

National Marine Parks in Scotland

A legal review of the National Park (Scotland) Act 2000

1. The legislative framework for National Parks in Scotland

The powers to designate National Parks were first introduced in the UK under the National Parks and Access to the Countryside Act (1949) but these powers only applied to England and Wales. The lacuna was filled in Scotland by the National Parks (Scotland) Act 2000, which introduced a new scheme for the designation of national parks in Scotland.

Under this legislation¹, National Parks are to be established in order to promote the following aims:

- (a) to conserve and enhance the natural and cultural heritage of the area,
- (b) to promote sustainable use of the natural resources of the area,
- (c) to promote understanding and enjoyment (including enjoyment in the form of recreation) of the special qualities of the area by the public, and
- (d) to promote sustainable economic and social development of the area's communities.

In the case of marine areas, the final aim, namely the promotion of the sustainable economic and social development of the area's communities, may be modified² given that users of the marine environment may come from outside the National Park area.

It is clear that National Park status in Scotland is not simply a nature conservation designation. Rather, National Parks have economic and social objectives alongside environmental objectives. At the same time, the legislation does introduce some hierarchy by incorporating the so-called Sandford principle³, meaning that 'if, in relation to any matter, it appears to the [National Park Authority] that there is a conflict between the National Park aim set out in section 1(a) and other National Park aims, the authority must give greater weight to the aim set out in section 1(a).'⁴ Yet, this requirement has been interpreted by the courts in a way 'that greater weight need not necessarily be decisive [and] greater weight only has to be given to that aim where that aim is in conflict with one or more of the other aims identified in s.1(a) of the Act.'⁵ Indeed, the courts made clear that 'the primary goal [of the legislation] is to work towards achieving all four aims together.'⁶

¹ National Parks (Scotland) Act 2000 (hereinafter 2000 Act), s. 1.

² 2000 Act, s. 31(1).

³ Named after Lord Sandford who chaired the National Parks Policy Review Committee in 1974.

⁴ 2000 Act, s. 9(6).

⁵ *Cairngorms Campaign and others v The Cairngorms National Park Authority and others* [2012] CSOH 153, para. 94.

⁶ *Ibid.*

2. Designating marine areas as part of a National Park area

A key function of a designation order under the 2000 Act is to identify the area to be designated as a National Park.⁷ The key question in the current context is the extent to which the legislation permits the designation of marine areas as part of a National Park.

The legislation does not expressly define its geographical scope. It simply refers to a proposal being made in relation to ‘an area.’⁸ In the absence of explicit limitations on the areas that may be designated, as are found for example in some nature conservation legislation⁹, it can be assumed that the legislation applies to any area within Scotland, which is generally understood as including ‘so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland.’¹⁰

That a proposal can cover ‘an area that includes the sea’ is confirmed later in the legislation.¹¹ However it is important to understand that this confirmation is found in a provision which confers a power on Scottish Ministers to modify the application of the Act ‘in relation to an area that includes the sea.’ It therefore cannot be read as a limitation that the Act only covers ‘areas that include the sea’ but not areas that are composed exclusively of sea. There is therefore no reason to interpret the Act as requiring that a marine area within a designation order must be an appendage to a larger land-based National Park. Nor can it be assumed that there is any minimum land area that must be covered by a proposal.

There are nevertheless further questions as to both the landward and seaward limits of an area proposed for designation.

From a practical perspective, completely separating the marine area from adjacent land areas may not be feasible, particularly in light of the objectives of the legislation. Most importantly, areas may only be considered for designation if the following three (cumulative) conditions are met:

- (a) that the area is of outstanding national importance because of its natural heritage or the combination of its natural and cultural heritage,
- (b) that the area has a distinctive character and a coherent identity, and
- (c) that designating the area as a National Park would meet the special needs of the area and would be the best means of ensuring that the National Park aims are collectively achieved in relation to the area in a co-ordinated way.

In the case of marine areas, the second of these conditions may be modified given that it may be quite difficult to apply to marine areas.¹² If there is to be a distinctiveness of marine areas however, it is likely to arise from the land-sea

⁷ 2000 Act, s. 7(1)(a).

