



Law Society
of Scotland

Consultation response

Conditions for harbour access and seafarers' pay-rates: scope and compliance

June 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Marine Law and Employment Law Sub-committees welcome the opportunity to respond to the UK Government's consultation on *Conditions for harbour access and seafarers' pay-rates: scope and compliance*¹. We do not seek to answer all of the consultation questions. We have the following comments to put forward for consideration.

General comments

In order for these measures to be of greatest benefit, effective enforcement will be required and we note from the consultation that UK Government "wish to empower Statutory Harbour Authorities (SHAs) and the Secretary of State for Transport (including through the Maritime and Coastguard Agency (MCA)) to enable the delivery and enforcement of this, and we envisage that a proportionate and risk-based approach to checks would be taken once the legislation is in effect" (consultation document, page 5).

We consider that the MCA would be best placed to enforce such new regulations rather than SHAs, assuming the MCA is given the resources and personnel to carry out enforcement activity given its already wide enforcement remit and in Scotland, small team. The MCA is the declared UK flag authority and has relevant regulatory powers, including the right to conduct port state inspections of foreign flag ships in UK ports under the Paris Memorandum of Understanding on Port State Control², which includes inspections for compliance with Maritime Labour Convention (MLC) 2006. The MCA has a track record of dealing with non-compliance in a robust manner.

Another reason for the MCA to enforce regulations is the potential to create a conflict of interest in the duties of SHA officers, who would ordinarily wish to maintain good relations with ship-owners as customers of the

¹ <https://www.gov.uk/government/consultations/conditions-for-harbour-access-and-seafarers-pay-rates-scope-and-compliance>

² Accessed at <https://www.parismou.org/sites/default/files/Paris%20MoU%20including%2043rd%20amendment%20final.pdf>

SHA. This potential conflict is highlighted in the Maritime Labour Convention Regulations and associated guidance relating to inspections:

MLC Regulation 5.2.1 paragraph 3 states: “Inspections in a port shall be carried out by authorized officers in accordance with the provisions of the Code and other applicable international arrangements governing port State control inspections in the Member.”

Guidelines for port State control officers carrying out inspections under the MLC 2006, Section 1.1: 1. “In accordance with resolution IV of the 94th (Maritime) Session of the International Labour Conference (ILC), these inter-national guidelines for port State control officers¹ (PSCOs) have been developed to...”

Footnote 1: The MLC, 2006, uses the term “authorized officer” in Regulation 5.2.1 to reflect the fact that national situations differ and in some cases the person carrying out a port State inspection under the Convention may not necessarily be the same person or persons as those currently carrying out inspection under the existing international (regional) port State control arrangements. The 94th (Maritime) Session of the ILC resolution used the term “port State control officers”. In these guidelines the same term and the related acronym PSCO is used to refer to “authorized officer”.

MLC inspections in the UK are carried out by MCA trained PSCOs who are generally qualified in accordance with IMO Resolution A.1138(31) Procedures for Port State Control, 2019. Section 1.8 is reproduced below:

“1.8 PROFESSIONAL PROFILE OF PSCOs

1.8.1 Port State control should be carried out only by qualified PSCOs who fulfil the qualifications and training specified in section 1.9.

1.8.2 When the required professional expertise cannot be provided by the PSCO, the PSCO may be assisted by any person with the required expertise, as acceptable to the port State.

1.8.3 PSCOs and persons assisting them **should be free from any commercial, financial, and other pressures and have no commercial interest in the port of inspection**, the ships inspected, ship repair facilities or any support services in the port or elsewhere, nor should PSCOs be employed by or undertake work on behalf of ROs or classification societies.” (Our emphasis).

In the event that SHAs are to undertake a role in delivery and enforcement, we consider that there will be a need to support SHAs, financially and practically, in order to recruit and upskill the necessary staff to implement the delivery and enforcement of the proposed changes. We anticipate that SHAs will face significant costs given that these would be new functions to be carried out. In order to ensure that the necessary preparations can be made, there will need to be sufficient lead-in time for enacting the measures.

