

**EXPLANATORY MEMORANDUM TO THE  
MERCHANT SHIPPING (ACCIDENT REPORTING AND INVESTIGATION)  
REGULATIONS 2005**

**2005 No.881**

1. This explanatory memorandum has been prepared by the Marine Accident Investigation Branch (MAIB), a part of the Department for Transport and is laid before Parliament by command of Her Majesty.

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

2. **Description**

- 2.1 These Regulations replace the Merchant Shipping (Accident Reporting and Investigation) Regulations 1999 (S.I. 1999/2567) (“the 1999 Regulations”).

The Regulations specify the purpose of investigations, make provision for their scope and conduct, define the accidents and hazardous incidents which may be investigated, and set out the requirements for reporting accidents and the publication of reports and summaries.

3. **Matters of Special Interest to the Joint Committee on Statutory Instruments**

- 3.1 The instrument provides new powers to the Chief Inspector of Marine Accidents, and to Inspectors of Marine Accidents. These powers:

- 3.1.1 Enable the Chief Inspector, following an accident, to require a ship to remain accessible within UK territorial waters if there are serious grounds for concern that access to the ship, crew, or evidence related to the accident will not be made available to the MAIB outside UK territorial waters if the ship leaves the jurisdiction (r.9).

- 3.1.2 Enable an Inspector to exclude any person from an interview, who is not a solicitor or professional legal adviser acting solely on behalf of the interviewee, if he considers the presence of that person to be a hindrance to the investigation. Any exclusion must have the agreement of the Chief Inspector, and the interview would be suspended until the interviewee's substitute nominee were available (r.10).

- 3.1.3 Create a “closed loop” system in relation to any recommendations made by the Chief Inspector, by placing obligations upon addressees of recommendations to take them into consideration and report back on what has been done; or if nothing has been done to implement them, to explain why this is the case.

3.2 The instrument also creates new offences:

- 3.2.1 It will be an offence for a harbour authority or inland waterway authority to fail without reasonable cause to report to the MAIB accidents or serious injuries of which they are aware, or to fail without reasonable cause to provide any information required by the Chief Inspector under regulation 7(3).
- 3.2.2 It will be an offence for any person to fail without reasonable cause to comply with the requirement to ensure that a ship is accessible in United Kingdom waters for the collection or preservation of evidence.
- 3.2.3 Any person charged with such offences will be liable on summary conviction to a fine not exceeding Level 5 on the standard scale.

#### **4. Legislative Background**

- 4.1 The investigation of marine accidents is governed by powers contained in section 267 of the Merchant Shipping Act 1995 (“the Act”). Section 267(3) enables the Secretary of State to make, by regulations, such provision as he considers appropriate in that connection.
- 4.2 The aim of these Regulations is to improve the efficiency and efficacy of the MAIB, reflect best working practices adopted by the Branch, and align MAIB practices more closely with the processes of other transport accident investigation branches.
- 4.3 These Regulations are the latest in the series of instruments relating to marine accident investigation following the creation of the MAIB in 1989. Previous instruments were S.I. 1989/1172, S.I. 1994/2013 and S.I. 1999/2567. The first two instruments were made under substantially similar powers contained in earlier Merchant Shipping Acts. These Regulations replace the 1999 Regulations by consolidating them with amendments.
- 4.4 The Regulations were sent out for a three-month consultation on July 27<sup>th</sup>, 2004. The consultation period ended on October 31<sup>st</sup>, 2004. An analysis of the responses to the consultation was undertaken and this document can be found at Annex A to the Regulatory Impact Assessment. It is also available on the MAIB website.

#### **5. Extent**

- 5.1 These Regulations extend to the whole United Kingdom and will apply to all individuals and ships involved in an accident within UK territorial waters, and to all UK-registered ships, and individuals onboard, involved in an accident anywhere in the world. Various provisions will affect ship owners, operators, harbour and port authorities, inland waterway authorities, and the Maritime and Coastguard Agency (MCA).

#### **6. European Convention on Human Rights**

6.1 Not applicable.

## 7. Policy Background

7.1 Section 267 of the Act enables the Secretary of State to appoint inspectors of marine accidents, together with a Chief Inspector of Marine Accidents. It also sets out powers to enable the Secretary of State to make regulations with respect to the investigation of marine accidents, as well as setting out the general powers available to inspectors of marine accidents.

7.2 The aim of these Regulations is to give legislative effect to working practices that have evolved in recent years, which underpin effective investigations and recommendations. The Regulations aim to address several risks, namely:

7.2.1 Under-reporting and late reporting of accidents can lead to loss of evidence. MAIB hears about approximately 50 accidents a year through sources other than reports made directly to the Branch. It is estimated that in total, as many as several hundred accidents a year are never reported. In addition, some 18% of accidents are not reported within a week, and 36% of injuries are not reported within two weeks of occurring. Three main types of evidence can be lost as a result. Evidence from voyage data recorders (VDR) and other electronic memory systems on board vessels can be overwritten before inspectors arrive. Physical evidence can perish, be contaminated or accidentally be moved. In a worst case, the vessel may have sailed from UK waters before the inspectors can arrive on the scene, and if non-UK flagged, the vessel is then beyond MAIB's jurisdiction. Finally, witness evidence degrades with time, and can be contaminated by outside influences.

7.2.2 Contradictions identified in the 1999 Regulations may lead to confusion. Regulation 6 of those Regulations defines an accident as "any contingency caused by an event on board a ship or involving a ship". Although by definition a contingency is an unforeseen event, no exception was made for cases involving suicides and attempted suicides, or death from natural causes, thus creating a contradiction. Similarly, the 1999 Regulations require an investigation to be discontinued when the Secretary of State orders a formal investigation to be held (under section 268 of the Act), although it is now accepted that technical investigations complement any formal investigation.

7.2.3 Occasional intimidation of witnesses to an accident threatens to undermine the MAIB's ability to discharge its statutory duties effectively and to hinder the progress of future investigations. Witness declarations are one of the most important forms of evidence available to an Inspector in an investigation. In recent times, experience has shown that personnel, including lawyers, representing other parties involved in an accident (such as shipowners or their insurers) have

increasingly imposed themselves upon interviewees, inevitably reducing the Inspectors' ability to encourage the witness to speak openly. The intimidation of witnesses by their supposed representatives in a small number of cases has made it difficult for inspectors to ascertain the truth about the events leading to the accidents concerned.

7.2.4 The 1999 Regulations do not require anyone to respond to any recommendations that may be addressed to them. Lack of response has thus been a major factor tending to defeat the principal objective of the Branch, namely that of promoting future safety of life at sea. The implementation of recommendations is of fundamental importance in assessing and improving its effectiveness in this respect. Further, estimates show that 1 in 14 recommendations elicit no response, suggesting that 1 in every 14 safety recommendations may have been ignored, to the detriment of safety.

7.3 General response to the consultation was good. The consultation pack was sent to approximately 100 representatives of the maritime industry, waterway authorities, government departments, devolved administrations, and others. A summary of the draft Regulations was published in Lloyd's List on August 18<sup>th</sup>, 2004. In total, the MAIB received 30 responses to the consultation. Of these, 7 fully supported the draft Regulations and offered no other comments. Comments provided by the remaining 23 respondents covered both the draft Regulations, and the proposed Marine Guidance Note. No comments of substance were received regarding the Regulatory Impact Assessment.

7.4 The amendments to the 1999 Regulations will have an impact on the way in which the MAIB conducts its business. By increasing the efficiency and efficacy of the Branch, the public perception of accident investigation will improve. Also, by formalising the best working practices adopted by the Branch, slippage in standards or delivery of service will be prevented. The alignment of working practices across the three accident investigation Branches (Marine, Air, and Rail) also enhances the quality of service provided, and allows standards to be set across accident investigation as a whole.

## **8. Impact**

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 There is no impact on the Exchequer.

## **9. Contact**

9.1 Rachel Jones at the Marine Accident Investigation Branch can answer any queries relating to the instrument. Tel: 023 8039 5503. E-mail: rachel.jones@dft.gsi.gov.uk.

