

**National Barge Travellers Association**  
**Objections to Draft Middle Level Navigation Byelaws 2019**

**General objections to the draft byelaws**

The National Barge Travellers Association (NBTA) believes that the byelaw-making process provides insufficient independent scrutiny and therefore little protection for the boating public, especially boat dwellers, compared to primary legislation, and we believe that the navigation, mooring and other rules specified in the draft byelaws should be contained in new primary legislation and a new Private Bill promoted by the MLC. This would provide greater protection to the boating public.

The byelaw-making process provides insufficient protection for Barge Travellers against the arbitrary exercise of power by the Middle Level Commissioners (MLC) using the powers to make navigation byelaws in the Middle Level Act 2018. The byelaw-making powers could be used to clear the waterways of any boat or boater, or any class of boat or boater, that the MLC wish to exclude, such as boats used as homes or boats without a permanent mooring.

The procedure for making the byelaws is not transparent. Objections have to be submitted to the MLC, and there appears to be no provision for independent scrutiny of the draft byelaws and objections to them by any third party, whether that may be a Government department such as DEFRA, or a Parliamentary select committee. We have no confidence that objections to the draft byelaws will receive fair consideration. We therefore object to the byelaws in their entirety.

**Failure to comply with the Middle Level Act 2018 (the 2018 Act) and Undertakings made to Parliament**

**Section 3(6)(c)**

Section 3(6)(c) of the 2018 Act states that the Navigation Advisory Committee (NAC) must be consulted on any proposals for navigation byelaws. The MLC have not provided any evidence that the NAC has been consulted regarding these draft byelaws.

**Section 3(7)**

Section 3(7) of the 2018 Act states that the NAC must provide a report to the MLC on any byelaw proposals. The MLC has not provided any evidence that any such report has been submitted by the NAC.

**Section 16 and Undertaking 6**

Section 16 of the 2018 Act states that a protocol for the removal of vessels must be published by the MLC; Undertaking 6 of 13th July 2018 states that this protocol will be annexed to the byelaws. No such protocol has been annexed to the draft byelaws and there is no evidence that any such protocol has been produced by the MLC. I refer to Iain Smith's communication to the NBTA of 10th April 2019 in which he stated on behalf of the MLC:

"The formal process will, of course, have to follow the requirements of the 2018 Act and, as part of that, it is accepted that the Protocol will have to accompany the formal consultation".

## **Undertaking 4**

Undertaking 4 of 13th July 2018 states that standards equivalent to the Boat Safety Scheme will be specified in the byelaws. The draft byelaws do not contain any reference to the Boat Safety Scheme.

## **Objections to specific clauses**

### **Clause 2(i)**

We object to the following definitions:

"Houseboat": this definition could be used to exclude Bargee Travellers from the Middle Level waterways, as the definition excludes boats that are lived on but are not static. The definition also conflicts with the terminology used in the heading of Undertaking 5 of 13th July 2018. We recommend that the definition of "houseboat" is changed to "any vessel or floating structure that is not capable of navigating under its own power, excluding an unpowered butty towed by a motor boat where the pair of boats habitually navigate together".

"Pleasure vessel": this excludes vessels used as the used as the owner's or master's home. A residential vessel is not a pleasure vessel, it is a home.

**Clause 3(i)** is unreasonable. It is not always possible to prove the existence of dangers of navigation, collision or special circumstances. In cases of emergency, gathering such evidence may endanger people and distract from dealing with the immediate danger.

**Clause 3(ii)** is repugnant to the general law because it violates the rights of boat owners and passengers with protected characteristics under the Equality Act 2010 such as disability, age or pregnancy who cannot comply with the byelaws or conduct themselves in the same way as a person without that protected characteristic could comply with them or conduct themselves. The Equality Act 2010 cannot be modified by a byelaw. Clause 3(ii) is also unreasonable. If a passenger on a boat has no fixed address or refuses to give details to the master, the master of the boat should not be penalised. It is unreasonable to expect the master of a boat to demand the full name and address of every person who accompanies him or her for a short cruise.

