

Harbours Act 1964 section 40A: Consultation on a second round of applications from harbour authorities to be designated with the power to give harbour directions

GOVERNMENT RESPONSE



**Department
for Transport**

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Introduction

Background

1. This consultation concerned 6 applications received from statutory harbour authorities (SHAs) wishing to be designated with the power to give harbour directions under new section 40A of the Harbours Act 1964 (“the 1964 Act”), as inserted by section 5 of the Marine Navigation Act 2013:

<http://www.legislation.gov.uk/ukpga/2013/23/section/5>).

The power would allow designated SHAs to give harbour directions for the movement, mooring, equipment and manning of ships¹ within or entering or leaving their harbours.

2. The mechanism under new section 40A of the Harbours Act is a simpler, quicker and far less costly means for an SHA to acquire the power to give harbour directions than applying for a harbour revision order under section 14 of the 1964 Act or the promotion of a private bill. Once an SHA has been designated with the power, it represents an additional tool in its regulatory armoury for managing ships in its harbour alongside the other powers in its local statutes such as its harbour byelaw-making powers. The procedure for making harbour directions is far less cumbersome than that for harbour byelaws, which must be confirmed by the Secretary of State. The harbour directions power should, therefore, enable a harbour authority to have a more agile response to address/mitigate safety, environmental and other risks identified in its harbour.

3. The Secretary of State for Transport is responsible for designating SHAs for English harbours and non-fishery Welsh Harbours. Designation of applicant SHAs for Welsh fishery harbours and Scottish harbours are respectively the responsibility of the Welsh and Scottish Governments.

Harbour directions guidance

4. The Department for Transport issued Harbour Directions Guidance in November 2013 which can be found at the following link:

<https://www.gov.uk/government/publications/harbour-directions>

This is non-statutory guidance but is aimed at providing assistance to SHAs as to the requirements of the Secretary of State before an SHA is included in a harbour directions designation order.

¹ In section 57(1) of the Harbours Act 1964 the definition of “ship”, where used as a noun, includes every description of vessel used in navigation, seaplanes on the surface of the water and hovercraft within the meaning of the Hovercraft Act 1968;

5. To ensure responsible use of the harbour directions power, an industry-led National Directions Panel (NDP) was set up whose membership comprises the following six organisations representative of either SHAs or harbour users:

British Ports Association (BPA)
Royal Yachting Association (RYA)
British Tugowners Association (BTA)
UK Chamber of Shipping
National Federation of Fishermen's Organisations (NFFO)
UK Major Ports Group (UKMPG)

The Department for Transport has observer status on the NDP.

6. The NDP issued Supplementary Guidance: Code of Conduct on Harbour Directions in November 2013 to coincide with the issue of the Departmental guidance (see above) which can be found at the following link:

<http://www.rya.org.uk/SiteCollectionDocuments/Legal%20docs/NDP%20Guidance%20-%20Code%20of%20Conduct%20on%20Harbour%20Directions%20-%20Nov2013.pdf>

Under the Code of Conduct, harbour authorities applying to be designated with the power to give harbour directions are asked to submit a signed Assurance Statement that they will abide by the Code as part of their application and all applicant SHAs have done so. The Code sets out a recommended process of consultation with port users, provides model directions for harbour authorities, and sets out a local dispute resolution process.

7. **This is the second such consultation on applications from SHAs wishing to be designated with the harbour directions power.** The first round resulted in the SHAs for 29 harbours in England and Wales being designated in 2015/2016 with the power to give harbour directions².

8. The Department launched the second round of applications to be designated with the power to give harbour directions on 1 October 2015 with the publication of a notice on the Department's website. The notice was also circulated to port associations and directly to harbour authorities who had asked to be notified of the second round. The notice requested SHAs wishing to apply for the harbour directions power to include the following information in their applications:

² <http://www.legislation.gov.uk/uksi/2015/573/made>
<http://www.legislation.gov.uk/uksi/2015/1656/made>
<http://www.legislation.gov.uk/uksi/2016/820/made>