**Regulatory Impact Assessment:**

**The Merchant Shipping (Accident Reporting and Investigation) Regulations 2005**

**Marine Accident Investigation Branch**

**(MAIB)**

**March 2005**

## **1.1 Title of Proposed Measure**

The Merchant Shipping (Accident Reporting and Investigation) Regulations 2005

## **2.1 Objective**

The aim of the new Regulations is to give legislative backing to working practices that underpin effective investigations and recommendations. This will improve the efficiency and efficacy of the Marine Accident Investigation Branch (MAIB), reflect best working practices adopted by the Branch, and align MAIB practices more closely with the processes of other transport accident investigation branches.

The new Regulations will apply to all individuals and ships involved in an accident within UK territorial waters, and to all UK-flagged ships, and individuals onboard, involved in an accident anywhere in the world. Parts of the Regulations will affect ship owners, operators, harbour and port authorities, inland waterway authorities and the Maritime and Coastguard Agency (MCA).

## **2.2 Background**

Based in Southampton, the MAIB is an independent unit within the Department for Transport, deriving its authority from section 267 of the Merchant Shipping Act 1995. The Merchant Shipping (Accident Reporting and Investigation) Regulations 1999 provide the legislative framework within which the MAIB operates.

The role of the MAIB is to contribute to safety at sea by determining the causes and circumstances of marine accidents, and by working with others to reduce the likelihood of such causes and circumstances recurring in the future. **The sole objective of any MAIB investigation is to prevent future accidents through the ascertainment of the causes and circumstances of an accident. It is not its purpose to apportion liability, nor, except so far as is necessary to achieve its objective, to apportion blame.**

The MAIB receives approximately 1,500 reports of accidents and incidents each year. There is an increasing public expectation that all investigations will be conducted thoroughly, so as to identify deep-rooted safety issues against which sustainable remedial action can be implemented.

MAIB employs 19 inspectors, and 16 support staff. MAIB's budget for 2005/06 is £2.69 million. Taking into account the limited manpower and financial resources available to the Branch, it becomes essential for reporting procedures to allow a timely and effective response to a sufficiently wide range of accident types. This allows the Branch to fulfil its remit in an increasingly complex and diverse marine environment.

The Regulations specify the purpose of investigations, make provision for their scope and conduct, define the accidents and hazardous incidents which may be investigated, and set out the requirements for reporting accidents and the publication of reports and summaries. The current proposals are intended to replace the Merchant Shipping (Accident Reporting and Investigation) Regulations 1999, and will apply to UK-registered ships world-wide, and non-UK-flagged ships within UK territorial waters.

### **2.3 Risk Assessment**

The risks associated with the current Regulations are outlined below:

- a) MAIB requires adequate and timely notification of every accident. The current Regulations require only ship owners, and masters or senior surviving officers, to report an accident.

However, MAIB has identified an ongoing problem with under-reporting of accidents. This is partially due to foreign ship owners and masters not knowing of the requirements laid upon them to report to the MAIB. A conservative estimate for under-reporting can be calculated by examining the number of accidents and injuries that have not been reported to the MAIB, but are serious enough for MAIB to learn about through the press or other non-marine sources. This figure currently stands at approximately 49 accidents a year, and suggests a considerably higher figure for under-reporting as a whole.

The scale of late-reporting means that some 18% of reported accidents are not reported within a week, and 36% of reported injuries are not reported within two weeks of their occurrence. In the past, this has meant that annually, up to 200 accidents and 250 injuries are not reported on time. Late reporting can mean that vital evidence may be lost or contaminated by the time MAIB investigators reach the scene. Specific incidents of this occurring cannot be detailed due to the confidentiality of marine accident investigations, but in general terms, there are three types of evidence that can be lost:

- Evidence from voyage data recorders (VDR) and other electronic memory systems on board vessels. Data contained on VDR and other electronic equipment is overwritten as often as every 12 hours. In order to ensure the safe retrieval of the information from such systems, inspectors need to act within this time frame. In cases where witness vessels may have picked up a collision on their equipment, the 12-hour deadline becomes even tighter, as the witness vessels need to be identified before being contacted.
- Physical evidence can perish, be contaminated, or accidentally moved. The longer it takes for the MAIB to be informed, the

greater the chances of such losses. In extremis, the vessel may have sailed from UK waters before the inspectors can arrive on the scene, and if non-UK flagged, beyond MAIB's jurisdiction.

- Witness evidence degrades with time, and can be contaminated by outside influences.

Clearly, non-reporting of an accident, or late-reporting leading to the loss of any one of these types of evidence, will affect the ability of MAIB to exercise its function effectively.

- b) The current Regulations contain several contradictory definitions, one of which is found in Regulation 6 of the 1999 Regulations. An accident is defined as "any contingency caused by an event on board a ship or involving a ship". However, the current Regulations make no exception for suicides and attempted suicides, or death from natural causes, which are clearly not accidents. This also means that MAIB Regulations are out of line with those of other Accident Investigation Branches.
- c) Current Regulations require an investigation to be discontinued when the Secretary of State orders a formal investigation to be held. It is now accepted that technical investigations, such as those undertaken by MAIB, feed into and indeed complement any Formal Investigation ordered by the Secretary of State. The obligatory discontinuation of any accident investigation would seriously undermine the remit of MAIB, and put future maritime safety at risk.
- d) The current Regulations require that equipment pertinent to the investigation of the accident be left undisturbed, and that an inspector be allowed to deny access or interference with any ship involved in an accident. Implicit in this is the requirement for any vessel to remain accessible to the MAIB until evidence is collected. However, there is currently no explicit requirement for ships to remain accessible in this way, and all foreign-flagged vessels leave MAIB's jurisdiction when they leave UK territorial waters. The number of accidents involving foreign-flagged vessels is substantial, with 17.8% of reported accidents and 8.7% of reported injuries occurring on non-UK flagged vessels. By leaving MAIB jurisdiction before an investigation is complete, vessels would undermine the sole objective of MAIB.
- e) Witness declarations are one of the most important forms of evidence available to an Inspector. The current Regulations do not provide adequate protection to witnesses making declarations to inspectors. Witnesses are permitted to have a representative of their choice present at all times during the interview. However, the intimidation of witnesses by their chosen representatives after a small number of accidents has made it difficult for inspectors to ascertain the truth about the events leading to those accidents. Personnel, including lawyers, representing other parties in an



accident have increasingly imposed themselves upon interviewees, inevitably reducing the Inspectors' ability to get the witness to speak openly about the other party represented.

Clearly, intimidation of witnesses threatens to undermine the MAIB's ability to discharge its statutory duties effectively, and will hinder the progress of future investigations. The ability of a witness to speak openly and confidentially to the MAIB, in the absence of anyone representing another party to the accident, is fundamental to a safety investigation.

MAIB requested information from anyone who wanted to discuss intimidation of this kind. No such information was received.

- f) The current Regulations include a long list of documents and records which cannot be released without a Court Order. This list is now considered restrictive, particularly when police and other official authorities have a claim to this evidence under their own powers.
- g) The sole objective of an MAIB investigation is the prevention of future accidents, through the ascertainment of an accident's causes and circumstances. It is not its purpose to apportion liability, nor, except so far as is necessary to achieve its objective, to apportion blame. Nevertheless, there are regular attempts to delay or "neuter" MAIB reports, because of concerns over future prosecutions or litigation. In many cases, draft reports sent out for consultation, in accordance with the Regulations, are dealt with by companies' legal departments looking at possible litigation concerns, rather than by marine departments looking at future safety issues. Additionally, MAIB reports are often based upon evidence that would not be admissible in Court, such as declarations taken from witnesses under MAIB powers (i.e. without caution or a right of silence).

Comments regarding the use of MAIB reports in legal proceedings were requested. Several explicit endorsements of the idea that a MAIB report should not be used in judicial proceedings for which it was not originally intended were received.

- h) The MAIB send letters containing safety recommendations to many parties and organisations. Currently, the Regulations do not require any addressee to respond to a safety recommendation letter. There are several risks associated with the presence of this loophole.
  - Lack of response has been a major difficulty for the organisation, since the implementation of recommendations is one of the main ways in which to assess and improve the effectiveness of the Branch.
  - Historically, over 2000 safety recommendations have been made by the MAIB. Estimates show that about 1 in 14

recommendations elicit no response, suggesting that 1 in every 14 safety recommendations may have been ignored, to the detriment of safety of life at sea.

