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Chief Executive
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21st December 2020

Dear Mr Parry

Formal complaint: Consultation on changes to Boat Licence Terms and Conditions.

This is a formal complaint in line with the Canal & River Trust (CRT) complaints procedure. We are not satisfied with the conduct of, or the proposals contained in, the consultation on changes to Boat Licence Terms and Conditions of September to December 2020.

We therefore seek a review of the conduct of the consultation, the proposed Boat Licence Terms and Conditions, and the principles underpinning the proposals.

We refer to the following legislation: European Convention on Human Rights 1950 (ECHR)/ Human Rights Act 1998; General Canal Byelaws 1965-1976; Transport Act 1968; British Waterways Act 1983; British Waterways Act 1995; Equality Act 2010; British Waterways Transfer of Functions Order 2012 SI 2012 / 1659; Consumer Rights Act 2015; General Data Protection Regulation (GDPR) (EU) 2016/679; Data Protection Act 2018. and The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 SI 2019 / 419.

We also refer to: Canal & River Trust v Geoffrey Douglas Mayers (2013), Chester County Court (Claim 0NH00407); the HM Government Consultation Principles 2018; R (ex parte Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey [2014] UKSC56; and Jones v Canal & River Trust [2017] EWCA Civ 135.

We argue that the proposed changes to the Boat Licence Terms and Conditions are erroneous and non-compliant in relation to the above legislation, and should be withdrawn by CRT.

We argue that the Boat Licence Terms and Conditions should be replaced with a statement of the applicable legislation and a requirement that the boat licence holder is required to comply with the applicable legislation at all times.

Conduct of the consultation

The consultation has been conducted in violation of the HM Government Consultation Principles 2018 and contrary to the authority R (ex parte Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey [2014] UKSC56.

In restricting the consultation to individuals and excluding representative groups (such as boater organisations like the NBTA, NABO and RBOA) from completing the consultation response form, CRT has violated Principle F of the Consultation Principles.

In restricting the consultation response mechanism to an online form only and not providing alternative methods of responding, CRT has violated Principles F and G of the Consultation

Principles in that it has failed to ensure that all groups can access the consultation and has failed to consult stakeholders in a way that suits them.

It is well known by CRT that liveaboard boaters are in older age groups and some are on very low incomes. Both groups experience digital exclusion. At least 5% of the NBTA's one thousand members have no access to the internet, and a significant additional proportion of those who do use it only have limited access. Bargee Travellers' internet access is limited by cost and lack of signal, or is limited because they only use the internet in libraries and internet cafes. This is despite the fact that when the Government carries out consultations with Gypsy and Traveller communities, it offers other consultation methods as well as online consultations. CRT's failure to offer alternative methods will disadvantage the liveaboard community, who are very likely to give up the attempt to respond to the consultation.

The digital exclusion that Bargee Travellers experience has been exacerbated by the closure of libraries and internet cafes for much of the time since March 2020 due to Covid-19. CRT has failed to take the additional factor of Covid-19 restrictions into account, despite releasing the consultation in late 2020.

In failing to tailor the consultation to the known demographic make-up of liveaboard boaters, CRT has also indirectly discriminated against them on the basis of their age, in breach of Sections 13 and 19 of the Equality Act 2010.

The assurance that assistance for those who cannot complete the consultation online will be made available by CRT is entirely inappropriate. This undermines both confidentiality, and confidence in the impartiality of the process. The NBTA has received requests for assistance with the consultation from members who do not trust CRT to assist them or who are afraid to ask CRT for assistance. This further compounds the violation of Consultation Principles F and G: CRT has failed to ensure that the full range of people affected are consulted, and has further failed to consult stakeholders in a way that suits them.

The inclusion in the consultation document of a tick-box asking respondents to state "I confirm that I have read and understood the information above" and not allowing the respondent to proceed to answering the question if they do not tick the box, is intimidating in the extreme. It is intimidating because the tick-box mirrors the declaration on the boat licence application form that "I have read, understand and accept the licence terms and conditions", implying that ticking the box means agreement with the proposal. It is also intimidating because the consultation does not state a reason for the inclusion of this tick-box. This further excludes people from the consultation if they feel that they do not sufficiently understand the proposals to honestly tick the box. The most deprived of respondents will be discouraged from responding. There is no option to proceed if you feel you do not understand the proposal, or to state that you do not understand it. The NBTA is aware of a number of boaters who have stated that they do not understand the consultation. This is the opposite of the requirement in Principle F of the Consultation Principles, in that it serves to exclude people from completing the consultation.

CRT has violated Principle C of the Consultation Principles in that it has failed to give enough information to ensure that those consulted understand the issues and can give informed responses. No alternatives to the single set of specific proposals have been included in the consultation.

Failure to ensure procedural fairness in the consultation by not setting out the range of alternative actions that could be adopted as well as the proposals favoured and presented by the consulting organisation is unlawful contrary to the authority *R (ex parte Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey* [2014] UKSC56. This judgement states that

“consulting about a proposal does inevitably involve inviting and considering views about possible alternatives” ... “Haringey’s message to those consulted was therefore that other options were irrelevant and in such circumstances I cannot agree that their assumed knowledge of them saves Haringey’s consultation exercise from a verdict that it was unfair and therefore unlawful” ... “Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority’s adoption of the draft scheme...”

