



**THE LAW SOCIETY
of SCOTLAND**
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Consultation Response

Marine Scotland's Consultations on Planning Scotland's Seas.

**The Law Society of Scotland's response
November 2013**

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Law Society of Scotland's Planning Law Sub-Committee (The Committee) welcomes the opportunity to comment upon the terms of the Scottish Government Consultations under the heading of: Planning Scotland's Seas and entitled:

1. Consultation on Priority Marine Features,
2. Possible Nature Conservation Marine Protected Areas
3. Scotland's National Marine Plan Consultation Draft
4. Draft Sectoral Marine Plans for Offshore Renewable Energy in Scottish Waters.
5. The Relationship between the Statutory Land Use Planning System and Marine Planning and Licensing

The Society's Marine Law Sub-Committee is comprised of members who are legal practitioners and academics with a diverse range of interests.

The Sub-Committee should like to respond as follows:

Question 1.11: Much of the consultation is aimed at developing or implementing Government policies, including a laying out of the underlying evidence.

The Sub-Committee is not in a position to comment on the validity or otherwise of the (largely scientific) evidence. Nor is our role to determine government policy as such. However the Sub-Committee has reviewed the various drafts with a particular focus on horizon scanning for any legal (and practical) challenges of implementation.

Question 1.2 This is a complex and relatively novel area and Marine Scotland are to be commended on adopting a holistic approach in the consultation which aims to reconcile potentially competing objectives, policies and legal requirements, explaining both the context and the process for marine planning. Much thought has been clearly given to the complexity of the issues, including the interrelationship between the statutory requirements of marine planning and spatial policies such as Marine Protected Areas and Offshore Energy Renewables. Perhaps less satisfactory because least developed is the explanation of the relationship between marine and terrestrial planning, as this marine planning system is being introduced.

Question 1.3 As the systems and the specific issues are so interrelated, we have taken the approach of providing a composite response rather than address each of the papers and individual consultation questions separately. However we have aimed to identify each of the relevant consultation documents and the relevant issues

Our main areas of comment are :

- Whether policy objectives are consistent and compliant with relevant marine legislation
- Consistency with other legislative initiatives, principally the Regulatory Reform (Scotland) Bill
- The impact of spatial policies
- The relationship with terrestrial planning
- The process risks inherent in the sheer volume of material which is presented
- The principle of transparency in practice

These issues are inextricably linked but, at the risk of some duplication, we offer the following comments:

Question 2.1 Policy objectives

Marine Planning takes place not only in the context of overall Government policy objectives but also existing legislation, determined to a large extent by European Directives such as the Water Framework Directive, the Habitat and Birds Directive and the Marine Strategy Directive which aims to achieve Good Environmental Status (GES) of the EU's marine waters by 2020,

Relevant documents display a range of objectives which are not entirely consistent:

(i) **The Scottish Government** has a stated national policy objective or purpose

“To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through **increasing sustainable economic growth**”

(ii) **The National Marine Plan**. In Scotland, the legislative and management

framework for the marine environment was established by the Marine (Scotland) Act 2010, allowing implementation of the Marine Strategy Directive and looking to the future in terms of integrated planning and an ecosystem approach within Scotland's seas. The Marine and Coastal Access Act 2009, provides the legislative framework for marine offshore planning. A National Marine Plan entered into by all the UK marine and fisheries administrations sets out high level objectives. These are:

- **Achieving a sustainable marine economy**
- **ensuring a strong, healthy and just society**
- **Living within environmental limits**
- **Promoting good governance**
- **Using sound science responsibly**

(iii) **Marine (Scotland) Act 2010.** The 2010 Act is very clear that Scottish Ministers and public authorities have a duty to further “ **sustainable development** “ (sic)

3 Sustainable development and protection and enhancement of the health of the Scottish marine area

In exercising any function that affects the Scottish marine area under this Act—

- (a) the Scottish Ministers, and
- (b) public authorities

must act in the way best calculated to further the achievement of **sustainable development**, including the protection and, where appropriate,

enhancement of the health of that area, so far as is consistent with the proper exercise of that function.