**Clause 5** is unreasonable in that it makes no provision for the joint ownership and registration of vessels by a couple or by a family. In addition, the right of appeal against refusal of registration under Section 12(10) of the 2018 Act is not mentioned in the draft byelaws, and it should be.

**Clause 5(ii)** is unreasonable in that it lacks transparency and vests too much power in the MLC, effectively giving the MLC "Henry VIII" powers to decide what categories of vessel may or may not use the waterways. The categories of vessel under which a vessel may be registered must be transparently defined in the byelaws, otherwise the MLC will have arbitrary powers to exclude specific types of vessel (such as residential boats without a permanent mooring) from the waterways. The only vessels that should be excluded from

the waterways are vessels whose dimensions are too large for the waterways and vessels that are only capable of being navigated at a speed that would cause damage to the waterways.

**Clauses 5 (ix)(b); 5(x) and 5(xi)** are unreasonable in that voluntary return of a registration certificate should trigger a refund of the fee for the unused period of registration. It is unclear whether the already paid time period continues when a new owner applies for a new registration certificate or whether the new owner of a registered vessel is required to pay a fee on applying for a registration certificate in his or her name.

**Clause 8(i)** is repugnant to the general law in that it violates the rights of boat dwellers to privacy and respect for their homes under Article 8 of the European Convention on Human Rights (ECHR). The MLC must give adequate notice before inspecting a vessel and must not carry out such inspections without adequate notice and at a time that is convenient for the boat dweller.

**Clause 8(3)** would be onerous to comply with and it conflicts with the provisions of the Boat Safety Scheme in which appliances do not need to be in working order to pass the examination. If an appliance is unused, disconnected from its fuel supply and the gas or fuel lines capped off, it is outside the remit of a Boat Safety Scheme examination. The same should apply to appliances inspected by the MLC.

**Clause 12(3) (b) and (c)** are unreasonable because they are unjust. In the case of a vessel that is found drifting, stranded, aground or abandoned due to vandalism or being cast adrift deliberately, the owner should not be liable for the costs of the MLC in recovering it and the MLC should not be exempt from any duty of care regarding the vessel while it is being recovered by them.

**Clause 14** is unreasonable and onerous to comply with. No justification exists for forcing such a boat needing repair into a commercial boatyard. A boat owner could, for example, need a part where delivery could easily involve greater delays than 28 days, and be reliant solely on the supplier's ability. It would be an abuse of power by the MLC to prevent the owners of such boats from carrying out the repairs themselves, especially in cases where the cost of repair by a boatyard was prohibitive. This would be unwarranted discrimination against boaters on low incomes, such as pensioners. Clause 14 is also unreasonable because it makes no provision for boats moored to private lawful bankside moorings.

**Clause 15** is repugnant to the general law because it conflicts with the rights of the public to freedom of expression and freedom of assembly under Articles 10 and 11 of the ECHR. Additionally, the clause is unreasonable because no definition of "event", "procession" or "stunt" are provided: these are vague terms that could be applied to almost any activity, such as a group cruise with multiple boats or a cruise by people wearing pirate costumes with "Happy Birthday" banners hung on the boat, both of which are common occurrences.

**Clause 16(i)(c), Clause 38(i), Clause 39(i)(b) and Clause 39(ii)** are vague in their use of the terms "reasonable", "unreasonable" and "disturbance". The proposed byelaws refer to situations where there may be a variable and contentious balance between rights. The Rule of Law dictates that criminal offences should as far as possible create certainty, so that the citizen can tell when his or her actions would be against the law. These draft byelaws fail the test set out by Lord Bingham in *The Rule of Law* (2010), in that the citizen cannot predict when he or she would be committing an offence in breach of the draft byelaws.