In failing to state any alternatives to the proposals in the consultation, CRT is violating Principle B of the Consultation Principles in that it is clear that the development of the policies is not at a formative stage but that CRT already has a final view on what changes it will make to the Boat Licence Terms and Conditions.

In any event, changing the Boat Licence Terms and Conditions is too complex a matter for a consultation in the form offered. It is not appropriate to carry out a consultation on complex quasi-legal matters such as changes to terms and conditions with a yes/no tick-box questionnaire, when the breach of any revised boat licence terms could result in people’s boats being seized and liveaboard boaters being made homeless. In using this method of consultation, CRT has failed to ensure that respondents can give informed responses, contrary to Principle C of the Consultation Principles.

The effect of the above non-compliances with the law and with the Consultation Principles means that the consultation responses will be skewed and unrepresentative of those who will be affected if the proposed changes are implemented. It is therefore not a valid consultation.

General principles regarding the terms and conditions of the CRT boat licence

The boat licence is issued under Section 17 of the British Waterways Act 1995, not as claimed in the General Terms and Conditions for Boat Licences under Section 43(3) of the Transport Act 1962. All the conditions for the issue or revocation of a boat licence are set out in the British Waterways Act 1995.

In seeking to amend and expand the reach of the Boat Licence Terms and Conditions, CRT is incrementally and covertly undermining the statutory nature of the boat licence and unlawfully attempting to move it to a civil contract basis and enable itself to gain the ability to impose unlimited terms and conditions, without seeking the legislative change that it requires in order to do so.

The boat licence must be issued if any applicant meets the conditions of Section 17 of the British Waterways Act 1995, and can only be revoked if the licence holder breaches the conditions set out in the 1995 Act.

Contract terms, even if agreed, can never override statute. Any additional terms or conditions that override statute are not binding, even if the boat licence holder has agreed to them. In practice, anyone seeking to hold a boat licence is coerced by CRT into agreeing to the terms and conditions because a boat licence will not be issued without such agreement.

As in the last review in 2015, CRT has provided no evidence of the scale of the problems it claims to be seeking to address. CRT does not have the power to impose such extensive terms and

conditions, many of which exceed its legal powers to enforce. CRT should dispense with the Boat Licence Terms and Conditions altogether, and replace them with a statement of the applicable legislation, with one simple condition that "the boat licence holder is required to comply with the applicable legislation at all times".

Data Protection issues in the proposals

Scope

CRT is, in relation to licensing, the Navigation Authority, pursuant to the British Waterways Transfer of Functions Order. The grant of a boat licence (pursuant to Section 17 of the 1995 Act), the Boat Licence Terms and Conditions and the proposed amendments to the Terms and Conditions are not consumer contracts and therefore out of scope of the Consumer Rights Act 2015.

However issues relating to the processing of personal information fall within scope of the GDPR, the Data Protection Act 2018 (DPA) and the UK GDPR (as amended by SI 2019 / 419). It is not open to the public to comment one way or another save to identify where manifest breaches are alleged to occur. If CRT attempts to promulgate the proposals that are prima facie in breach of the GDPR this is a matter for the regulator, the Information Commissioner's Office (ICO).

From 1st January 2021 onwards the UK remains bound by the terms of the GDPR (as amended by SI 2019 / 419, to become "UK GDPR") and the DPA (as amended).

Requirement for information sharing

The proposals will be mandatory. For a would-be boat licence holder to refuse to abide by the proposals leads to the boat licence being revoked. If a liveaboard boater has their licence revoked while they are on CRT's water then pursuant to Section 8 of the 1983 Act the boat can be seized, notwithstanding due process.

The proposals include an obligation to provide any information that CRT may demand (paragraph B5). As a non-consumer-contract the proposals offer no opportunity for a "reasonableness" test to be applied to challenge this obligation.

The fundamental tenets of the GDPR include that information processing has to be sanctioned by the data subject. Consent must be specific in scope (the information to which the consent relates) and purpose (the way that the information is processed including dissemination to third parties). Consent must be capable of being withdrawn by the data subject without detriment. See Article 5 and Article 7 GDPR.

The central pillar of the GDPR is to provide to the data subject the right to control what data a third party holds on them and how that data is processed. CRT is in these proposals completely ignoring that fundamental right. As such the provision is highly offensive and thus unreasonable in the Wednesbury sense.

Source of shared information

Paragraph B5 of the proposals includes the proposed right of CRT to contact a third party which is specified as the insurer or broker.

While the insurer and broker will both themselves also be covered by the GDPR, CRT would claim (under the proposals) to be entitled to demand the information under the head of "law enforcement".

This is a false claim. In any event a commercial organisation approached by a quasi-public sector body demanding information has no incentive to withhold information on a matter of principle. It must reasonably be expected that the insurer or broker would therefore freely hand over the information.

