

# Transport Scotland Guidance – Harbour Directions Powers

## How to apply for designation.

### 1. Introduction

The Marine Navigation Act 2013 modified the Harbours Act 1964 by adding a new section 40A, which provides Scottish Ministers with the power to designate by order a harbour authority as one having the power to make harbour directions (as defined by that section).

This informal guidance advises harbour authorities in Scotland on the process for applying for such designation. The guidance has no force in law but is aimed at providing assistance to harbour authorities as to the requirements of Scottish Ministers before they include an authority in a designation order.

### 2. What are Harbour Directions?

Harbour authorities have responsibilities for the safe and efficient management of their harbours and powers of direction can be a useful tool in regulating ship movement in the harbour.

In terms of section 40A of the 1964 Act, harbour directions are issued by the harbour authority in respect of ships entering, within or leaving their harbour. They may relate to movement, mooring, unmooring and manning of ships, to equipment or to information to be provided by the master of a ship. For example harbour directions could be used:-

- To prescribe where and how ships are to moor or move within the harbour ;
- To regulate the use of navigation channels ;
- To ensure effective communication with the harbour master by requiring certain ships to have working radio equipment or sufficient experienced crew; and,
- To ensure that ships have certain equipment in working order.

The full text of articles 40A to 40D is reproduced at Annex A for ease of reference.

Harbour directions will only apply to ships as defined in the Harbours Act 1964. This Act defines a ship as including every description of vessel used in navigation, seaplanes and hovercraft. The Court of Appeal in England has held that to mean that to be used in navigation, a vessel must be used to make ordered progression from one place to another.

Harbour directions create criminal offences and harbour authorities must therefore ensure that

- directions are clear and unambiguous
- it is clear who is responsible for complying with a direction

Harbour users must be able to easily understand what is permitted and what is not permitted within the harbour. Harbour directions should therefore use simple language; with definitions of the terms used in the harbour directions (see Annex B).

### **3. Why use Harbour Directions?**

Some harbour authorities already have a specific power to issue directions contained in their local legislation but others may rely on the limited harbourmaster's powers under section 52 of the Harbours Docks and Piers Clauses Act.

The new powers may prove a useful additional tool to authorities in regulating the harbour or addressing specific issues which require an enforceable power rather than more informal means or in byelaws.

Since its first publication in 2000, the Port Marine Safety Code (PMSC) has recommended a harbour authority seek additional powers if a risk assessment concludes that it would be well advised to secure powers of general direction to support effective management of ships in the harbour waters.

Powers to give harbour directions would meet this recommendation, and a designation order made by Scottish Ministers would provide a simpler process to provide these powers to a number of harbour authorities who would otherwise require to promote a harbour revision order for the purpose.

Those harbour authorities that have identified the need for additional powers, but found the process of obtaining byelaw making or general directions powers impractical, should give consideration to obtaining the power to give harbour directions.

#### **4. National Directions Panel and the Code of Conduct**

An industry-led National Directions Panel (NDP) has been set up to provide guidance on the operational use of harbour directions, to act as a focal point on any issues arising from the granting of harbour directions powers and to keep the code of conduct under review.

The NDP includes representatives of the British Ports Association, the UK Major Ports Group, the UK Chamber of Shipping, the Royal Yachting Association, the British Tugowners Association and the National Federation of Fishermen's Organisation. Department for Transport and devolved administrations attend as observers.

The NDP has agreed a non-statutory code of conduct on the exercise of harbour directions and has produced non-statutory guidance on using harbour direction powers which is available on the industry websites.<sup>1</sup>

Scottish Ministers expect any harbour authority applying for designation to agree to sign up to this non-statutory code of conduct before it is designated with the power of harbour directions.

Enquiries about the Code of Conduct or the National Directions Panel should be directed to the panel chairperson c/o UK Chamber of Shipping as noted in the industry guidance.

