

Summary of responses to the supplementary consultation on the Transfer Order 'A New Era for the Waterways', 12th September – 24th October 2011

December 2011



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



The Scottish
Government



defra

Department for Environment
Food and Rural Affairs

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1. Introduction

Background to proposal

In March 2011, Defra launched a consultation on the UK Government's proposals to place those waterways in England and Wales which are owned by the state in trust for the nation through the establishment of a civil society organisation, a New Waterways Charity (NWC). It stated the Government's proposal for those waterways owned and/or managed by British Waterways (BW) to be transferred to the NWC in April 2012, with the Environment Agency navigations being subsequently transferred in 2015/16, subject to affordability and the agreement of the charity's Trustees at that time. The consultation closed on 30 June and a Government response to the consultation was published on 12 September.

The Transition Trustees of the NWC announced on 6 October that the new charity would be called Canal & River Trust (CRT), or Glandwr Cymru in Wales.

The Public Bodies Bill now before the UK Parliament would, subject to its enactment, provide the necessary powers to transfer functions, assets and liabilities from British Waterways to the CRT. Assuming successful passage of that Bill, the Government proposes to use those powers to make a Transfer Order moving across functions and making consequential provision, and to make a separate scheme transferring property, rights and liabilities.

What we were seeking views on and why

A supplementary consultation document was published alongside the Government response to the earlier consultation on 12 September. The supplementary consultation provided further detail about the content of the proposed Transfer Order. It provided information about the legislation which relates to British Waterways, the general form of the transfer and the small number of significant amendments that the UK Government believes are necessary to existing legislation, in order to reflect the fact that the CRT will be operating in civil society rather than as a public corporation. The consultation invited comments in response to specific questions on the proposed transfer. The consultation also sought, on behalf of the Scottish Government, the views of stakeholders particularly in Scotland about aspects of consequential changes in Scotland resulting from the continued operation of British Waterways in Scotland.

Transition Trustees' input to this response

In developing this response, we have worked with the Transition Trustees of the Canal & River Trust and agreed the response with them.

2. Summary of responses and the Government response

We received 61 responses to the consultation. Five of these were received within one week after the deadline and have been included in this summary. A list of respondents is at **Annex A**. Names of individual respondents are not listed in Annex A for data protection reasons, though many stated an affiliation with one or more of the organisations who had responded to the consultation on behalf of its membership.

Defra held a stakeholder meeting during the consultation period with representatives of some key stakeholder organisations, at which the consultation document was discussed and there was an opportunity to ask questions.

The main points raised by the consultation and the Government's or Scottish Government's response to each area are given below.

Questions in section 3 – Significant material adaptations of existing statute law

Removal of the Ministerial power to direct disposal of property under the Local Government, Planning and Land Act 1980

We asked: *Do you agree that the power for the Secretary of State and the Welsh Ministers to give directions on the sale of land assets will no longer be needed when the assets of BW in England and Wales transfer to the NWC? If not, what are the circumstances in which you envisage such directions would be needed?*

You said: Approximately one-half of respondents answered this question. Of those who responded, nearly two thirds agreed with the Government's proposal to remove the power for the Secretary of State and the Welsh Ministers to give directions on the sale of land assets. Those who disagreed with the proposal expressed concerns that removing the accountability to Parliament could result in CRT selling off valuable national assets and that additional safeguards were needed. Some respondents raised more general concerns while not addressing the question, such as the Government should have a role in checking over any proposals to sell land of historic interest or that any income derived from land sales should be invested back into the property portfolio.

The Government's response: The Government confirms its intention to remove the power for the Secretary of State and the Welsh Ministers to give directions on the sale of land assets when the assets of BW in England and Wales transfer to the CRT. The operational heritage infrastructure will be preserved in a trust in perpetuity, for the benefit of the nation. The Trust Obligations will detail which land will be inalienable.