As the identities of the broker and insurer are not defined in the proposals this opens up the possibility of CRT also approaching historic insurers. This gives the opportunity for CRT to amass information (in essence “farming” information) in a manner that the GDPR specifically excludes.

The GDPR is specific that consent must be actively sought from the data subject, freely given by the data subject and the consent must relate to a specific scope and purpose. It is therefore not open to CRT to demand information from “any source” when taken with an assumed or implied consent.

Noting that Section 17(3)(b) of the 1995 Act confines the obligation of the applicant to provide evidence that the insurance exists (and nothing more) it follows that farming of information in this way goes well beyond that provided for in statute and is therefore not part of the public purpose of CRT.

Conversely data gathering by CRT for purposes other than law enforcement (within scope of Section 17(3)(b) of the 1995 Act) does three things. Firstly it passes into the realm of CRT acting in its “value-added” charitable persona (ie not as navigation authority). Secondly this means that the Consumer Rights Act is engaged. There is no question that when considered as a consumer contract the proposals amount to a grossly unfair contract. Thirdly the engagement of the Consumer Rights Act means that the contract-related provisions of the GDPR are engaged.

In particular the GDPR states that the establishment of a contract cannot be contingent on data sharing consent being granted by the data subject. It is also the view of the NBTA that data farming by CRT without the explicit consent of the boater and on a “carte blanche” basis is wholly unfair and thus leads to an unfair contract (see inter alia Section 62 of the Consumer Rights Act).

It is also the view of the NBTA that there is an ambiguous boundary between CRT in its capacity as Navigation Authority and its persona as a charity (the “value added” functions) and this ambiguity gives rise to unfairness in the mind of the boater: the boater does not know whether he or she is engaging with CRT as a licensing authority or as a charity that appears to be seeking to farm his or her information.

Information regarding use and structure of the boat provided to insurers

Section 17(3)(b) of the 1995 Act stipulates that CRT is entitled:

- (a) to know that an insurance policy is in force in respect of the relevant vessel; and
- (b) either
 - (i) to be provided with a copy of the certificate of insurance; or
 - (ii) to be provided with evidence that the policy exists and is in force.

This provision confines CRT to knowledge that the insurance is in force; it does not entitle CRT to be privy to the terms of the insurance. For CRT to demand additional information (that may be private between the insurer and the insured) is *ultra vires*. When taken with the wide-reaching scope of the assumed consent, this gives rise to a violation of the GDPR.

Absence of appeal

The proposals provide no mechanism to challenge the Boat Licence Terms and Conditions or appeal a decision of CRT reached in relation to a given term that an applicant may be considered by CRT to have breached.

This leaves the sole remedy available to an applicant to engage in judicial review of the Boat Licence Terms and Conditions in which, after three months of promulgation, the applicant is time-barred from pursuing. In turn this leads to a “Catch 22”.

If (a) the proposals are promulgated by CRT (b) a boater is then found to be in breach (c) the boater would be served a Section 8 Notice (d) the boater has objected to the Section 8 Notice (e) a claim has been issued by CRT and (f) proceedings commenced, in combination these events will easily pass the three month window for bringing an evidence-driven action in Judicial Review of (a).

Alternatively for (a) a would-be boater waits for promulgation of the proposals (b) conclude that he or she was aggrieved by the Boat Licence Terms and Conditions and (c) issue proceedings in judicial review within the statutory three month window, would undoubtedly leave the Court devoid of evidence with which to assess the matter.

Alternatively the aggrieved boater could take the matter to the Waterways Ombudsman. To do this he or she would have to make a complaint first to CRT. CRT’s policy is to not admit complaints that relate to policy. Although the Ombudsman can admit complaints that CRT has refused to consider, the Ombudsman’s remit is to exclude complaints that should be heard by a court.

Given the severity of the consequence of a Notice issued by CRT under Section 8 of the 1983 Act to a liveaboard boater, this in essence deprives the boater of an effective route to redress. This gives rise to a breach of the Convention rights of the boater under Article 6 ECHR.

“Including but not limited to”

Paragraph B5 of the proposals includes the assumed right of CRT to contact a third party and obtain from that third party whatever information CRT requires.

Just as we refer above to obtaining information from any source, this section refers to obtaining any information. The same arguments apply in relation to scope of information.

The GDPR is specific that consent must (a) be actively sought and given and (b) that the consent must relate to a specific scope and purpose. It is therefore not open to CRT to demand “any information”, especially when taken with an assumed or implied consent.

Possibility of compromising insurance

Paragraph B6 of the proposals would permit CRT to make available to an insurer information held by CRT about the use, apparent structure and construction of a vessel, again on an unbounded basis and again covered by an assumed or implied consent.

The requirement of Section 17(3)(b) of the 1995 Act is to confirm that insurance is in place. There is no requirement for the insurer to be provided with information as to use, structure or construction. Should the insurer have concern (at its sole opinion) over fitness for navigation then it can stipulate that the vessel shall undergo a survey before insurance will be provided.

