SEWEL MEMORANDUM

RAILWAYS AND TRANSPORT SAFETY BILL

Motion

That the Parliament endorses the principle of introducing alcohol and drug testing for mariners as set out in the Railways and Transport Safety Bill and agrees that the relevant provisions in the bill on these issues that relate to devolved matters should be considered by the UK Parliament.

Purpose

1. This Memorandum outlines the terms of the UK Parliament Railways and Transport Safety Bill. It highlights the provisions in Part 4 of the Bill which deal with Alcohol and Drugs Testing in Shipping, and considers certain specific issues in Part 4 which fall within the competence of the Scottish Parliament. The Parliament is invited to agree that the specific devolved issues identified in relation to recreational mariners should be considered by the UK Parliament.

Railways and Transport Safety Bill: Background and Contents

2. The Railways and Transport Safety Bill was introduced in the House of Commons on 14 January 2003. The legislation covers a range of Railways and Transport Safety issues. It aims to improve public confidence in the railways and give Police greater powers to tackle alcohol and drug abuse amongst maritime and aviation personnel. The Bill would create an independent body tasked with establishing the causes of accidents on the railways as a Rail Accident Investigation Branch. It also deals with related issues dealing with the British Transport Police, the Office of Rail Regulation and related road and rail safety matters.

3. The Bill contains a package of reforms designed to improve safety across a range of transport areas. The Bill is in 7 parts, with 7 schedules structured as follows:

- Part 1: (Investigation of Railway Accidents)
- Part 2: (Office of Rail Regulation)
- Part 3: (British Transport Police)
- Part 4: (Shipping: Alcohol and Drugs)
- Part 5: (Aviation: Alcohol and Drugs)
- Part 6: (Miscellaneous)
- Part 7: (General)

4. This Memorandum addresses Part 4 of the Bill which deals with alcohol and drug testing in relation to shipping. It extends to any professional mariner and (subject to any exceptions made by regulations), to any non-professional mariner sailing in United Kingdom waters, as well as to mariners in United Kingdom - registered ships elsewhere. It introduces new provisions to regulate alcohol consumption in the maritime sector beyond existing powers.

5. The Memorandum deals principally with the effects of Part 4 of the Bill in relation to Shipping: Alcohol and Drugs testing as it effects certain devolved matters. It also touches on Part 6 in so far as clause 104 is discussed. The devolved issues arising relate only to part of the scope of these provisions.

Shipping: Alcohol and Drugs: Policy

6. Maritime safety is a reserved matter by virtue of Section E3 of Schedule 5 to the Scotland Act (Marine Transport). The policy lead falls to the UK Department for Transport (DfT). The structure of the maritime safety organisation also reflects these UK responsibilities, principally through the Maritime and Coastguard Agency (MCA), an Executive Agency of the DfT.

7. On 20 August 1989 51 people died in the Marchioness disaster on the River Thames. Following the Marine Accident Investigation Branch's (MAIB) inquiry into the disaster, the UK Government commissioned an inquiry under John Hayes into river safety. The Hayes Report, published in 1992, included 22 recommendations. Recommendation 18 stated:

> "The Department [for Transport], after appropriate consultation, should promote legislation to introduce a breath test similar to that applying to motor vehicle drivers which would apply to the skippers and crew of all vessels."

8. A further inquiry under Lord Justice Clarke was announced by the Deputy Prime Minister on 18 August 1999 to review all the arrangements to ensure safety on the River Thames. Lord Justice Clarke's report included the following recommendations:

> "Alcohol legislation for vessels should be in the form of primary legislation and an offence similar to that of being in charge of a vehicle while under the influence of drugs should also be introduced for vessels.
>
> Subject to consultation:
>
> Alcohol legislation should extend to all persons on duty whose duties extend to the navigation of the ship, the operation of her engines or navigational equipment and any member of the crew (including bar and catering staff) who might be called on to assist in the event of an emergency.
>
> It should extend to private pleasure craft.
>
> It should apply to all vessels in UK waters, irrespective of flag.
>
> Breath testing should be carried out after an accident or if there is reason to suspect a breach of the law but there should not be random testing"

9. Lord Justice Clarke published his report on the Formal Investigation into the collision between the Marchioness and the Bowbelle on 23 March 2001. His first recommendation referred to proposals put forward by the Department for Transport that reflected the position included in his earlier inquiry:-

> "We endorse the proposed legislation and recommend that it be enacted as soon as possible."

