



Law Society
of Scotland

Seafarers' Wages Bill

Law Society of Scotland briefing for Second Reading
in the House of Lords

July 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.

We welcome the opportunity to consider and comment on the Seafarers' Wages Bill¹ ahead of Second Reading in the House of Lords on 20th July 2022. We previously responded² to the UK Government's consultation on *Conditions for harbour access and seafarers' pay-rates: scope and compliance*³. If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General remarks

This is a high-level Bill, formed of 15 clauses, and there are a number of places where further regulations and/or guidance are contemplated. It is not therefore possible to assess the full impacts of the measures at this stage or to comment fully on how feasible the provisions will be in practice.

In response to the earlier UK Government consultation, we supported the Secretary of State via the executive agency of the Maritime and Coastguard Agency (MCA), being the party empowered to verify and enforce the provisions. While it appears that under the Bill responsibilities are split between the Secretary of State and harbour authorities (for example, with harbour authorities receiving NMW equivalence declarations, and the MCA undertaking any verification or investigation), it is not clear how harbour authorities will resource, up-skill staff and cover costs to be able to undertake these additional tasks and obligations. In order for these measures to be of greatest benefit, effective enforcement will be needed and this will require sufficient resourcing. We also anticipate that there will require to be processes set up between the Secretary of State/MCA and harbour authorities to manage the requirements, powers and duties under the Bill in practical terms.

¹ <https://bills.parliament.uk/bills/3310>

² <https://www.lawsco.org.uk/media/372967/22-06-07-mar-consultation-conditions-for-harbour-access-and-seafarers-pay-rates.pdf>

³ <https://www.gov.uk/government/consultations/conditions-for-harbour-access-and-seafarers-pay-rates-scope-and-compliance>

We note that it will be important for a strong awareness raising campaign to be undertaken to make businesses who will be affected by the provisions of the Bill aware of the requirements and in particular, the criminal offences, before these come into force.

Comments on the Bill

Clause 1

Clause 1 sets out the scope of the Bill.

In response to the UK Government consultation on these measures, we noted that if the Government's aim is to achieve a level playing field and improve conditions for seafarers broadly, it would be appropriate for the provisions to apply to all seafarers calling at regularly scheduled calls at UK ports irrespective of ship type. We therefore consider it appropriate that the Bill takes a wide approach to applicability of the measures to vessel type.

We note that "ship" is defined in the Merchant Shipping Act 1995 section 313 as "every description of vessel used in navigation". The Bill refers to "kind of vessel used in navigation". We consider it would be most appropriate for the definition within this Bill to be consistent with the definition used in the Merchant Shipping Act so as to provide consistency across the statute book.

Clause 2

Clause 2 sets out the meaning of non-qualifying seafarers. We note that section 313 of the Merchant Shipping Act 1995 contains a definition of 'seaman' – it may be of assistance if this Bill cross-referred to that Act to provide clarity across the statute book.

Clause 3

Clause 3 empowers a statutory harbour authority to request a declaration from the operator of a service that they pay the seafarers working on their services at least a rate equivalent to the national minimum wage (NMW) for the time worked in the UK or its territorial waters.

Clause 3(3) provides that: "A harbour authority may not request a national minimum wage equivalence declaration in respect of any year unless it appears to the authority that ships providing the service will, by the end of the period to which it relates, have entered the harbour on at least 120 occasions in the year". It is not clear how the process of this assessment will work in practice, particularly given that a ship may use multiple harbours under the control of multiple authorities. In such circumstances, it is not clear whether there will be coordination of the harbour authorities and if so, how this will be undertaken and by whom.

Clause 4

Clause 4 sets out the nature of a NMW equivalence (NMWe) declaration. This is an enabling provision with the national minimum wage equivalent to be an hourly rate specified in regulations.

We previously suggested in our consultation response that the NMWe provisions be based on the Maritime Labour Convention Regulations 2006, Regulation 2.2 and suggested that the Government consider the minimum monthly wage for seafarers set by the International Labour Organization in determining the appropriate NMWe. We suggest these matters are taken into account when preparing the regulations.

Clause 5

Clause 5 enables the Secretary of State to require operators to provide information for the purpose of establishing whether a service is being operated consistently with a NMWe declaration which has been provided by the operator.

We note that clause 5(3) provides that an operator is not required to provide information “to the extent that doing so would cause the operator to breach the data protection laws of any country or territory.” We consider this carve-out to be appropriate.