It would be useful to understand if every SHA will be expected to have the capability for delivery and enforcement of these measures, particularly where some will rarely or perhaps never see relevant vessels. We suggest that the awareness-raising and cost impacts of the measures on smaller harbours might be best considered on a ‘value for money’ basis.

We consider that this is a complex matter and suggest that careful consideration of the details, as well as consultation with industry, is required so as to minimise the risk of unintended consequences. We note that there may be potential for conflict between the proposed approach and existing legislation controlling the responsibilities for flag states to control seafarer remuneration, particularly under The United Nations Convention on the Law of the Sea (UNCLOS) and MLC. UNCLOS Article 94(2) relates to the jurisdiction and control in administrative and social matters, and in relation to seafarers and provides that flag states: “[*shall*] assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew...”. Extending requirements to foreign flag ships beyond those obligations under MLC 2006 Regulation 2.2 goes beyond this requirement.

The proposed ability to prevent vessels from accessing UK ports will need to be considered in light of the open port duty (we note this is referred to in the consultation document), but also any existing contractual arrangements which ports might have made with relevant vessels and/or employers. It is important that the law is clear and able to be understood and complied with, and therefore it is crucial that the definition as to which vessels are included/excluded from the scope of these measures is clear.

Consultation questions

1. Your (used for contact purposes only):

Name – Alison McNab

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2. You are responding:

on behalf of an organisation

3. Your organisation's name is:

Law Society of Scotland

4. Your organisation's location is:

Scotland

5. Your organisation is a:

medium organisation, 50 to 249 people – although our membership is over 12,000

6. Your organisation is:

- another sector not mentioned: Legal

7. What should be included in our definition of ‘an equivalent of the National Minimum Wage’ (NMWe)? You may tick multiple boxes.

- **Basic rate should follow International Labour Organization principles including a normal working pattern for basic rate calculation based on 8 hours per day/48-hour week**
- **NMWe should be calculated in a way which mirrors the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015**
- **NMWe should align with the appropriate age/apprenticeship bands of the NMW**
- **Other, provide your reasoning**

Other.

We suggest this be based on the MLC 2006 Regulation 2.2. We note the references the International Labour Organization principles - the ILO also sets a minimum monthly wage for seafarers³ to which the Government may wish to give consideration in the setting of this requirement.

8. What, if anything, would you like to see the Government do to improve employment protections for seafarers?

We have no comment.

9. Should seafarers working on scheduled RoRo (roll-on/roll-off) services calling at UK ports once a week or more qualify as seafarers working on ships that regularly use UK ports?

We note that the consultation proposes treating seafarers working on scheduled RoRo ships differently from seafarers on other ship types. We suggest that vessel type should not be the sole criteria for creating a level playing field in terms of seafarer pay. For example, there are scheduled container or break-bulk services from the UK to offshore islands (e.g. Isle of Man and Channel Islands) - if the minimum pay for seafarers only applies to the RoRo competitors of such services, this could potentially present an unfair commercial advantage.

10. If you do not think they should qualify, assuming that provisions will be introduced in some form, what alternative criterion would you suggest to determine seafarers working on ships that regularly use UK ports?

Please see our comments at Q9.

³ For example, see recent information here: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_845493/lang-en/index.htm

11. Do you have any suggestions as to how we can further define ‘scheduled’ services? (currently defined as working to a published schedule)

Please see our comments at Q9.

12. Which service types should be specifically excluded from these provisions (regardless of their frequency and operation according to published schedules)? You may tick multiple boxes. Provide reasoning for your choices.

- **None - no specific service type exclusions**
- **Cruise**
- **Container services on short sea routes**
- **Container services on deep sea routes**
- **Bulk and General Cargo services on short sea routes**
- **Bulk and General Cargo services on deep sea routes**
- **Roll on Roll off (RoRo) - unaccompanied trailer services (with capacity for up to 12 passengers)**
- **Mixed Container and Ro-Ro (Con-Ro) services**
- **Dedicated car carriers**
- **Other**

While we appreciate that there are differences to be considered between RoRo services and vessels engaged in international carriage/projects, if the aim is to achieve a level playing field and improve conditions for seafarers broadly, we consider that the provisions should apply to all seafarers calling at regularly scheduled calls at UK ports irrespective of ship type.