⁸ 2000 Act, s. 2(1).

⁹ E.g. Nature Conservation (Scotland) Act 2004, s. 3, referring to ‘any **land** of special interest by reason of its natural features’ (emphasis added). See also s. 67 of the Marine (Scotland) Act 2010, limiting the designation of MPAs to ‘any area of the Scottish marine protection area’ but including ‘any island in that area of sea, whether or not any part of the island lies above mean high water spring tide.’

¹⁰ Scotland Act 1998, s. 126.

¹¹ 2000 Act, s. 31.

¹² 2000 Act, s. 31(1).

interface. Furthermore, the first condition would also seem to point towards including relevant coastal features within the designated area, particularly in the context of cultural heritage. In this vein, Scottish Natural Heritage explained in their 2006 proposals for coastal and marine national parks that ‘islands and peninsulas are likely to be included within a coastal and marine National Park, together with relevant parts of coastal [National Scenic Areas] [and] coastal communities closely linked to the sea should generally also be included.’¹³ Indeed, all of the coastal and marine national parks included in the 2006 proposals were made up of large marine areas, but also including relevant islands and often only a small coastal strip. Nevertheless, the proposal explicitly stated that ‘the maritime focus of a coastal and marine National Park means that its inland boundary may be drawn relatively tightly in places’ to the extent that ‘along developed coasts and industrial areas and major ports and harbours, a boundary at MLWS or even further out may be considered appropriate.’¹⁴ Whilst this is not an official legal opinion, these comments support the view that proposals could, in principle, be composed largely, if not exclusively, of marine areas. The same approach was adopted by the Scottish Government in their consultation exercise.¹⁵

Looking seawards, an important limitation is that any marine areas must be within the internal waters or territorial sea of Scotland in order to fall within the scope of devolved competence.¹⁶ In other words, National Parks can only be designated under the legislation within 12 nautical miles of the territorial sea baselines. Of course, the precise area to be covered must be determined on a case-by-case basis taking into account both the designation conditions and other practical considerations. For example, in the SNH proposals, it was suggested that ‘the 6nm (from baseline) boundary for inshore fisheries management is perhaps the maximum that a Scottish Park should extend to at present and in places there may be case for less than this.’¹⁷ This is a pragmatic choice, in part justified by the third condition for designating an area (see above), but it underlines that a balance must be struck in applying the legislation to marine areas. Indeed, certain changes to marine legislation following EU Exit, including the removal of rights of third countries to fish within the 6 to 12 nautical mile limit around Scotland, may mean that designating a National Park beyond the 6 nautical mile limit is more feasible today. This is ultimately a policy choice, albeit one that must take into account the designation criteria.

3. The Designation Process

Under the legislation, it is the Scottish Ministers who may designate a new national park by order, but only after they have followed a number of procedural steps outlined in Appendix 1.

¹³ SNH Advice on Coastal and Marine National Parks, para. 15.

¹⁴ SNH Advice on Coastal and Marine National Parks, para. 15.

¹⁵ Scottish Executive, *Scotland’s First Coastal and Marine Park: a consultation* (2006).

¹⁶ See e.g. Scotland Act 1998, s. 29.

¹⁷ SNH Advice on Coastal and Marine National Parks, para. 14.

Several key points can be made about this process:

- The Scottish Ministers retain the exclusive power to initiate the process. Moreover, Scottish Ministers may abandon a proposal at any stage prior to laying a draft designation order before the Scottish Parliament. Political leadership at the national level is therefore vital to success.
- The process requires consultation of local stakeholders at various stages in the process. The importance of this process cannot be overemphasised given that a major challenge identified in the last national consultation on marine and coastal National Parks was the anxieties over the impact of designation on businesses and communities and in particular impacts on infrastructure and local house prices. This requires relevant information to be available during the consultation process in order to address these concerns and to reassure communities that the designation of a National Park is likely to be in their long-term interests.
- Potential negative impacts on fishing and other marine activities such as aquaculture were also highlighted in the last national consultation. In the case of marine areas, the process must include ‘consultation with persons representative of the interests of those who carry on commercial fishing operations in the part of the area consisting of the sea.’¹⁸ Getting consensus between different interests would be critical in moving forward the agenda and it has been a major stumbling block in past efforts to designate marine National Parks.
- The ultimate designation decision must be approved by the Scottish Parliament, but the Parliament cannot modify the proposed designation. Nevertheless political pressure can be a key means of moving the process forward. One tool that has been used in the past to get this on the agenda of the Scottish Parliament has been the petitions procedure.¹⁹