**Clause 20** is unreasonable and onerous to comply with. In certain river or weather conditions, the speed may need to be above 4 mph in order to navigate safely, and yet this situation will not be an emergency. It is unreasonable to require boaters to obtain the MLC's consent in advance of what may be unpredictable weather or water conditions. In addition, most boats do not have speedometers and it is impossible for the skipper to measure a boat's speed precisely. This clause is out of line with other navigation authorities, who apply speed limits according to nature and size of the navigable channel.

**Clause 21(b)** is unreasonable in that it is so vaguely worded that it can be used to vindictively prohibit specific boats or boat owners from the waterways. The only vessels that should be excluded from the waterways are vessels whose dimensions are too large for the waterways and vessels that are only capable of being navigated at a speed that would cause damage to the waterways.

**Clause 22(i)** is unreasonable and leads to an absurdity. It is impossible to predict what any future statutory rights or powers may be.

**Clause 22(v)** is unreasonable because it is unjust not to exempt a boat owner from recovery of costs in the case of failure to re-moor or reposition a boat due to illness, disability, hospitalisation, family emergency or other emergency.

**Clause 24(viii)** is repugnant to the general law. The Public Right of Navigation on all navigable rivers (such as the Old River Nene) includes the right to moor for a reasonable time. The right of navigation on the artificially constructed Middle Level waterways includes the right to moor as a proper incident to navigation (see *Middle Level Commissioners v Marner and Anr* [2006] EWCA Civ 931). These Common Law rights cannot be extinguished by means of inferior legislation such as byelaws.

**Clause 24(ix)** is unreasonable and would be onerous to comply with where there is a shortage of mooring space as is the case in most of the Middle Level waterways. Mooring alongside another boat makes the best use of mooring space where this is limited, and depending on the width of a waterway at a particular point, two boats moored alongside each other do not necessarily cause an obstruction to navigation.

**Clause 24(x)(a)** is unreasonable as no definition of "lawfully moored" is provided.

**Clause 24(xi)** [this should read 24(xii)] mandates for an unreasonable imbalance of power between the occupiers of riparian residences and the occupiers of moored boats. This clause should include a reciprocal offence that "any occupier of a riparian residence shall ensure that no unreasonable annoyance is caused to any occupier of any vessel that is moored or remains stationary during the course of ordinary navigation".

**Clause 25(i)** is repugnant to the general law. The Public Right of Navigation on natural rivers includes the right to moor for a reasonable time, with 'reasonable' being capable of definition only on a case-by-case basis (see *Original Hartlepool Collieries Company v Gibb* [1877] 5 Ch D 713). The right of navigation on the artificially constructed Middle Level waterways includes the right to moor as a proper incident to navigation (see *Middle Level Commissioners v Marner and Anr* [2006] EWCA Civ 931). These Common Law rights cannot be extinguished by means of inferior legislation such as byelaws. Clause 25(i) is also repugnant to the general law in that the MLC are claiming the power to enforce mooring time limits at moorings where they do not own the bank of the waterway or the

bed of the waterway. Clause 25(i) is onerous because it does not reflect the reality of navigating all year round, where weather conditions, mechanical breakdown, illness and injury can mean a boat has to remain moored for longer than a specific time limit. Bargee Travellers would be disproportionately and adversely affected due to the fact that their boats are their homes.

**Clause 25(ii)** is repugnant to the general law in that it violates the rights of boat owners with protected characteristics under the Equality Act 2010 such as disability, age or pregnancy not to have a provision, policy or procedure applied to them in the same way as to a person without that protected characteristic, when applying the provision, policy or procedure would put them at substantial disadvantage. Substantial disadvantage includes criminal prosecution and conviction. The Equality Act 2010 cannot be modified by a byelaw.

**Clause 26:** we object to the definition of "houseboat" for the reasons stated above and we recommend that the definition of "houseboat" is changed to "any vessel or floating structure that is not capable of navigating under its own power, excluding an unpowered butty towed by a motor boat where the pair of boats habitually navigate together".