Provision in the Transport Acts 1962 and 1968 on employment

We asked: *Do you agree that the provisions in ss.73 to 75 of the 1962 Act and s.137 of the 1968 Transport Act are not needed by the NWC? If not, please explain your reasoning.*

You said: A majority of respondents agreed that the provisions specified would not be needed by the Canal & River Trust. In response to this question several respondents expressed a view that the pension liabilities should not be transferred to the CRT but should be retained by Government. Some others thought the pension liabilities should only be transferred to the CRT if sufficient Government funding was provided to account for this liability. One respondent explicitly disagreed with the proposal on the grounds that arbitration and other mechanisms for negotiation and conflict resolution are imperative to good employment relations. One response expressed a view that the statutory protection given by these provisions is not directly replaced by the requirements under more recent legislation and sought assurance that the BW pension fund had protection equivalent to that provided by sections 73-75 of the Transport Act 1962. Some respondents expressed a view that the transfer to the CRT provided an opportunity to reduce the pay, bonuses and pensions of the BW Directors and senior management staff.

The Government's response: The Government confirms its intention not to extend these provisions to the CRT. The Trustees firmly believe that the maintenance of good employee relations is very important to the success of CRT. Good, regular communication and liaison at all levels contribute to that and the Trustees have committed to continuation of the existing Representation and Procedure Agreement with Unite and Unison on the same terms. They will be looking at ways further to improve dialogue with all employees of CRT, both unionised and un-unionised. In accordance with employment law all employees of BW in England and Wales will transfer to CRT on the same terms and conditions they currently have.

Classification and maintenance of waterways – Sections 104 and 105 of the Transport Act 1968

We asked: *Do you agree that the NWC should have an enhanced statutory proposer role in relation to ministerial orders on classification and maintenance of its waterways? If not please explain your reasons.*

You said: There was an even split between those supporting and those opposing the proposal for the charity to have an enhanced statutory proposer power. Concerns were raised, primarily from a small number of live-aboard boaters that there should be no changes on re-classification which might lead to a down-grading of waterways or restrictions on particular users and which in particular could impact to the detriment of certain live-aboard boaters. A number of respondents raised concerns about the need to ensure commercial freight operations continue. Concerns were also raised that there should be no change which would impact on the duty of the charity Trustees to get the best possible value from the funds at their disposal. Any additional burdens on the charity would need to be matched by additional Government grant. One respondent was concerned that the proposal might impact on reclassification of cruiseway waterways, which appeared contrary to the position set out in the first consultation and would be robustly opposed.

The Government's response: The Government confirms its intention for the charity to have an enhanced statutory proposer power. A significant number of the responses opposing the proposal were not focused on the proposal itself. Nearly half of respondents objecting to the proposal raised concerns about how reclassification and maintenance changes might impact on some live-aboard boaters. These points were ones which stakeholders have already raised in comments on the previous consultation on the creation of the charity and did not specifically address the question posed in the supplementary consultation. Comments were also made that the charity should look at a range of efficiency measures before looking to re-classify waterways, again points which were more relevant to, and were raised in response to, the previous consultation.

The Government believes that providing the charity with an enhanced statutory proposer role will not have any impact on decisions on re-classification or maintenance as applications will still be subject to a cost benefit analysis, consultation and determination by Ministers. This will ensure a transparent process.

Ministers' Powers of Direction under the Transport Act 1962

We asked: *Do you agree that the power of Ministers to direct the NWC under the Transport Act 1962 should be restricted to circumstances in the interests of national defence? If not, what powers of direction, if any, should continue to apply to the NWC?*

You said: The majority of respondents agreed with the proposal. Nearly all of the responses opposing the proposal were from live-aboard boaters who wanted powers of direction to remain to provide accountability and to provide constraints on the charity's actions towards live-aboard boaters such as evictions. While agreeing with the proposal, two respondents queried the need for a direction for national defence where other legislative measures might be used where there was a serious defence or military threat to the nation.