10. The UK Government has accepted this recommendation, and the Railways and Transport Safety Bill Part 4 implements these policies.

Railways and Transport Safety Bill: Part 4

11. Part 4 of the Bill provides for alcohol and drug testing in the maritime sector. The existing legislation in Section 58 of the Merchant Shipping Act 1995 makes it an offence for the master or a seaman employed in a UK-registered ship, or in a foreign ship in a UK port or in UK waters, to endanger his ship or other ships by reason of being under the influence of drink (or drugs). Under existing legislation there is no maximum blood/alcohol limit specified.

12. Part 4 of the Bill provides for the creation of statutory alcohol limits for mariners, and the creation of an alcohol testing regime. These provisions largely mirror provisions for road users and safety-critical staff on railways and related transport systems. The Bill also provides powers to extend this regime to include other intoxicating drugs. The Bill seeks to ensure that an alcohol-testing regime is put in place in a similar manner to that already existing in other transport modes (the proposed limit would be set at 80mg of alcohol per 100ml of blood, as for roads).

13. The Bill's provisions, therefore, would apply to professional mariners on all commercial shipping, cargo vessels and fishing vessels throughout the United Kingdom. All of this would fall within the scope of the relevant reservation in respect of Marine transport (Section E3 of Schedule 5 to the Scotland Act).

14. In relation to Scotland, however, there are two specific instances where there is concern that the proposals fall outwith the scope of the reservation. The first issue involves the recreational mariners sector.

Recreational Mariners on Internal Waters:

Clause 77 extends the drink and drugs provisions to "non professionals" and is intended to catch recreational mariners. Clause 88(2)(a), however, provides that Clause 77 shall have no effect in relation to anything done in internal waters in Scotland. Internal waters as used in this section would include inland waterways.

The Department for Transport included clause 88(2) following discussions with the Scottish Executive but is prepared to omit it on the basis that a Sewel motion will be passed. As presently drafted the Bill would not extend to any of the waters of Scotland including inland waters, and waters as contained in the definition of Scotland in the Scotland Act 1998 namely internal waters and the territorial sea adjacent to Scotland. The Scottish Executive's concern is that there is a devolved interest in so far as inland waters are concerned. (The Bill however refers to such inland waters as internal waters. For the purposes of this memorandum references to inland waters should be construed as referring to internal waters as contained at clause 88(2)(a) of the Bill).

15. So far as clause 77 is concerned there is no definition of "non professional" but the clause is drafted in such a way that it will catch all persons on board a ship exercising or purporting to exercise a function in connection with navigation. The definition of ship at clause 86 (1) (a) is the same as that used in the Merchant Shipping Act 1995 namely "every description of ship used in navigation". "Navigation" has not previously been defined in shipping legislation but the Bill now includes a definition at clause 86 (1) (b). This states that "a reference to navigation of a vessel includes..... the control or direction ..... of the course of a vessel.".

16. This definition of navigation makes a distinction between "navigation" for the purposes of the Bill and "navigation" as defined by the courts. In case Law (Curtis v Wild [1991] 4 AER 172) it has been held that inland waterways could not be "navigated" for the purposes of the Merchant Shipping Act 1894 (as it then was). Part of the reason for the finding was because the court was of the view that "navigated" had to mean proceeding from one fixed point to another fixed point and not simply the use of pleasure boats or "messing about in boats". The definition of navigation in the Bill includes controlling or directing the course of the vessel with a view to encompassing "messing about in boats".