13. Who do you consider should be empowered to verify and enforce NMW equivalent (for in-scope services) in UK territory and waters as a condition of access to ports?

- **Statutory Harbour Authorities (SHAs)**
- **The Secretary of State**
- **Other**
- **Don't know**

Provide your reasoning.

We consider that the Secretary of State, via the executive agency, the Maritime & Coastguard Agency would be most appropriate to fulfil this role.

14. Should SHAs be explicitly empowered to make a surcharge applicable to relevant ship operators that do not evidence compliance with such conditions e.g. no provision of, or flawed declaration?

- Yes
- No
- Don't know

Provide your reasoning.

We have no comment.

15. Should SHAs be empowered to suspend access to port for persistently non-compliant ship operators, and be exempted for this purpose from the requirements of the 'open port duty' under s.33 Harbours Docks and Piers Clauses Act 1847 as adopted; and should the Secretary of State be empowered to direct SHAs in this regard?

- Yes
- No
- Don't know

Provide your reasoning.

We have no comment.

16. In what scenarios should there be exemptions from the above described suspension of port access? You may tick multiple boxes.

- None - no exceptions
- Force majeure
- Overriding safety considerations
- The need to reduce or minimise the risk of pollution
- The need to have Port State Control deficiencies rectified
- Other

Provide your reasoning.

We consider that any legislation which would create no exceptions to being suspended from entering a UK port would likely be counter to international law, specifically UNCLOS article 18(2), In addition, we consider that there should be a clause allowing for some form of force majeure entry.

17. Should the onus be on the ship operator, regardless of whether it is the direct employer of the seafarers in question, to evidence compliance? And if so, should that information be submitted to the SHA, or to the MCA in the first instance?

- Yes - Either SHA or MCA
- Yes - always SHA in first instance
- Yes - always MCA in first instance
- No
- Don't know

Provide your reasoning and suggestions on how a vessel operator should evidence compliance.

Yes, the onus should be on the ship operator to evidence compliance and we suggest that information should always be submitted to the MCA in the first instance.

18. Do you think that anyone empowered to check compliance should be able to do so by:

- random checks?
- risk-based selection?
- intelligence-led selection?
- any reasonable combination of the above?

Provide your reasoning.

We have no comment.

19. Are there any other means to ensure compliance with NMWe requirements for in scope services we have not considered?

We have no comment.

20. Where a relevant ship operator operates at a port owned or operated by a related company, should any special provisions be made to avoid conflicts of interest? (outline any suggestions)

We have no comment.

21. Do you think that applying NMWe requirements to ships that regularly use UK ports will have an overall (tick one box):

- **negative impact on the UK's shipping and maritime sector?**
- **positive impact on the UK's shipping and maritime sector?**
- **no material impact on the UK's shipping and maritime sector?**
- **do not know the impact on the UK's shipping / maritime sector?**

We have no comment.

22. Do you think there are any risks or impacts we have not considered, including any unintended consequences?

We have no comment.

23. Is an average of £5.50 per hour a representative wage on board ships serving the UK where NMWe rates are currently not generally paid or exceeded? Provide your reasoning.

We have no comment.

24. Is an assumption of an average of 120 seafarers per ro-pax vessel reasonable? Provide your reasoning.

We have no comment.

25. Is an assumption of 30 seafarers per RoRo vessel reasonable? Provide your reasoning.

We have no comment.

26. Is an assumption of 20 seafarers per container/bulk vessel reasonable? Provide your reasoning.

We have no comment.

27. Is it a reasonable assumption that, averaged across the services in scope, 50% of seafarers are paid less than the UK minimum wage? If not, suggest an alternative, accurate percentage, and your reasoning.

We have no comment.

28. Do you have any other comments on the Impact Assessment?

We have no comment.



For further information, please contact:

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