4. The powers and functions of a National Park Authority

Designation of a National Park involves the establishment of an Authority to oversee the management of the park and the achievement of the above objectives.²⁰ The centralisation of decision-making into a single body, alongside the provision of a financial resources²¹, is seen as a key means for achieving the coordinated management of National Parks. At the same time, one of the challenges identified in the previous national consultation was understanding how a National Park Authority would fit within existing governance arrangements in order to ensure that it does not become another layer of bureaucracy. This is a particular challenge in the marine context, given the multi-faceted and complex nature of marine governance. Yet, the issues are not insurmountable and it is a question of carefully designing the governance arrangements with the needs of a particular area in mind.

¹⁸ 2000 Act, s. 31(3).

¹⁹ See e.g. <http://archive2021.parliament.scot/GettingInvolved/Petitions/nationalparks>

²⁰ 2000 Act, ss. 7(1)(b)-(c).

²¹ 2000 Act, s. 22.

Whilst a National Park Authority must be established, the governance arrangements can be tailored to the specific requirements of each area. The precise constitution of each Authority must be detailed in the designation order creating a particular National Park. Nevertheless, any governance arrangements must operate within the constraints of the legislation. For example, the legislation caps membership at a maximum of 25 and it also describes three categories of members that must sit on the Authority:²²

- Some members must be appointed directly by the Scottish Ministers, including at least one fifth of the total members who are to be appointed as local members²³
- Some members must be appointed by the Scottish Ministers based upon nominations from such local authorities as the designation order may specify
- At least one fifth of Members must be elected in a public poll of people entitled to vote in a local government election in an electoral area falling wholly or partly within the National Park area

The requirement for local members means that community participation in decision-making is guaranteed. Yet, careful consideration must be given to the constitution of a National Park Authority for a marine National Park, given that it invariably will not only require local interests to be represented, but also the interests of users from outside the park area. A balance must be struck between these different stakeholders in the institutional design of the Authority. It must also be noted that 'each National Park is to have one or more National Park Advisory Groups, with the function of advising the National Park authority on any matter relating to the functions of the authority.'²⁴ Such advisory groups allow another forum for the involvement of experts and other stakeholders in the decision-making process.

A key tool for the management of National Parks is the National Park Plan. All National Park Authorities must produce a plan every five years which sets out its policy for managing the National Park and achieving the National Park aims.²⁵ In developing the plan, the National Park Authority must comply with other relevant statutory duties, such as the so-called biodiversity duty under section 1 of the Nature (Conservation) Scotland Act 2004. The plan is an opportunity to set out the conservation and economic priorities for the National Park over a particular period, as well as related policies to guide day to day management of the area. The proposed plan must be subject to a public consultation and finally approved by the Scottish Ministers before it can be adopted.²⁶ Once adopted, not only the National Park Authority but also the Scottish Ministers and other relevant local authority and public bodies and office-holders must, in exercising their functions in relation to a National Park, 'have regard to the National Park Plan as adopted.'²⁷ This is a significant obligation as it applies to decision-makers under other important statutory

²² 2000 Act, sch. 1, para. 3.

²³ Local members must either have their sole or main residence within the National Park area or be a councillor for an electoral ward or a member of a community council, any part of whose area is within the National Park; 2000 Act, sch. 1, para. 3(5).

²⁴ 2000 Act, s. 20(1).

²⁵ 2000 Act, s. 11.

²⁶ 2000 Act, s. 12.

²⁷ 2000 Act, s. 14.

regimes discussed below, for example regional marine planning or fisheries management.

