

National Barge Travellers Association

Consultation Response: Middle Level Commissioners Proposals for Amended Navigation Legislation

Introduction

This consultation response is from the National Barge Travellers Association (NBTA). The NBTA is a volunteer organisation formed in 2009 that campaigns and provides advice for itinerant boat dwellers on Britain's inland and coastal waterways. The term Barge Traveller includes anyone whose home is a boat and who does not have exclusive use of a permanent mooring for their boat with planning permission for residential use. The NBTA is the only national organisation in Britain dedicated to upholding and defending the rights of itinerant boat dwellers. The NBTA has members on all the major navigation authorities' waterways and beyond.

General

The NBTA does not believe that there should be any changes to the licensing position of boats using the Middle Levels for navigation and we are opposed to the introduction of a licensing system. The reason for this is that over the past 7 years, the NBTA has seen navigation and other authorities taking increasingly draconian approaches to the enforcement of boat licensing conditions; to the enforcement of the law relating to the licensing of boats and to the imposition and enforcement of conditions for the mooring of boats. All of these changes have been detrimental to the rights and the welfare of all boat dwellers and especially to Barge Travellers, many of whom have been and are being made homeless as a result.

We appreciate that the current proposals for change were consulted upon and accepted by users of the Middle Levels in 2008, but we note that the licensing and charging powers sought require enabling legislation beyond the extent of the powers that can be enabled by the Transport and Works Act 1992 and therefore the powers sought are repugnant to the general law and the Middle Level Commissioners would be acting *ultra vires* if the proposals in this consultation document were implemented without new primary legislation. The NBTA is extremely concerned that the Middle Level Commissioners have omitted to inform the public of the limited extent of their current powers to introduce a licensing and charging regime under the existing legislation. It is disappointing that the Commissioners have decided to recycle proposals that on examination have been found to be legally dubious. It is questionable whether this is a good and appropriate use of the Commissioners' and the consultees' time and resources and we are puzzled as to why the Commissioners believe that these proposals can become law when the legislative environment has not changed since the previous consultation.

We draw your attention to the following paragraphs on page 28 of *Empowered or hindered?*

An assessment of the effectiveness of existing legal powers in enabling navigation authorities to achieve their full potential. (Association of Inland Navigation Authorities, 2009).

Whilst it is accepted that new enabling powers were required in addition to byelaws and that these powers included the repeal and alteration of provisions of the Middle Level/Nene Navigation Acts, the MLC have been

frustrated and concerned at the difficulties and waste of resources involved in seeking to obtain such powers. The lack of any public general act framework equivalent to the Land Drainage Act has been particularly unhelpful, as has the inconsistent interpretations over the years placed by Defra lawyers on the width of provisions which may be granted under the provisions of the Transport and Works Act 1992. The 1992 Act has proved difficult to interpret as is evidenced by conflicting advice from Defra lawyers in relation to it.

The position regarding byelaws is similarly onerous since, while it is accepted that byelaw making powers do exist within the Transport Act 1968, the lack of a basic model form which could constitute an already agreed framework or baseline has meant that the drafting of byelaws has had to be „de novo“ and involved the consideration of other byelaws, already in force, which may be applicable. This has created a good deal of additional work for the MLC and has tied up resources unnecessarily, which is particularly significant for a small authority. The outcome, especially regarding the proposed Order has been particularly frustrating, since the provisions contained in the proposed MLC order and byelaws were agreed with Users.

The MLC view is that, aside from the making of byelaws, the present framework for the obtaining of navigation powers is defective since it neither provides nor readily enables the obtaining of such powers except possibly at considerable expense, which may not be available to the body seeking such changes.

If any changes are agreed and prove to be legally possible to implement in the form they are proposed in the consultation document, they should not be implemented by means of a Transport and Works Act Order in any event (TWAO). The reason for this is that a TWAO would criminalise boat dwellers who may through no fault of their own (for example due to delays in the payment of welfare benefits that they are entitled to) find themselves on the wrong side of the law.

As it stands the draft TWAO and byelaws, in particular the definition of “houseboat” and Draft Byelaw 22, appear to seek to prevent and criminalise the residential use of vessels unless they are not used as a means of transport. This would be both unjust and unlawful. This provision fails to recognise that many vessels are used both as a home and as a means of transport or for navigation. To prevent and criminalise the residential use of vessels that are also used as a means of transport would be unlawful because of Article 8 of the European Convention on Human Rights/ Human Rights Act 1998, which, being primary legislation and thus having a superior force of law to a TWAO, entitles people to respect for their homes and freedom from arbitrary interference with their homes. We note that the Commissioners have not proposed any definition of “used as a means of transport”. To include the draft byelaws as they stand would lead to an arbitrary and draconian interpretation of whether a vessel is “used as a means of transport” in a way that would violate the Article 8 rights of boat dwellers and lead to mass evictions of boat dwellers and the discriminatory exclusion of Bargee Travellers from the Middle Levels.

