COUNCIL FOR NATURE CONSERVATION AND THE COUNTRYSIDE

An Advisory Council to the Department of the Environment

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Sean McCann
Assistant Clerk
Environment Committee
Room 247, Parliament Buildings
Stormont Estate
BELFAST, BT4 3XX

Dear Sean,

Marine Bill

Thank you for your letter of 12 Mar 2012 inviting our views on the proposed Marine Bill.

Introduction

The Council for Nature Conservation and the Countryside (CNCC) is the statutory body providing advice to the Department of the Environment on nature and countryside conservation issues, particularly as they affect Northern Ireland.

Our response takes the form of some general comments below and a more detailed examination of the Bill contained in the attached table.

General comment

The draft Marine Bill (the "Bill") fails to identify an overarching aim/general duty against which the provisions and actions taken under the Bill can be assessed. We would favour an approach such as in The Marine (Scotland) Act 2010 (the "Scotland Act") which gives a clear precedent of adopting such standards and these relate to the achievement of sustainable development and also to mitigating climate change. We recommend that Part 1 of the Bill is extended to include the following provisions:

(2) Sustainable development and protection and enhancement of the health of the Northern Ireland inshore region area

In exercising any function that affects the Northern Ireland inshore region area under this Act—
(a) the Department, 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.

(3) Mitigation of and adaptation to climate change

In exercising any function that affects the Northern Ireland inshore region area under this Act, the Climate Change Act 2008 or any other enactment—
(a) the Department, and
(b) public authorities,
must act in the way best calculated to mitigate, and adapt to, climate change so far as is consistent with the purpose of the function concerned

In seeking to avoid any gaps between marine and terrestrial planning, the proposal to have regard for the other's jurisdiction is fully supported. However, this has potential to introduce confusion, since it is possible to envisage occasions where each authority assumes that the other has lead responsibility. In particular, the UNCLOS definition of the baseline for territorial waters purposes as the low water line may introduce confusion, as may the definitions given in Section 13 concerning NCZ boundaries. We would like to see reference to the UNCLOS definition in the guidance mentioned in Section 22, along with detailed case studies. In passing, we also believe that the Department's responsibility to provide guidance should be strengthened to "must provide timely advice and guidance". We note their record in this field is very poor; no guidance is yet available on the WANE Act some 8 months after Commencement, perhaps evidence that "may" in that Act has not been treated with the importance that it needs.

Whilst we appreciate that it is the Marine Bill that you are scrutinising, we would like to take the opportunity to express our worries about the resourcing of the implementation of the Act. These concerns are around the funding required to deliver the MCZ network. Table 2 on page 21 of the RIA show one off costs of £195k-£221k to establish the network and an annual cost of £163k for monitoring and enforcement thereafter. To our eyes, these seem extremely modest and seem to imply little or no additional staff and, given that the size of the network cannot yet be known, are speculative at best. It is also unclear whether the 2007 Scottish figures upon which these estimates are based have been adjusted for inflation. It should be noted that the MSFD and marine renewables industry has greatly increased the demand for marine experts and there is currently a skill shortage both nationally and internationally.

Yours sincerely,

PATRICK CASEMENT
CHAIRMAN

Item	Provision	Comments
PART 1		
Extent of NI inshore region	1(5)	We note that the boundaries of the NI Inshore Area are to be determined by an Order in Council and feel that this will be an important step to clarify exactly where the boundary lies and particularly relevant in relation to the extent to which the Bill will apply to Lough Foyle and Carlingford Lough. Clear guidance is provided by the United Nations Convention on the Law of the Sea (UNCLOS) states: 'Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State'. It should be noted that, as a result of significant melting of polar ice-caps due to climate change, our coastline is likely to change quite significantly in the future, which will affect the boundaries.
PART 2 – MARINE PLANS		
Overarching comment		Whilst the intentions for the inshore region are covered, we can find no mention of the offshore region. Though this lies outside the responsibility of NI Government, we would like to see reference to which Department is responsible for coordination with adjoining administrations and governments, as without clarity there is a risk that the ecological coherence required by MSFD will not be achieved.
Requirement to produce Marine Plans	2(1)	We are concerned that Section 2(1) states that the Department 'may prepare' a marine plan. We believe that this runs counter to the purpose of the Bill, and that the word 'may' should be replaced by 'must'. Similarly Section 2(2) requires that the Department 'must seek to ensure that every part' of the NI inshore region is covered by a marine plan. We believe that this should be an absolute requirement to ensure that marine plans covering all of the NI inshore waters will be prepared. The Scotland Act makes marine planning compulsory and is therefore more robust. We recommended that Section 2(1) is amended so that it reads as follows; *2(1) the Department must prepare a marine plan for an area (a "marine plan area") consisting of the whole or any part of the Northern Ireland inshore region.*
Marine Plan to be in conformity with MPS	2(5)	This section requires marine plans to be in conformity with any Marine Policy Statement or marine plan covering all of NI waters, 'unless relevant considerations indicate otherwise'. We are uneasy that this clause may allow departure from the MPS and would wish to see clarification of the scope of