- Their **rationale** explaining why the power to make harbour directions is needed. For example reasons might include:
 - risk analysis has identified a need for a harbour authority to seek the harbour directions power;
 - to assist harbour authority in meeting recommendations of the Port Marine Safety Code and Good Practice;
 - to deal with specific incidents and/or accidents;
 - an increase in traffic;
 - recommendations in a Marine Accident Investigation Branch report;
 - harbour users have requested the power to protect various activities in the harbour.
- Details of any **proposal for amending or repealing any statutory provision of local application which would be inconsistent with the power to give harbour directions or unnecessary**, if that power is conferred **or a statement of intention** for amending/and or revoking any existing byelaws or directions that might otherwise conflict with harbour directions.
- The **outcome of consultations with harbour users with respect to suitability of the harbour authority** applying to the Department **to be designated** with the power to give harbour directions **and on what the power will cover**.
- Details of the **composition of the existing port user group (PUG) or the proposed composition** if a PUG is to be set up for the purpose.
- Copies of **the applicant harbour authority's local Acts/Orders** and details of provisions relevant to describing the harbour limits.
- **Harbour Directions Code of Conduct Statement:** a signed Statement of Assurance that the harbour authority will abide by the industry-led National Directions Panel's³ (NDP) Harbour Directions Code of Conduct
- A list of **relevant local or regional organisations and e-mail contact details** for the Department to use in its formal public consultation.

³ British Ports Association, Royal Yachting Association, British Tugowners Association, UK Chamber of Shipping, National Federation of Fishermen's Organisations and the UK Major Ports Group.

The applications

9. Applications were received from the SHAs for the following 6 Harbours:
- Exeter (Exeter City Council)
 - Neath⁴ (Neath Port Authority)
 - Plymouth (Plymouth City Council)
 - St Mary's Isles of Scilly (Duchy of Cornwall)
 - St Mawes (St Mawes Pier & Harbour Company)
 - Tor Bay⁵ (Torbay Council)

Consultation

10. Given the nature of the subject matter and the fact that the applicant SHAs had carried out an informal consultation with their harbour users prior to submitting their applications, a targeted consultation exercise carried out over a 6 week period was considered appropriate.

11. The consultation ran from 24 October till 5 December 2016. The consultation documentation was published on the Department's website (www.gov.uk/dft) as well as being sent by e-mail to relevant national organisations and local stakeholders identified by the applicant SHAs at the 6 harbours in respect of which applications had been made.

12. A total of 6 responses were received: 2 from national organisations and 4 from harbour users/stakeholders from individual harbours. The respondents are listed in the Annex. The Royal Yachting Association's (RYA) response gave comments on all 6 second round applications but has been treated as a single response to the consultation. The format of the response document has been structured according to the three consultation questions posed.

Question 1

Do you consider the statutory harbour authorities for the harbours for which applications have been made (see Annexes D-1 to D-6 to the consultation document) to be fit and proper bodies to be designated with the power to give harbour directions?

13. The **RYA** considered that there was no reason to believe that any of the applicant SHAs were not fit or proper bodies to be designated with the power to give harbour directions. **Trinity House** did not comment on Question 1.

⁴ Wales – the Secretary of State for Transport is responsible for designating Welsh non-fishery harbours

⁵ Tor Bay harbour includes the harbours of Torquay, Paignton and Brixham.

14. In respect of **Exeter City Council's (ECC's) application**, the Exeter Water Users Group (EWUG) considered the Council to be a fit and proper body to be designated with the power to give harbour directions. The Exe Power Boat and Ski Club (EPBSC) objected to ECC being designated on the grounds that conferral of the harbour directions power might lead to restrictions being imposed on the areas of the harbour currently set aside for power boating and water skiing which were agreed in the 1970s.

15. A private individual "representing public users, marina berth holders and other local interests within Tor Bay" considered **Torbay Council** a fit and proper body to be designated with the harbour directions power.

16. The single response from the St Mawes Sailing Club in respect of **St Mawes Port and Harbour Company's application** did not comment in respect of Question 1.

17. Save for the RYA's response there were no other responses in respect of the following harbour directions applications:

Neath Port Authority (NPA)

Plymouth City Council (PCC)

Duchy of Cornwall (in respect of St Mary's Isles of Scilly)

18. Cattewater Harbour Commissioners, a neighbouring Plymouth harbour authority designated with the harbour directions power in the first round of applications, sent an e-mail of support in January 2016 to coincide with PCC lodging its expression of interest to be designated.

Question 2

Are you content with the port-user group arrangements proposed at the 31 harbours for which harbour directions applications have been made?

19. EWUG, in conjunction with the Exe Estuary Users Association were instrumental in setting up an **Exeter Port User Group (PUG)** for the purposes of harbour directions. EPBSC were concerned initially that they were not adequately represented on the PUG but have now been given a place on it.

20. The **Neath PUG** will comprise those members of the existing River Users Group likely to be affected by proposed harbour directions. The RYA said they were content with the proposed PUG arrangements providing that the Monkstone Cruising and Sailing Club were represented on the PUG and NPA has complied with this request.