### 3.1 Options

Four options have been identified as opportunities to achieve the objectives set out in 2.1. These are:

- i. Continue to rely on the provisions of the 1999 Regulations
- ii. Information and education campaigns
- iii. Develop Memoranda of Understanding with Stakeholders
- iv. Introduce revised Regulations

**a) Option 1 involves relying on the provisions of the 1999 Regulations.** By continuing to operate under the existing Regulations, the MAIB's ability to deliver its remit effectively would be undermined. The risks inherent in continuing to rely on these Regulations are presented above in some detail. It would not be practicable for MAIB to continue to use these Regulations, nor would it help improve working practices and align the accident investigation branches in general. **Option 1 is therefore clearly not a suitable course of action, and is thus rejected.**

**b) Option 2 involves carrying out a series of information and education campaigns.** The MAIB already publishes a large amount of its investigation work and safety recommendations. These include the Safety Digests, Informational Leaflets, and the Investigation Reports.

All full investigation reports are also published, with the aim of having these available within 6 months of an investigation beginning. As well as hard copies, these are available on the MAIB website, which takes some 30,000 hits per month. Summaries of some accidents looked at by the MAIB, but where a full investigation was not undertaken, are also available on the MAIB website.

Safety Digest publications are issued three times a year; in April, August, and December. The Digest is intended to be easy to read, and every edition contains a brief summary of over 20 accidents, each with detailed lessons to be learned. 9000 copies are currently distributed to approximately 6000 addressees world-wide (many companies get multiple copies which they distribute to their ships).

In addition to the regular Safety Digest, specialist Digests are printed and distributed. Once a year, a Fishing Safety Digest is published at the same time as the major fishing industry conference in Glasgow, with the accidents contained within it being of direct relevance to the industry. MAIB has also published a Leisure Craft Safety Digest.

MAIB distributes a large number of informational leaflets and flyers on an ongoing basis. These cover a range of issues from abbreviated accident reports for fishermen, to guidance for witnesses and next of kin.

Safety Bulletins are issued where major safety issues likely to recur before a report can be printed, arise during an investigation. Bulletins are distributed as widely as possible within the industry in the quickest time possible.

Annual reports and Business Plans are also published on an annual basis.

Presentations form a large part of MAIB's continuing efforts to raise its profile. Nationally and internationally, inspectors attend colleges, organisations and conferences, giving presentations about the work of the MAIB. MAIB staff regularly attend trade exhibitions to promote the Branch, and have a stand at the annual fishing exhibition in Glasgow. The work of the Chief Inspector and others within the European Maritime Safety Agency (EMSA), the International Marine Organisation (IMO), and the Marine Accident Investigator's International Forum (MAIIF) raise the profile of MAIB and maritime safety in general at the international level.

Raising awareness of the MAIB and of the issues surrounding safety at sea is therefore already an important part of the MAIB's work. **Option 2 is therefore rejected as a possible way forward.** However, information and education campaigns of this type are considered vital, and they will continue to be used alongside the Regulations to highlight the work MAIB does.

MAIB requested information from stakeholders regarding the effectiveness of current publications and other informational leaflets. As a result of queries raised during the consultation, the MAIB intends to produce additional leaflets explaining the requirements for reporting incidents involving divers.

- c) **Option 3 involves developing Memoranda of Understanding (MoUs) with all relevant stakeholders.** The MAIB currently has five MoUs in place. These are the Marine and Coastguard Agency (MCA), the Health and Safety Executive (HSE). The States of Guernsey Board of Administration and Jersey board of Administration, the Category 2 Red Ensign Group Administrations, and the Ministry of Defence. An MoU with the Association of Chief Police Officers (ACPO) and the Association of Chief Police Officers in Scotland (ACPOS) is currently under negotiation, as is an MoU with the Crown Prosecution Service.

MoUs are usually made between the MAIB and a single stakeholder. They require a degree of self-regulation, since they are not enforceable by law. Each MoU would have to be tailored to the specific stakeholder with whom they are signed. In view of the number of national and international stakeholders with which the MAIB is involved, several tens of thousands, this would be an impossible task. **Option 3 is therefore rejected as a possible way forward.**

**d) Option 4 involves revising the current Regulations.** The MAIB investigation process stems from the legal framework provided by the Regulations. Incorporating these changes into legislation will allow the Branch to further its work, to reflect change and to improve its service delivery. The proposed revised Regulations would consolidate and strengthen the ability of the MAIB to prevent future marine accidents, by giving legislative backing to working practices that underpin effective investigations, leading to meaningful recommendations. The intentions of the proposed revised Regulations are listed by Regulation below.

- **Regulation 6** expands the list of people who must report an accident, to include the ship's owner, Harbour Authorities, and Inland Waterway Authorities, as well as the MCA. This offers valuable help in combating the problems of under-reporting and late-reporting of accidents.
- **Regulation 7** excludes the need to investigate accidents that are the result of suicide or death from natural causes. It also removes the requirement for an investigation to be discontinued where the Secretary of State orders a Formal Investigation to be held. These are "tidying-up" provisions.
- **Regulation 9(7)** makes explicit the power of the Chief Inspector of Marine Accidents to require a ship to remain accessible within UK waters, if he considers this necessary for the preservation of evidence. This power may not be used unless the Chief Inspector has reasonable grounds for concern that evidence would not be made available were the ship to leave UK waters. **Regulation 9(8)** further balances this power by imposing a duty on the MAIB to complete the evidence-gathering process as expeditiously as possible.
- **Regulation 10** provides Inspectors with a new power to exclude any person, other than a professional legal adviser solely representing the witness, from an interview if they have substantial reason to believe that the presence of that person would hamper the investigation. Any use of this power must be

done with the agreement of the Chief Inspector. The interviewee would subsequently be allowed to choose another nominee.

- **Regulation 12** reduces the range of documents or records that may not be made available without a Court Order, to exclude communication between persons involved in the operation of the ships involved, and any voyage data and other records. However, witness declarations obtained by a marine accident inspector during the course of his investigation, together with any notes, or voice recordings of interviews, will continue to be undisclosable without a Court order. Any information witnesses give to inspectors as part of the investigation into a marine accident will be held in confidence at all times.
- **Regulation 13** makes clear that if an accident report is based on information obtained by MAIB's powers, it cannot be used in any judicial proceeding whose purpose is to apportion liability or blame, unless a Court determines otherwise.
- **Regulation 15** puts in place a closed-loop recommendations system, whereby anyone to whom a MAIB recommendation is addressed must consider that recommendation, and respond to MAIB within 28 days outlining the details of any action that will be taken, or reasons why no action is being taken.

### **3.2 Business Sectors Affected**

The MAIB has the jurisdiction to investigate accidents that involve a UK ship anywhere in the world, or involve any ship within UK territorial waters. The business sectors affected are thus the shipping industry, including ship owners, crew, shipping companies; the fishing industry; leisure craft operators; and ship and parts manufacturers; as well as passengers on ships; harbour and port authorities; the coastguard; and other marine emergency services. Many of the proposed changes to the Regulations have no impact at all on these businesses, charities or the voluntary sectors involved. The impact of those that do is outlined briefly below.

The changes to Regulation 6 will mean that a larger number of people will be obliged to report accidents to the MAIB. Most do so already as part of best practice, yet it is estimated that between 1.2% and 3.6% more accidents may be reported than before. This is an average of 16 to 48 accidents per year. The number of extra authorities added to the list totals approximately 600 harbour authorities<sup>1</sup>, and 32 inland waterway authorities<sup>2</sup>, giving an estimated range of 0.02 to 0.07

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<sup>1</sup> PORTS division estimate the number of ports in the UK at 617. However, in some cases a port operator acts as harbour authority for more than one port. 600 has been taken as an estimate of the number of harbour authorities. This number is for England, Wales, and Scotland only.

