EXPLANATORY MEMORANDUM TO

THE MERCHANT SHIPPING (WATERCRAFT) ORDER 2023

2023 No. 35

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument will ensure that those who use mechanically powered personal or recreational watercraft in a dangerous or unsafe manner can be prosecuted. Such watercraft were previously believed to have been within scope of the relevant provisions of the Merchant Shipping Act 1995 ("MSA") and the Harbours Act 1964 which are applicable to "ships". However, following a serious accident involving two personal watercraft users, the Court of Appeal ruled they were not covered.

2.2 This instrument will close that gap by applying existing measures contained in the MSA and the Harbours Act 1964, as well as in relevant secondary legislation, to a new category of "watercraft".

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument contains sub-delegation.

3.2 In exercise of the power at section 112(3)(a) of the Railways and Transport Safety Act 2003, this instrument applies in relation to watercraft the Secretary of State's powers to legislate in relation to ships as conferred by sections 10 and 85 of the MSA.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England, Wales, Scotland and Northern Ireland. It is applicable to all powered personal and recreational watercraft used in UK waters.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for maritime matters, Baroness Vere, has made the following statement regarding Human Rights:

"In my view the provisions of the Merchant Shipping (Watercraft) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The MSA is the principal primary legislation providing for the regulation of United Kingdom ships wherever they may be and ships in United Kingdom waters. Among other things, it provides for:

- the maintenance of a register of British ships (see Part 2), including conferring a power to make provision for and in connection with the registration of ships as British ships (see section 10);
- a criminal offence relating to conduct which endangers ships, structures or individuals (see section 58);
- the safety of ships (see Part 4), including:
    - conferring a power to make provision for securing the safety of United Kingdom ships and ships in United Kingdom waters and persons on them, and for protecting the health of persons on them (see section 85);
    - powers to detain dangerously unsafe ships (see sections 94 to 97);
    - a criminal offence relating to an owner's liability for the unsafe operation of a ship (see section 100).

6.2 There is also a substantial body of secondary legislation that applies in this arena, made chiefly under the MSA. In particular:

- the Merchant Shipping (Registration of Ships) Regulations 1993 supplement the MSA's provisions on registering ships as British ships;
- the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 implement the International Regulations for Preventing Collisions at Sea 1972 (as amended), to secure the safe operation of vessels; and
- the Merchant Shipping (EPIRB Registration) Regulations 2000 deal with the registration of emergency position indicating radio beacons carried on vessels.

6.3 The Harbours Act 1964 contains powers for a designated harbour authority to give directions in respect of ships leaving or entering the authority's harbour (see sections 40A to 40D).

6.4 Both the MSA and the Harbours Act 1964 define a "ship" in terms of a vessel "used in navigation" (see section 313(1) of the MSA and section 57(1) of the Harbours Act 1964). Until the Court of Appeal decision in *R v Goodwin* [2005] EWCA Crim 3184, it was understood that these were wide definitions encompassing, among other things, the mechanically propelled personal watercraft the operation of which was at issue in that case. In light of that decision, the meaning of a "ship", and so the scope of the MSA and the Harbours Act 1964, has been narrowed to exclude personal watercraft. The decision has also cast doubt on whether other descriptions of vessel might fall within the definition of "ship" for the purposes of relevant legislation.

6.5 Section 112 of the Railways and Transport Safety Act 2003 confers power on the Secretary of State to provide for a shipping provision to apply (with or without modification) in relation to specified things which are used, navigated or situated wholly or partly on the water. Section 112(3) makes it clear that includes power to make provision which applies a power to legislate or which creates an offence.

6.6 This instrument is made in exercise of the power in section 112 of the Railways and Transport Safety Act 2003 to apply in relation to watercraft (as defined in article 3 of the Order) the provisions described in paragraph 6.1 to 6.3 as they apply in relation to

ships, together with supplementary provision about interpreting those applied shipping provisions and (in relation to the application of applied powers to legislate) supplementary procedural provision.

7. Policy background

What is being done and why?

7.1 The number, size, power and availability of personal watercraft, in particular, have all increased significantly over recent years and their use in UK waters has increased markedly during the Covid-19 pandemic. Although most users of personal and recreational watercraft are responsible and conduct themselves safely, there remains a significant minority who, through their actions, can endanger other water users and property.

7.2 Most personal and recreational watercraft are launched from local and harbour authority-managed waters. These bodies, which are best placed to deal with local conditions and safety concerns, have the power to introduce byelaws and harbour directions to control personal and recreational watercraft use in the waters they manage. However, the extent of those powers depends, in the case of harbour authorities, on their establishing legislation and many areas do not have any provisions in place.

7.3 This patchwork of local provisions was thought to have been underpinned by national legislation applicable under the MSA. This provides for the prosecution of those who dangerously misuse ships and protects accident victims by enabling a legal route to justice. However, following a serious injury involving a collision between two personal watercraft users, the Court of Appeal ruled that personal watercraft were not within scope of the definition of "ship" in the MSA since they were for recreational purposes only and were not "used in navigation". As a result, the MSA's provisions, including those relating to dangerous use, were considered never to have applied to personal watercraft. A materially identical definition of "ship" is also used within the Harbours Act 1964, which includes provisions relating to the management of harbours, where the judgment also has a similar impact.