21. **PCC's PUG** will be a sub-committee of the Port of Plymouth Marine Liaison Committee (PPMLC) which is the same approach as that of two other

Plymouth-based SHAs designated in the first round of harbour directions applications: Cattewater Harbour Commissioners and the Sutton Harbour Company. The RYA said that provided Port of Plymouth Sailing Association (PPSA) were represented on the PUG they were content with PUG arrangements. PPSA are listed as a member of the sub-committee.

22. The **St Mary's Isles of Scilly PUG** will be the existing harbour user group. The RYA, in its reply, said that it was content with the proposed PUG arrangements at St Mary's.

23. The **St Mawes Harbour User Group will be the adopted PUG** at St Mawes. The RYA has accepted an offer from St Mawes Port and Harbour Company to be represented on the PUG and the Company has admitted the RYA's suggested representative onto the PUG.

24. A sub-group of the Torquay and Paignton Liaison Forum and the Brixham Liaison Forum will be **Torbay Council's adopted PUG** for the purposes of harbour directions. The RYA, in its response, said that provided that the proposed Port User Group includes representatives of the same users' organisations that are represented on the two harbour liaison fora (including the RYA) then it is are content with the proposed Port User Group arrangements and this is the case.

Question 3

Do you have any further comments about designating the statutory harbour authorities for the harbours for which applications have been made with the power to give harbour directions not covered in Questions 1 and 2?

25. **Trinity House** said "we would request that the areas of jurisdiction for each new 'DHA' [designated harbour authority] are defined in WGS 84 Datum Latitude & Longitude." However, the harbours, the SHAs for which are being designated, must be described in the Schedule to the designation order by reference to the harbour limits provisions in the SHA's local legislation. Trinity House has been informed of this and accepts the position.

26. One respondent considered that the harbour directions powers should be available to all ports as part of their statutory structure. The section 40A powers do provide a simpler, less costly means by which a harbour authority can acquire powers to give harbour directions than via a harbour revision or empowerment order. We consider it appropriate that SHAs wishing to acquire the power should submit applications to be designated in order that harbour users and other stakeholders have opportunity to make representations before any decision is taken by the Secretary of State to confer that power on a given SHA.

27. St Mawes Sailing Club indicated in its response that it had written to St Mawes Pier and Harbour Company to enquire if they had any harbour directions proposals and for a PUG meeting to be held to consider them. The Code of Conduct provides for port users to be consulted in advance on any prospective directions prior to them being formally publicised.

Consideration of second round harbour directions applications and consultation responses

28. Five out of the 6 responses received either supported or did not object to the designation of the 6 applicant SHAs.

29. One respondent, EPBSC a user of Exeter Harbour, expressed concern about the harbour authority, ECC, being designated with the harbour directions power because of concerns that this would lead to restrictions in their activities in the harbour in the two areas set aside for power boating and water skiing which had been in place since the 1970s. In response to their concerns about representation on the PUG, a direct representative of EPBSC has now been co-opted onto the PUG. There are 15 other members of the Exeter PUG, representing the various categories of harbour user none of whom registered any objection to ECC's designation with the harbour directions power nor to the PUG arrangements put in place.

30. As regards EPBSC's concerns, designation of ECC involves the conferral of the harbour directions power only at this stage. When ECC comes to exercise the power it has undertaken to abide by the Harbour Directions Code of Conduct. Section 40B(2) of the 1964 Act requires the harbour authority to consult representatives of harbour users prior to making a harbour direction. The Code gives PUG members an important role in considering harbour directions proposals. This will enable EPBSC, and other Exeter PUG members, to make arguments for or against any proposed harbour directions. Under the Code it is recommended that PUG members should be consulted at least 14 days before a prospective harbour direction is formally publicised for at least 28 days and made available for inspection under section 40B of the 1964 Act. In the event of unresolved objections to a proposed harbour direction, the Code also sets out a dispute resolution process in which the PUG has a critical part to play.

31. ECC's application for the harbour directions power under section 40A of the 1964 Act, is a separate matter from the current consultations being undertaken by the Exe Estuary Management Partnership on the Exe Estuary Management Plan 2016-2021.

32. In summary, the Department considers that the applicable legislation Harbour Directions Code of Conduct, which applicant SHAs have agreed to abide by should ensure responsible use of the power and contains sufficient safeguards for harbour users to make representations where they feel they may be adversely affected by a proposed harbour direction. Accordingly, the Secretary of State proposes to designate all 6 second round applicant SHAs with the power to give harbour directions.

