



Law Society  
of Scotland

# Consultation response

Consultation on draft regulations for the control and management of ships' ballast water and sediments

16 June 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Marine Law Sub-committee welcomes the opportunity to respond to the Maritime and Coastguard Agency's consultation on *draft regulations for the control and management of ships' ballast water and sediments*<sup>1</sup>. We do not seek to respond to the consultation questions but have the following general remarks to make.

## General comments

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We consider that the requirements of the Merchant Shipping (Control and Management of Ships' Ballast Water and Sediments) Regulations 2021 will be well known to internationally trading shipping operators as the regulations seek to implement the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 ("the BWM Convention") which entered into force on 8th September 2017. As these measures have been in force for some time in an increasing number of coastal and port states, UK ships that carry ballast water and trade internationally are likely to be experienced in operating within the requirements. In addition, there may be local regulations within UK harbours and ports which already mirror the proposed requirements – we are aware of one example of this in Scotland.

While we consider that the powers of enforcement set out in the draft regulations are clear, we question the extent to which monitoring and enforcement action will be undertaken, particularly due to resourcing requirements for this. There may be an opportunity to give ports a greater role in monitoring vessels' ballast water management compliance. This could include strengthening the wording of paragraph 27.1 of the draft Marine Guidance Note to reflect a recommendation to ports. The information referred to at paragraph 27.2 could be included in routine pre-arrival information sent from the ship to the port. This would give harbour masters more information on which to base any further investigation or take action if necessary, as referred to in paragraph 27.3.

There may be opportunities for ports in certain circumstances to carry out random sampling of ballast water from vessels seeking to de-ballast. While this would be onerous if carried out on every vessel, in terms of both cost and time, random sampling may help to create a deterrent effect for any breaches of the regulations. There may also be scope for ports to monitor the track and timing of vessels carrying out ballast exchange in a

<sup>1</sup> <https://www.gov.uk/government/consultations/consultation-on-draft-regulations-for-the-control-and-management-of-ships-ballast-water-and-sediments>

designated area to ensure the process is compliant and aligns with what has been recorded in the ballast water record book.

We note that the consultation states: “The general policy approach, in line with the MCA’s published enforcement policy, is to use these civil sanctions whenever possible before using criminal offences.” We support the rationale for this approach. Paragraph 2.17 of the consultation discusses the use of civil penalties and includes reference to a wider range of sanctions affecting operations and authorisations than simply financial penalties. We consider it is appropriate to use civil sanctions where possible, including a potential for use of fixed and variable monetary penalties, and/or enforcement undertakings in some cases, rather than relying on prosecutions.

The impact assessment does not discuss the costs of prosecuting criminal offences under the draft regulations, including in Scotland where such prosecutions would be undertaken by the Crown Office and Procurator Fiscal Service, as the prosecuting authority in Scotland in the public interest and where sufficient admissible evidence exists according to Scottish evidential rules. There requires to be clarity as to the approach to be taken where an offence can be committed by a range of people. How is it intended that such matters will be dealt with? For example, will all individuals be prosecuted jointly or would the Crown Office and Procurator Fiscal Service have discretion to choose those to be prosecuted?

In relation to the draft Statutory Instrument, regulation 45(4) does not appear to make sense.

By creating offences by means of Regulations, there is a restricted opportunity for scrutiny, and we consider that it is therefore important to consider the content of the criminal law and the principles to which such offences should conform. Such offences carry both the risk of conviction and the consequences and implications for those convicted with a criminal record which may affect professional career opportunities as well as scope for foreign travel. We note that it will be important for a strong awareness raising campaign to be undertaken to make those operating in the sector aware of these regulations and in particular, the criminal offences, before these come into force.

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