(iv) **Planning Scotland's Seas : National Plan** A number of different terms are used:

- The Scottish Government press release refers to **“sustainable economic growth that is sensitive to the environment “** and to **“ the balance needed for sustainable growth “** .
- The Executive summary on the website states “Creation of the National Marine Plan is a major component of the Marine (Scotland) Act 2010 and will for the first time set out national strategy. It will aim to ensure **sustainable economic growth of marine industries**, while taking the environmental (sic) into account, and will set out policies including economic, social and marine ecosystem objectives.
- The Introductory leaflet states “The Plan contains general policies designed to ensure that all future decisions lead to **sustainable economic growth which is sensitive to the environment , other users and the long term health of the seas”**
- The Consultation document itself states **“Sustainable economic growth means building a dynamic and growing economy that will**

provide prosperity and opportunities for all, while respecting the limits of our environment in order to ensure that future generations can enjoy a better quality of life “ .

(v) Planning Scotland’s Seas: Other documents

Offshore Renewable Energy Draft Plans: the introductory leaflet offers the view that “ large scale development of offshore renewables represents the biggest opportunity for **sustainable economic growth** in Scotland for a generation“ and envisages “ promoting development in **sustainable locations** at an early stage “

It is not at all clear that these various objectives, aspirations and definitions consistent. In particular, it is not clear that “sustainable development “ as embedded in the 2009 Act is the same as “ sustainable economic development “or “ sustainable economic growth as used in the Introductory leaflet or the consultation documents.

The phrase “ sustainable economic development “ or “ sustainable economic growth “ (which have been much debated in the context of the Regulatory Reform (Scotland) Bill) (see below) do appear to have a markedly different emphasis from the phrase “ sustainable development “ as embedded in the 2010 Act

If it is intended to mean the same thing, it is not all helpful to use different terms. If the difference is intentional then this has considerable implications, and there is a

risk that both the consultation process and the eventual outcome (if the difference remains) could be challenged on the grounds that the policy aim is to deliver an objective or objectives which are not compliant with the 2010 Act.

We strongly recommend that further thought is given to the issue of internal consistency with marine legislation to ensure that this commendable holistic approach is not compromised. At the least, further explanation should be given as to what any differences might (or might not) mean in practice and how the policy objectives are aligned in the context of marine planning and licensing under the 2010 Act.

2.2 Consistency with other legislative initiatives

Considering consistency with other legislative initiatives, it is significant that the term “sustainable economic development” is used in the Regulatory Reform (Scotland) Bill. What is meant by this and the potential impact on designated regulators has been the subject of much evidence and discussion. At the time of finalising this response, the Sub-Committee has recommended that a definition should be included.

The Minister has now given an undertaking that a definition will be incorporated.

Consistency of definition is all the more important given the complexity of the landscape, the different status of the various regulators and the differential impact of current initiatives, including legislative proposals. In this area of marine planning, in summary:

- Marine Scotland is a Department and all functions and actions are undertaken in name of Scottish Ministers. The Marine (Scotland) Act 2010 states that public authorities, including the Scottish Government, must take **authorisation or enforcement decisions** in accordance with the National Marine Plan and Regional Marine Plans, unless relevant considerations indicate otherwise. They must also have regard to the statutory marine plans in taking other decisions. However, Marine Scotland is not included in Schedule 1 (regulators to which the Bill applies) and in formal terms the Regulatory Reform (Scotland) Bill does not apply to Ministers
- Scottish Natural Heritage (SNH) is a Non Departmental Public Body and is a regulator to which the Regulatory Reform (Scotland) Bill applies. SNH is a statutory adviser to Marine Scotland in respect of Marine planning decisions.

Assuming S3 2010 Act applies to SNH function as a statutory adviser, would this create a tension between SNH?

