

A Guide to the

# MARINE NAVIGATION ACT 2013

By Ian Woods, Solicitor at Ben Macfarlane & Co

## INTRODUCTION

The Marine Navigation (No.2) Bill (“the Bill”) received Royal Assent on the 25<sup>th</sup> April 2013 becoming the Marine Navigation Act 2013 (“the Act”) and is expected to come into force over the next few months. The Act amends existing legislation in relation to pilotage, harbour authorities, general lighthouse authorities and the manning of ships, as well as extending the powers of port police.

This article provides a brief overview of the main provisions of the Act but seeks to concentrate on new powers given to harbour authorities to issue ‘Harbour Directions’.

## OVERVIEW OF THE ACT

The Act has been described as ‘*broad in content but specific in nature that seeks to invigorate, liberate and innovate to the benefit of the maritime industry*’. Supporters of the Act see it as a mechanism to enhance safety whereas others are concerned that it may reduce safety and provided a mechanism for unelected harbour authorities to create new criminal offences. A brief summary is provided below.

### *Pilotage Exemption Certificates*

The requirement to have a maritime pilot on board a vessel to enter or traverse some harbours creates an added expense to shipping companies. In some instances, where a master or first mate has a detailed knowledge of a particular harbour and meets the requirements set by that harbour authority, that person is eligible for a Pilotage Exemption Certificate (“PEC”) under s.8 of the Pilotage Act 1987. Section 2 of the Act amends the Pilotage Act 1987 and extends eligibility to hold a PEC to any ‘deck officer’.

The objective of the Act here is to create greater flexibility by allowing harbour authorities to grant PECs to other deck officers if they can prove themselves to be competent. Concerns that broadening the categories of persons eligible to hold PECs may compromise safety was illustrated by

comments from the UK Harbour Masters’ Association who wrote in a letter to the House of Commons that: “*it is essential that the role of the pilot is, in the interests of marine safety, restricted to only the most experienced navigation officers signed on the vessel’s articles or other official documents*”.

Despite these and other concerns, section 2 was enacted un-amended on the basis that a competent harbour authority is restricted by section 8 of the Pilotage Act to only issue a PEC when they are certain that the applicant’s skill, experience and local knowledge are sufficient for him to be able to pilot the ship. A PEC is specific to a particular waterway *and* a specified named vessel or vessels. Although the qualifications required to obtain a PEC are set by the harbour authority it is envisaged that a PEC should be restricted to deck officers that are regularly tasked with the navigation of the ship and who can demonstrate this.

Section 4 of the Act (which amends the Pilotage Act 1987 by substituting a new section 15(3)) makes it an offence for the master of a ship not to give a pilotage notification before the ship is navigated in an area for which a pilotage direction is in force.

### *Harbour Directions*

Section 5 of the Act provides a new power to all designated harbour authorities to give ‘harbour directions’ to ships within, entering or leaving their harbour. This section has been the most controversial part of the Act and has been viewed by many as providing an unlimited power to a non-democratically elected authority to impose byelaws that may restrict important freedoms including the right to navigate. Section 5 and ‘harbour directions’ generally are considered in greater detail below.

### *Port Constables*

This section extends the geographic jurisdiction for ports police forces in England and Wales beyond the boundary of the port.

### *General Lighthouse Authorities*

These sections authorise General Lighthouse Authorities (“GLAs”) to enter into agreements for others to use the authorities’ assets and allow them to provide consultancy and other services.

### *Manning Requirements for Ships & Marking Wrecks*

Section 10 of the Act amends section 47 of the Merchant Shipping Act 1995 relating to manning requirements on ships and allows regulations made under section 47 to specify conditions by reference to documents prepared by other people.

Section 11 of the Act amends section 252 of the Merchant Shipping 1995 under which harbour authorities have power to mark wrecks which are or are likely to become a danger to navigation. Under this section the marking of wrecks can either be by physical devices (such as buoys or lights) or by broadcasting relevant information e.g. to show relevant information on electronic charts and devices.