<sup>2</sup> British Waterways and Environment Agency estimate the number of inland waterway authorities at 30 in England and Wales. They report that Northern Ireland has only 1 inland

additional accidents to be reported per authority per year. The cost of reporting such low numbers of accidents is minimal.

Regulation 9 may have an impact on non-UK registered ships. However, this will only have effect if the ship has an accident within UK waters and then tries to leave. As the power made explicit in this regulation is in fact already implicit in the current regulations, there should be no significant additional impact on businesses.

Regulation 10 protects the confidentiality of witness declarations. This would have no impact on businesses.

Regulations 12 and 13 will have an impact on the legal sector. The use of reports in Court will decrease, and the use of inspectors as expert witnesses will decrease alongside this. However, these costs are likely to be relatively small in the overall legal process. The Department for Constitutional Affairs have seen the final draft of the Regulations, and are content with the wording therein.

The impact of Regulation 15 on businesses, charities and the voluntary sector should be negligible. Historically, 8% of recommendation letters have received no reply. This amounts to a total of 4 letters in the past six months, although more than one addressee may not have replied. This is likely to have a negligible impact on the industry as a whole.

Thus, in general the proposed changes to the regulations will have little or no effect on maritime businesses, charities and voluntary organisations.

MAIB requested information regarding the business sectors affected. No additional information was received.

#### **4.1 Costs and Benefits**

- a) Option 1 is to continue to rely on the current Regulations, so there would be no additional costs. The risks of this option are presented in some detail in the risk assessment contained in section 2. There would be no benefit from this option, and it has been ruled out in paragraph 3.1a above.
- b) Option 2 is to produce a series of publicity and information campaigns. This is already done, as described in 3.1b above. Additional benefits would be restricted to the particular issue raised in a publication. To make the changes outlined above would require at least seven separate publications. The cost of this would be outside the current budget of MAIB, and since the publication would raise awareness of changes that would not have a legal basis, the

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waterway authority, and have no information about Scotland. The Scottish Executive was also unable to provide this information. 1 inland waterway authority for Scotland has been included in the estimate.

value for money of this type of exercise is limited. Option 2 is therefore unworkable unless significant additional funding was received.

c) Option 3 is to sign a series of Memoranda of Understanding.

The benefits to MAIB are:

- Each MoU could be tailored to a specific individual, giving personal concerns more coverage.
- MAIB would also gain from being able to speak to many stakeholders individually, and raise its profile significantly. This would assist in the forging of good relations with all sectors of the maritime industry.
- MoUs are not legally binding, and could be altered more easily to reflect changes in the industry or within a particular sector of the industry.

The benefits to industry are:

- A MoU could be tailored to the specific needs and concerns of a business.
- The MoU would be mutually agreed, thus giving the industry more input into its content and wording.

The costs of negotiating tens of thousands of individual MoUs would be enormous, and would have a particularly onerous effect on individual fishermen and other small businessmen.

Although Option 3 has some benefits, the costs to both the MAIB and the maritime industry would be prohibitive, and neither stakeholder has the manpower or the resources to implement this option.

d) Option 4 is to change the current Regulations for the proposed revised Regulations. This option offers benefits to both the MAIB and to the maritime industry. Most of these benefits are non-quantifiable, but they are nevertheless significant.

The benefits to MAIB are as follows:

- The working practices of the MAIB will be updated, making the MAIB more efficient.
- The legal framework will also match that of other accident investigation branches. Less time will be spent on events that are not accidents, and the MAIB will be able to fulfil its remit even if a Formal Inquiry begins.
- The function and service delivery of the MAIB will improve. For example, an increase in the number and timeliness of accidents reported will mean the MAIB operate more effectively. This can only improve safety awareness within the shipping industry as a

whole, as more important safety issues are picked up and made public by the MAIB.

The benefits to stakeholders are as follows:

- Investigation processes and procedures will be clearer, making it easier for all stakeholders to understand their responsibilities.
- Companies and individuals will no longer have to take into account the risk of MAIB reports being misused for purposes for which they were not originally intended.
- Witnesses will gain more certainty that what they say will be kept confidential, and are more likely to be forthcoming during interviews with inspectors.
- The uptake of a culture of increased openness will enhance the quality of declarations received by inspectors, improving the value of the reports published by the Branch.
- Individuals at sea will also benefit from the proposed changes by travelling on safer ships, with more safety-conscious crew.

The costs to MAIB are as follows:

- The financial costs to MAIB of implementing the new Regulations will be absorbed within the current MAIB budget. Much of the proposed changes are already in place, for example a voluntary recommendations system exists, which is managed within the Branch.

Most costs to industry will also be negligible:

- The only compulsory cost to any organisation as a result of the "closed loop" system of recommendations is the cost of responding to a letter of recommendation. Most companies already operate this system voluntarily, as a matter of good practice.
- There may be some negligible additional costs to harbour authorities and inland waterway authorities from the extension of the requirement to report accidents. Since the only requirement is to report an accident, whether by phone or by fax, the costs are minimal.
- The bar on using MAIB reports in any judicial proceedings, unless a court orders otherwise, may result in marginally increased litigation costs for parties to an accident. As a change in Regulations is not expected to change the outcome of any legal proceedings, and the removal of other documents from this requirement may have a compensatory effect on the legal costs involved; the benefits would outweigh any costs involved.
- There may be a significant, but unquantifiable cost to owners and/or operators were a ship to be required to be accessible in UK waters. This would only come into effect in the case of an accident, and then only if the ship concerned was likely to refuse



to allow MAIB inspectors access to the vessel, crew, or evidence at its next port. However, this requirement is already implicit in primary legislation, and thus the revised Regulations, by making it explicit, should not add any additional compliance costs to operators that are not already in place.

Option 4 will thus enhance the Branch's ability to investigate accidents and to make timely and valuable safety recommendations. Stakeholders will gain a clearer picture of where responsibilities lie in the investigation process, and they will reduce costs, losses, and fatalities. General safety at sea for all individuals will increase. The compliance costs of the proposed changes in the Regulations will not affect industry or stakeholders to a large degree. Many of the costs described above only come into play when an accident has occurred, and until this happens, there are no costs to anyone. **Based on this assessment of costs and benefits, Option 4 appears to be the most appropriate way in which to achieve the initial objective.**

MAIB requested any hard data regarding costs and benefits, but no information was received.

#### **4.2 Competition Assessment**

In accordance with government policy, MAIB has undertaken an initial competition assessment. Options 1 and 2 are effectively the status quo, and so have no effect on competition. Competition assessments were undertaken for options 3 and 4. The assessment of Option 3 highlighted the potential for disproportionate costs to small businesses. This reinforces the discussion in the costs and benefits section above. The competition assessment undertaken for Option 4 showed no disproportionate effect on small firms. In fact, there would be minimal effect on industry as a whole. Since no business will be affected by the Regulations unless they have an accident, the effect on competition is negligible.

MAIB requested comments or concerns about the competition assessment, but no information was received.

#### **4.3 Small Firms Impact Test**

Of the options considered, only option 3 has a disproportionate effect on small firms. Since this option is inappropriate for other reasons as well, it will not be implemented.

From our initial considerations, agreed in principle by the Small Business Services Unit, Option 4 has no disproportionate effect on small firms. As a result, no small firms impact test has been undertaken.

MAIB requested additional comments specific to small firms and the impact of new Regulations on such businesses, but no comments were received.

#### **4.4 *Racial Equality Impact Test***

As the Regulations will apply only to those ships and individuals involved in an accident, there is no way to affect their racial equality.

Option 4 has no disproportionate effect on racial equality, and no impact is expected.

#### **5.1 *Enforcement and Compliance***

The requirement to report accidents is taken very seriously by the MAIB. If an owner or authority failed to report an accident, they would be liable to a fine, as applies to persons required to report under current Regulations. In practice, they would be unlikely to be prosecuted unless the offence was blatant and repeated.

The requirement to respond to safety recommendations is also regarded as crucial to the effectiveness of MAIB. In the future, the names of addressees who do not respond to a MAIB safety recommendation will be made public in an annual report to the Secretary of State.

#### **5.2 *Monitoring and Evaluation***

The investigation regime adhered to by MAIB is subject to ongoing review by all those who use it. It is also subject to audit at any time.