To assist designated harbour authorities in drafting their harbour directions, the NDP has drafted a set of model directions. They are provided as examples of good practice and can be found annexed to the NDP's guidance. Scottish Ministers recognise that all harbour authorities are unique and

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<sup>1</sup> [http://www.britishports.org.uk/sites/default/files/ndp\\_guidance\\_-\\_code\\_of\\_conduct\\_on\\_harbour\\_directions\\_-\\_november\\_2013.pdf](http://www.britishports.org.uk/sites/default/files/ndp_guidance_-_code_of_conduct_on_harbour_directions_-_november_2013.pdf)  
<http://www.rya.org.uk/SiteCollectionDocuments/Legal%20docs/NDP%20Guidance%20-%20Code%20of%20Conduct%20on%20Harbour%20Directions%20-%20Nov2013.pdf>  
[http://www.ukchamberofshipping.com/media/filer/2013/12/02/ndp\\_code\\_on\\_harbour\\_directions.pdf](http://www.ukchamberofshipping.com/media/filer/2013/12/02/ndp_code_on_harbour_directions.pdf)  
[www.ukmajorports.org.uk/pages/latest-news](http://www.ukmajorports.org.uk/pages/latest-news)

believe that harbour authorities, in consultation with port users, are best placed to make decisions on which harbour directions would be appropriate, based on local circumstances and issues to be addressed.

## **5. Making an application for designation**

Harbour authorities seeking to be designated with powers of harbour direction should write to Transport Scotland at [Harbourorders@scotland.gsi.gov.uk](mailto:Harbourorders@scotland.gsi.gov.uk) setting out their reasons for seeking the new powers. This may include reference to a risk assessment or other circumstances which requires the new powers.

They should indicate why these powers have not been sought previously under the HRO process and include some analysis of the benefits of using the designation route. They should also indicate how they propose to deal with any overlap between harbour direction powers and existing byelaws.

Authorities seeking designation should also confirm that they are signed up to the code of conduct and a sample letter of assurance is attached at Annex C. If a harbour authority is unable to sign up to the code of conduct, this should be explained in the covering letter.

All applications to be designated with the powers to make harbour directions will be assessed on a case by case basis. It is anticipated that an initial tranche of applications will be considered shortly after the legislation is brought into force on 1 October 2013 and if approved will be included in the first designation order. Thereafter applications will be considered as received and further designations will be made as necessary.

Any proposed designation order will be subject to a period of public consultation before it is made so authorities seeking designation are advised to undertake informal consultation with harbour users or others likely to be affected by any directions before applying for designation.

A summary of the designation process is in Annex D. This process applies to Scotland and related guidance for England and Wales can be found on the Department for Transport Website.<sup>2</sup>

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<sup>2</sup> DfT Guidance for England and Wales can be found at <https://www.gov.uk/government/publications/harbour-directions>

## **Annex A**

### **Harbours Act 1964**

#### **Harbour directions**

40A Directions.

(1) A designated harbour authority may give directions (“harbour directions”) in respect of ships—

- (a) within their harbour, or
- (b) entering or leaving their harbour.

(2) A harbour direction may relate to—

- (a) the movement of ships;
- (b) mooring or unmooring;
- (c) equipment (including nature and use);
- (d) the manning of ships.

(3) A harbour direction may require the master of a ship to provide information to a specified person in a specified manner.

(4) “Designated harbour authority” means—

- (a) a harbour authority for a fishery harbour in Wales, who are designated by order of the Welsh Ministers,
- (b) a harbour authority for any other harbour in England or Wales who are designated by order of the Secretary of State, and
- (c) a harbour authority for a harbour in Scotland who are designated by order of the Scottish Ministers.

(5) A harbour direction is subject to any direction under section 52 of the Harbours, Docks and Piers Clauses Act 1847 (directions by harbour master).

(6) A harbour authority may not give a harbour direction which conflicts with an enactment.

(7) An order designating a harbour authority may amend or repeal any statutory provision of local application which the person making the order thinks is—

- (a) inconsistent with the power to give harbour directions, or

(b) unnecessary as a result of the power.

#### 40B Procedure.

(1) Harbour directions must be in writing.

(2) Before giving harbour directions a harbour authority must consult such representatives of users of the harbour as the authority think appropriate.