		'relevant considerations'. We presume that it carries similar meaning to 'material considerations' as used in terrestrial planning policy, but believe that without clarification there will be uncertainty and the possibility of litigation. A requirement for guidance on this matter should be included: 2(5)(a) *The relevant policy authorities must produce guidance regarding relevant considerations including providing examples of considerations that would allow marine plans not to be in conformity with the marine policy statement under s2(5) or decisions under section 6(1).*
Withdrawal of Marine Plan	4	We are concerned that it will be very easy for the Department to withdraw a plan as the duty on it is simply to inform parties and consult the other relevant NI Departments. There is no provision for other parties to appeal or even formally object to the withdrawal of a plan. We believe that the intention is that a plan should only be withdrawn where a replacement has been already been drawn up (for example covering a wider area or multiple plans replacing a single plan) but as framed the Bill does not legally require a plan that is being withdrawn by the Department to have a replacement. We recommend that the legislation should be amended to allow for withdrawal only where a replacement has been published (i.e. the new marine plan effectively revokes the former). *4(5) The marine plan shall only be withdrawn where an existing plan has been adopted in relation to the area to which the withdrawn plan applies.* We would prefer that the withdrawal of a plan was permitted only after wide consultation with interested parties and under specifically defined circumstances such as manifest error or availability of a replacement plan.
Review of Marine Plans	5	This section covers the duty to keep matters under review, including a number of interests which may come into conflict and prove difficult to balance, such as environmental, social and cultural and economic interests. To make the issues clearer and easier to implement, we suggest that Section 5 should be made subject to the overarching aims referred to in our general comment set out at the start of this response; ie sustainable development and climate change. We therefore suggest that Section 5(1) begins with the following words: *'Subject always to the general duties set out at Part 1 (6) and (7)…..'* In section 5(3)(b) we suggest that 'its natural resources' should be replaced by 'maintenance of its natural resources'. We are not clear what 'dependent on the region' means, and would prefer to see a clearer term used here.

		We are concerned that no time period for review has been included. We would suggest that plans should be reviewed every 5 years to keep pace with new and emerging issues. A five year period also provides sufficient certainty to rely upon the content of the Plan.
Relevance of Marine Plans to decision-making	6(1)	The comments on 2(5) above on clarification of the scope and meaning of 'relevant considerations' also apply here.
Requirement to have regard to Marine Plans	6(3)	This section makes clear that a public authority 'must have regard' to any appropriate marine plan in taking any decision which may affect the NI inshore region but which is not an enforcement or authorisation decision. We generally welcome the duty that this imposes, but believe that it is essential to give clarification of what 'must have regard' entails – it suggests that the authority is not actually required to comply with the marine plan as long as it appears to have considered it, and also that the authority is not required to justify any act which runs counter to the marine plan. We would propose the following addition which would reflect the requirements of 6(2); *6(3)(a) if a public authority takes a decision falling under section 6(3) otherwise than in accordance with any appropriate marine plan, the public authority must state its reasons*
Interpretation	10	We recommend a clear definition of the term 'sustainable development' along the lines of the Brundtland Commission report: 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.
PART 3 – Marine Conservation Zones		
Designation of MCZs	11(1)	We have serious concerns about this section and its relationship to Sections 12 and 18. Under this section it appears that the Department has discretion with regard to declaring an area as a MCZ, while Section 18 states that there is a duty to do so if it meets certain conditions. We recommend that there should be a definite duty to designate MCZs in line with the policies for designation of Natura 2000 sites and Areas of Special Scientific Interest if marine protection is to have any value. We recommend that Section 11 (1) is amended as follows: *11 (1) the Department must designate areas of sea falling within the Northern Ireland inshore region as marine conservation zones ("an MCZ") where there are grounds to do so under Section 12 and to meet the objectives set out under section 18*.
MCZs	12.(1)	We are concerned that the Bill appears to completely ignore marine archaeology and recommend that it should also be