The Government's response: The Government intends to restrict Ministerial powers of direction to circumstances in the interest of national defence. Accountability is maintained through the charity's new governance structures which are specifically designed to ensure accountability to the wide community of interested parties, not just waterways users but also to environmental and heritage groups and local communities. The charity will also be accountable to the Government, through its funding agreement, for the Government's long-term funding for the waterways. The Government notes the continuing concerns of some live-aboard boaters but there are a number of legal mechanisms already in place to provide protections for users of the waterways where enforcement action has been taken. The Government does not believe the needs of some live-aboard boaters should be specifically addressed by a continuing general power of direction. More generally, it does not believe a more general power of direction is appropriate in dealing with an independent charity.

Freedom of Information and the Environmental Information Regulations

We raised three options for treating the CRT in relation to the Freedom of Information Act (FOIA) and the Environmental Information Regulations (EIRs):

Option 1: Do not include the CRT as a 'public authority' for the purposes of the FOIA. CRT will commit to high standards of transparency within the spirit of the FOIA and EIRs, in accordance within its proposed transparency policy.

Option 2: Bring the CRT within the scope of the FOIA only in respect of information relating to its exercise of functions of a public nature.

Option 3: Include CRT as a public authority in Schedule 1 of the FOIA. This will bring it within the scope of the FOIA and the EIRs.

You were invited to indicate and explain your preferred option. We also asked: *Are there any improvements that you would like to see to the CRT's proposed transparency policy?*

You said: Respondents had mixed views. Roughly one-third of individuals and one-third of organisations that responded to the consultation chose not to answer this question at all. Of those who did, those who wanted FOIA and EIR to apply wholly to the CRT formed the biggest grouping (roughly one-third of all those organisations who responded to the consultation and two-fifths of individual respondents to the consultation). Typical reasons given included the public functions to be carried out by the CRT and the CRT's public funding; the importance of accountability and transparency.

A smaller group of organisations (roughly one-fifth of all such respondents to the survey) and individuals (roughly one-eighth of all such respondents to the survey) said that the FOIA should not apply to the CRT. Typical arguments included the need for the CRT to be treated like other charities, and to avoid imposing administrative burdens on the new charity. The small group of organisations and individuals who supported partial application of the FOIA to the CRT tended to argue in favour of a balance between the CRT's charitable activities and those where it was performing a public function.

The Government's response: The Government has listened carefully to arguments made by all sides of this complex debate, including those of stakeholders and the CRT's transitional trustees. It believes that a balance should be struck between, on the one hand, the wish of many stakeholders that individual citizens should have continued access to information held by a body that will, like its predecessor, exercise important statutory powers, functions and duties, and, on the other hand, the desire of the CRT's transitional trustees that the Government should duly recognise that the CRT will be an independent charity operating within its own structures of governance and accountability. The Government finds that, while the public will continue to have a legitimate interest in the way that the CRT operates the statutory functions currently carried out by BW, accountability for the CRT's broader charitable purposes and activities should be left to its own governance arrangements – as is the case for any other charitable body. Moreover, bodies with which the CRT may subsequently merge should not be caught by the provisions of the FOIA and EIRs unless they are already caught by those provisions. As far as possible, the CRT should be treated, for the purposes of the FOIA and EIRs, comparably to other statutory navigation authorities.

The Government, therefore, intends, subject to parliamentary approval, to apply the FOIA to the CRT in respect of those functions and duties that will transfer from BW to the CRT under the proposed Transfer Order. This limited application of the FOIA will have the effect of excluding from the provisions of the Act those broader charitable functions carried out by the CRT (including, e.g., its own fundraising). It will also exclude bodies that merge with the CRT, unless the FOIA already applies to them at the point of merger.

Recognising that, as concerns administrative burdens, this will initially put CRT in a potentially disadvantageous position with regard to other statutory navigation authorities, the Government will, within two years, launch a procedure, under s.5 of the FOIA, to consider extending the

provisions of the Act to other statutory navigation authorities, with the intention of creating a broadly comparable level of obligation across the various navigation authorities. Such extension would be in line with the Government's commitment to extend the provisions of the FOIA. If, however, under this process, the Government decides not to apply the FOIA to those authorities, it will reconsider the continued application of FOIA to the CRT, with the view to ensuring long-term parity of treatment across the sector.