It follows that, under a blanket implied consent, that CRT is proposing to have a right that permits it to process information that is beyond the scope of its statutory power. This is *ultra vires*. Article

5(1)(c) of the GDPR stipulates that data processing must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”. Seeking a right to process information that is *ultra vires* cannot be “limited” and must thus represent a violation of the GDPR.

There is a further difficulty with this provision. There may be information under the heading of “use” that might interfere with the commercial relationship between the boater and insurer.

In particular the “use” might imply that CRT is empowered to provide information to the insurer that infringes the privacy of the boater. In normal circumstances where a nefarious insurer is seeking confidential information about someone in a way that is unfair processing of data, the ICO prosecutes that body. Under the proposed changes to the Boat Licence Terms and Conditions, CRT is seeking to promulgate precisely that mechanism.

In any event interfering with a contractual relationship is outside the scope of Section 17 of the 1995 Act and thus CRT’s sought power is not relevant and thus for CRT to process information in this way is a violation of Article 5 of the GDPR.

FCA approved insurance

Paragraph B2 of the proposals stipulates that insurance must be provided by an FCA accredited insurer. Section 17(1) of the 1995 Act stipulates that the insurance must comply with Schedule 2 of the 1995 Act. Schedule 2 stipulates that the insurance “... must be issued by an insurer ... who has ... permission under the law of another member state of the European Community [to provide insurance services]”.

The UK is in the transition period having left the EU but EU legislation remains in force. The terms of the Withdrawal Agreement have not yet been completed. However it must be assumed that, as one of the significant exports of the UK is Financial Services, a treaty will be ratified providing for the export into the EU of Financial Services and thus, by rational inference, import of Financial Services. Insurance is a financial service. Therefore the obligations on the UK in relation to the portability of EU-issued insurance is presently indeterminate.

It is not open to CRT to stipulate quasi-statute that has not yet been defined by the product of the negotiations of the Withdrawal Agreement or some alternative treaty. It would thus be *ultra vires* for CRT to demand that insurance must be by an FCA-licensed provider.

Information sharing for the purposes of law enforcement

A body engaged in law enforcement is entitled to process and share data for the purposes of law enforcement (only) and the scope and extent of the information shared has to be relevant. Whilst CRT is engaged in a public function, this is not “law enforcement” for the purposes of Part 3 of the Data Protection Act. CRT is neither a “competent body” for the purposes of Section 30 of the Data Protection Act, nor is it engaged in “law enforcement purposes” as defined in Section 31 of the Data Protection Act.

Although CRT has at its disposal byelaws (falling under the ambit of criminal law) the licensing task is a civil law matter. It follows that in fact all of CRT’s activities fall within the scope of the GDPR and not under Part 3 of the Data Protection Act.

CRT is therefore not entitled to stipulate the implied consent of an applicant permitting CRT to share his or her data with undisclosed recipients.

Even if this is incorrect, and CRT has limited scope under the head of “law enforcement” to process data, this right is bounded by the division in CRT’s persona between that of “navigation authority” and “value-added charity”.

It is the NBTA’s view that while CRT may claim it has legitimate power under Part 3 of the Data Protection Act to seek information for the purposes of verifying compliance with Section 17(3)(b) of the 1995 Act (which is disputed), the scope of this justification could only be confined to that required to verify compliance with Section 17(3)(b) of the 1995 Act when taken with the content of Schedule 2 of the 1995 Act (clarifying the capabilities required of an insurance policy). CRT has exceeded this confinement in seeking powers entitling it to request significantly more than that laid out within these confines.

Shared ownership

CRT is stipulating in paragraph G8 of the proposals that upon sale of a boat the previous owner must notify CRT within 14 days. This may be compared to the regime for the licensing of motor vehicles in which a previous vehicle owner is expected to notify the licensing authority that he or she no longer holds responsibility for the vehicle.

However if a motor vehicle is disposed of to a dealer then the new owner information is not made available to the old owner and vice versa. Further the reason why the old vehicle owner notifies the licensing authority of the identity of the new owner is in order to match up and authenticate the declaration of the new owner (as responsible party) to the licensing authority to mitigate theft of vehicles. This is provided for in statute.

This is not the purpose of the proposal regarding provision of the information by the previous boat owner. This is because CRT has no interest in pursuing stolen boats as it does not fall within its remit. CRT’s only interest is to ensure that when a boat is sold, CRT knows who to call upon for the new licence fee. There is no statute that stipulates that CRT shall be responsible for ensuring that an outgoing boat licence holder makes known to CRT the identity of an incoming boat licence holder. As such, the demanding and processing of such information is unlawful.

Conversely the fundamental principle of the GDPR is to ensure the privacy of natural persons and thus includes contracts between people. So when someone sells a boat it is a private matter that the contract has been made. CRT’s only right to have an interest in the transaction is that it is obligated to know that the old owner no longer has responsibility for the vessel. It is open to the new owner to seek new licensing as appropriate. It is not CRT’s right to know this.

