottish Parliament, but that this cost would have to be met from the Scottish Government's budget.

### **Marine protection**

33. The FM estimates the cost of establishing 10 inshore marine protected areas and 10 demonstration/local protected areas. Table C (page 50) shows the spread of set-up and annual running costs, indicating a total annual cost to the Scottish Government varying significantly as different sites are established. Officials said that the pattern of monitoring costs (which come in with a spike in 2016-17 and 2017-18 of £750,000 each year that is not explained in the Financial Memorandum) is due to the fact that the monitoring takes place five years after implementation. This means that 2016-17 and 2017-18 each see the costs of monitoring the five sites to be set up in 2010-11 and 2011-12 respectively. The monitoring costs thereafter will level to £150,000 per year to reflect the fact that

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<sup>230</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Col. 1350

<sup>231</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Col. 1350

<sup>232</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Col. 1350

<sup>233</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Col. 1345

one further site is expected to be identified each year from 2013-14 and to be monitored five years later.<sup>234</sup>

34. The Committee noted that the estimates in the Financial Memorandum for the cost of the Bill's historic environment provisions are to undertake work to make data that has been collected for other purposes fit to be used effectively in the context of the marine planning system.

## CONCLUSION

35. The Committee welcomes the detailed cost information available in the Financial Memorandum. The Committee acknowledges the possible variation in some costs, depending on, for example, the detailed implementation experience of local marine planning. The Committee also acknowledges the complexity that arises due to the sequencing of costs as different marine plans and different protected area designations come on stream. However, the Committee recommends that the Scottish Government should consider how the presentation of information and the consultation on financial implications can be improved so as to avoid the misunderstandings which were raised in evidence to the Committee.

36. Although they can largely be identified from different tables throughout the Financial Memorandum, the Committee recommends that the costs summary at Table F could usefully have separately identified the total expected one-off set-up costs (albeit that these are spread over several financial years), and the total annual running costs once the Bill is fully implemented.

37. The Committee expresses concern at the way in which the costs associated with the 'third tier' of marine planning (integration of management of Scottish waters with the UK, EU and international contexts) have been expressed. No cost information for activities to implement this third tier is mentioned in the Financial Memorandum. Officials said that a cost of about £1 million per year associated with this had been described in the Financial Memorandum of the UK Marine and Coastal Access Bill and in the corresponding Legislative Consent Memorandum (LCM) to the Scottish Parliament.

38. However, the LCM is not clear that any costs from marine planning at this level will fall on the Scottish Government.<sup>235</sup> Paragraph 34 of the LCM states that designating nine additional marine protected area sites in the offshore zone may cost around £1 million, but is not clear that this cost is to fall on the Scottish Government. The Statement of Funding Policy between the UK Government and the devolved administrations states that, "where...decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust for

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<sup>234</sup> Scottish Parliament Finance Committee. *Official Report, 2 June 2009*, Col. 1354

<sup>235</sup> Legislative Consent Memorandum on the UK Marine and Coastal Access Bill. LCM(S3) 14.1. Available online at: <http://www.scottish.parliament.uk/business/legConMem/LCM-2008-2009/CoastalAccess-lcm.pdf> [Accessed 8 June 2009]

such costs, the body whose decision leads to the additional cost will meet that cost.”<sup>236</sup>

39. Given that officials stated clearly in evidence that this cost would have to be met from the Scottish Government’s budget, the Committee is concerned that it appears to have no opportunity to scrutinise whether the assumptions behind this expenditure estimate are appropriate. They are not described in the Financial Memorandum. The status, and appropriate route for scrutiny, of the costs of this third tier of planning are unclear. The Committee recommends that the lead committee seeks clarification from the Scottish Government on this situation.

## **APPENDIX A: WRITTEN EVIDENCE**

This appendix contains written evidence received from the following organisations—

- Angus Council;
- Argyll and Bute Council;
- Dumfries and Galloway Council;
- Highland Council;
- North Ayrshire Council; and
- Shetland Islands Council.

Also enclosed is supplementary written evidence received from the Scottish Government bill team.

### **SUBMISSION FROM ANGUS COUNCIL**

1. *Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?*

The Council responded to the consultation document “Sustainable Seas for All” by submitting Report No 901/08. Within that report, mention was made of the fact that the document recognised the substantive costs involved in setting up the new national marine management organisation, Marine Scotland, and that it should also be recognised that other agencies, including local authorities, will also incur extra costs and should be resourced accordingly.

2. *Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?*

It would seem that substantial sums have been identified for the Marine Planning Partnerships.