		possible to include areas of archaeological importance in Marine Conservation Zones as is the case under the Scottish legislation. We suggest that Section 12(1) should be amended to read; *(d) features of historic or archaeological importance*
Grounds for designation of MCZs	12.(1)	As discussed above, we suggest that this should be amended to read; *12(1) The Department must make an order under section 11 designating an area as an MCZ where it is necessary and expedient to do so, having regard to the objectives set out under section 18 and for the purpose of conserving…*
Grounds for designation of MCZs	12.(7)	We have grave concerns about Section 12 (7) which we believe seriously undermines the concept of MCZs by allowing economic considerations to take precedence over environmental considerations where protection of MCZs is concerned. If the general duty on the Department under the Marine Bill is to 'further the achievement of sustainable development' and the 'mitigation of and adaptation to climate change' this means that it must give equal weight to environmental, economic and social considerations. It is remarkable that Section 12 (7) on designation of MCZs makes no mention of environmental concerns or consequences but does refer to taking into account economic and social consequences of designation. If Part 1 is amended as we suggest then this section is unnecessary. If, however, Part 1 were not amended then Section 12(7) should include specific reference to environmental as well as economic and social consequences. This should include the consequences of not designating an area as well as those of designating it.
Grounds for designation of MCZs	12.(9)	We are concerned that, unlike the Scottish legislation, Section 12 does not include any guidance or instruction on designation criteria. We would recommend that the Department adopts the guidance developed by the Joint Nature Conservation Committee with help from Natural England to ensure conformity across the United Kingdom. We therefore suggest the inclusion of an additional sub-section 12(9) referring to designation criteria along the lines of the provisions under the Scotland Act: *12 (9) The Department must, following discussion with JNCC —* *(a)prepare and publish guidance setting out scientific criteria, to inform consideration of whether an area should be designated a MCZ, and* *(b) have regard to such guidance in exercising their functions under section 11*.
Further provision	13.(3)	We believe that two further conditions should be added to this section, to enable effective management of the MCZ

as to orders designating MCZs		and enforce protection of the MCZ. We suggest the following wording: *13(3)(d) Without the inclusion of the area of seashore, the effective management of the MCZ would be impossible or impracticable.* *13(3)(e) Without the inclusion of the area of seashore, enforcement of the full protection of the MCZ would be impossible or impracticable.*
Consultation on MCZs	14.(3)	We believe that Section 14 (3) (a) is too narrow in only placing a duty on the Department to publish its proposal to make an order in such a manner that it brings it to the attention of those it thinks likely to be affected by making the order. We believe that this should also include those who are likely to be interested in the making of the order as in the Scottish legislation. This would include NGOs and other interested individuals who might have a legitimate role to play in consultation on designation of MCZs. We therefore suggest the following amendment: *14 (3) (a) be published in such a manner as the Department reasonably considers is most likely to bring the proposal to the attention of any persons who are likely to be interested in or affected by the making of the order* We also recommend the establishment of clear timeframes for consultation. The model for ASSI designation is again relevant, with Section 28 of the Environment (NI) Order 2002 specifying a period of three months for responses to proposed ASSI declarations. We believe that this would represent a reasonable timescale for interested parties to respond.
Consultation on MCZs	14.(4)	We believe that the designation process should closely reflect the process for the designation of terrestrial and coastal areas as ASSIs in requiring independent scrutiny of the proposals for individual MCZs that are brought forward by the Department. In the case of ASSIs this is provided by CNCC, and we suggest that it should also fulfil this function with regard to MCZs. This would also have the benefit of close contact with progress and processes across the rest of the UK through CNCC's representation on JNCC, who are responsible, both for co-ordinating nature conservation across the UK, and for implementing the nature conservation activities in the offshore marine area.
Publication of orders	15.(3)	We recommend that Section 15 (3) (a) should also be amended as section 14(3)
Designation of MCZs	18	We have several concerns regarding this section. While it sets out that the Department has a duty to designate Marine Conservation Zones (MCZs), it then goes on to impose a number of significant qualifications which weaken the general duty.