In the circumstances outlined above, the EIRs may be considered to apply to the CRT to the extent that the CRT is carrying out 'functions of public administration'. Ultimately, it will be for the Courts to determine whether CRT is caught by this provision of the law. In the absence of clear jurisprudence or a specific ruling on this matter, the Government will look to the CRT Trustees to adopt a transparency policy that would, as they have proposed, 'closely follow...the spirit of the EIRs', and it will seek to capture this commitment in the funding agreement that is being negotiated between the Government and the CRT trustees. This will ensure continued access to environmental information on comparable terms as now.

House of Commons Disqualification Act 1975; Scottish Parliament (Disqualification) Order 2010; National Assembly for Wales (Disqualification) Order 2010

We asked: *Do you agree that the disqualifications applying to members of the BW Board through the House of Commons Disqualification Act 1975, Scottish Parliament (Disqualification) Order 2010 and National Assembly for Wales (Disqualification) Order 2010 should not be applied to the trustees of the NWC? If not, please explain your reasoning.*

You said: The majority of respondents were in favour of not imposing the same disqualifications on the CRT Trustees as applies to members of the BW Board. Most did not give any reason for their support but some of the reasons cited included there being no reason why Trustees could not stand for Parliament and that they should enjoy the same rights as members of other charitable organisations. The reasons given for retaining the disqualifications were the time commitments involved and any conflict of interest which may arise as a result of their dual roles.

The Government's response: The Government confirms it will not apply the House of Commons Disqualification Act 1975, the Scottish Parliament (Disqualification) Order 2010, or the National Assembly for Wales (Disqualification) Order 2010 to the Trustees of the new charity (nor the Northern Ireland Assembly Disqualification Act 1975, to which the same principles apply). There are already sufficient rules governing the roles of MPs in situations where a conflict of interest occurs. The efficient running of the board of Trustees is subject to the CRT's governance arrangements and it would be for the CRT to decide and take any action if the Trustee in question was not capable of fulfilling their role to an acceptable level due to time constraints.

Questions in section 4 – Consequential provision for Scotland

BW is a cross-border organisation and is responsible to the Scottish Government in respect of its activities in Scotland. Scottish Ministers have decided that Scottish canals will remain in the public sector and so British Waterways will continue to operate in Scotland. The decision to establish the Canal & River Trust and to transfer BW waterways in England and Wales into it

will require a few consequential changes to legislation to allow the BW Board to operate effectively in Scotland in future without involvement from UK Government Ministers.

On behalf of the Scottish Government, the supplementary consultation document also sought the views, particularly of stakeholders in Scotland, about key aspects of those consequential changes in Scotland. The Scottish Government has analysed these responses.

Only thirteen responses were received to the Scottish component of the consultation, suggesting that there is general contentment with the proposals. One respondent did not offer comment on the consultation questions but wrote to draw attention to other secondary legislation which will continue to apply. Seven of the 12 other respondents provided replies covering solely the Scottish element of the consultation and so would appear to be stakeholders in Scotland whilst 5 provided responses covering both the England and Wales and Scotland questions.

The Board

We asked: *Do you agree with the Scottish Government's proposal that the British Waterways Board, operational solely in Scotland, should consist of a chair, a vice chair, and between one and four other members?*

You said: A majority of respondents either agreed with the proposals or did not comment. One Scottish organisation preferred a minimum Board of four, while another organisation preferred six. A few respondents, who do not appear to be stakeholders in Scotland, expressed a view that a Board of 9 was necessary to avoid concentration of power in the hands of too few people and to act as a safeguard against the abuse of power. One response suggested that the quorum should be increased to four.