The evaluation of the effectiveness of MAIB is based on the use of the in-house database. All accidents are recorded on this database, along with any safety recommendations sent out to those involved. Whether or not a response to a recommendation has been received, and whether any action is going to be taken, is also recorded. In this way, the MAIB can regularly monitor the uptake of all safety recommendations, and can also keep a track of reasons why particular recommendations may not be implemented.

#### **6.1 *Summary and Recommendations***

The assessment of the options undertaken above is summarised in the table below.

**Table 6.1.2: Summary of Option Assessment**

<b>OPTION</b>	<b>INITIAL ASSESSMENT</b>	<b>BENEFITS AND COSTS</b>	<b>COMPETITION AND SMALL FIRMS IMPACT</b>
1: Do Nothing	Fail	N/a	N/a
2: Information Campaign	Fail	N/a	N/a
3: MoU	Borderline	Costs outweigh benefits	Particular effect on small firms.
4: Revised Regulations	Pass	Benefits outweigh costs	No effect on competition; No disproportionate effect on small firms.

Based on the summary in the table above, it is clear that Option 4 is the most effective path to take through which to achieve the original objective. The proposed new Regulations aim to improve efficiency and productivity, to reflect best working practices, and to align policies on accident investigation across all transport modes. The changes in the Regulations focus on the risks to delivery faced by MAIB, and aim to achieve these objectives without causing undue compliance costs to industry.

The assessment indicates that the greatest benefits, in terms of preventing future marine accidents, would accrue from applying Option 4. MAIB recommends that the revised Regulations be implemented as soon as practicable.

**7.1 Declaration**

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed .....

Date

Department for Transport

## **Annex A: Analysis of Responses to Public Consultation**

### **1. Introduction**

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The Marine Accident Investigation Branch (MAIB) was set up in 1989 with responsibility for contributing to safety at sea by determining the causes and circumstances of marine accidents, and working with others to reduce the likelihood of such causes and circumstances recurring in the future. The sole objective of any MAIB investigation is to prevent future accidents through the ascertainment of the causes and circumstances of an accident. It is not its purpose to apportion liability, nor, except so far as is necessary to achieve its objective, to apportion blame.

#### **1.1 The Regulations**

The Regulations specify the purpose of investigations, make provision for their scope and conduct, define the accidents and hazardous incidents which may be investigated, and set out the requirements for reporting accidents and the publication of reports and summaries. The current proposals are intended to replace the Merchant Shipping (Accident Reporting and Investigation) Regulations 1999, and will apply to UK-registered ships world-wide, and non-UK-flagged ships within UK territorial waters.

The aim of the new draft Regulations is to give legislative backing to working practices that underpin effective investigations and recommendations. This will improve the efficiency and efficacy of the Marine Accident Investigation Branch (MAIB), reflect best working practices adopted by the Branch, and align MAIB practices more closely with the processes of other transport accident investigation branches.

#### **1.2 The Consultation**

In accordance with government policy, the draft version of the new Regulations was sent out for public consultation on the 27<sup>th</sup> July 2004. Comments were requested by the 31<sup>st</sup> October 2004. The consultation pack dispatched consisted of the proposed Draft Regulations, a draft Marine Guidance Note (MGN), a draft Regulatory Impact Assessment (RIA), and a List of Consultees. Nearly 100 copies of the pack were sent to representatives of the maritime industry, waterway authorities, government departments, devolved administrations, and others.

#### **1.3 This Document**

This document sets out the nature and substance of the comments received regarding the public consultation, and the process used to analyse these comments is outlined. The comments considered to be most important are discussed in some detail, and the reasons behind the decisions taken by MAIB in response to these comments are presented. Many other comments

received are also included in the body of this document: where action will be taken, the action is specified and the reasoning is presented. Where no action will be taken, the reasons for this decision are given. A detailed list summarising every comment received and any action taken, including subsequent changes made to the Draft Regulations is included at Annex A.

## ***2. Responses to the Consultation***

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MAIB sent out nearly 100 copies of the consultation pack. The pack was also placed on the MAIB website for viewing, allowing anyone who wished to do so the opportunity to comment on the proposed Draft Regulations.

30 responses to the consultation were received within the consultation period. MAIB continued to accept comments up to a week after the deadline of the 31<sup>st</sup> October, to allow for busy schedules and postal delays. Comments were received via post, fax, and electronic mail. Many telephone queries were also answered during the course of the consultation. Of the 30 responses received, 7 fully supported the draft Regulations, and offered no other comments. Comments provided by the remaining 23 respondents covered both the Draft Regulations, and the Marine Guidance Note. Barring a few spelling errors, no comments were received regarding the Regulatory Impact Assessment.

## ***3. The Decision-Making Process***

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Once the consultation packs were dispatched, all incoming correspondence was logged, and any action taken was noted. At the close of the consultation period, this log was used to ensure all responses were included in the decision-making process. In order to analyse the comments effectively, the responses were merged into a single document, which was divided according to draft Regulation. Each proposed Regulation could then be assessed in terms of all comments it received. The results of this process are given in the three sections below.

## ***4. Comments resulting in Significant Amendments***

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The comments are discussed in this section in order of the Regulation they address. For the purposes of this analysis, there are three main sets of comments. These are:

- Proposed power of the Chief Inspector to ensure ships remain accessible in UK waters
- Proposed power of MAIB inspectors to exclude witnesses' nominated representative from an interview
- Proposed power to share MAIB evidence with other official authorities

### **4.1 Draft Regulation 9(5) and 9(6): Accessibility of Ships in UK Waters**

17.8% of reported accidents, and 8.7% of reported injuries occur on non-UK flagged vessels. The proposed Regulations seek to address the current loophole in legislation, which would allow a non-UK flagged vessel to leave UK waters, and thus MAIB jurisdiction, were such a vessel to be involved in

an accident within UK territorial waters. The current Regulations implicitly allow this power, but proposed Regulation 9(5) seeks to make it explicit. This power is tempered by proposed Regulation 9(6) which places time constraints on the Chief Inspector to minimise the burden placed on the ship in question.

The principle behind this proposal is understood and explicitly endorsed by several respondents. However, there are four areas of concern:

This regulation might place an unnecessary financial and/or administrative burden on the operator of a service or on the passengers aboard a ferry service. Queries regarding the availability of compensation for the owner/operator of a ship remaining in UK waters under 9(5) were also raised. Further concerns surround the availability of berths in ports, were the powers in 9(5) to be used.

The power in 9(5) was thought to be too great for incidents of "serious injury". The legality of the powers was questioned by lawyers, who interpret Section 267(4) of the Merchant Shipping Act 1995 as not allowing for a power of the CI to detain a vessel in UK waters.

The Marine Accident Investigation Branch intends to address these concerns as follows:

9(5) shall not apply unless there are grounds for concern that access to the ship, crew members, or any evidence on board will not be made available to MAIB if the ship were to leave UK waters;

The Marine Guidance Note (MGN) will explain that ships may be moved to ensure that availability of berths is not affected, and indeed will outline the entire process undertaken should this power be used;

Instances of serious injury will be excluded from this Regulation;

MAIB's lawyers are satisfied that the Secretary of State has sufficient powers under section 267(3) and (4) of the Merchant Shipping Act 1995 to make this regulation.

#### **4.2 Draft Regulation 10(5) and 10(6): Exclusion of Witnesses' Nominated Representatives**

Witness interviews are one of the most important forms of evidence used in an investigation. After a small number of accidents, the intimidation of witnesses by their "chosen" representatives, has made it difficult for inspectors to ascertain the truth about the events leading to these accidents. In these cases, personnel and lawyers representing other parties in an accident have imposed themselves upon witnesses, creating an unacceptable conflict of interest, and reducing the inspectors' ability to get the witness to speak openly about the other party represented. Clearly, this behaviour threatens to undermine MAIB's ability to discharge its statutory duties effectively, and will hinder the progress of investigations.

As with Regulation 9, the principle behind this Regulation is supported by many. However, the legality, appropriateness, and the clarity of the proposed new power have met with some concerns:

Section 259 of the 1995 Merchant Shipping Act appears to give the interviewee the unqualified right to choose, and this right of the witness should be considered paramount in accordance with English law.

