



GREENPEACE



February 2009

Parliamentary Briefing

Marine and Coastal Access Bill Amendment

Offences against MCZs (Clauses 135, 136, 137 etc)

The organisations listed above are all members of Wildlife and Countryside Link's Marine Task Force¹, which has been campaigning for several years for improvements in marine conservation and better management of the marine area. We have been closely engaged in the Marine & Coastal Access Bill process from the outset.

Background

1. The general offence and offences against MCZ byelaws/orders

Link welcomes the idea of a "general offence" of damaging protected features of an MCZ. However, the drafting of clause 136, and the proposed statutory defence at clause 137 (3) cause concern, as does the "downgrading" of the offence of breaching MCZ byelaws or orders (from an either way offence, with a maximum fine of £50,000 in the Magistrates' Court and an unlimited fine in the Crown Court – draft Marine Bill, April 2008) to a summary-only offence with a maximum fine of £5,000.

We believe that the existence of a general offence (requiring proof of the offender's state of mind) should not automatically downgrade byelaw offences (which merely require proof of what the offender has done). It is for the court to decide how serious individual cases are, and the availability of substantial penalties for the byelaw offence does not, of course, mean that the court will hand them down in any but deserving cases.

As for the general offence itself – the following elements would *all* need to be proven beyond reasonable doubt:

- Knowledge, either actual or constructive, that the damaged feature is in an MCZ. It is unlikely that MCZs will be marked on the water surface, so the concept of "ought to have known" is highly uncertain.

¹ Wildlife and Countryside Link is a coalition of the UK's major environmental organisations working together for the conservation and protection of wildlife, the countryside and the marine environment.

- That the act has significantly hindered (or may so hinder) the achievement of the conservation objectives. Marine ecosystems have considerable powers of recovery, over time, which is why it is worthwhile giving protection to badly damaged sites. If an MCZ is large and the conservation objectives have not clearly anticipated the act involved this will be very hard to prove to the necessary standard, albeit it may clearly be the case.
- That the act involves the intentional killing, injuring, taking, destroying etc of a protected feature. It is often hard to prove intent in criminal cases, but it is doubly difficult when a feature is underwater or when an act takes place out of sight of land. It is for this reason that Part I of the Wildlife and Countryside Act 1981 is so poor at protecting the marine environment and needs augmenting by this Bill. The omission of the possibility of reckless commission of the offence is inexplicable and needs rectifying. Reference should also be made to disturbance of any animal in a MCZ which is a protected feature of that MCZ, in line with s9(4A) of the Wildlife and Countryside Act 1981 (s136(2)(a) currently only refers to killing or injuring).

2. The statutory defence against the general offence

There is a statutory defence at clause 137 (3) – that a person cannot be guilty of the general offence if the act involved was done whilst fishing and the effect of that act on the protected feature could not reasonably have been avoided. In many instances it is fishing that has created the parlous situation that needs rectifying by this Bill. Moreover, it is very easy, in waters where the sea bed cannot be seen, to claim that damage caused by nets, lines, trawls or dredges could not reasonably have been avoided. The annex below includes an amendment seeking to remove the statutory defence.

It has been suggested that this clause is necessary in Common Fisheries Policy (CFP) waters. Outside of the 12nm zone, commercial fishing cannot be limited other than via the CFP. Between 6 and 12nm, Article 9 of the CFP Framework Directive provides that fishing may only be limited after the Commission, any affected Member States and the Regional Advisory Council have been consulted. Within 6nm (and in those parts of the 6-12nm zone where there are no historic European fishing rights), Parliament is sovereign. It would be wrong, for CFP reasons, to enforce the clause 135 offence against European fishermen beyond 12nm and in much of the 6-12nm zone, without going through the CFP channels. However, there is no need for 137 (3) in the 0-6nm zone and in parts of the 6-12nm zone. Given the importance of fishing as a damaging activity, it is entirely counterproductive for this defence to exist.

The simplest way to deal with this would be for the clause 137(3) defence to be deleted, and we have suggested this in the annex below. The defence could potentially be replaced by an empowering provision (not supplied below) that allows further statutory defences to be created (on an MCZ or area basis) by way of a subsequent statutory instrument. Thus, in relation to MCZs within 6nm, the defence would not exist at all. But, in CFP waters, the defence could be enacted by order, perhaps the same order that designates the MCZ. This would have the benefit of allowing the relatively easy removal of the defence if ever the EU agreed that fishing should be banned within an MCZ.

The availability of the fishing defence and the other matters mentioned above have the effect of emasculating the Bill's MCZ enforcement provisions – providing an almost un-provable general offence while at the same time downgrading the more

realistic byelaw offence. The Annex to this briefing contains suggested amendments to clauses 135, 136 and 137.

3. Further detail on offences

It is noted that an entirely standard text that allows the directors or managers of a company to be convicted if their consent, connivance or neglect led to the offence by the company appears to have been removed since the Draft Bill of April 2008. The Annex contains the suggestion that it be reinstated.

Similarly, it is suggested that a provision, well known in fisheries law, that the master, owner or charterer of any vessel involved in the commission of an offence should also be liable for the offence.

Further, the Annex also suggests that (as is already present in the Bill in relation to IFCA byelaws) the court, on conviction, should have powers to order forfeiture of gear or equipment used in the commission of the offence.

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Annex – Amendments

Marine & Coastal Access Bill House of Lords Committee Stage, February 2009

1. The general offence and offences against MCZ byelaws/orders

Clause	Clause 135 Offence of contravening byelaws or orders
Amendment	<p>Page 82, line 33-4: Leave out subclause 135 (2) and insert '(2) A person who is guilty of an offence under this section is liable – (a) on summary conviction to a fine not exceeding £50,000 (b) on conviction on indictment to a fine'</p> <p>Page 82, line 35: At end insert new subclause '(4) In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court must in particular have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence'.</p>
Clause	Clause 136 Offence of damaging etc protected features of MCZs
Amendment	<p>Page 83, lines 4-8: Leave out 136 (1) (b) and (c). Page 83, line 11: Leave out 'intentionally' and insert 'intentionally or recklessly' Leave out 'kills or injures' and insert 'kills, injures or disturbs' Page 83, line 13: Leave out 'intentionally' and insert 'intentionally or recklessly' Page 83, line 15: Leave out 'intentionally' and insert 'intentionally or recklessly' Page 83, line 17: Leave out 'intentionally' and insert 'intentionally or recklessly'</p>
Clause	Clause 137 Exceptions to offences under section 135 or 136
Amendment	Page 84, lines 1-9: Leave out 137(3)

2. Further detail on offences

Clause	New clauses – Offences by directors, partners, etc, liability of master, owner or charterer
Amendment	<p>Insert clause 124 of the Draft Marine Bill, April 2008, made applicable to offences under sections 135 and 136.</p> <p>Insert the following:</p> <p>‘Where any sea fishing boat is used in the commission of an offence under sections 135 and 136, the master, the owner and the charterer (if any) shall each be guilty of an offence under those sections and punishable accordingly.’</p>
Clause	New clause – Powers of court following conviction
Amendment	<p>Insert a clause analogous to clause 160 of the current Bill – powers of the court to order forfeiture of gears or fish – with scope increased to include vessels and recreational equipment – and to suspend an MCZ byelaw permit, or disqualify the offender from obtaining an MCZ byelaw permit - to be applicable to offences under sections 135 and 136.</p>