A National Park Authority has other specific powers conferred on it by virtue of the legislation, including powers to make bye-laws (subject to confirmation by the Scottish Ministers)²⁸ and to enter into management agreements with owners or occupiers of land²⁹ within the national park.³⁰ It may also have additional powers conferred upon it.

In particular, an Authority may have planning functions directly conferred upon it.³¹ If granted, the precise scope of planning functions will depend upon the designation order, but it may include being treated as the planning authority for all purposes under the planning Acts or simply to be responsible for the preparation of a local development plan, but with other planning powers retained by relevant local authorities. Those planning functions only relate to terrestrial planning, but in relation to marine areas, this could include (at least under current arrangements³²) responsibility for developing planning policy and granting planning permission for fish farms.³³

Broader marine planning powers are generally conferred upon Regional Marine Planning Partnerships³⁴ which are established for the larger Scottish Marine Regions designated under the Scottish Marine Regions Order 2015. It would certainly be appropriate for a National Park Authority to engage within the process of regional marine planning through participation in a Marine Planning Partnership where one had been established.³⁵ In any case, as noted above, the public bodies developing a Regional Marine Plan would have to take into account a National Park Plan and this duty seeks to ensure some coordination between these different regulatory regimes, which would be vital to the successful management of the area. Equally, when a Regional Marine Plan already exists for an area for which a National Park Plan is being developed, the National Park Authority will have to have regard to that document in developing its own plan.³⁶

The power to determine marine planning applications can in theory be delegated separately from the power to adopt regional marine plans. Section 51 of the Marine (Scotland) Act 2010 allows the Scottish Ministers to make an order which provides that any of the delegable marine licensing functions³⁷ shall be delegated to, inter alia,

²⁸ 2000 Act, sch. 2, paras 8-9. Contravention of bye-laws constitute a criminal offence.

²⁹ Which includes land covered in water; see Interpretation and Legislative Reform (Scotland) Act 2010, sch. 1.

³⁰ See 2000 Act, s. 15.

³¹ 2000 Act, s. 10.

³² The recent Griggs Review has however proposed changes to the way in which aquaculture is regulated and the Scottish Government has committed to implementing those proposals; see <https://www.gov.scot/news/next-steps-to-improve-regulation-of-aquaculture/>

³³ See Town and Country Planning (Scotland) Act 1997, s. 26.

³⁴ Marine (Scotland) Act 2010, ss. 12-14.

³⁵ To date, Marine Planning Partnerships have only been established in Shetland and the Clyde. In Orkney, it was decided to delegate functions directly on Orkney Islands Council, without establishing a Marine Planning Partnership.

³⁶ Marine (Scotland) Act 2010, s. 15(3).

³⁷ Delegable marine licensing functions are all of those functions conferred on Scottish Ministers by Part 4 of the Marine (Scotland) Act 2010, with the exception of functions specified in s. 51(6). These

a public authority. Thus, where the National Park Area includes marine areas, it may also be possible for a National Park Authority to have marine licensing powers for that area delegated to it. Such powers would still have to be exercised in accordance with the relevant regional marine plans. Even if not delegated marine planning powers, a National Park Authority could be designated as a statutory consultee under the section 27(4) of the Marine (Scotland) Act 2010.

It is also possible that a National Park Authority could take on additional regulatory roles, for example as a manager of the seabed under the Scottish Crown Estate Act 2019.³⁸

At the same time, a National Park Authority would not necessarily be able to manage all activities within its area. Many aspects of shipping regulation, including the regulation of navigational rights and freedoms, are reserved under the Scotland Act 1998³⁹ and therefore it would be beyond the powers of a National Park Authority to manage these issues. Fishing regulation in Scotland is devolved but it is largely carried out at the national level through the Scottish Ministers. Indeed, the Scottish Ministers have in the past made clear that a National Park Authority would not take over management of fisheries.⁴⁰ As noted above, the development of fisheries regulations by the Scottish Ministers would have to have regard to the National Park Plan, although this would not bind the Scottish Ministers to any particular outcome⁴¹ and it would be only one of multiple considerations that they would have to take into account in developing fisheries policy.⁴² In any case, it would be vital that a National Park Authority engaged with the development of fisheries policy relating to the area over which it was responsible, given that this is an important economic activity relating to the use of the seas. For example, it would be appropriate for a National Park Authority to participate in meetings of the relevant Regional Inshore Fisheries Group responsible for developing fisheries management plans for the area concerned.