For example if the boat is removed from the jurisdiction then CRT as licensing authority is ex-officio and has no right to process information relating to the new owner. As such, demanding the identity of a new owner is not simply *ultra vires* Section 17 of the 1995 Act. It also gives rise to a violation of the GDPR.

Paragraph G8 of the proposals also stipulates that when a boat is in joint ownership that all joint owners' details must be identified to CRT. While CRT states that if this information is not provided the ownership is recorded as single-person owned, this does not remove the possibility of breach that can lead to licence termination.

CRT’s interest in boat licensing is confined to knowing who is responsible for the boat and that a licence is in force per Section 17 of the 1995 Act. CRT’s interest does not go beyond these confines. Therefore CRT has no business stipulating that it must be informed of the identities of other people who may be involved in a private contract with the licence holder.

On this basis CRT intends to process information that is beyond its remit in terms of boat licensing. It is therefore not authorised to process this data and therefore it is unlawful for CRT to demand it.

Imbalance between the licensor and licensee

Article 7(4) of the GDPR (and UK GDPR) states:

“When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract”

Recital 43 of the GDPR states:

“In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.....”

CRT is a body that carries out statutory functions and exercises statutory powers and is clearly a public body. For the reasons stated in this document there is a clear imbalance of power in the proposals.

The advice of the ICO is that where there is a imbalance of power between CRT and its licensees, the general rule is: “whenever you have difficulty meeting the standard for consent, this is a warning sign that consent may not be the most appropriate basis for your processing. So we recommend you look for another basis”.

CRT is persevering with not only assuming that consent is assumed to be given (without asking for it, in itself a violation) but has taken no other steps to provide for a boater giving informed consent under the proposed changes to the Boat Licence Terms and Conditions. As such CRT has ridden roughshod over the principles of the GDPR.

Issues regarding specific proposals:

Section A. Home Mooring requirement to "cruise"

The imposition of this condition would be unreasonable and unlawful, contrary to Section 17(3)(c) (i) of the British Waterways Act 1995. The judgement in *Canal & River Trust v Geoffrey Douglas Mayers* (2013) in the Chester County Court (Claim 0NH00407) is persuasive, especially in the light of the fact that there is no other case law on the matter. In his judgement, H H Judge Derek Halbert stated at paragraph 6.3:

"... A boat which has a home mooring is not required to be "bona fide used for navigation throughout the period of the licence" but neither is it required to ever use its home mooring. The [British Waterways] Act [1995] requires that the mooring is available, it does not say it must be used. The guidelines also have this effect. The boat is still subject to the restriction that it must not stay in the same place for more than 14 days but there is nothing to stop it being shuffled between two locations quite close together provided they are far enough apart to constitute different places."

The 1995 Act does not define how a boat with a home mooring must travel. In proposing this change, CRT is attempting to use the Boat Licence Terms and Conditions to award itself powers that it was not granted by statute. In exercising the public functions it inherited from British Waterways, CRT is only able to exercise powers if these have been conferred by statute. If CRT

used this condition to terminate a boat licence, it would be acting *ultra vires* and a boater could successfully defend the action based on the above; in addition, CRT would be vulnerable to Judicial Review.

This proposal is an attack on liveaboard boaters. As CRT well knows, many liveaboard boaters without a home mooring are forced into a position where taking a home mooring is the only way to avoid having their home seized and removed after enforcement by CRT of its unlawful interpretation of Section 17 (3) (c) (ii) of the British Waterways Act 1995. Because only around 2% of moorings have planning consent for residential use, these liveaboards risk attracting planning enforcement action and/or eviction from the mooring if they spend 365 nights per year on their mooring. Therefore, if the mooring is in the area where they need to be for the purpose of employment, education, family or other reasons, they may quite lawfully spend considerable time moored on the towpath in various places that are near the home mooring. Alternatively, because of the excess demand over supply of moorings, in other cases where removal and seizure of a liveaboard boat has been averted by the boater taking a mooring, the only available mooring is in a very inconvenient location for their employment, education, family or other reasons. This means that the boater will be unable to make use of the mooring even though they are paying the mooring fee.

In addition, CRT has provided no definitions of what is a "genuine cruise" or of what is "nominal use" of the home mooring, and nor has it provided any justification why so-called "nominal" use of the mooring will be disregarded. This would leave boaters vulnerable to arbitrary enforcement action based on the personal opinions and prejudices of individual members of CRT staff.

As in the last review of the Boat Licence Terms and Conditions in 2015, CRT has provided no evidence of the existence or the scale of the alleged "problem" it claims to seek to address. Once again we see so-called "fairness" and the implied accusations of unfairness being used by CRT to attack particular types of boaters, coupled with an inability to recognise and accept that where people have different reasons for their use of the waterways, their usage patterns will be different, and yet the boat licence and mooring permit is open to anybody to purchase regardless of their intended usage pattern.

Section B. Insurance

CRT already has powers to enforce the requirement for Third Party insurance in Sections 17(4) and 17(5) of the British Waterways Act 1995 and this proposed condition would unlawfully exceed these enforcement powers. Provision of the insurance certificate alone is sufficient for the boat to be on the waterways lawfully. In seeking to also demand the policy terms and conditions and the policy Schedule, CRT would be acting unlawfully, in excess of its powers under Schedule 2 of the 1995 Act.