If a licensing system is lawfully introduced the licensing authority must in return provide an adequate depth of water for navigation; must provide sufficient places to moor boats for periods of 14 days or more and must provide, or require local authorities to provide, adequate potable water, sewage disposal and refuse disposal facilities free of charge. The location of these facilities should be planned so that water, sewage and refuse facilities are

always available within a maximum cruising time/distance of 4 hours.

The authority of *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* [1978] Scot CS CSIH 3 confirms that while a Public Right of Navigation does not extend to the right to lay permanent mooring structures, where a Public Right of Navigation exists, it includes the right to moor for temporary periods using equipment that is intended to be, and can conveniently be, taken onto and carried on board the vessel in the ordinary course of use (such as ropes and mooring pins).

In the *Fairlie Yacht Slip* case, the Court made no ruling on what length of time constitutes "temporary". The reasonableness of the length of each stay depends on factors such as the circumstances of each boat and on river and weather conditions. Therefore to place specific time restrictions on moorings would be an unlawful and unreasonable interference with the Public Right of Navigation. As a public corporation the Middle Level Commissioners are required to exercise statutory power in a reasonable manner following the authority of *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1KB 223.

Fixed and enforced mooring time limits do not reflect the reality of navigating all year round as NBTA members do. Circumstances such as flood; high winds; mechanical breakdown; illness; ongoing medical treatment; disability; pregnancy; family emergency and caring for vulnerable or elderly family members mean that Bargee Travellers may need to stay longer than a given time limit. They need to be able to do so without being penalised for circumstances that are beyond their control and no fault of their own. To do otherwise would be fundamentally unjust and unreasonable.

Comments on the draft TWAO

Clause 3.1 must include the wording "develop ... for the use by vessels that are used as primary residences, whether or not these vessels are also used for navigation or as a means of transport". Clause 3.1 otherwise appears to contradict the inclusion of a definition of "houseboat" in the draft byelaws. If this is not included the NBTA will consider taking legal action and will make formal objections to Parliament.

It must be explicitly recognised that people live on boats and protection for them must be included in any legislation, on an equal footing to the leisure use of boats. Article 8 provides boat dwellers with greater rights and protection compared to recreational users of boats and this must be recognised within any new legislation.

It should be recognised that there is no prohibition on the residential use of vessels that do not have a permanent mooring provided that their use does not amount to change of use of the land they are moored to by remaining in one location for more than 28 days in any calendar year.

All moorings should have a minimum stay time of 14 days and there should be widespread provision of 14-day moorings throughout the waterways.

Any licensing system should have reciprocal agreements with the Environment Agency, Conservators of the River Cam and Canal & River Trust.

Clause 3.4, allowing the Commissioners to exercise powers notwithstanding interference with public rights of navigation, would be repugnant to the general law and if implemented

the Commissioners would be acting *ultra vires*. The Public Right of Navigation is a Common Law right that has existed since Time Immemorial and has in some cases been codified in primary legislation. To seek to interfere with the Public Right of Navigation by means of secondary legislation would make the TWAO open to Judicial Review.

In Clause 4.1, the meaning of “the use of those services and facilities” must be defined. This clause must also include a mechanism to limit the Commissioners' ability to impose terms and conditions “as they think fit” that is stronger than a requirement that these should be “reasonable”. If this is not re-worded to include these safeguards, the clause will act as a “Henry VIII” clause allowing the Commissioners to do anything they like, which would be an open door to the harassment and persecution of boat dwellers, as we have seen on other navigation authorities' waterways. Any charges should reflect the level of services and facilities provided including the ability of the Commissioners to provide an adequate depth of water for navigation and any seasonal variations in depth of water.

Conversely, this could be an opportunity for the Commissioners to demonstrate a model of enlightenment and excellence in its treatment of boat dwellers.

The use of the term “emergency” in Clause 4.3 is too narrow a definition: in the case of boat dwellers, giving birth (for example) is not an emergency but is likely to require a longer stay at a mooring location. The wording should be changed to include an entitlement for a vessel to stay longer when the longer stay is reasonable in the circumstances.