## **HARBOUR DIRECTIONS**

### *The Regime Prior to the Act*

Harbours in England, some more than others, have a range of powers to set regulations, give directions or create byelaws. These powers allow harbour authorities to make regulations covering a wide range of subjects that, inter alia, include: the movement of vessels within the harbour, navigational rules, licences, speed limits, alcohol etc. Prior to the Act there were three main types of powers:

1. Special Directions;
2. General Directions; and
3. Byelaws.

### Special Directions

Section 52 of the Harbours, Docks and Piers Clauses Act 1847, usually incorporated into a harbour’s local enabling legislation, allows a harbour master (or person designated by the harbour master) to give specific vessels instructions for specific movements, these are known as ‘Special Directions’. Failure to comply is an offence unless the master, whose vessel is the subject of the directions, reasonably believes that he would endanger the vessel by complying. Special Directions are not, however, generally applicable or permanent regulations.

### General Directions

Some harbour authorities have powers of General Direction; however, this is more the exception than the rule. These powers allow a harbour authority to lay down general and long term rules relating to the movement of ships (and other related matters) by a simpler and more flexible method than making byelaws. In most cases, powers of General Direction have been introduced via an amendment to the local enabling legislation (i.e. the Act of Parliament setting up a particular harbour authority) by way of a Harbour Revision Order. The Revision Order will include the procedure for making General Directions. This procedure may involve a consultation process with an advisory body such as the Chamber of Shipping and/or the Royal Yachting Association as well as the users or categories of users of the harbour.

### Byelaws

A harbour’s power to make harbour byelaws will be set out in the local enabling legislation. The code to good practice on port marine operations states that byelaws should be reviewed regularly to ensure that they remain fit for purpose, however, due to the lengthy and relatively expensive process for revising byelaws, many harbours’ byelaws have not been updated with many dating back to the 1970’s.

Subject to any available defence, failure to comply with a Special or General Direction and/or a Byelaw is an offence punishable, usually, by way of a fine.

### *The Regime under the Act*

Section 5 of the Act inserts new sections 40A – D into the Harbours Act 1964 permitting all designated harbour authorities to give directions (“Harbour Directions”) in respect of ships within their harbour and entering or leaving the harbour. These directions:

- (a) may relate to the movement of ships, the mooring or unmooring of ships, equipment (including their nature and use) or the manning of ships;
- (b) may apply generally or only in relation to specified circumstances, areas, periods or descriptions of ships;
- (c) may be different for different circumstances, periods, areas, or descriptions of ships.

A master of a ship must ensure that Harbour Directions are complied with and any breach, without reasonable excuse, is an offence and may incur a penalty not exceeding level 4 on the standard scale (currently £2,500).

The effect, therefore, of section 5 of the Act is to provide all designated harbour authorities with the power to make long term and generally applicable rules that govern all categories of ships within and entering or leaving the harbour area including recreational users of the harbour.

However, before giving Harbour Directions the harbour authority must:

- (a) consult such representatives of users of the harbour as the authority think appropriate;
- (b) make such arrangements as they think appropriate for publicising a proposed harbour direction for at least 28 days before it is given;
- (c) make Harbour Directions available for inspection and supply a copy to anyone who requests it;
- (d) as soon as is reasonably practicable after giving the direction, publish a notice in a newspaper specialising in shipping news stating that the direction has been given and giving details for the inspection and supply of copies of Harbour Directions.

### *What has changed?*

At first glance these appear to be similar to the powers of General Direction secured by some harbour authorities via Revision Orders and Byelaws. Why then has the introduction of Harbour Directions caused concern to sectors of the maritime community including the RYA?

One of the main reasons for unease was that it was felt that the new provisions conferred substantial law-making powers without any supervisory safeguards or democratic checks and balances. It was, and is, feared that Harbour Directions may be exercised indiscriminately, without reasonable cause or without paying attention to any objections that might lead to burdensome restrictions being imposed on navigation and the use of recreational craft.