The Scottish Government's response: The Scottish Government confirms its intention for the British Waterways Board, operational solely in Scotland, to consist of a chair, vice chair and between one and four other members, and that it will not revise the existing quorum of three. Scottish Ministers believe that a large Board would represent poor value to the Scottish purse, and would be excessive for the size of organisation. The maximum size proposed is similar to that for the boards of other Scottish transport organisations, such as Highlands and Islands Airports Ltd, Caledonian Maritime Assets Ltd and David MacBrayne Ltd. The proposed minimum Board size is consistent with the existing quorum level of three, which has been in existence for many years. Recruitment is underway for the Scottish-only Board, with Ministers aiming to ensure sufficient expertise to lead the organisation successfully in this transition and as it looks to meet new challenges and maximise opportunities across the range of its activities.

Scottish legislation

We asked: *Do you agree with the Scottish Government's proposal that the British Waterways Board operating solely in Scotland should, in future, come within the scope of the following relevant Scottish legislation:*

- (a) The Freedom of Information (Scotland) Act 2002;*
- (b) The Environmental Information (Scotland) Regulations 2004;*
- (c) The Scottish Public Services Ombudsman Act 2002; and*
- (d) The Ethical Standards in Public Life etc. (Scotland) Act 2000?*

You said: Respondents, who included The Waterways Ombudsman and the Scottish Information Commissioner, were supportive of the proposal.

The Scottish Government's response: The Scottish Government confirms its intention that the British Waterways Board operating solely in Scotland should come under the scope of relevant Scottish legislation. In addition to the ones listed, this will include the Public Services Reform (Act) 2010 and the Public Records (Scotland) Act 2011.

Water

We asked: *Do you agree that the water abstraction legislation now in place in Scotland is sufficient such that the requirement for Ministerial consent in the Transport Act 1962 can now be repealed?*

You said: There was no disagreement with the proposal.

The Scottish Government's response: The Scottish Government confirms its intention to repeal the requirement for Ministerial consent.

Other issues raised in the responses

Many respondents raised issues outside the immediate remit of this consultation and which were addressed in the previous consultation.

One issue outside the remit of the consultation was a view expressed by some individuals and organisations involved in outdoor swimming that the move to the CRT would be an opportunity to change the law to allow responsible swimming in waters controlled by CRT. The Government has noted these concerns. However the future policy on swimming in waters controlled by the CRT will be a matter for the Trustees.

3. The Way Forward

Following the outcome of this consultation, and, subject to Parliamentary approval of the Public Bodies Bill, the Government will lay before Parliament an Order to transfer the functions of British Waterways in England and Wales to the Canal & River Trust.

The Transition Trustees issued a progress report on 6 October setting out their thinking on membership, governance, funding, management and other matters relating to the new charity. The report is available at <http://www.britishwaterways.co.uk/media/documents/Trustee-Announcement-The-Canal-and-River-Trust.pdf>

Annexes

Annex A – List of respondents

Angling Trust
Association of Chief Executive of Voluntary Organisations (ACEVO)
Bedford & Milton Keynes Waterway Trust
British Canoe Union
British Marine Federation
British Waterways Pension Trustees Limited
Commercial Boat Operators Association
Coventry Canal Society
English Heritage
Historic Narrow Boat Owners Club
Historic Scotland
Inland Waterways Advisory Council
Inland Waterways Association
Land Registry
National Association of Boat Owners
National Bargee Travellers Association
National Council for Voluntary Organisations
Nationwide Alliance of Boat Surveyors & Examiners
Norfolk and Suffolk Boating Association
Outdoor Swimming Society
Residential Boat Owners' Association
River and Lakes Swimming Association (RALSA)
Royal Yachting Association
Scottish Information Commissioner
Southern Canal Association
Staffordshire and Worcestershire Canal Society
The Association of Waterways Cruising Clubs (AWCC)
The Information Commissioner
The Kennet & Avon Canal Trust
Trial Waterways Partnership for the K&A and B&T
VisitScotland
Waterways Ombudsman
West Midlands Fire Service