1. There is no reason why the Inspector should not suggest to the interviewee that he change his nominee, rather than giving the Inspector the power to veto the witness's nominee.
2. The provision does not clarify whether or not the interview will be suspended until the arrival of the replacement nominee. It is also not made clear whether the Inspector has the right to exclude the second nominee from the interview, nor whether the second nominee can be from the same organisation as the first.

The Marine Accident Investigation Branch intends to address these concerns as follows:

1. The Regulation will be amended such that an inspector can not exclude a witness's representative where that representative is a solicitor or other professional legal adviser solely representing the interviewee.
2. The Chief Inspector would have to give his agreement to any such exclusion, and may only do so if both the inspector and the Chief Inspector have substantial reason to believe that the presence of the nominee would hamper the investigation.
3. An additional paragraph will be included in this Regulation to make clear that the interviewee is entitled to nominate a replacement representative, and also that the Chief Inspector has the power to exclude second and subsequent nominees from the interview, subject to the same provisions. It will be made explicit in the MGN that the interview will be suspended pending the arrival of the replacement nominee.

#### **4.3 Draft Regulation 12(6): Sharing MAIB Evidence with other Official Authorities**

Proposed Regulation 12(6) has been included in order to allow the Police and other official authorities access to physical evidence retained by MAIB. Present Police powers give Police the right to seize any physical evidence necessary to their investigation. This could mean that such evidence is not available to MAIB, if Police believed that once held by MAIB it would be refused to them. MAIB are recognised as the leading authority in the collection, download and playback of voyage data recorder information. This Regulation was included to allow the MAIB to give the Police and other official authorities a copy of any data contained within the voyage data recorder on board a ship, and any other technical data the MAIB may hold. However, concerns regarding the release of confidential information have arisen.

1. Passing on sensitive information to the MCA or Police at the discretion of the Chief Inspector will undermine MAIB's position. Police should be required to apply to the Courts for access to confidential information.
2. Voice recording of interviews can be released to the Police and other official authorities under this Regulation, which contravenes the right against self-incrimination as contained in the European Human Rights Convention.

The Marine Accident Investigation Branch intends to address these concerns as follows:

1. The Regulation will make clear that the only information covered here will be physical evidence that should be made available to other official authorities conducting their own investigations regardless of who holds the information. Police currently have these powers.
2. The Regulation will be amended to make clear that only recordings pertinent to the accident in question, not interviews subsequent to the accident, are included.

#### **4.4 Summary**

By making the changes detailed above, it is felt that all main concerns have been taken into account and addressed in an appropriate way. Where necessary, the Marine Guidance Note will outline the procedure that will be adopted, and the details of the implementation of such Regulations will be covered.

### ***5. Comments resulting in Minor Amendments***

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The procedural comments are discussed in this section in order of the Regulation they address. For the purposes of this analysis, there are eleven procedural sets of comments. These are:

- Definitions of major injury and serious injury
- Reporting of accidents and injuries on inland waterways and in harbours
- Reporting of accidents and injuries by both ship owners and masters
- Reporting requirements relating to serious injuries
- Reporting requirements relating to accidents in ports
- Duty of MAIB to respond to those involved in an accident within 28 days
- Restrictions regarding the disclosure of the names and addresses of those people involved in an accident
- Requirements surrounding the release of witness declarations
- The discretion of the Chief Inspector to release technical analysis
- Requirements surrounding Court Orders to release documentation
- Requirements to publish take-up of recommendations

#### **5.1 Draft Regulation 2: Definitions of Major Injury and Serious Injury**

Comments highlighted a lack of clarity and some overlap between these definitions. Relatively minor injuries were reportable, but more major injuries not requiring hospitalisation were not reportable. It was suggested that the OCIMF injury definitions were used to enhance uniformity between Flags.

As a result of these comments, the definition of major injury will be refined to exclude a confinement to bed on ship for 24 hours. Thus, in addition to those injuries specified within the definition, only injuries requiring hospitalisation will be “major injuries”. All other injuries reportable will fall under “serious injury”, thus eliminating the overlap and reducing confusion. The OCIMF injury



guidelines were felt to be too long and too complicated to include in legislation.

### **5.2 Draft Regulation 4: Reporting of Accidents and Injuries on Inland Waterways and in Harbours**

Concern was expressed that as drafted, too many minor incidents in hire craft and workboats are included in the reporting requirements. This would place a significant unnecessary burden on harbour and inland waterway authorities to report these kinds of accidents.

As a result of these concerns, the draft Regulations will be amended such that the reporting requirements will only apply to recreational craft hired on a bare-boat basis, and harbour or inland waterway workboats under 8m in length, if the accident involves explosion, fire, death, major injury, pollution, or the capsizing of a power-driven vessel. It is felt that this will significantly reduce the burden by ensuring that those accidents unintentionally caught in the previous drafting are released from the reporting requirements. All other accidents will remain covered by the reporting requirements, thus contributing to the efforts to reduce instances of under-reporting.

### **5.3 Draft Regulation 6(1): Reporting of Accidents and Injuries by both Ship Owners and Masters**

The main concern here was the additional burden placed on the owner as well as the Master of a vessel, particularly when the owner of a vessel knows that the Master has already reported an incident to the MAIB. This element of duplication was felt by some to be an unnecessary burden on the industry.

The draft Regulations will be amended such that a ship's owner is exempt from reporting an accident if the owner has confirmed that the Master or Senior Surviving Officer has reported the accident to MAIB.

### **5.4 Draft Regulation 6(4): Reporting Requirements relating to Serious Injuries**

There is concern that by including serious injury in this proposed Regulation, there is a requirement to report, immediately, in detail, and at length, an injury that may in reality be very minor.

This point was taken into account, and the amended draft Regulations will reinstate Regulation 5(3)(b) from the 1999 Regulations, which places a 14-day maximum period on the time allowed to report a serious injury. This differs from the current drafting, which requires a serious injury to be reported as soon as is practicable.

### **5.5 Draft Regulation 9(3): Duty of MAIB to respond to those involved in an accident within 28 days**

There is concern that the duty of the Chief Inspector to notify those involved in an accident of any intention to investigate within 28 days has been removed.

This concern has been taken on board, and the 28-day time limit will be reinserted into the draft Regulations.

### **5.6 Draft Regulation 12(1): Restrictions regarding the Disclosure of the Names and Addresses of those People involved in an Accident**

It was asked why the names and addresses of those people involved in an accident ever needed to be disclosed.

The regulation will be amended to remove the exception contained within it, as it is MAIB policy never to publish the names and addresses of those involved in an accident.

### **5.7 Draft Regulation 12(2): Requirements surrounding the Release of Witness Declarations**

Concerns were raised that an interviewee would be breaking the law were they to release their own declaration without a Court Order.

The draft Regulations were never intended to make this action an offence. A new draft Regulation will be inserted to ensure that a person giving a declaration to an Inspector in the course of an investigation may release his copy of that declaration.

### **5.8 Draft Regulation 12(3): The Discretion of the Chief Inspector to release Technical Analysis**

The definition of the analysis releasable under this Regulation was questioned.

The Regulation will be amended to state explicitly that only independent analysis commissioned by the Chief Inspector can be released.

### **5.9 Draft Regulation 13(10) and 13(11): Requirements surrounding Court Orders to release Documentation**

There was concern that the reference in 13(10) to 12(4) (with regard to factors to be considered by the Court), may not all be relevant.

Regulation 13(10) will be altered to exclude 12(4)(a) from the reference.

### **5.10 Draft Regulation 15(4): Requirements to publish Take-up of Recommendations**

There was concern that too much flexibility had been given to the Chief Inspector regarding the publication of acceptance of recommendations.

This Regulation will be amended to require the Chief Inspector to publish take-up of recommendations.

### **5.11 Draft Regulation 16(1): Extension of Time to the Report Consultation Period**

There was concern that the Chief Inspector would never give permission for an extension to the time taken to respond to copies of the investigation report, even if the reasons were legitimate.