Clause 6

Clause 6 provides that an inspector appointed by the Secretary of State may board a ship in a harbour in the UK or enter any premises for the purposes set out under clause 6(2).

Clause 7

Clause 7 enables a harbour authority to make a determination to impose a surcharge on an operator of a service in certain circumstances.

We note that the clause provides that a surcharge may be imposed where “it appears to the authority that the operator has committed an offence under section 3(5)”. We consider that this is subjective and could be open to interpretation which could cause uncertainty and a lack of clarity for operators.

We note that “The amount of the surcharge is to be determined by a tariff of surcharges specified by the harbour authority in accordance with regulations...”. Until such time as these regulations are made available, we cannot comment fully on the provisions, however, it is currently unclear as to what determines the value of the surcharge. There is the potential that this could be subjective – for example, where a vessel calls at multiple ports, could a harbour authority impose a surcharge based on the number of calls at a competitor’s ports?

Clause 8

This clause provides that an interested party, as determined by the Secretary of State, may make an objection to a harbour authority's determination to impose a surcharge, the tariff of surcharges specified by a harbour authority, or the imposition of a surcharge or its amount. The clause sets out requirements around seeking representations in relation to the objection, the Secretary of State's consideration of the objection and decision as to the objection.

We note that the Bill does not provide a maximum length of time for the objection process to be carried out – this could cause uncertainty for parties involved who could potentially be waiting for a considerable period of time for a decision to be taken.

Clause 9

Clause 9 provides that a harbour authority may refuse access to its harbour if the operator has not paid a surcharge imposed by the harbour authority as required in accordance with the Bill.

This provision applies irrespective of whether an objection has been made under clause 8 (see clause 9(2)). While we note that the Bill's Explanatory Notes state: "This is a key provision to incentivise payment of NMWe and to achieve the policy intention of making payment of NMWe a condition of access to UK harbours"⁴, we consider that it may be inappropriate for a harbour to be able to block access to a ship where an objection to a surcharge has been raised, particularly against the background that the Bill does not provide for any maximum time period in which the Secretary is to consider objections. This could result in a ship being unable to access a port for potentially a number of months and later for the surcharge to be revoked by decision of the Secretary of State. That said, we also recognise the challenges associated with this approach as a ship could knowingly use the objection process so as to enable access to a port until such time as the objection is resolved.

We previously highlighted that 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), and we therefore welcome the exceptions set out in clause 9(3) which provides that a harbour authority may not refuse access to a harbour in the circumstances set out in the Bill.

Clause 10

Clause 10 concerns prosecution of offences in England and Wales and Northern Ireland. We have no comment to make.

Clause 11

This is an enabling provision which provides powers for the Secretary of State to:

- 1) give guidance to harbour authorities as to how to exercise their powers under this Act, and

⁴ Explanatory Notes, Paragraph 58

- 2) give directions to any one or more harbour authorities requiring them
 - a) to exercise, or not to exercise, any of their powers under this Act, or
 - b) to exercise any of their powers under this Act in a particular way.

While we welcome the requirement on the Secretary of State to publish any guidance and directions under this clause (clause 11(5)), we consider that it would be appropriate for the Secretary of State to be required to consult with relevant persons before the issuing of guidance or directions. A requirement for consultation provides for an additional layer of scrutiny by stakeholders and a requirement on the Secretary of State to consult will help to ensure openness and transparency of the Secretary of State's actions.

Clause 12

Clause 12 concerns the power to make regulations by statutory instrument, and sets out that regulations made under the Bill are subject to the negative resolution procedure, other than those in respect of clause 15.

Given the potential nature and impacts of the provisions which may be made by regulations under clauses 3, 4, 7 and 9, we suggest that such regulations should be subject to the affirmative resolution procedure to enhance the scrutiny of the regulations by the Parliament.

Clause 13

This clause provides definitions of "harbour" and "harbour authority" aligned with the definitions in other legislation - the Harbours Act 1964 in England, Wales and Scotland, and the Harbours Act (Northern Ireland) 1970 in respect of Northern Ireland. We consider it appropriate that such definitions are used so as to provide consistency across the statute book.

Clause 14

Clause 14 is the interpretation clause. We have no comments.

Clause 15

Clause 15 sets out the extent, commencement provisions and short title. We have no comments.

For further information, please contact:

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