The proposals regarding sharing information regarding the use, apparent structure and construction of the boat would fall foul of the General Data Protection Regulation (GDPR). The GDPR prohibits making agreement to the sharing of such personal information a condition of any service. CRT would be in breach of the GDPR if it imposed this blanket requirement. The GDPR also prohibits making agreement or consent to a third party such as the insurer and/or broker providing CRT with information a condition of any service and this proposed change would also fall foul of the GDPR.

The sharing of information with insurance companies about the movements of any boat under the heading of 'use' of the boat; information about the apparent structure of the boat; and information about the construction of the boat, would also contravene the boat owner's right to privacy and

respect for their home under Article 8 of the European Convention on Human Rights in the case of a boat that is lived on.

In practice, references to 'sharing' information with third parties includes selling information to commercial parties, which would also be unlawful on the part of CRT without express consent from the boat owner.

Prohibiting the use of insurance policies that are not authorised and regulated by the UK Financial Conduct Authority would be unlawful contrary to Schedule 2 of the British Waterways Act 1995, which entitles boat licence holders to insure their boats with an EU provider. If this proposal is being made in anticipation of changed conditions regarding the UK's exit from the EU, it would be unlawful if implemented, because the proposed change seeks to pre-empt and override the terms of any overarching agreement between the UK and the EU regarding financial services.

The requirement set out in legislation is for Third Party insurance cover. The type of cover is specified in Schedule 2 of the British Waterways Act 1995. This is not dependent on the intended use of the boat, and such policies do not specify what the intended use of the boat must be. In exceeding the requirements of Schedule 2 of the 1995 Act, the proposals unlawfully seek to widen CRT's powers.

Almost every insurance policy will expire at some point during the boat licence period, very often shortly before or shortly after the start date of the licence. Boaters should be able to submit any documentation by email in addition to the web portal or post. Setting a requirement to provide certificates at each insurance renewal will create a cost for CRT. The interaction of B3 and B6 could mean there are some 60,000 certificates being submitted each year. In the light of previous experience of NBTAs members regarding failings and non-compliances in the CRT licensing system, we doubt whether CRT systems are robust enough to cope with this.

Section C. Termination period

The proposed changes would be unlawful. The grounds for issue and termination of a boat licence are set out in Section 17 of the British Waterways Act 1995. These grounds apply regardless of whether any breaches are 'repeated'. If CRT introduced this proposal, it would be acting beyond the powers granted to it under the Transport Acts and the British Waterways Acts.

CRT has powers of arrest under Byelaw 39 (1965) of the General Canal Byelaws 1965-1976 which states that "No person shall commit any nuisance in or on any canal". This power, together with wider Police powers to deal with anti-social behaviour and criminal activity, is perfectly adequate to deal with situations where a boater is behaving in an anti-social manner.

The proposals are extremely one-sided, to the point of being unjust to the boater. There is no definition of "unreasonable" in the context, and no policy is set out for how this would be decided fairly.

There is no definition of what constitutes "repeated" breaches. As they stand, these proposals would allow CRT to collect evidence of breaches, not act on the individual breaches and then compile them into evidence of repeated breaches. In addition the proposals do not define a process for informing boaters in advance that they are on their last warning regarding "repeated breaches".

No information is provided about the rights of the boater should they dispute the issue, or about how they can appeal against the suspension of the licence, or how the suspension of a licence operates when the boat is being used as a home, or about the process for an "internal investigation",

or any transparency regarding how the process can be seen to have been followed, or about the boater's right to make a complaint, or information about taking such a complaint to the Waterways Ombudsman. There is also no information about compensation if the suspension or termination prove to be erroneous.

No information is provided in the case of a boat owner who has more than one boat and the issue is only with regard to a particular boat. It is not made clear whether all licences are terminated, and if not, this term appears to preclude the owner from renewing their existing licences.

The proposal to communicate by post disadvantages Bargee Travellers, who may not access their post for more than 28 days.

Section D. Our obligations & refunds

This proposal seeks to remove the statutory duty of CRT to maintain the waterways in accordance with Section 105 of the Transport Act 1968. As such it is unlawful. In addition, CRT's Articles of Association set out that "The Trust's objects are to preserve, protect, operate and manage Inland Waterways for public benefit for navigation". If a boat cannot navigate due to failure of CRT then it is legitimate that they should be able to obtain a refund. CRT may seek to limit this, or have a clear policy regarding refunds, but removing the right to a refund altogether, except when selling the boat, is unreasonable and disproportionate. CRT cannot lawfully limit its liability for negligence to exclude damage to property. A boater is free to make a claim for damages against CRT regardless of the nature of the damage. It is unfair and unjust to deny the boater a refund in cases where boats cannot navigate due to negligence on CRT's part.

The proposed limits to refunds are unfair on boaters with three-month licences and unfair in cases where a boater upgrades to a Standard Canal and River licence from a Rivers Only licence and then the access to the relevant canal is lost due to CRT negligence.