Ministers have indicated that it's their intention to bring forward an amendment at Stage 2 of the Regulatory Reform (Scotland) Bill which will make it clear that the planning functions of a local authority will not be subject to the proposed duty to contribute to sustainable economic growth. But as the Planning Circular highlights, the relationship with terrestrial planning is critical, whether it is in relation to water quality, ports and harbours development or the development of energy grid infrastructure. In the exposition of the licensing regime in the Circular, which is helpful and clear, it is noted that terrestrial planning authorities are not statutory consultees but will be consulted on a case by case basis. Apart from issues of timing, there is therefore the possibility that relevant authorities- Marine Scotland as the marine planning and licensing authority, SNH as statutory consultees and the terrestrial planning authorities for their role may be operating to different statutory duties, and/or standards as well as different plans and different planning cycles As has been pointed out in relation to Regulatory Reform (Scotland) Bill it would create fertile territory for confusion and challenge if

regulators or advisers of different status were subject to different duties, particularly different statutory duties.

We recommend further thought is given to this to ensure legislative, policy and practical consistency as far as possible and if not, the resolve the issue of primacy.

2.3 The impact of spatial policies

We commend the approach of simultaneously promoting and consulting on specific spatial policies, that is the Marine Protected Areas ((MPAs) and Offshore Energy. The drivers for MPAs and Offshore energy are somewhat different, but should all fall within the concept of “sustainable development” as embedded in the 2010 Act. The incorporation of these spatial policies as elements within the National Marine Plan will give significant weight to these spatial policies and we agree it is appropriate to incorporate both. This should not be at the expense of existing and competing uses, such as established and new fishing methods (including aquaculture) and leisure uses, and indeed both National and Regional Plans should be flexible enough to accommodate new uses and new policies as these emerge.

Offshore Energy: While the plans sensibly and very appropriately take a marine planning approach to development of the plans, we note the extreme uncertainty of

assumptions and projections in the various accompanying assessments. The key questions that arise are those that are considered in more detail elsewhere:

- (a) How do the objectives set out in these spatial plans relate to the principles of the National Marine Plan and requirements of 2010 Act?
- (b) How to ensure integration with terrestrial planning, particularly given the identified challenge of providing an appropriate grid infrastructure which will involve different terrestrial planning and licensing authorities.

2.4 The relationship with terrestrial planning

As noted above, Ministers have indicated that there will be a Stage 2 amendment to the Regulatory Reform (Scotland) Bill that planning future of local authorities will have no duty to contribute to sustainable economic growth. As the marine planning documents highlight, the relationship with terrestrial planning is vital whether it is in relation to water quality, ports and harbours development or the development of energy grid infrastructure. While the guidance is reasonably (but not completely) comprehensive in its identification of interested parties, this does not of itself resolve competing interests

A key challenge is the intended integration of terrestrial and marine planning , and how this will work in practice, given the different statutory frameworks, the different

roles and accountabilities of the relevant authorities and the current differences in planning cycles, until the new Marine Regional plans as well as the MPAs and related Regulations are in place. These are addressed in turn

(a) 'Integration' is discussed at page 10 of the NMP, where it is said

“Integration between marine and terrestrial planning will be important and will be achieved through consistency of policy, guidance, plans and decisions, and local authorities will be represented within Marine Planning Partnerships. Legislation has been amended to require terrestrial planning authorities to give consideration to marine plans which apply to inshore waters, when developing strategic and local development plans.”

Here and in the circular, reference is made to the new duty to have regard to the marine planning process, but without clear guidance as to how Terrestrial Planning Authorities (TPA's for the purpose of this paper) are to reconcile any conflict between that requirement and the terrestrial plan led system. Reference should be made to the pivot of the terrestrial planning system, section 25 of the Town and Country Planning (Scotland) Act 1997 as amended, which requires the TPA- and indeed Government, to adhere to the **development plan** as defined in section 24 of the Act, unless there are material considerations to the contrary.