Prior to the Act, very few harbour authorities had secured powers of General Direction (mainly due to the lengthy and expensive procedure of obtaining a Harbour Revision Order) and those that had were subject to a more stringent consultation procedure than is provided for under the Act. A revision to harbour byelaws requires a lengthy consultation process and approval from the Secretary of State. Under the Act, as things now stand, it is far easier (and less expensive) for all designated harbour authorities to lay-down regulations in the form of Harbour Directions without the same level of scrutiny.

### *Harbour Directions & Byelaws*

The question then arises: what is the difference between Harbour Directions and byelaws? An authority’s power to make byelaws derives from the incorporation of section 83 of the Harbours, Docks & Piers Clauses Act 1847 into the local enabling legislation. Section 83 sets out a list of purposes for which byelaws can be made and generally byelaws have a much wider scope than Harbour Directions under the Act. For example, byelaws can be made for the purpose of regulating the duties and conduct of all persons employed in the harbour and the opening hours of gates and entrances to the harbour. These are matters which would appear to fall outside the scope of Harbour Directions (defined above).

### *Difficulties under the Act*

One difficulty that may arise is if there is a conflict between a Harbour Direction and a byelaw. It is likely that any Harbour Directions intended to update byelaws will have to expressly provide that they are to replace the relevant provisions of the byelaws but in the cases where this is not clear which regulation should prevail?

In relation to enforcement of Harbour Directions, it is an offence where a master of a ship fails to ensure compliance with Harbour Directions. A 'master' is defined in the inserted section 40D(3) to the Harbours Act 1964 as "*in relation to a ship,...the person who has command or charge of the ship for the time being*" (emphasis added). In relation to recreational craft, it will be necessary for the harbour authority to determine whether this is the helm, the owner of the boat or the most experienced/qualified person on board. For example the following scenario may arise: a boat, co-owned in equal shares by an equally qualified and experienced husband and wife, breaches a harbour direction whilst the wife was at the helm with control over the boat and the husband was standing on the deck tying fenders shouting commands, directions or giving advice. The Act clearly envisages that one person will be responsible and in the scenario described problems may arise in identifying the 'master'. It is suggested that any incident where a breach of a Harbour Direction may be in issue, steps are taken at an early stage to identify the master of the vessel.

### **COMMENT**

For many harbours the process of revising byelaws or securing powers of General Direction by way of a Harbour Revision Order is lengthy, difficult and expensive. As a result, many harbourmasters will welcome the addition of Harbour Directions to their regulatory powers. However, the procedure for drafting and implementing Harbour Directions is likely to be altered by a proposed 'Code of Conduct on Harbour Directions' ("the Code") being developed by the RYA together with the British Ports Association, the UK

Major Ports Group and the UK Chamber of Shipping. The Code is likely to provide a means of challenging proposed Harbour Directions through a local Port User Group (PUG). If no resolution can be found, organisations such as the RYA or the Chamber of Shipping will be able to refer the disputed directions to an independent third party.

Although not compulsory, the RYA has indicated that the government will expect all harbour authorities to adopt the Code, a draft of which is yet to be published. It is likely that the Code will add a further layer of complexity to the implementation process of Harbour Directions and potentially provide a platform for lengthy challenges detracting from the original purpose of the Act; to provide harbours with wider and less restricted powers of regulation. On the other hand, the risk of having to engage in a dispute process will encourage harbour authorities to carry out a more thorough consultation process in the first instance and engage with the PUG to achieve their aim in a proportionate manner.

Ultimately the ability to give Harbour Directions will be a useful tool for harbour authorities working in an often changing environment. The effect on the recreational harbour user will remain to be seen but harbours should be careful about implementing reactionary measures (for example, making the use of kill cords mandatory following the Padstow harbour R.I.B incident) until all the information is to hand and the arguments for and against a particular measure can be scrutinised carefully.

This article is intended only to give general guidance and you should always consult a lawyer with any particular problem you may have.

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