The requirement to send back paper licence discs by post is outdated and unfair in that it delays the payment of a refund, given that CRT routinely sends licence discs by email for boaters to print out themselves, meaning that even if they send back the paper licences, the boater still has the electronic file with which to print another set of licence discs.

Further, the proposed changes under Section A seek to require all boaters when not on a mooring to be on a "genuine cruise". CRT makes even stricter unlawful movement demands on boats without a home mooring. To impose an expectation on boaters that they should cruise, without a reciprocal obligation on CRT that cruising should be possible, is unjust.

Section E. Boat Safety Certificate

CRT already has powers to inspect and remove unsafe boats, which are set out in considerable detail in Section 7 of the British Waterways Act 1983, including a criminal penalty of up to £1,000 for breach of safety requirements. These powers include the safeguard for the boater that a CRT officer may not enter a boat without giving 24 hours notice, except in cases where CRT has reason to believe the boat is unsafe and an immediate inspection is required. CRT does not require any further powers to deal with unsafe boats, and the inclusion of this proposal in the Boat Licence Terms and Conditions suggests that CRT is seeking to unlawfully extend the legislation.

In addition, CRT already has powers to enforce the requirement for a Boat Safety Certificate in Sections 17(4) and 17(6) of the British Waterways Act 1995. This proposal conflicts with the provisions of Section 17(6) of the 1995 Act and is therefore unlawful. In addition, the proposal

conflicts with Section 17(11) of the 1995 Act which enables the limited use of a vessel without a Boat Safety Certificate, in certain circumstances and with CRT's consent, which must not be unreasonably withheld. It would be unlawful to impose the proposed requirement because this would unlawfully fetter CRT's discretion to allow boats to navigate without a Boat Safety Certificate. We note that due to the Covid-19 pandemic, CRT effectively used its powers under Section 17(11) of the 1995 Act in extending Boat Safety Certificates for a period during the lockdown in March to May 2020.

In addition, whilst it may be the boater's responsibility to provide CRT with any updated information in a timely manner, it is not the boater's responsibility to check that the CRT's information systems are updated. In any case, the Boat Safety Scheme number should be sufficient proof that the vessel meets safety standards.

The GDPR prohibits making agreement to the sharing of personal information a condition of any service. In proposing that "Acceptable evidence may include, but is not limited to" a list of examples, CRT is effectively proposing that in future years CRT can add whatever it likes to the information demanded as evidence, without any further consultation, since the boat licence holder has already agreed that the information demanded is effectively unlimited. This is both unfair and contrary to the GDPR.

This proposal seeks to unlawfully widen the existing powers of CRT under the British Waterways Acts of 1983 and 1995 by introducing a very wide margin of discretion for CRT to demand large amounts of evidence. We believe that this is intended to be used to socially cleanse the waterways of certain types of boaters, in particular those on low incomes who live aboard, and as such is both unlawful and unreasonable.

Section F. Wider or larger dimensioned boats

The proposals under section F would be unlawful if introduced. CRT has a statutory obligation under Section 105 of the Transport Act 1968 to maintain the main navigable channel of the relevant waterways to "a) dimensions sufficient to allow passage of any craft that were recorded as having customarily used the particular waterway during the 9 months prior to 8 December 1967, or b) if the waterway or part has been restored or improved since that date, to dimensions such as the restoration work made possible (which could be greater or lesser)".

CRT does not have the power to change the dimensions of a waterway (for example by rebuilding a lock so that it is narrower than the statutory width and/or the published width) without a Ministerial Order under the Transport Act 1968. If CRT changed the dimensions of a waterway without a Ministerial Order, it would be acting beyond its legal powers. To state as the proposals do, that waterway dimensions may be subject to change, would be unlawful. It would also be unjust to change the dimensions of a waterway with the effect that certain boats suddenly become too large and are then subjected to enforcement because they are too large for the revised dimension of a waterway that they are already navigating upon. This would violate the rights of the boater under Article 7 of the European Convention on Human Rights to no punishment without law: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". The boater would be in line for substantial compensation, regardless of CRT's attempt in these proposals to limit the issue of refunds of licence fees.

CRT already has powers in Byelaw 3 (1965) of the General Canal Byelaws 1965-1976 to regulate the use of boats that are not fit for navigation on the canal where they are intended to be used. The proposals unlawfully exceed the powers of CRT as stated in the Byelaws.

CRT already has powers in Byelaw 6 (1965) of the General Canal Byelaws 1965-1976 to regulate the use of fenders. These powers do not extend to prescribing that fenders must be used where there is a risk of striking another boat. The proposals unlawfully exceed the powers of CRT as stated in the Byelaws.