(3) A harbour authority must make such arrangements as they think appropriate for publicising a proposed harbour direction for at least 28 days before it is given.

(4) A harbour authority must—

(a) make harbour directions available for inspection, and

(b) supply a copy to anyone who requests it.

(5) A harbour authority may charge for the supply of copies.

(6) As soon as is reasonably practicable after giving a harbour direction the harbour authority must publish a notice in a newspaper specialising in shipping news—

(a) stating that a harbour direction has been given, and

(b) giving details of the arrangements for the inspection and supply of copies of harbour directions.

#### 40C Enforcement.

(1) The master of a ship must ensure that harbour directions are complied with.

(2) Breach of subsection (1) without reasonable excuse is an offence.

(3) A person guilty of the offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

#### 40D Supplemental.

(1) Harbour directions—

(a) may make provision that applies generally or only in relation to specified circumstances, areas, periods or descriptions of ship, and

(b) may make different provision for different circumstances, areas, periods or descriptions of ship.

(2) Harbour directions may be varied or revoked by subsequent harbour directions. .

(3) In section 40A—

“mooring” includes casting anchor, and

“unmooring” includes weighing anchor.”

## **Annex B**

### **Modern Drafting tips**

- Reduce the length and complexity of sentences;
- Do not use outmoded language such as 'hereby', 'forthwith' (use 'as soon as practical'), 'thereof', 'therewith', 'hereinafter', 'thereto', (replace with 'to it').  
Also avoid the use of archaic terms;
- Do not use initial capital letters for words that are not proper nouns or defined terms in harbour directions;
- Replace 'shall' with 'must' or 'shall not' with 'must not' where it is intended to impose an obligation;
- Adopt a gender neutral drafting style, for example instead of using 'he', 'his' etc use 'he or she' or 'his and her' and ensure harbour directions comply with equality legislation;
- Avoid the passive form, use active verbs;
- Ensure consistent terminology is used throughout the harbour directions to avoid ambiguity or creating uncertainty in those complying with the harbour directions or enforcing them. Synonyms should be avoided unless intended to mean something different;
- Locations referred to in the harbour directions should be ones that those unfamiliar with the locality can easily locate (for example marked on charts covering the area);
- All relevant enabling powers should be specified.



## **Annex C**

### **Assurance template**

I confirm that the following resolutions of the [specify name of Harbour Authority] were duly passed at a meeting of the [specify harbour authority] on [date].

The harbour authority has had regard to the content of and agrees to comply with the code of conduct on harbour directions. In particular:

- a) to maintain a Port User Group and to apply the dispute resolution procedure set out in the code of conduct; and,
- b) to have regard to guidance issued from time to time by the National Directions Panel on the subject of harbour directions.

The [Chief Executive] is authorised to apply to Scottish Ministers for [specify harbour authority] to be designated as a designated harbour authority for the purposes of section 40A of the Harbour Act 1964.

Name

Signed

Date

## Annex D

### Designation process

- First tranche of applications is likely to be invited towards the end of 2013 with a closing date early in the new year.
- Each case for designation will be considered on its merits and should include:-
  - Reasons for application –
    - Why do you need these powers?
    - What will they be used for?
  - Risk assessment if appropriate
  - Details of user consultation
  - Signed letter of assurance as in annex C

As much information as possible should be provided to allow Ministers to make an informed decision

- A draft designation order will be the subject of a 42 day consultation period:-
  - it will be advertised in the Edinburgh Gazette and on Transport Scotland's Website on behalf of Scottish Ministers;and
  - in a local publication and on the harbour's website/notice board by each of the applicants for designation.
- Any objections or representations received will be considered and should further information be required from applicants there will be a short period for that to be provided.
- If objections to a specific application raise issues which may require more time to resolve, that harbour may be removed from the designation order to avoid delay in granting powers to other applicants. Once issues are resolved a further designation order may be made.
- Order will be made and does not require any Parliamentary procedure
- After the first designation order is made further applications will be considered on an ad hoc basis although we may issue calls for further applicants when we receive an application.