		Sections 18(2) and (3) set out the requirement that any MCZ designated in Northern Ireland must be taken together with MCZs designated under the Scottish Act and 2009 Act to 'form a network' which contributes to conservation in the overall UK marine area. We believe that this provides a clear loophole that would enable NI to avoid designating MCZs in situations where it could be argued that certain habitats or species are already protected adequately across the UK marine area as a whole through designations in English, Scottish, Welsh or offshore waters. We therefore recommend that the term 'UK Marine Area' in s18(3)should be amended to *'the Northern Ireland inshore region in combination with the other areas forming the UK Marine Area'* Section 18 also makes no reference to the possibility of designating some MCZs as highly protected sites. This is a serious omission and we recommend that 18(3) should also include the following: *(d) that the network includes highly protected sites* We believe that an explicit reference (and duty) to designate such highly protected sites is essential to avoid the significant risk that such sites would not be protected adequately. This is based on the evidence of past failures in protecting marine habitats that have been designated as SACs and Marine Nature Reserves. We recommend that Section 18(4) includes a further paragraph to include World Heritage Sites, given that the Giants Causeway WHS extends out to sea, and includes one of Northern Ireland's most famous wrecks, the *Girona* galleass. This should read: *18(4)(e) the whole or part of any coastal World Heritage Site as designated under the World Heritage Convention.*
Duties of public authorities regarding MCZs	20	We have grave concerns about two expressions that appear in Section 20: - 'capable of affecting (other than insignificantly)' which appears repeatedly - 'a significant risk of the act hindering the achievement of the conservation objectives stated for the MCZ' which appears in s20(5) We consider that these require much closer definition, and fear that if they remain undefined they could lead to litigation with subsequent high costs and serious delays to the process of designating and managing MCZs. We believe that this risk is entirely avoidable since a great deal of time and effort has been devoted to developing

		terminology and processes for dealing with similar issues with regard to Natura 2000 sites and to Environmental Impact Assessments, both of which relate to EU law, just as this Bill relates to the Marine Strategy Framework Directive. We suggest therefore that the wording in this section is brought into line with the wording used in transposing other relevant EU Directives, which has now been tested in the courts. Alternatively the wording used in the Environment Order with regard to ASSIs, which talks of acts that are 'likely to damage' the protected features, might be used. In addition Section 20 makes it possible for a public authority to carry out an act that it considers may negatively impact on a MCZ as long as it has notified the Department and then waited 28 days for the Department's advice, which it is not obliged to heed. This needs significant revision to prevent serious damage to MCZs without the possibility of sanction or redress. In the first place we believe that many public bodies will lack the expertise to assess whether an act may negatively impact on an MCZ. We therefore suggest that the Department should be consulted whatever activity is considered within an MCZ. Public authorities must then wait 28 days for advice, which they would be bound to act on. Failure to comply with either component would lead to sanctions, including a requirement to carry out remedial work to reverse any damage incurred. Section 20(8) could continue to apply, but the authority would be required to provide clear evidence to the Department that the need to act was genuinely urgent. Accordingly, we would suggest the following amendments: *(4) Subject to subsection (6), subsection (5) applies in any case where a public authority (other than the Department) intends to do an act which is likely to have significant effects on –* *(a) the protected features of an MCZ;* *(b) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent* *(5) If the authority believes that there is or may be a significant risk of the act having an adverse effect on the integrity of the MCZ the authority must notify the Department of that fact.* *…* *(7) Where the authority has given notification under subsection (5) it must wait until the expiry of the period of 28 days beginning with the date of the notification before deciding whether to do the act and then only in accordance with subsection 11.* *(11) In carrying out its duties under this section a public authority must act in accordance with any advice or guidance given by the Department under section 22.*