17. In so far as clause 77 covers recreational mariners in inland waterways in Scotland current case law would strongly suggest that it relates to a devolved matter. As such any provision that extended to inland waterways would be outside the scope of the reservation in the Scotland Act 1998 which relates to the Merchant Shipping Act 1995.

18. The second issue concerns:

Coverage of all craft e.g. jet-skis.

The UK Government's policy intention is that the new testing arrangements should apply to all vessels, including personal water craft such as jet-skis. Here, in case law (Steedman v Scofield [1992] 1LL163) it has been held that certain pleasure craft such as jet-skis would not be covered by the definition of "ship" in the Merchant Shipping Act. As a result certain pleasure craft [would] fall outwith the definition of "ship" and so not be caught by the Merchant Shipping Act reservation.

19. The Bill, includes an Order making power at Clause 104 for the Secretary of State (for Transport) to make an Order to apply any shipping provision to "specified things which are used, navigated or situated wholly or partly in or on water". This clause enables any shipping provisions in this Bill and other shipping legislation to apply to things used on water. Its potential application is very wide. One such application would be to enable an Order to be made to include within clause 77 certain types of pleasure craft operated by nonprofessionals. An order could therefore be made to extend clause 77 to craft such as jet-skis to remove any uncertainty as to whether clause 77 could at present extend to such craft.

20. Regulations under clause 77(4) would allow for certain recreational mariners to be excepted from the alcohol limits, but they would not be excepted from the wider requirement that their ability to navigate a vessel should not be impaired by alcohol or drugs. This will ensure that the offence created is a proportionate one. Any exceptions will be defined in relation to the power of the vessel, its size, or its location. There will be consultation later in the year.

21. The Bill, as presently drafted, applies clause 104 to Scotland. It is therefore capable of applying to both reserved and devolved matters, in so far as the Order making power is used to apply to craft that fall outwith the definition of "ship".

Scottish Executive Position

22. The main issue for the Scottish Executive, and for the Parliament to consider, is whether the opportunity should be taken for the UK Bill to apply the new alcohol and drug testing provisions for shipping to all of the recreational sector in Scotland. At

present, the Bill as drafted excludes Scotland from the provisions in relation to internal waters (inland waterways). The consent of the Scottish Parliament by means of a Sewel motion would therefore be required if the UK Government was to amend the existing Bill to ensure that it applies to Scotland.

23. The Bill also has provision in clause 104 which would allow the Secretary of State, by order, to apply a shipping provision (such as the drink and drugs provision in clause 77) to things which may not be "ships" for the purposes of the Merchant Shipping Act 1995. This order making power would apply to Scotland, as well as the rest of the United Kingdom. In so far as the order making power may be used to include craft that may fall outwith the definition of "ship" a Sewel motion would be required as such craft are probably not caught by the Merchant Shipping Act reservation for the reasons given in para graph 18.

24. The Scottish Executive's view is that these provisions should apply in Scotland at the earliest possible time. Maritime safety is a vital area. The Executive would support, as a general principle, the application of maritime safety rules on a consistent basis throughout the UK as happens in relation to maritime safety at present.

25. The Executive is aware that there have been cases identified by the Marine Accident Investigation Branch across a range of shipping sectors, including the recreational side, where alcohol has been an issue and where fatalities have been involved.

26. It is also clear that the existing policy lead across all other shipping issues is reserved. The Government's main safety bodies and advisers, and supporting agencies such as the MCA, are reserved matters as provided for in the Scotland Act 1998. The emergence of the two issues identified as applying to Scotland does not reflect any existing planned institutional or devolved policy activity in Scotland. Rather, it reflects the views taken by the courts in relation to specific cases about interpretation of definitions in one aspect of the existing reserved legislation. And nor does the Executive see any case for separate Scottish maritime safety rules in one part of one shipping sector affected by these provisions.

27. It would be possible for the Executive to legislate in relation to the specific areas which appear not to be caught by the Merchant Shipping Act 1995. This, however, could lead to a potentially anomalous situation between Scotland and England on a point where, on the grounds of safety, consistent policy and application would be beneficial. Introducing the legislation in the UK Bill across Scotland on the same basis as in England and Wales, would also avoid the risk of incidents occurring (or not being deterred) while the opportunity was taken for Scottish provisions to be made.