Government's expectation about conflict in both legal and in policy terms should be clearly laid out. In particular, this potential conflict should be discussed in more concrete terms at paragraphs 13 and 14 of the Circular: para 13 refers to the duty in s 15 of the 2010 Act to act "in accordance with the UK Marine Policy Statement, the Scottish National Marine Plan, and any Regional Marine Plan, unless relevant considerations indicate otherwise. While Section 15 should be referred in the circular to facilitate accurate cross-reference, we note that this section does not in fact **oblige** a TPA to comply with the 'appropriate marine plans', since it may depart from them if reasons are given. The circular therefore appears to overstate the position. It is suggested that the circular addresses the potential for conflict more precisely.

(b) It should be borne in mind, and, it is suggested, in terms in this circular, that by the time the Marine (Scotland) Act 2010 was enacted, all of Scotland's strategic development plans (all of which are of cities on the coast) and most local development plans will have reached an advanced stage. Many of the coastal /terrestrial development plans will not therefore have had the opportunity to reflect the marine planning framework. While development planning is intended to adhere more firmly to a five year cycle, it follows that the development planning framework could not come into clear synchronisation with the marine planning framework until the next wave of development plans comes into existence from about 2015 forward.

It is suggested that Government addresses how this should be accommodated specifically in this circular.

(c) The draft circular does not refer to the hierarchy of developments, or the National Planning Framework, except for a passing reference to future arrangements for the transfer to Marine Scotland of arrangements for fish farming permissions.

This absence of comment may be a feature of the lack of concrete examples of cross coastal/ terrestrial developments, although we note that marine planning consents from Marine Scotland do reference the current Planning framework as well as local development plans. It is suggested that an attempt is made to forecast for the guidance of both TPAs and Marine Scotland what would happen in the event of a national development (or part of such) which may have implications for or from the marine planning environment. Guidance should be given as to how both authorities should proceed, and when the Scottish Ministers may become involved.

(d) **Planning Appeals (and local reviews)**

There is no discussion about what might occur if an aspect of a marine licensing application (possibly a much larger undertaking in relative terms) fell foul of the planning system and was refused by the Terrestrial Planning Authorities. This could

be particularly relevant in the context of offshore energy initiatives, which as noted elsewhere, require a significant terrestrial interface.

This could well be a relatively small but crucial element of an undertaking. If refused by delegated authority (say on design grounds) then it would require to be determined by a Local Review Body, whose decision would be final, and from whom there would be no appeal on the merits. Should such applications be excluded from schemes of delegation and referred to committee? Ministers would require to give directions to that effect.

(e) The Historic Environment and other considerations

While the circular gives guidance on the interaction with the natural environment, it is relatively cursory on the interaction with the permission systems for the historic environment, speaking only of the prospect of historic marine protection areas, and not explaining how terrestrial assets are to be considered, either by Marine Scotland or the TPAs. Some of this need not concern TPAs in the final analysis, such as scheduled monument consent, but TPAs may be the first to become aware of emerging coastal areas of archaeological significance.

TPAs do however have responsibility for listed building consent and conservation areas and have important statutory obligations to have regard to the historic and architectural qualities of listed buildings, and their setting, when considering whether

consent should be given. It is unclear from the circular how Marine Scotland will proceed when an application under their jurisdiction may adversely affect the historic environment onshore, for example by affecting coastal erosion patterns

Given the immense importance of Scotland's coastal historic environment, including the St Kilda, and Orkney, and Edinburgh World Heritage Sites in particular, it is recommended that a section is added, complementary to the section on marine conservation, to explain Government's expectations as to how the relevant bodies, including Historic Scotland or any successor organisation, should approach their duties as regards the historic environment. It should be borne in mind that the criteria for listed building and scheduled monument consent are also administrative systems separate from land use planning with differing criteria and time scales for appeals (although it is understood these may eventually be drawn closer together)