Decisions relating to MCZs	21	As with Section 20 we would wish to see much clearer definition of the terms 'significant risk', 'other than insignificantly' and 'substantially lower risk'. Without definition these have the potential to lead to litigation.
Decisions relating to MCZs	21.(7)	Section 21(7) causes us significant concern, and has the potential to seriously weaken the protection afforded by designation as a MCZ if an applicant (who could be the authority itself!) can satisfy a public authority that three criteria can be met. The first criterion concerns choosing the lesser of two evils and prompts the question as to why it should be necessary to chose either. The second criterion is related to the familiar and recognised consideration of over-riding public interest, but is stated in ill-defined terms of unquantified public benefit that outweighs unquantified or defined risk of damage to the environment. The third criterion relates to mitigation, but fails to give any direction as to who will decide what constitutes 'equivalent environmental benefit', what criteria might be used to assess compensatory or mitigation measures, and who will monitor and enforce the measures undertaken. There is no indication as to where these compensatory measures should be carried out and what sanctions might be imposed if they are not carried out satisfactorily. Finally the suggested use of compensatory measures does not comply with the precautionary principle. Without clarification of these matters the criterion is effectively meaningless and will doubtless be eventually challenged in the courts. We recommend that if Section 21(6) cannot be met then the applicant must seek judgement from the Department rather than the public authority as to whether the criteria under Section 21(7) have been met. If the over-riding public interest criterion can be met, the Department should be required to assess the potential damage and the consequent compensatory measures that are required and where they should be carried out. The party that is authorised to damage the MCZ must be directly responsible for carrying out the measures, which must be monitored by the Department. Failure to fulfil the conditions imposed, which would include failure of the measures, would constitute an offence under Section 31. We would therefore suggest rewriting of s 20(7)(a) to give a much clearer sense of the need for over-riding public interest, and the omission of the clause 'or make arrangements for the undertaking' from s 20(7)(c). We believe that these provisions cannot take precedence over the over-riding public interest provisions of the Habitats Directive since the protection of EU designated habitats or species within an MCZ cannot be subject to compensatory measures. Finally we have doubts that it would be possible to operate Section 20(7) in practice, given that it requires a

		complicated interaction between Departments, which has proved extraordinarily difficult in the past. The experience of habitat destruction in the Strangford Lough SAC and the subsequent failure of two Departments to work together to instigate restoration measures is a salutary lesson.
Advice and guidance by the Department	22	We welcome the requirement for the Department to provide guidance on this range of topics. However we believe that it is not enough for the Department to provide advice and guidance to other parties and public authorities, without there being a requirement for the recipient to act on that advice and guidance. Without that onus on the recipient there is little or no point in the Department preparing and issuing advice. We also believe that it is important that the Department publishes guidelines on how it will assess and evaluate potential damage and compensatory measures, and provides examples of possible activities that might be undertaken to provide equivalent environmental benefit. The publication of these guidelines should coincide with the enactment of the legislation to ensure that the Department is prepared for implementation and is not caught out when it is required to act.
Failure to comply with duty	23	The sanctions against a public authority where it has failed to comply with its duties which are set out in this section should be extended to cover the new general duties that we believe should be added to Part 1. We have grave concerns over Section 23(2) which we believe provides no sanction at all. As phrased it is merely a discretionary right for the Department to request an explanation for the failure of the public authority to protect the MCZ. We strongly recommend that the word 'may' is replaced with 'must'. In addition we believe that this section should set a timescale for the provision of a written explanation, and suggest that it should be within 14 days of the request. Finally there is no provision for any further action by the Department if it is not satisfied with the explanation given by the authority. The whole exercise is pointless if the authority is not subject to sanctions, and the Department is not given the powers to impose the necessary sanctions. We suggest that Section 23(2) is reworded as follows: *23 (2) (c) if the authority does not provide an explanation in accordance with sub-section (b); or the Department considers that the public authority's explanation is inadequate; or the public authority's explanation does not prove that the public authority has complied with its duties under Part 1, section 20(2), section 21(5) or section 22 of this Act, then the Department may require the public authority to;* *(i) compensate the person aggrieved by the failure;* *(ii) discharge the duty where that is still possible;*