It remains important that the publication of reports is not delayed unnecessarily. However, the MAIB does not wish to reduce the effectiveness of the report consultation period. The term “exceptional circumstances” will therefore be modified to “good reasons” in this draft Regulation.

## ***6. Other Comments resulting in no Amendments, and Comments Rejected***

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Other comments and proposals rejected are discussed in the order they appear in the draft Regulations. There are six such comments to consider in this section:

- Definition of a ship’s owner
- Exclusion of Pleasure Vessels from Reporting
- Reporting requirements relating to accidents in ports
- Duty to Preserve Evidence
- Confidentiality of Evidence
- Consultation on Recommendations

### **6.1 Draft Regulation 2: Definition of a ship’s owner**

There was some concern that this definition excluded ships under demise charter, and that the definition does not cover all types of owner a ship may have.

The definition will not be changed, as it was felt that the wording already contained in Draft Regulation 2(2) covers all eventualities.

## **6.2 Draft Regulation 4(1)(a): Exclusion of Pleasure Vessels from Reporting**

Concern was voiced that pleasure vessels had been excluded from reporting requirements, whereas it was felt that there should be no distinction between commercial and leisure vessels on the sea.

It has never been the Department for Transport policy to require pleasure vessels to report accidents or injuries. Further, the MAIB was not set up with this function in mind, and the resources are unavailable to make this requirement possible.

## **6.3 Draft Regulation 6(5): Reporting Requirements relating to Accidents in Ports**

Further clarification was requested as to whether the MAIB was required to investigate accidents occurring in ports.

Accidents on board ships in ports are indeed the responsibility of the MAIB to investigate, with the exception of those involving stevedores and shore-based workers which are the responsibility of the HSE. This will be included in the Marine Guidance Note, as it is not the function of Regulations to clarify. The inclusion of a new subparagraph in the current draft of the Regulations means that this Draft Regulation is now 6(6).

## **6.4 Draft Regulation 9: Duty to Preserve Evidence**

Concerns were raised that the duty to preserve evidence under Regulation 9 applied only to those obliged to report under 6(1). Where a harbour authority has vessel traffic services or other records that may be erased, their exclusion from the reporting requirements may cause evidence to be lost.

This point was taken up by MAIB, and although there is a risk that VTS monitoring data may be lost, it was felt that the current safety provisions under ISPS were sufficient to cover this issue. This will be included in the Marine Guidance Note for clarity.

## **6.5 Draft Regulation 12(2): Confidentiality of Evidence**

Concerns were raised that by excluding communications between people, VDRs, charts, and logbooks from the list of documents releasable only by Court Order, evidence specific to a ship could be released by MAIB, violating the commercial confidentiality of that ship.

The MAIB is not in a position to protect physical evidence seizable under Police powers. Under these circumstances, the intention of Regulation 12(2) is to protect all evidence that has been collected under the powers of the MAIB inspectors, which differ to those of the Police Force. The nature of the evidence listed above precludes its inclusion in the protections of 12(2).

## **6.6 Draft Regulation 15: Consultation on Recommendations**

Two respondents have felt that MAIB should subject recommendations to consultation.

MAIB rejected this proposal. Consultation is for the express purpose of allowing persons whose reputation may be damaged by a report to make representations as to the facts or analysis within a report. Recommendations are not intended to impugn any person or body and are the personal responsibility of the Chief Inspector. It is strongly believed that in the interest of safety, recommendations should not be laid open to debate and dilution by interested parties. No change will be made to this Regulation.

## **6.7 Summary**

By including comments rejected by MAIB, and offering arguments in support of the rejection, the analysis of responses is complete. All other minor comments are placed in Annex A, which offers a full list of comments received, along with the actions taken by MAIB in response to those comments.

## **7. Conclusion**

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The Marine Accident Investigation Branch considers the public consultation on the Draft Regulations to have been a success. We have measured the success in several ways.

Firstly, the number of queries and requests for additional copies of the pack was taken into account. At least 30 extra copies of the consultation pack were dispatched from MAIB. A summary of the draft Regulations was printed in Lloyds List, and assuming that this led to more copies being downloaded from the MAIB website, the interest in the draft Regulations went beyond that of the original list of consultees. This can only be a good sign.

Secondly, the number of responses to the consultation was larger than expected. With a distribution list of approximately 100 people, of which several were representatives of large groups within the industry, 30 responses constituted nearly a third of addressees. Again, this is a signal of success.

The final way in which the consultation can be deemed successful is the effect of the comments on the final Regulations that will be laid before Parliament. Many changes have been detailed above; nearly all of which have been made as a direct result of a comment sent in by the maritime industry. MAIB believes that these draft Accident Reporting and Investigation Regulations are now even more effective than they were before the public consultation began.

MAIB would like to thank all those who participated in the public consultation, and would like to extend hopes that the effort of all those who responded will be rewarded by a more effective MAIB, and an increase in the safety of lives at sea.

## Annex B: Comments received following Public Consultation on the Draft Merchant Shipping (Accident Reporting and Investigation) Regulations 2005

Reg <sup>n</sup> .No.	Summary of Comments	Action to be taken by MAIB
General	<p><b>Support</b> This piece of legislation would be of benefit to many countries reviewing their own domestic regulations, and would therefore be of major interest in the general context of technical co-operation activities. The proposals also clarify the judicial role of MAIB when conducting investigations.</p> <p><b>Concern</b></p> <ol style="list-style-type: none"> <li>i. Do the Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) Regulations 2004 (VTM Regulations) impact upon MAIB and its objectives? Is there any conflict between the two regulations?</li> <li>ii. It would appear that the proposed regulations seek to give considerable flexibility to the MAIB under the guise of increased effectiveness of accident investigation. It appears that this is a matter of inadequate resources rather than seeking to improve the current regime.</li> </ol> <p><b>Proposals</b></p> <ol style="list-style-type: none"> <li>i. It would be better if all UK agencies could work from the same SI/M notice. Operators would appreciate more guidance and information on reports expected to be produced for the other UK agencies.</li> </ol>	<ul style="list-style-type: none"> <li>▪ There is no conflict between the VTM Regulations, which relate to the Marine and Coastguard Agency, and the Accident Reporting and Investigation Regulations, which relate to MAIB.</li> <li>▪ The proposed Regulations are aimed at improving investigations; resources have no influence on the draft.</li> <li>▪ It is not feasible for all agencies to work to the same SI/M note. MAIB is quite separate from the MCA and other authorities.</li> </ul>
2	<p><b>Concern</b></p> <ol style="list-style-type: none"> <li>i. "Ship" does not seem to be defined.</li> <li>ii. Consideration should be given to providing a definition of "ship's owner".</li> <li>iii. Are elderly passengers suffering heart attacks on board a vessel reportable as serious injuries? Can this be spelled out in the draft Regulations?</li> </ol> <p><b>Proposal</b> Definition of Accident: Would like to have positive confirmation that the reporting of injuries to divers whilst diving is not required, accident deemed non-reportable because it did not occur on the vessel. Definition of senior surviving officer: it might be better if such a duty were to fall on the most senior officer on board, regardless of department. The purpose of</p>	<ul style="list-style-type: none"> <li>▪ The definition of major injury will be refined to exclude a confinement to bed on ship for 24 hours. Shoulder has been changed to the singular.</li> <li>▪ The OCIMF injury guidelines were felt to be too long and too complicated to include in legislation.</li> <li>▪ The definition of "ships owner" will not be changed, as it was felt that the wording already contained in Draft Regulation 2(2) covers all eventualities.</li> <li>▪ "Ship" is defined in Section 313 of the Merchant Shipping Act 1995. As this is the</li> </ul>