One possible option for transferring regulatory powers over certain fisheries is as a grantee of a right of regulating a shell fishery under section 3 of the Sea Fisheries (Shellfish) Act 1967. However, this legislation only applies to shellfish⁴³ and it has been used relatively restrictively in Scotland to date. Alternatively, a National Park Authority could promote the designation of a Demonstration and Research Marine Protected Area in order to promote the 'demonstration of sustainable methods of marine management or exploitation' or 'research into such matters.'⁴⁴ A proposal

excepted functions largely relate to altering the scheme for marine licensing, rather than the granting of individual licences.

³⁸ Section 3 of the 2019 Act allows Crown Estate Scotland to transfer management of a particular asset to inter alia 'another Scottish public authority.'

³⁹ Scotland Act 1998, Sch. 5, Part II, Heading E.3.

⁴⁰ See e.g.

<http://archive.scottish.parliament.uk/s3/committees/rae/petitions/documents/LetterfromMinister15.03.07.pdf>

⁴¹ See e.g. *Ineos Upstream Ltd v Lord Advocate* [2018] CSOH 66, at para. 15 in which the duty to have regard to a development plan was interpreted as giving the document 'a degree of priority' but 'other policy may overtake and supersede development plan policies.'

⁴² See e.g. new duties on fisheries policy authorities under the Fisheries Act 2020.

⁴³ Defined as 'crustaceans and molluscs of any kind'; 1967 Act, s. 22(2).

⁴⁴ Marine (Scotland) Act 2010, s. 71(1).

must meet certain criteria laid down by the Scottish Government, including demonstrating the novelty of the proposed investigation, how the proposal fits within broader national objectives and whether there is sufficient support from stakeholders. In addition, the guidance makes clear that funding and resources required to deliver the objectives of the MPA are the responsibility of the proposer. In this respect, the leadership of a National Park Authority could provide a significant advantage in taking forward this sort of initiative, given that it has financial resources that it can draw upon.

A final issue that requires consideration is the interaction between a new marine National Park and other existing nature conservation designations, such as Nature Conservation Marine Protected Areas, Sites of Special Scientific Interest, Special Areas of Conservation and Special Protection Areas. In the future, this may also include Highly Protected Marine Areas. A National Park designation would clearly not supersede such nature conservation designations. Indeed, in many ways, a National Park designation is a means of ensuring the coordinated management of various other nature conservation designations. For example, one of the priorities for the Cairngorms National Park is to secure favourable condition of designated sites within the Park through the exercise of management functions.⁴⁵ Of course, formal powers to manage those sites remains with existing statutory bodies, which in most cases is Scottish Natural Heritage or the Scottish Ministers. However, the involvement of a National Park Authority may provide an additional set of management tools that could be utilised to proactively manage protected areas. Furthermore, a National Park Authority could provide a forum for bringing together relevant actors to make the best use of existing management tools. For example, the Marine (Scotland) Act 2010⁴⁶ and the Conservation (Natural Habitats, &c) Regulations 1994⁴⁷ both provide for the establishment of management schemes involving all relevant authorities to collectively manage a particular site. To date, such schemes have not been widely utilised in Scotland, but they could be a useful means of ensuring coordination of management activities in line with international best practice on marine protected area management.⁴⁸

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⁴⁵ Cairngorms National Park Partnership Plan 2017-2022, p. 18.

⁴⁶ Marine (Scotland) Act 2010, s. 99.

⁴⁷ Conservation (Natural Habitats, &c) Regulations 1994, reg. 34.

⁴⁸ See further *Saving our Seas through Law Legal Policy Brief No. 4, Legal Tools for the Management of Marine Protected Areas in Scotland* (2019).

Appendix 1

Designation of Scottish National Parks: Process