		(iii) undertake measures to remediate the damage caused where such remediation is possible; or *(iv) where remediation is not possible to undertake such measures of direct environmental benefit to MCZs as the Department shall direct*
Bye-laws for the protection of MCZs	24 24 - 29	Section 24(3)(f) fails to recognise that the marine environment is three-dimensional, with elements that do not lie on the sea-bed but exist in the water column above it. This needs to be clearly and explicitly articulated. Nowhere in these sections is there any mention of consultation on byelaws. This contrasts with Marine Nature Reserves where the Nature Conservation and Amenity Lands Order clearly states 'Before making byelaws under this article (ie *Byelaws for the protection of marine nature reserves)* the Secretary of State (*now the Department)* shall consult the Committee for Nature Conservation (*now the Council for Nature Conservation and the Countryside)'.* We suggest that CNCC should also be consulted with regard to byelaws for MCZs, which will effectively replace Marine Nature Reserves.
Offences - byelaws	30	We welcome the recognition that contravention of a byelaw should constitute an offence. However we believe that a maximum fine of £5,000 is not sufficient considering that some of the activities that might be prohibited or restricted by a byelaw could cause severe damage to a MCZ in a short space of time but lead to a relatively small fine. We would propose the following amendment: *(2) A person who is guilty of an offence under this section is liable;* *(a) on summary conviction to a fine not exceeding level 5 on the standard scale* *(b) on conviction on indictment to a fine* *and where a person is guilty of an offence against this provision within one year after the conviction he shall be guilty of a further offence and shall be liable, in addition to that fine, to a fine not exceeding level 5 on the standard scale for every day subsequent to the day on which he is first convicted of an offence under that provision on which that provision is contravened.*
Offences	31	We recommend that the offence of disturbance should be included within the general offences for MCZs under this section. At present it appears that disturbance of animals or plants within an MCZ is an offence only if a byelaw is in place (and it is not a mandatory requirement to impose byelaws). This should be included in Section 31(2)(a). We suggest the following wording: *(2)(a) intentionally or recklessly kills, injures, or disturbs any animal in an MCZ which is a protected feature of that MCZ* We welcome both the high level of penalty for offences in relation to MCZs and the inclusion of a provision requiring the

		courts set the penalty with particular regard to any financial benefit accrued by the person convicted. It is essential that members of the judiciary are suitably trained and provided with appropriate guidance to ensure that penalties are proportionate to the offence. We believe that courts should also be able to impose custodial sentences in line with the Wildlife and Natural Environment Act (NI) 2011, which recommends up to 6 months on summary conviction and 2 years on indictment. Finally we recommend that there is a mechanism for requiring compensatory and/or restoration measures to be carried out by those convicted in line with the 'polluter pays' principle.
Exceptions	32.(4)	This section causes us serious concerns over the defence of acts done in the course of sea fishing. We are aware of many cases where this activity has caused serious damage to marine habitats and whole ecosystems: the Modiolus reefs in Strangford Lough is just the best known of these cases. This defence has the potential to totally undermine the objectives of setting up a network of MCZs, since sea fishing is probably the most likely activity to take place and the most likely to cause significant damage and disturbance. While we understand that this has been included because the Common Fisheries Policy allows all member states with historical rights to fish between 6 and 12 nautical miles offshore with equal access to domestic fleets and the Government is therefore unable or unwilling to restrict access to MCZs by foreign vessels who they would be unable to hold accountable for damage. However the situation does not arise with regard to the zone up to 6nm offshore, and so we believe that the sea fishing defence should only apply to the 6nm to 12 nm zone. We note that the Department has the discretion to amend or remove this defence, perhaps in anticipation of proposed changes to the Common Fisheries Policy, but this does little to allay our concerns. There is little certainty that the CFP will include the desired changes and the Department will certainly find it difficult to introduce further legislation to remove this defence. We would prefer Section 32(4) to be deleted, or at the very least the defence limited to a zone 6-12nm offshore.
Fixed penalties	33	We believe that fixed penalties are a practical solution to improving administration, but they will only be an effective tool in helping to enforce protection of MCZs if they are accompanied by clear guidance on matters such as the level of fines, the circumstances where they are applicable, and the issue of repeat offences. It is also essential that such guidance is available from the outset, so that it is in place when the Bill becomes law.

Enforcement officers	36	We recommend that the power to appoint enforcement officers should be a requirement rather than an option. In Section 36(1) the word 'may' should be replaced by 'shall'.
Commencement	47	The inclusion of this section without any explanation is unacceptable. We are greatly concerned that this critical part of the Bill could simply gather dust on a shelf if not enacted at the same time as the other Parts. These three parts are all equally important aspects of the Marine Strategy Framework Directive and should receive equal treatment. We recommend that this section should read: *47. The provisions of this Act come into operation on the day after the day on which this Act receives Royal Assent.*
SCHEDULE 1 – Marine Plans: Preparation and Adoption		
Statement of Public Participation	5 6	We have concerns over the nature and formulation of the Statement of Public Participation ('SPP'). In essence, the SPP determines the nature and format of the public participation/consultation process that is undertaken by the Department in formulating each marine plan. The SPP sets the timetable for preparation of a draft, the consultation period and how representations must be made. However, outside of this framework the Department has absolute discretion on the timescale for consultation and receipt of representations (limited to what the Department 'considers reasonable'), meaning that the Department could set a very limited time period for representations, or potentially even a very restricted scope for consultation responses (see also below with regard to the scope for an examination in public). We also note that it is this broad framework that provides one of the central (albeit limited) grounds for challenging any marine plan (under s8 and 9 of Part 2 of the Bill). Arguably it may not be difficult for the Department to comply with a 'procedural requirement' that the Department itself determines at its own discretion. S6(3) states that the SPP 'may' include provision for the holding of public meetings regarding consultation drafts. This should be amended to '*must include provision'*. We consider that the framework for consultation within the Bill must be more prescriptive in terms of allowing for a reasonable timeframe for consultation responses. The consultation provisions should also include a specific requirement for consultation to be carried out with the relevant Departments in Scotland, England, Wales and ROI.