In current marine licensing decisions, Marine Scotland appear to cover a rather wider spectrum of relevant factors than set out in the draft Planning Circular , including the cumulative impact of different factors, and we suggest that the draft Planning Circular should also be more explicit in these areas. In the longer term we note the likelihood of a future European Directive on Marine Spatial Management with the possibility that this will include integrated coastal management. Whether or not this becomes a European requirement, Scotland has the opportunity to

demonstrate leadership in the area of integrated coastal planning and we suggest that an expanded Planning Circular should be the platform from which that can be achieved

(e) Different accountabilities

Over the piece, although this is a strong piece of work, it is fairly clear that it is set out from the perspective of Marine Scotland as it beds down the new system and forecasts how it will work in practice. This is in itself a formidable task. However, there is slight concern as to the extent to which the circular deals with all the issues which may emerge for the TPAs when an important terrestrial planning application or listed building consent application as an element of a marine licensing project is either unpopular with a local community, or contrary to a development plan, or adversely affects a listed building. It is hoped that this is to some extent an issue of timing, as TPAs and Marine Scotland explore and resolve not only policies and working practices, but complex accountabilities in the future. However care should be exercised in finalising the circular at this early stage to ensure that local perspective and the questions it gives rise to are adequately addressed.

2.5 Process risks

Overall, we welcome the fact that readers are able to see so much inter-connected policy at the same time. This has for example made it easier to identify (and hopefully then resolve) inconsistencies of policy or process, either internally or with other legislation.

It may, though, be worth noting the danger of losing track of the process affecting individual documents when a whole suite of integrated policies are being developed together. This was shown in the recent decision of the Aarhus Compliance Committee (Case ACCC/C/2012/68) where it was held that although several policy documents on renewable energy had been subject to appropriate public participation, there had been none for the National Renewable Energy Action Plan, even though this did qualify as a "plan or programme" under article 7 of the Aarhus Convention. This failing meant that the UK was held to be in breach of the Convention, even though in the context of the wider policy development there may have been little new in this particular plan.

2.6 The importance of transparency

In terms of transparency- which we suggest includes intelligibility- we welcome the fact that such an effort has been made to address different levels of interest, from overall executive summaries through to detailed interactive data sets. We also welcome the recognition of the positive benefits of planning whether of the introduction (and future regulation) of MPAs, the possibilities of offshore energy or of the integration of coastal planning.

Nevertheless with such a relatively new regime, and given the challenges of integrating with terrestrial planning and the forthcoming Marine Protected Areas, we suggest that thought be given to how the new regime can be best presented for public intelligibility. To some extent this will be easier once work on MPAs and Offshore Energy priorities can be integrated and the issues regarding consistency are addressed. In practice for planning authorities themselves, including Marine Scotland and the future Regional Planning Partnerships, it may well be that coordinating the timing of plans and sharing the evidence base will be as important as hypothetical guidance, but there is a danger of practical co-operation outrunning public understanding and expectation. We recommend that the excellent efforts to

address different interest groups is maintained to ensure as far as possible public understanding of the importance and benefits of the new system.

3. Looking forward

We commend Marine Scotland on the work to date and are of the view that documents provide a sound platform for future marine planning and licensing. We recognise that there is still much more to do to put in place a system which fully integrates marine, coastal and terrestrial planning including :

- The designation and introduction of Management measures for MPAs.
- Enforcement consistency and ensuring regulatory best practice, recognising that resource issues are highly relevant
- The role of different interest groups in both the marine and terrestrial planning process eg Marine Scotland's current consultation paper " Allocation of Mackerel Quota for Inshore Fishing " also raises the possibility of enabling Inshore Fishery Groups (IFGs) and others to play a role in the management of a local fishery
- Impact of Common Fisheries Policy (CFP) Reform including Discards Ban: which could have a significant impact on territorial infrastructure issues

We look forward to further contributing to the development of this significant new strand of 21st century law

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