3. *Did you have sufficient time to contribute to the consultation exercise?*

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<sup>236</sup> HM Treasury. (2007) Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: Statement of Funding Policy, section 3.2.8. Available online at: [http://www.hm-treasury.gov.uk/d/pbr\\_csr07\\_funding591.pdf](http://www.hm-treasury.gov.uk/d/pbr_csr07_funding591.pdf) [Accessed 8 June 2009]

Yes.

4. *If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.*

It is difficult to assess the financial impact when the geographic extent of the Regional Marine Plans has yet to be decided. It is also noted that these plans will be developed on a phased basis with priority given to areas where the competition for resources and development pressures are highest. I am unable to comment further on this issue.

5. *Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?*

Local authority budgets are under severe pressure because of new burdens and new legislative duties and the decline in building standards and development management income. We believe the Council would find it very difficult to cover any additional costs that may be required and therefore any additional resources should be adequately reflected in future financial settlements.

6. *Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?*

No comment.

7. *If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?*

No comment.

8. *Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?*

No comment.

David S Sawers  
Chief Executive

#### SUBMISSION FROM ARGYLL AND BUTE COUNCIL

#### **Consultation**

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes, Argyll and Bute Council responded to the consultation 'Sustainable Seas for All'. We made no comments on financial assumptions made as part of this consultation as no financial information was provided.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not relevant.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

### **Costs**

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

#### Aquaculture

Argyll and Bute Council do not currently have the resources for the monitoring and enforcement of marine aquaculture consents. With the ongoing transfer of existing consents from The Crown Estate to local authorities, the Council will take on the role of monitoring and enforcement of these sites in addition to any new sites. There is also a requirement for resources to provide specialised training for planning officers that determine aquaculture applications and enforce consents, which we have estimated to be in the region of £5,000.

#### Regional marine planning

The financial memorandum for the draft Bill does not detail the expected number of staff that would be required to take forward marine spatial planning for an individual region. Looking at experience in terrestrial planning and existing marine projects, the Council considers that any regional team should be made up of at least four full-time professional officers covering a range of disciplines. This team should also have administrative and technical support, in particular GIS support. An estimated cost for four planning officers is £168,400 per annum.

#### Marine Protected Areas

The Bill identifies that management schemes can be prepared for marine protected areas. The costs set out in the Financial Memorandum (Table 5) identify an estimated cost of £23,000 against a management scheme. This figure appears very low if it is to include stakeholder involvement and consultation. It is not clear whether other costs identified in Table 5, such as £50,000 for consultation cover the costs of consulting on a management scheme.

#### Examples of costs for existing marine management projects in Argyll and Bute

**ICZM project** – development of two Integrated Coastal Zone Management plans (Loch Etive & Loch Fyne)  
Total budget - £100,000 (Council project)

**Sound of Mull SSMEI project** – development of a marine spatial plan & implementation  
Total budget - £180,000

**Argyll Marine SAC** - development of one plan covering two marine Special Areas of Conservation  
Total budget - £160,000 (Council project)

**Clyde SSMEI** – development of a marine spatial plan for the Firth of Clyde  
Total budget – in excess of £360,000

The costs above are the full project costs and include setting up stakeholder groups, administration, consultancy fees, marketing, equipment, staffing and travel. It is also important to note that the only project that has planned at the likely scale of a marine region is the Clyde project. The other projects have planned for much smaller areas but possibly planned in greater detail.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The organisation cannot meet the costs associated with the Bill. The funding should come from either applicants/licence holders or as additional Revenue Support Grant from the Scottish Government.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

See comments under questions 4.

### **Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

No comments

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

It is likely that there will be future costs associated with the Bill but it may not be possible to quantify these costs at this stage.

SUBMISSION FROM DUMFRIES AND GALLOWAY COUNCIL

Please note that the Questionnaire responses below reflect the comments of one Dumfries & Galloway Council officer can only represent a limited view on the matter.

### **Consultation**

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes. Yes, but detailed analysis was not possible within current resources.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

See response to part 2 of Q1 above.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

### **Costs**

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Detailed analysis within current resources has not been possible, but not confident that the full extent of costs has been identified.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

No.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Detailed analysis within current resources has not been possible, but not confident that it does so.

### **Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Detailed analysis has not been possible within current resources but not confident that this is the case.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

It is anticipated that there will be costs beyond those already identified, but detailed analysis has not been possible within current resources.

## SUBMISSION FROM HIGHLAND COUNCIL

### **General**

Highland Council welcomes this opportunity to contribute to the scrutiny of the Marine (Scotland) Bill: Financial Memorandum. If the Finance Committee wishes any further information, Highland Council will be very happy to contribute what it can. Highland Council recognises that the Bill could have significant resource implications for itself given that the Council may have at least 3 Scottish Marine Regions within its administrative area and is likely to have a lead role in developing and delivering a local marine planning function.