In addition the specific proposal regarding fenders would endanger vessels if adhered to. It is not safe to use side fenders where there is a risk of striking another boat. The most common occasion for a boat to strike another boat is when two boats are using a lock. If either or both boats have side fenders and in some cases bow or stern fenders in use, there is a risk that the boats will become jammed in the lock, which could lead to sinking and loss of life. This proposal was clearly devised by a person with no practical experience of inland waterway boating. Narrowboats have sacrificial rubbing strakes along the hull for these situations, to prevent damage to the structure of the boat when locking with other boats. No definition of "proper fenders" has been provided; this proposal would allow CRT to socially cleanse the waterways of certain types of boaters and as such is both unlawful and unreasonable. It would be entirely disproportionate to terminate a boat licence due to not using "proper fenders" and in the case of a liveaboard boat, would trigger a full assessment of the proportionality of the termination and consequent loss of home under Article 8 of the European Convention on Human Rights, as prescribed in the authority *Jones v Canal & River Trust* [2017] EWCA Civ 135. A court would be very likely to find that a licence termination for such a reason was unlawful.

Section G. Change of ownership

CRT does not require any additional licence conditions to manage transfers of boat ownership. CRT already has powers in Section 6 of the 1983 British Waterways Act to demand information regarding the owners of a boat, with criminal penalties for making intentional false declarations of the relevant information. The requirement to either use the online licensing system or to send the information by post is restrictive and outdated. CRT should be able to receive the required information by email.

Section H. False declarations

CRT does not require any express contractual rights to manage the issue of intentional false declarations and it cannot simply award itself such rights or powers by devising additional licence conditions. In order to gain extra powers CRT requires primary legislation. CRT already has powers in Sections 17(4) and 17(5) of the British Waterways Act 1995 to terminate licences in the event of false declarations regarding the conditions for issuing licences. It already has powers in Sections 5 and 6 of the 1983 British Waterways Act to enforce the recovery of charges and to demand specific information, with criminal penalties for making intentional false declarations of the relevant information. In demanding additional information that is not specified in the legislation, this proposed condition would unlawfully widen and exceed these enforcement powers.

The GDPR prohibits making agreement to the sharing of personal information a condition of any service. In proposing that "When licensing your Boat, you must provide information that is true and accurate to the best of your knowledge and belief, including but not limited to" a list of examples, CRT is effectively proposing that in future years CRT can add whatever it likes to the information demanded, without any further consultation, since the boat licence holder has already agreed that the information demanded is effectively unlimited. This is both unfair and contrary to the GDPR.

Section I. Behaviour towards Trust colleagues

To introduce this power would violate the rights of the boater under the British Waterways Act 1995. CRT must issue a boat licence if the boater complies with the requirements of Section 17 of the 1995 Act. In addition, the proposal would unlawfully extend the effect of the General Canal Byelaws 1965-1976. CRT already has powers of arrest under Byelaw 43 (1965):

"(1) No person shall assault, resist, obstruct or impede any officer or servant of the Board in the execution of his duties or disobey his lawful orders.

(2) No person shall use scurrilous, abusive, offensive or threatening language on or near any canal"

The introduction of this proposal would place considerable power in the hands of CRT staff to terminate licences on subjective grounds, potentially due to false allegations without any witness evidence regarding the licence holder and without protection for licence holders from similar aggression from CRT staff. There is no reciprocal requirement that CRT staff will not threaten, swear at or be aggressive towards licence holders. It is possible some staff may abuse this provision by deliberately provoking certain boaters, or certain types of boaters, to produce an aggressive reaction. The proposal contains no provisions regarding the boater's right of appeal or right to independent review. It would be draconian and excessive to terminate a boat licence, which in the case of a liveaboard boater would render them homeless, on the grounds stated. A licence termination in such circumstances would be disproportionate and would trigger a full assessment of the proportionality of the termination and consequent loss of home under Article 8 of the European Convention on Human Rights, as prescribed in the authority *Jones v Canal & River Trust* [2017] EWCA Civ 135.

The proposal that the boat licence holder is responsible for the behaviour of others contradicts an international principle of law. It is a fundamental principle of the rule of law that no person may be punished for an offence that he or she has not personally committed.

In proposing that the behaviour prohibited "may include but is not limited to" a list of examples, CRT is effectively proposing that in future years CRT can add whatever it likes to the list of prohibited behaviour, without any further consultation. The additional implication of this proposal is that it would give CRT absolute power to decide that any behaviour whatsoever on the part of a boater amounts to a breach of this proposed condition, leading to the arbitrary and unfair termination of boat licences. This is draconian in the extreme and is completely unacceptable. In the case of a liveaboard, such a termination would trigger a full assessment of the proportionality of the termination and consequent loss of home under Article 8 of the European Convention on Human Rights, as prescribed in the authority *Jones v Canal & River Trust* [2017] EWCA Civ 135.

Action expected in remedy of the complaint

We require that CRT

- 1) Withdraws the proposals in the consultation in their entirety; and
- 2) Replaces the Boat Licence Terms and Conditions with a statement of the applicable legislation and a requirement that the boat licence holder is required to comply with the applicable legislation at all times.
- 3) Carries out a review of the principles underpinning the proposals.

We require a reply within fifteen working days, by the close of business on the 14th January 2021.

Yours sincerely,

Pamela Smith
Chair
National Barge Travellers Association