28. The purpose of clause 104 is to enable the Secretary of State to specify by order specific types of craft that may not otherwise be caught by the new provisions. This would allow specific types of craft such as personal watercraft, e.g. jet skis, to be treated for the purpose of Part 4 as "ships".

29. The order making power in clause 104 would rest with the Secretary of State because it would ensure consistency of application of the rules across the UK, in an area where the principle of UK wide policy is well established. The regulation making power in clause 77(4) would allow for consistent application of any exception of certain recreational mariners from the limits, whether by reference to vessel size, engine power, or location. It would also help to avoid confusion amongst the enforcement agencies

involved, which would include the UK Maritime and Coastguard Agency as well as the police.

30. The order making power could only be exercised following consultation. In addition, under clause 104(6) the Secretary of State's order making power may provide for the provision not to apply or to apply with modifications if it conflicts with legislation of the Scottish Parliament.

Enforcement

31. The police and maritime enforcement authorities have been consulted on the provisions. It is difficult to provide an assessment of the enforcement and resource consequences. The Association of Chief Police Officers (in England and Wales) has indicated that the slightly increased resource implications for the police would be largely offset by use of current resources such as harbour launches and search and rescue helicopters. The Department for Transport has indicated that they would fund on a UK wide basis any training necessary for police and marine officials to enforce the proposals. In particular the training would cover techniques on boarding ships at sea by means of helicopter or ship to ship transfer. In terms of testing apparatus, there would be minimal costs for implementation of the alcohol provisions, since the testing regime would use equipment already in use for alcohol testing on the roads. The number of tests required is expected to be low, as would the number of prosecution cases.

32. Police enforcement powers in Scotland will be similar to those provided in the Road Traffic Act 1988. Responsibility for the testing of relevant persons suspected of working whilst under the influence of drink or drugs will therefore fall on local police forces as they already do in respect of the above named legislation. When consulted the Association of Chief Police Officers in Scotland took the view, like its sister Association in England and Wales, that the proposed measures would have minimal resource implications...

Other Issues

33. The Bill creates the Rail Accident Investigation Branch (RAIB) to investigate accidents on the heavy rail network across GB and contains provisions for the RAIB to investigate accidents on tramways in England and Wales. Tramways in Scotland are a devolved matter, although there are unlikely to be any before 2008. It would be for the Executive to propose any legislation for extending these provisions to Scotland.

34. The aviation provisions of the Bill relate to issues which are reserved. However, they do have implications for the Executive through ownership of airports in the Highlands and Islands and our interest in developments in air transport in Scotland. As such, SEDD officials are liaising with Department for Transport officials on ongoing consideration and development of the proposals, but they involve no devolved matter.

Conclusion

35. The Executive concludes that in so far as the UK Railways and Transport Safety Bill would apply to recreational mariners in inland waters in Scotland, a devolved matter arises as set out in paras 15-17 above. The issue is therefore whether the proposed alcohol and drug testing regime in the Bill should be applied fully to such mariners in Scotland. These issues relate to applying the proposed alcohol and drug testing regime in the UK Railways and Transport Safety Bill fully to the recreational maritime sector in

Scotland. The Executive's view is that a consistent approach should be adopted across the United Kingdom in respect of these matters, including those aspects which relate to devolved matters. This reflects the importance of maritime safety issues. The Executive proposes that where the UK Bill addresses issues of devolved competence they should be considered by the UK Parliament.

36. It is in the interests of maritime safety that there should be a consistent application of maritime safety rules throughout the United Kingdom. Similarly it is desirable that there should be consistency throughout the UK where shipping legislation is to be applied to things which may not otherwise be subject to such legislation. The Executive, therefore, invites the Parliament to give its consent by means of a Sewel motion to these issues being considered by the UK Parliament.

Scottish Executive
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