### **Consultation responses**

Q1. Highland Council provided a comprehensive response to the consultation exercise that preceded the publication of the Marine (Scotland) Bill (copy available from the Clerks on request). At the time of the consultation, there was very limited information available on the financial implications of the Bill or how implementation of the Bill would be resourced by the Scottish Government.

Q2. At various places throughout its response, Highland Council raises the need for adequate resources to support the implementation of the Bill. Specific references are made to the need to provide additional resources in support of ecosystem based management, monitoring and enforcement and to support forward planning and research. Highland Council would like to see further details regarding the statement that “there will not necessarily be additional costs to local authorities for marine planning”. The Council may have at least 3 SMRs within its area, while only one coastal partnership exists to cover one specific area of the Highland coast (Moray Firth). It is difficult to see how the Highland Council could avoid becoming a lead partner in the SMRs and heavily involved in the delivery of the local planning function. It is also unclear what is actually going to be expected of local authorities and other relevant bodies, so it is difficult to comment on the accuracy of financial information provided with certainty. It is worth noting that SMR boundaries remain to be identified.

Q3. There was sufficient time to contribute to the consultation process but the consultation did not set out what was expected of partners. Rather it considered what might happen and on occasion more than one possible outcome was presented for comment. It was therefore not possible to consider financial implications beyond the general observation that additional resources would be required to implement the Bill and that these should be identified by the Government.

No consultation on financial implications took place.

### **Costs**

Q4. Given the comments contained within the response to Q2 (above), Highland Council is concerned that financial implications for the Council are not accurately reflected. The Council is likely to become involved as lead partner and heavily involved in the delivery of the local planning function. Although Highland Council has a strong history of coastal planning work related to aquaculture strategic planning and coastal zone management projects, this is limited compared to the statutory roles the Council may have within the new marine planning system. The Council would welcome discussion with Marine Scotland on what its role will be.

Q5. The Council is not content that the potential costs can be met from existing resources. In fact it knows that they can't. Additional resources should be provided by the Scottish Government via Marine Scotland, once roles, boundaries and legal obligations are clarified and agreed.

Q6. There remains quite a bit of uncertainty linked to the roles of local authorities via the Marine (Scotland) Bill and this is true of the timescales that apply to the projected cost implications. As an example, SMR marine plans will require to undergo Strategic Environmental Assessment. SEA could make it very difficult to meet the timescales established and add to the cost of the process if not already included in the figures provided in Table 3.

#### **Wider Issues**

Q7. Previous responses apply regarding the accuracy of projected cost implications.

Q8. Yes. There are bound to be additional future costs implications associated with subordinate legislation or in developing guidance. Guidance for lead authorities will be especially important. It is not possible to quantify what additional costs might be involved at present.

Highland Council  
27<sup>th</sup> May 2009

#### **SUBMISSION FROM NORTH AYRSHIRE COUNCIL PLANNING SERVICES**

##### **Consultation**

1. *Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?*

NAC Planning Services Response: Yes

2. *Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?*

NAC Planning Services Response: Not Clear

3. *Did you have sufficient time to contribute to the consultation exercise?*

NAC Planning Services Response: Yes

### **Costs**

4. *If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.*

NAC Planning Services Response: No - There are liable to be funding shortages and a need for specific skills/training costs to be built into the process.

5. *Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?*

NAC Planning Services Response: No - There are liable to be funding shortages and a need for specific skills/training costs to be built into the process.

6. *Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?*

NAC Planning Services Response: No - There are liable to be significant data requirement costs together with associated staffing issues/costs over and above those identified.

### **Wider Issues**

7. *If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?*

NAC Planning Services Response: Relationship to River Basin Management Plans - no account has been taken of this matter.

8. *Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?*

NAC Planning Services Response: There are likely to be future costs associated with the Bill via secondary legislation. It is not possible to quantify these costs at this juncture.

## **SUBMISSION FROM SHETLAND ISLANDS COUNCIL**

### **Consultation**

1. *Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?*
2. *Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?*

3. *Did you have sufficient time to contribute to the consultation exercise?*

The Shetland Islands Council (SIC) submitted a detailed response to the consultation on the Marine Bill (Sustainable Seas for All) on 22 September 2008. That part of the consultation process did not consider any financial aspects and consequently no comment was offered by the SIC. Your letter of 7 May was the first indication that the full Regulatory Impact Assessment on the Bill was available from the end of March 2009.