7.4 Although the case related to personal watercraft, the wording of the ruling also raised uncertainty about the status of recreational watercraft, such as yachts, speedboats and other similar vessels, and whether these were also potentially out of scope. In practical terms the Court of Appeal's ruling means that, except in the most serious of cases, for example if an accident leads to a fatality, or if there is applicable local legislation in place, there is no mechanism in place to prosecute an individual for dangerous use of a personal or recreational watercraft. This contrasts markedly with the provisions applicable to other, larger, maritime vessels and the regimes in place in other transport modes where those responsible for causing accidents can be brought to account through due legal process.

7.5 This instrument will close that gap by introducing national legislation, applicable in all UK waters, to enable those responsible for incidents or accidents involving dangerous use of a personal or recreational watercraft in UK waters to be held legally accountable for their actions. Applying the provisions which already exist for these offences within the MSA, which have been in place for a significant amount of time and are well-understood by the sector, to powered personal and recreational watercraft is an effective and proportionate response to this safety concern. For consistency, the

same approach will be used in relation to powers to give directions under the Harbours Act 1964.

7.6 Mechanically powered personal and recreational watercraft have been brought within scope since these are the key source of safety risk and concern especially in shallow waters shared with other users. The safety record of non-mechanically powered watercraft is good and there is currently no case for the wider applicability of the MSA's provisions to this sector although the Department will continue to keep this position under review.

Explanations

What did any law do before the changes to be made by this instrument?

7.7 It was originally thought that the provisions within the MSA and Harbours Act 1964 applied to personal and recreational watercraft in the same manner as larger ships. However, the Court of Appeal ruled that such craft were out of scope. As a result, the only applicable maritime safety legislation and offences were byelaws and harbour directions that may have been introduced by local or harbour authorities. Where such local laws exist, they are only applicable within the waters managed by those authorities.

7.8 The Court of Appeal's ruling also brought into doubt the applicability of other, related, legislative provisions including the status of personal and recreational watercraft registered in the UK Ship Registry and the powers of the Maritime and Coastguard Agency, as the relevant enforcement authority, to detain dangerously unsafe craft.

Why is it being changed?

7.9 The Court of Appeal's ruling removed the provisions of the MSA and Harbours Act 1964 together with relevant secondary legislation previously thought to apply to the safety of personal and recreational watercraft. The resulting legislative gap created meant that, outside of local or harbour authority managed waters if those authorities have introduced a byelaw or harbour direction to manage personal or recreational watercraft, those who dangerously misused such craft could not be held legally accountable for their actions should there be an accident.

What will it now do?

7.10 This instrument will apply the relevant provisions of the MSA and Harbours Act 1964 together with relevant secondary legislation to powered personal and recreational watercraft including offences relating to dangerous use. This will mean that, should there be an accident or incident involving these craft, if the cause is dangerous use, those responsible can be prosecuted. The legislation recognises that a number of actors have responsibilities, or may impact on, an incident or accident involving watercraft and applies relevant duties to the owners, operators and users of watercraft. These terms are already used and well understood within the sector and the instrument defines what those duties are. . The instrument will apply in all UK waters regardless of whether these are managed by a local or harbour authority. The application of the MSA and Harbours Act 1964 will not affect any local byelaws or harbour directions which have been introduced to manage personal or recreational watercraft but they will provide those authorities, and others which do not have any provision in place, with an additional route to prosecution. They will also enable those authorities which

do not currently have the necessary powers to introduce byelaws and harbour directions to control watercraft once in force.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument applies provisions in existing legislation to a new category of watercraft. It does not make any amendments to existing legislation but consolidation will be considered when the existing legislation is subject to review in due course.

10. Consultation outcome

10.1 The Department for Transport consulted on draft legislation between 6 September 2021 and 1 November 2021. The consultation paper was sent to a wide variety of organisations across the maritime sector including representative associations, user groups, businesses, manufacturers, devolved administrations, local government and enforcement bodies as well as being published on gov.uk[1]. A more detailed summary of the responses received is also posted on gov.uk.

10.2 A total of 491 responses were received spanning a wide range of stakeholders. Most (71%) were personal responses from individuals, and many did not provide a response to all of the specific questions asked in the consultation paper. While a small minority of respondents (2%) were opposed to the principle of the regulation and thought it unnecessary, the overwhelming majority agreed that the legislation was necessary and should be introduced as soon as possible. 29% expressed full support for the proposals as drafted. However, 67% requested amendments with many focussing on the key question of the definition of "watercraft" which determines which craft are within scope of the legislation.

10.3 The Department for Transport's initial proposal for the definition of "watercraft" was based on precedents used in other maritime legislation. It included, amongst other issues, exclusions based on minimum and maximum craft length. In doing so, the Department for Transport wished to ensure that existing legislation and enforcement regimes, which are already well understood by users, were reflected and that it was clear which craft would be within scope. The proposal also dovetailed with other applicable legislation such as the provisions for registration in the UK's Ship Registry.