The Commissioners must also comply with the Equality Act 2010 in respect of both residential and leisure/recreational boaters who have the protected characteristics defined by the Equality Act, such as disability, age or pregnancy.

Clause 7.1 must include a provision that if locks are closed overnight or for one day a week then waiting areas need to be provided and any mooring charges must be waived that would otherwise be levied.

In Clause 9.5, “without lawful authority” must be defined. This clause must state clearly the requirement that the Commissioners must follow due process and provide respect for the boat dweller's home by successfully making a claim in the County Court before removing a vessel that is someone's home. This is required by Articles 6 and 8 of the European Convention on Human Rights/ Human Rights Act. Both Canal & River Trust and the Environment Agency comply with this requirement. Genuine and thorough enquiries must be made to ascertain whether or not a vessel is someone's home.

Any decision to refuse, revoke, cancel or suspend registration of a vessel must be done in accordance with clear and publicly available criteria; the decision must be made reasonably, and this clause should be re-worded to specify that it is not intended to be used to prohibit the residential use of vessels.

Clause 11.1.a should include the residential use of vessels that are also used for navigation, as we have stated in our comments on Clause 3.1 above.

Clauses 11.1.c.(i), (ii) and (iii) and Clause 11.1.d should not prejudice the rights of riparian land owners to moor boats to their own land. Using a byelaw to interfere with the rights of riparian landowners would be repugnant to the general law and if implemented the Commissioners would be acting *ultra vires*.

Clauses 11.1.c.(i), (ii) and (iii) and Clause 11.1.d must not be used to prohibit residential use as to do so would violate the Article 8 rights of boat dwellers and would thus be repugnant to the general law and if implemented the Commissioners would be acting *ultra vires*.

Clause 11.1.f must clarify what would lead to the revocation of the registration of vessels; the potential reasons for revocation must be clearly defined and transparent.

Clause 11.1.i: safety standards must be consistent with other UK inland waterways and not excessive, as must be the requirement for insurance. There must be a provision for the temporary use of vessels without safety certificates and also a period of grace of at least one year to enable those without safety certificates to carry out the necessary alterations and obtain the certificate, bearing in mind that if this becomes law there will be considerable pressure on the available boat safety examiners and boatyard services leading to long waiting times for boat owners.

Clause 11.1.l must not be used to prohibit the residential use of boats or to interfere with the Public Right of Navigation to moor temporarily in the course of navigation.

Clause 13: to comply with Article 6, notices should always, without exception, be served both on the owner by post to the last recorded address and by affixing them to the boat. This is because boat dwellers frequently do not have regular access to postal mail and may not even have an address at all.

Comments on the Draft Byelaws

Draft Byelaw 12 1 d must include a safeguard protecting the use of a vessel as a home and preventing any arbitrary mooring restrictions or movement restrictions. It must also include a policy and safeguard against the victimisation and bullying of boat dwellers by navigation authority staff which regrettably is a regular occurrence on the waterways.

Draft Byelaw 17 ii must not be used to exclude boat dwellers from the Middle Levels.

Draft Byelaw 19 ix must define “the exercise of any statutory function of the Commissioners in respect of Navigation” and must not be used to exclude boat dwellers from the Middle Levels.

Draft Byelaw 21.i: as already stated above, this proposed provision would be repugnant to the general law and if implemented the Commissioners would be acting *ultra vires* due to the inclusion in the Public Right of Navigation of a right to moor for temporary periods, “temporary” not being defined but being dependent on factors such as the circumstances of each boat and on river and weather conditions.

Draft Byelaw 21.ii: as stated above, the use of the term “emergency” in Clause 4.3 is too narrow a definition: in the case of boat dwellers, giving birth (for example) is not an emergency but is likely to require a longer stay at a mooring location. In many cases it is not possible to predict accurately the duration of the “emergency” or the circumstances requiring a longer stay. The wording should be changed to include an entitlement for a vessel to stay longer at a mooring place without penalty of any kind, when the longer stay is reasonable in the circumstances.

Draft Byelaw 22 would appear to seek to criminalise living on a boat that is also used for navigation or as a means of transport. If the intended consequence of this proposed byelaw is to make living on a boat a criminal offence, the NBTA will seek by all means necessary to prevent this proposed byelaw being adopted. To criminalise living on a boat would be a violation of the Article 8 rights of all boat dwellers. Alternatively, draft byelaw 22 must be amended to make it clear that the residential use of a vessel that is also used for navigation or as a means of transport is not prohibited without the consent of the Commissioners.

National Barge Travellers Association

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