Time was sufficient in respect of consultation on the remit of the Bill as outlined in Sustainable Sea for All but has been insufficient in respect of financing of the Bill and its consequences.

### **Costs**

4. *If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.*
5. *Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?*
6. *Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?*

There is still a degree of uncertainty with the Marine (Scotland) Bill as proposed in respect of what functions may or may not be delegated to Local Authorities in connection with marine planning and licensing. It is still unclear how many Scottish Marine Regions there will be and the SIC would comment that cost should not be the driving factor in the number ultimately formed. Consequently it is difficult to determine what the financial implications of the Bill might be for the SIC and whether or not any new costs can be met.

It is gratifying to note that, should the local authority take on the lead role within an SMR and play a main role in the delivery of marine planning, any extra costs would be offset by a resource transfer from central government as the local authority would effectively be taking on a new function.

### **Wider Issues**

7. *If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?*
8. *Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?*

There is insufficient detail in order to adequately comment on these two aspects.

The SIC believes there is a strong case for marine planning and management decisions to be made at the local level and, through the delegation provisions within it, the Marine (Scotland) Bill should provide the basis for this to happen unless a decision is taken (by the Local Authority) to opt-out. Given that the Planning etc Act 2006 seeks to devolve decision making to a more appropriate level, it would be pertinent to take a similar approach to marine planning (and management) and decisions on local developments should lie locally. Based on experience to-date, the best means of achieving this in Shetland is by designating the Islands as a SMR and designating the SIC as the lead authority in terms of marine planning and licensing.

Martin Holmes  
On behalf of Chief Executive

#### SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH GOVERNMENT

The Committee asked for background information on the increased resources for marine management, particularly in the context of proposed spending in 2010/11.

I attach the relevant table from the 2007 Spending Review documentation- which sets out the substantial increase in marine management provision.

#### **MARINE AND FISHERIES**

Table 24.05 Detailed Spending Plans 2008-11

	<b>Budget 2007-08</b>	<b>Draft Budget 2008-09</b>	<b>2009-10 Plans</b>	<b>2010-11 Plans</b>
<b>Fisheries Research Services</b>	<b>26.4</b>	<b>29.5</b>	<b>33.7</b>	<b>32.3</b>
<b>Scottish Fisheries Protection Agency</b>	<b>21.8</b>	<b>24.4</b>	<b>24.7</b>	<b>25.0</b>
<b>Fisheries Processing and Marketing Grants</b>	<b>11.5</b>	<b>10.6</b>	<b>9.8</b>	<b>11.1</b>
<b>Fisheries Harbour Grants</b>	<b>0.4</b>	<b>0.4</b>	<b>0.4</b>	<b>0.4</b>
<b>Marine Management</b>	<b>-</b>	<b>7.0</b>	<b>7.9</b>	<b>8.7</b>
<b>Other</b>	<b>0.3</b>	<b>1.1</b>	<b>1.0</b>	<b>1.0</b>
<b>EU Income</b>	<b>-6.1</b>	<b>-7.4</b>	<b>-6.5</b>	<b>-7.7</b>
<b>Total</b>	<b>54.3</b>	<b>65.6</b>	<b>71.0</b>	<b>70.8</b>

The text makes clear that these new resources will primarily be for purposes linked with the marine bill:

“Scotland has an enviable maritime heritage and a world-class marine environment. We are committed to Scottish marine legislation to achieve better protection for the marine environment and more streamlined regulation of the use of the sea. Substantial additional funds are available to support the new legislation and to put in place new planning arrangement for our seas. The funding will also support the Scottish Marine Management Partnership in developing systems to implement the new legislation, and to support projects and management arrangements ahead of the Bill under existing legislation.

The additional marine funds will also support the implementation of the Scottish Freshwater Fisheries Strategy, and a renewed Aquaculture strategy.”

Linda Rosborough  
Head of Marine Planning and Policy  
Marine Scotland  
Scottish Government

**ANNEXE C: ANNEXE C: EXTRACTS FROM MINUTES OF THE RURAL  
AFFAIRS AND ENVIRONMENT COMMITTEE**

**11th Meeting, 2009 (Session 3), Wednesday 22 April 2009**

**Marine legislation:** The Committee considered its approach to forthcoming legislation on the marine environment and agreed that the clerks should issue a call for written evidence following introduction of the bill; to authorise the Convener to make bids to the Conveners Group (and where necessary the Parliamentary Bureau) for any fact-finding visits or external meeting held as part of the Committee's scrutiny of the bill; to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in respect of consideration of this bill; and to hold agenda items involving witness selection, the review of evidence and the consideration of drafts of the Committee's Stage 1 report on the bill in private at future meetings.