Advice and assistance	8.(1)	The Department is only under a discretionary duty to seek advice and assistance in formulating a marine plan and no specific bodies are listed. We recommend that this should be amended to: *8(1) In connection with the preparation of a marine plan, or of any proposals for a marine plan, the Department may seek advice or assistance from any body or person in relation to any matter in which that body or person has particular expertise, but must seek the views of the relevant independent statutory advisory bodies.*
	8.(2)	The Department is given a broad discretion in terms of the steps it may take to consult or 'involve' persons in the development of the marine plan, for example through the convening of groups. Again this provision appears too broad and flexible in terms of whom the Department may choose to involve and the manner of such involvement. We consider that a more formalised structure to this consultation procedure should be implemented from the outset.
Independent investigation	13	We have significant concerns over the framework for an independent 'investigation' to be carried out into any marine plan. The Department is only required to 'consider' the appointment of an independent person having had regard to representations received. The Department then has discretion over whom it appoints to undertake the investigation. The Department should not be given the power to determine who undertakes the investigation. In our experience Departmental appointments (for example for roads inquiries) have led to highly unsatisfactory inquiries due, quite frankly, to the person being appointed not being suitable for the post. The Bill should specify a fully independent body to undertake the investigation. In this jurisdiction the Planning Appeals Commission would be the preferred body due to its record of professionalism and impartiality. As drafted we do not see any requirement for such investigation to be a public examination (ie public inquiry or examination in public). This is a serious omission and again significantly restricts any scope for challenge under s8 and 9 of Part 2 of the Bill. Any investigation into a draft bill must be subject to the rigour of a public examination where evidence can be fully tested in a transparent manner. The Bill must contain provisions for; (i) a specified body to undertake an examination in public – the Planning Appeals Commission is the preferred independent body (ii) a specific requirement for a public inquiry/examination in public to be held except where no representations have been made, or any representations have been met or withdrawn or are representations which are

		solely of a frivolous or vexatious nature
Matters to which the Department must have regard	14	In setting the text of a marine plan, the Department is only required to 'have regard' to recommendations of an independent examination. The Department may also take into account 'any other matters that the Department considers relevant'. Whilst we would be concerned that this affords the Department far too much discretion in determining the content of the final marine plan, this is balanced to some extent by the requirement in section 15 of the Schedule – but the balances do not go far enough – see further below in relation to s15(4)
Adoption and publication	15.(1)	A marine plan is only adopted (ie comes into force) when the Department 'has decided' to publish the plan. The Department has no specific duty under the Bill to publish a plan within a reasonable timeframe and could therefore hold a draft plan in limbo for an indeterminate amount of time. Experience shows that the Department can be extremely slow in bringing policies and plans into force and the opportunity should not be lost in this Bill to put forward a reasonable timeframe for drafting, consulting and publishing a plan. This will provide certainty for all parties and allow those likely to be affected by a marine plan to adequately prepare for its implementation.
Departure from the draft plan	15.(4)	We would welcome the inclusion of a requirement for the Department to publish any reasons for modification from the original draft including reasons why recommendations of the independent examination have not been implemented. However, in light of the limited grounds for challenge under s8 and 9 of the Bill, provided the Department publishes reasons, the final plan will be immune from challenge even if those reasons are completely irrational or without foundation, since the 'procedural requirement' will have been complied with. Further, if no independent examination takes place, there is no requirement for the Department to provide any comment as to how it has taken representations into account in the final version of any plan (hence, in our view the need for a public examination to take place where substantive representations have been made).