33. Just as the Secretary of State may designate a harbour authority with the power to give harbour directions, he/she would also be able to remove the designation if there was sufficient evidence that the designated SHA was not using its power responsibly. Furthermore, a harbour direction must not conflict with any other enactment, for example existing harbour byelaws.

Designation Order

34. To date, three harbour directions designation orders have been made (see footnote 2 on page 4 above) together designating the SHAs for 29 harbours in England and Wales.

35. The designation of the second round applicant harbour authorities with the power to give harbour directions will also be effected by Order, which will come into force on the first common commencement date of 2017 (6 April 2017).

Review

36. The NDP will act as focal point for issues arising from the granting and use of harbour direction powers and oversee and make recommendations on the conduct of harbour authorities exercising the power, all of whom have given written assurance that they will abide by the Harbour Directions Code of Conduct.

37. The Marine Navigation Act 2013 (MNA 2013) which inserted the new harbour directions provisions into the Harbours Act 1964 was subject to a 3 year post-legislative review (PLR) 2013 the report on which will be laid before Parliament during March 2017.

[Optional paragraphs to be included if Government Response is published later than the post-legislative review of the Marine Navigation Act 2013. Designated harbour authorities were appreciative of the simpler, cheaper process to acquire the power to give harbour directions and that the powers would allow a more agile response to tackle/mitigate issues/risks identified in a harbour. However, a number of stakeholders responding noted that the definition of “ship” used within the Harbours Act 1964 did not include vessels such as

personal water craft⁶ so, when making harbour directions, it was frequently necessary to retain or modify byelaws to overcome this which added to the overall time and cost of making revisions.

As designation is merely the conferral of the harbour directions power at this stage, it is not possible to assess whether the section 40A power applying to ships rather than vessels is an issue in practice until designated SHAs start exercising the power.]

Future applications

38. This consultation concerned the second round of applications from SHAs wishing to be designated with the harbour directions power under new section 40A of the Harbours Act 1964. As further SHAs, evaluating their statutory powers, determine a need to apply to be designated with the new power, further batches of applications will be invited and considered though this is unlikely to happen before 2018. Any call for further expressions of interest will be widely publicised.

Ports Governance Branch
Maritime Commerce & Infrastructure
Department for Transport

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⁶ R v Goodwin judgement in Court of Appeal 7 December 2005 ruled that a jet ski was not a “ship” within the meaning of the definition of ship in section 57(1) of the Harbours Act 1964, as amended.

HARBOURS ACT 1964 – SECTION 40A:
DfT 2016-19 – CONSULTATION ON A SECOND ROUND OF APPLICATIONS
FROM HARBOUR AUTHORITIES TO BE DESIGNATED WITH THE POWER
TO GIVE HARBOUR DIRECTIONS

**LIST OF RESPONDENTS TO DEPARTMENT FOR TRANSPORT
CONSULTATION (TOTAL: 6)**

NATIONAL ORGANISATIONS – 2
Royal Yachting Association (RYA) ⁷
Trinity House
EXETER (APPLICANT: EXETER CITY COUNCIL) – 2
Exmouth Water Users Group (Exmouth Chamber of Commerce)
Exe Power Boat and Ski Club
NEATH (APPLICANT: NEATH PORT AUTHORITY) – 0
Mentioned in RYA reply but no other responses received
PLYMOUTH⁸ (APPLICANT: PLYMOUTH CITY COUNCIL) – 0 RESPONSES
Mentioned in RYA reply but no other responses received
ST MARY’S ISLES OF SCILLY (APPLICANT: DUCHY OF CORNWALL) – 0
Mentioned in RYA reply but no other responses received
ST MAWES (APPLICANT: ST MAWES PIER AND HARBOUR COMPANY) - 1
St Mawes Sailing Club
TOR BAY (APPLICANT: TORBAY COUNCIL) - 1
Private individual “representing public users, marina berth holders and other local interests within Torbay”

⁷ The RYA’s letter, which commented on all 6 applications, is being treated as a single response.

⁸ Plymouth City Council’s harbour consists of a series of piers which are listed in section 26(1) of the Plymouth City Council Act 1987 (PCCA - http://www.legislation.gov.uk/ukla/1987/4/pdfs/ukla_19870004_en.pdf). The Council’s limits of jurisdiction are defined in section 29 of the PCCA as an area of water within a distance of 100 metres of any pier. Three other Plymouth SHAs have already been designated with the section 40A harbour directions power: Sutton Harbour Company for Sutton Pool, Cattewater Harbour Commissioners for Cattewater Harbour, and Associated British Ports for Plymouth Millbay. The Dockyard Port of Plymouth is under the statutory control of the Queen’s Harbour Master Plymouth.