**13th Meeting, 2009 (Session 3), Wednesday 13 May 2009**

**Marine (Scotland) Bill (in private):** The Committee agreed possible witnesses for future meetings.

**15th Meeting, 2009 (Session 3), Wednesday 27 May 2009**

**Marine (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Phil Alcock, Policy Officer, Marine Biodiversity Policy and Sustainable Management Branch, Chris Bierley, Policy Officer, Nature Conservation Branch, Stuart Foubister, Divisional Solicitor, Solicitors Food and Environment Division, David Palmer, Branch Head, Marine Strategy Branch, Philip Robertson, Senior Inspector of Marine Archaeology, Linda Rosborough, Deputy Director, Marine Planning and Policy, and Ian Walker, Policy Officer, Marine Biodiversity Policy and Sustainable Management Branch, Scottish Government.

**16th Meeting, 2009 (Session 3), Wednesday 10 June 2009**

**Marine (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Captain Jim Simpson, Chair, Scottish Coastal Forum;

Lloyd Austin, Scottish Environment LINK;

Patrick Stewart, Marine Bill Consultant, Scottish Fishermen's Federation;

Professor Phil Thomas, Chairman, Scottish Salmon Producers' Organisation;

Ian Burrett, Scottish Sea Angling Conservation Network;

George Hamilton, Manager of Countryside, Heritage and Natural Resources Team, Highland Council;

Colin Galbraith, Director of Policy and Advice, Scottish Natural Heritage;

Andy Rosie, Acting Head of Environmental Protection and Improvement for North Region, Scottish Environment Protection Agency.

**Marine (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**18th Meeting, 2009 (Session 3), Monday 22 June 2009**

**Marine (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Brian Irving, Manager, Solway Coast Area of Outstanding Natural Beauty, Gordon Mann, Chairman, and Pam Taylor, Project Manager, Solway Firth Partnership;

Ron Bailey, Harbour Master, Clydeport Operations Ltd., and David Whitehead, Director, British Ports Association;

Morna Cannon, Marine Energy Officer, and Jeremy Sainsbury, Vice-Chairman, Scottish Renewables.

**Marine (Scotland) Bill (in private):** The Committee agreed witnesses for future meetings.

**19th Meeting, 2009 (Session 3), Tuesday 1 September 2009**

**Marine (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Libby Anderson, Policy Director, Advocates for Animals;

Professor Ian Boyd, Director, Sea Mammal Research Unit;

Brian Davidson, Association of Salmon Fishery Boards;

Colin Galbraith, Director, Policy and Advice, SNH;

Professor Phil Thomas, Chairman, Scottish Salmon Producers' Organisation;

Rob Hastings, Director of the Marine Estate, the Crown Estate;

Captain Nigel Mills, Director of Marine Services, Orkney Islands Council;

Walter Speirs, Chair, Association of Scottish Shellfish Growers.

A number of witnesses agreed to provide the Committee with supplementary information

**Marine (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting

**20th Meeting, 2009 (Session 3), Wednesday 9 September 2009**

**Marine (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

John Eddie Donnelly, Project Officer, Clyde Scottish Sustainable Marine Environment Initiative;

Dr Billy Sinclair, Chair, Clyde Inshore Fisheries Group;

Howard Wood, Chair, Community of Arran Seabed Trust;

Richard Lochhead MSP, Cabinet Secretary for Rural Affairs and Environment, Stuart Foubister, Divisional Solicitor, Legal Division, David Mallon, Branch Head, Marine Environment Branch, David Palmer, Branch Head, Marine Strategy Branch, and Linda Rosborough, Deputy Director, Marine Planning and Policy, Scottish Government;

Gordon Barclay, Head of Policy, Historic Scotland.

The Cabinet Secretary agreed to provide the Committee with supplementary information on a number of issues in relation to the Bill.

**Marine (Scotland) Bill (in private):** The Committee reviewed the evidence heard earlier in the meeting.

**23rd Meeting, 2009 (Session 3), Wednesday 23 September 2009**

**Marine (Scotland) Bill (in private):** The Committee agreed its approach to the evidence received.

**24th Meeting, 2009 (Session 3), Wednesday 30 September 2009**

**Marine (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report.

**25th Meeting, 2009 (Session 3), Wednesday 7 October 2009**

**Marine (Scotland) Bill (in private):** The Committee agreed its Stage 1 report.



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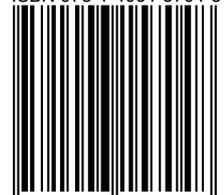
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