10.4 However, respondents expressed concern that larger unpowered craft – those over 2.5 metres in length – would be within scope. Responses indicated that the current safety record of these, larger, types of unpowered watercraft (which would include, for example, most sea kayaks) was excellent and that there was no safety case for the application of the dangerous use provisions of the Merchant Shipping Act 1995. They also argued that the 2.5-meter length distinction for unpowered vessels was largely arbitrary for this sector with many different classes and models of watercraft used for the same purpose being both above and below this length limit.

[1] See https://www.gov.uk/government/consultations/strengthening-enforcement-of-the-dangerous-use-of-recreational-and-personal-watercraft.

10.5 The Department for Transport has considered the evidence supplied by respondents and agrees that placing length limits within the definition of "watercraft" could potentially lead to unintended impacts such as manufacturers replacing longer models in their ranges with shorter versions which are, for example, less stable or are designed only for the use of experienced practitioners. Given that the key source of risk, and implications for the severity of an accident, is speed, the Department for Transport has decided to alter the definition to any watercraft which is 'capable of moving under its own mechanical power'. This brings any watercraft which has an engine or motor fitted into scope whilst also recognising that many watercraft, such as yachts, whilst having engines installed, spend most of their time – and generally achieve their fastest speeds – under sail power to ensure they are also within scope. The Department for Transport believes this definition brings additional regulatory clarity, will allow those smaller craft into which engines or motors are now being installed to be captured and is tailored to the key source of risk.

10.6 Most respondents agreed that it should be possible for owners to voluntarily register their watercraft in the UK Ship Registry to allow them to access the benefits this brings. Some respondents suggested that registration should be a mandatory requirement and that this would assist, for example, enforcement. The Department for Transport has considered this argument and, whilst it will maintain this provision under review, does not believe there is currently a case for the mandatory registration of all watercraft.

10.7 Several respondents questioned the application of the Merchant Shipping (Marine Equipment) Regulations 2016 ("the 2016 Regulations) to watercraft. The Department for Transport's intent in suggesting their application was to ensure, whilst not making the provision of safety equipment mandatory, that any safety equipment provided should comply with the design, construction and performance requirements of relevant international standards. However, the Department for Transport accepts that application could result in unintended consequences. The 2016 Regulations are written with equipment used on larger vessels, such as lifejackets complying with the requirements of the International Convention for the Safety of Life at Sea, in mind. Such equipment is not designed for use on watercraft and applying the obligations in the 2016 Regulations to watercraft may act as a disincentive to purchase or that provided equipment might not be fit for its intended purpose. Both outcomes have potential to reduce safety and, considering the advice which is readily available from organisations such as the Royal Yachting Association and the Personal Watercraft Partnership on appropriate safety equipment for specific types of watercraft, the Department for Transport has concluded that these requirements should be removed from the final instrument.

10.8 Few of the other questions within the consultation paper stimulated a significant response with most respondents who expressed a preference indicating they were content with the proposals (largely subject to the removal of unpowered watercraft from scope). In response to several queries the Department for Transport also clarified that the provisions of the MSA, for these purposes, were applicable to watercraft used on inland, as well as coastal, waters.

10.9 While the draft legislation has continued to be finessed to further enhance clarity and formatting, no further changes of substance have been made.

11. Guidance

11.1 The Maritime and Coastguard Agency (MCA) has published a significant amount of guidance on these provisions. Other than their applicability to personal and recreational watercraft, there is no change in the provisions themselves and the guidance is equally applicable to this sector.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is not expected to be significant and will fall largely on the MCA as the relevant enforcement authority. MCA has an established enforcement team and there is no change to the offences within the Merchant Shipping Act 1995 which have remained applicable to ships.

12.3 A full Impact Assessment has not been prepared for this instrument because no, or no significant, impact is foreseen.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 This is, principally, those who hire out powered personal and recreational watercraft. The instrument will place an obligation on these businesses to ensure that all reasonable steps are taken to secure that the watercraft is operated in a safe manner. It is noted that this provision is, generally, already included as a requirement in the public liability insurance that such businesses are required to have. It is, therefore, not anticipated that there will be any associated costs associated with the introduction of this instrument.

13.3 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to ensure that the instrument includes a short period between making and coming into force to allow affected businesses to familiarise themselves with these requirements and ensure compliance in advance of coming into force.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the government to keep this legislation under review to ensure it remains fit for purpose and, given the need for additional legislation in this area, that the application of the MSA and the Harbours Act 1964 and relevant secondary legislation is proportionate and appropriate to ensure that safety is maintained in this sector.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Baroness Vere, Parliamentary Under Secretary of State with responsibility for maritime policy at the Department for Transport, has made the following statement:

"Having regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and the Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that it would not be appropriate to make provision for review in this instrument because it would be disproportionate, taking into account the expected economic impact of the legislation."

15. Contact

15.1 Christopher Angell at the Department for Transport Telephone: 0300 330 3000 or email: maritimesafety@dft.gov.uk can be contacted with any queries regarding the instrument.

15.2 John Connell, Deputy Director for maritime operations at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Vere, Parliamentary Under Secretary of State for Maritime, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.