**Clause 27(i)(f)** is unreasonable because there is no provision for a boat owner to remedy an emergency of a boat being stuck in a lock and needing to be flushed out by opening the sluices. This is an occurrence that is common enough for boaters to know how to remedy it. Making it a criminal offence would put considerable strain on the staff resources of the MLC, who would be called out to deal with situations that boaters could manage themselves.

**Clause 27(v)** is unreasonable and onerous to comply with. Requiring a boat in a lock to be controlled by ropes at both the bow and stern would effectively exclude single-handed boaters from the Middle Level waterways. This would be repugnant to the general law by denying single-handed boaters the right to navigate on the Middle Level. It may be dangerous for a single-handed boater to use both the bow and stern rope in a lock because the boat could be hung up and sink if a boater on their own could not get to one of the ropes quickly enough to untie it. Single-handed boaters generally use a centre rope to control a boat in locks, and indeed this is a very widely used method of controlling a boat in a lock, not just by those who are boating on their own. Clause 27(v) is also repugnant to the general law as it would violate the Equality Act 2010 rights of boaters with disabilities, who may not be able to use ropes at both the bow and stern, and may suffer criminal prosecution as the direct result of their disability.

**Clause 28** is unreasonable. Towing boats tied side by side is often the safest and most controllable method where the width of the waterway allows and yet no provision is made for this. It would not qualify as an "emergency" and yet it would be best practice.

**Clause 29** is unreasonable. Diving operations may be essential to free a boat's propellor of weed or debris, if the boat has no weed hatch (and sometimes even if the boat does have a weed hatch). Prohibiting diving in these and similar circumstances risks causing obstructions to navigation that could be avoided. We note that the 2018 Act, these draft byelaws, the Boat Safety Scheme and all other waterways legislation that we are aware of, do not require a boat to be fitted with a weed hatch.

**Clause 33(ii)** is repugnant to the general law because it conflicts with the rights of the public to freedom of expression under Article 10 of the ECHR, and it potentially conflicts

with Article 8 in the case of a notice affixed to a person's home, whether that home be a boat or bricks and mortar. To use a byelaw to outlaw legitimate dissent (for example, affixing a notice urging people to object to an increase in registration charges for vessels) demonstrates a desire on the part of the MLC to exercise an unreasonably tight control over the activities of individuals. This is extremely dangerous because if it becomes law, this byelaw power could be used to target and exclude anyone from the Middle Level waterways who shows any public opposition to the conduct and the activities of the MLC.

**Clause 35(iii)(b)** is repugnant to the general law in that it violates the rights of boat dwellers to privacy and respect for their homes under Article 8 of the ECHR. The MLC must give adequate notice before inspecting a vessel and must not carry out such inspections without adequate notice and at a time that is convenient for the boat dweller.

**Clauses 40 (i) to (viii)** are repugnant to the general law. Under Section 114 of the Merchant Shipping Act 1995 the master of a vessel has sovereignty that is superior to the authority of an officer of the MLC.

**Clause 40(vi)(a)** is unreasonable because there is no requirement for an authorised officer to produce evidence of probable cause of a breach of compliance with the navigation acts and the byelaws. Without the necessity for the MLC to provide evidence of probable cause of a breach in compliance, this power could be used simply to victimise and vindictively pressurise specific boaters to leave the Middle Level waterways.

**Clause 41 (iii):** it would be unreasonable for the MLC not to accept applications for consent by email.

**Clause 43** is unreasonable. The offences (for example failing to secure a boat in a lock with bow and stern ropes) are of a minor nature and should not attract fines above Level 1.

**Clause 44** is unreasonable because this draft byelaw does not mention the right of appeal against the refusal of registration under Section 12(10) of the 2018 Act.

**National Barge Travellers Association**  
**17th November 2019**