	<p>"senior surviving officer" is clear but would it not be simpler to refer to "the person who has assumed command" in the absence of the master?</p> <ol style="list-style-type: none"> <li>i. The term "owner" as a person with a duty to report includes the "manager". Would it not be better to define "owner" to also include "operator" or "company"?</li> <li>ii. A "major injury" is defined as including "dislocation of the shoulders, hip, knee or spine". All these stated injuries should be in the singular rather than plural.</li> <li>iii. Definition of injuries: The Accident and incident criteria described here are unique to the UK flag, are not clear and out of date. Most of the shipping industry now used the OCIMF reporting guidelines, which are very clear and well understood throughout the industry. They are also internationally accepted and can be used for comparison/benchmarking.</li> </ol>	<p>primary legislation, redefining terms in the draft Regulations is duplication.</p> <ul style="list-style-type: none"> <li>▪ The definition of "Senior Surviving Officer" will remain unchanged. Assuming command is not always possible in cases where a ship no longer exists.</li> <li>▪ Clarification of the reporting of accidents involving divers will be included in the MGN.</li> <li>▪ The terms "loss of life" and "injury" as used in these Regulations by definition involve an external event or trauma. In this way, illnesses are excluded from reporting requirements (e.g. a heart attack is not reportable), as are deaths from natural causes. This will be clarified in the Marine Guidance Note.</li> </ul>
4	<p><b>Concern</b></p> <ol style="list-style-type: none"> <li>i. Why are pleasure vessels excluded from the requirements of draft Regulation 6?</li> <li>ii. It is understood from draft regulation 6 that pleasure vessel operators do not have a duty to directly report to MAIB. This places a significant responsibility on agencies to have in place a suitable incident reporting structure, and to collect all relevant information that may be required subsequent to a report being made to MAIB. It is not clear also how incidents occurring aboard a non-UK-registered craft will be reported and how evidence collection/detention of such a craft can be effected. The need for reporting such incidents is clearly understood in the world of commercial shipping, but it must be recognised that operators of recreational craft, are amateur boaters and as such will not adhere to the strict reporting regime expected of a professional mariner.</li> </ol>	<ul style="list-style-type: none"> <li>▪ It has never been the Department for Transport policy to require pleasure vessels to report accidents or injuries. The MAIB was not set up with this function in mind. Reporting requirements for small vessels have been focussed down to much smaller numbers as a result of the consultation.</li> </ul>
6(1)	<p><b>Support</b> The advantage of placing responsibility on both parties to report accidents and serious injuries is recognised, and this will help overcome the ongoing problem of under-reporting and late reporting of accidents by other parties.</p> <p><b>Concern</b></p> <ol style="list-style-type: none"> <li>i. The proposed requirement for both the Master/SSO, and the ship's owner to report is impractical and will impose an unnecessary administrative</li> </ol>	<ul style="list-style-type: none"> <li>▪ The draft Regulations will be amended such that a ship's owner is exempt from reporting an accident if the owner has confirmed that the Master of Senior Surviving Officer has reported the accident to MAIB.</li> <li>▪ With regard to the duty in relation to SAR etc., the draft Regulations state only that that the reports must be made "as soon as is</li> </ul>

	<p>burden on everybody concerned.</p> <ul style="list-style-type: none"> <li>ii. Where will the duty be in relation to Search and Rescue (SAR) Pollution and Salvage?</li> <li>iii. There appears to have been a change from these reports of examination only being necessary where the CI requests, to these reports being compulsory. This appears to mean an increase in the reporting requirements for crews and owners with no identifiable benefits.</li> <li>iv. It is of some concern that such reports, which necessarily contain opinion, are nonetheless capable of being recovered with the authority of the Court under draft Regulation 12(2). In this context it is of some concern that there is a proposed mandatory requirement to state measures taken to prevent a recurrence, which might then be the subject of a draft Regulation 12(2) Order. What is potentially the subject of disclosure here is information that has been statutorily required to be produced <u>after and as a result of</u> an examination into an accident.</li> </ul> <p><b>Proposals</b></p> <ul style="list-style-type: none"> <li>i. It does seem excessive to require both to make a report in situations where one of the parties knows that the other has complied with the reporting obligation. A person listed in 6(1)(a or b) should not be required to submit a report to the MAIB in cases where such a report has already been submitted by the person listed in the other sub-section.</li> <li>ii. The current arrangement for reporting accidents and serious injuries within one company is that all such reports are passed to the Chief Inspector's office from the master via the relevant fleet department. We propose that the wording of part (a) of this draft Regulation should be amended to "the Master or Senior surviving officer".</li> </ul>	<p>practicable."</p> <ul style="list-style-type: none"> <li>▪ Under the 1999 Regulations, these reports were not compulsory. However, requests for the reports were sent out for every accident. This Regulation therefore simply codifies this system.</li> <li>▪ A Court decision to obtain documents must take into account any future investigation, and the public interest.</li> </ul>
6(4)	<p><b>Concerns</b></p> <ul style="list-style-type: none"> <li>i. By now including "serious injury" in draft Regulation 6(1), there is a duty to report in detail and at length, an injury that could be very minor in reality.</li> <li>ii. Is it clearly established that an "accident or serious injury" occurring on a ship which is in a UK port is the realm of the MAIB and not the HSE?</li> <li>iii. By requiring harbour authorities to report accidents as now proposed, the scope and number of reports to MAIB is likely to increase significantly. The MAIB risks becoming the recipient of a large number of reports of minor incidents.</li> <li>iv. Harbour authorities need to have the freedom to act promptly in cases</li> </ul>	<ul style="list-style-type: none"> <li>▪ As a result of these concerns, the draft Regulations will be amended such that the reporting requirements will only apply to recreational craft hired commercially, and harbour or inland waterway workboats under 8m in length, if the accident involves explosion, fire, death, major injury, significant pollution, or the capsizing of a power-driven vessel.</li> <li>▪ The amended draft Regulations will remove the requirement for a serious injury to be</li> </ul>



	<p>where MAIB intervention is neither appropriate nor practicable. There therefore needs to be a clear understanding of the criteria for MAIB intervention in respect of those accident types where doubts potentially exist. Care needs to be taken to ensure that this welcome development is not undermined by now reducing the scope of harbour authority responsibility.</p> <p>v. The types of accidents included may not be applicable to the inland waterways system because of the nature of the accidents.</p> <p><b>Proposals</b></p> <p>i. "Serious injury" should not be included as per the original SI or as a very minimum, to apply only to those persons "employed" similar to the HSE regulations.</p> <p>ii. Inland navigation authorities are not often aware that accidents have taken place. Reporting is extremely sparse. Could MAIB raise this issue with the relevant user organisations via a publicity campaign?</p> <p>iii. May I suggest that the draft MGN be expanded to clarify how incidents involving "collision", "grounding", and "disabled" should be interpreted in the context of harbour and inland waterway operations, and to identify when reports are not required.</p>	<p>reported as soon as is practicable, and reinstate Regulation 5(3)(b) from the 1999 Regulations, which places a 14-day maximum period on the time allowed to report a serious injury.</p> <ul style="list-style-type: none"> <li>▪ Accidents on board ships in ports, with the exception of stevedores and shore-based workers, are the responsibility of the MAIB to investigate. This will be explained in the Marine Guidance Note.</li> <li>▪ Harbour authorities still have the same responsibility to investigate accidents. The MAIB investigation, if held, will be distinct and separate.</li> </ul>
7(1)	<p><b>Concern</b></p> <p>i. The Chief Inspector should decide within a specific time limit, i.e. 28 days, whether an investigation should be carried out. The collation/retention of records is not always a straightforward affair and undertaking the process when there is ultimately no need could and should be avoided. It is unacceptable for individuals to be kept under the threat of investigation without a finite time limit.</p> <p><b>Proposal</b></p> <p>i. The CI should be required to inform persons listed in draft Regulation 6(1) whether he intends to launch an investigation or not. The CI should at the very least be required to send an acknowledgement of receipt stating the date on which the initial report in accordance with draft Regulation 6(1) was received, so that the party holding the evidence can calculate when it is safe to cease to preserve it.</p>	<ul style="list-style-type: none"> <li>▪ The 28-day time limit will be reinserted into the draft Regulations.</li> </ul>

8	<p><b>Concerns</b></p> <ul style="list-style-type: none"> <li>i. That a miscarriage of justice may occur if the Chief Inspector is no longer required to reopen an investigation if he suspects this may be the case.</li> </ul> <p><b>Proposals</b></p> <ul style="list-style-type: none"> <li>i. Retain the provisions in the 1999 Regulations, i.e. that the CI of Marine Accidents is required to re-open the investigation if he is of the opinion that new and important evidence has been discovered, or if he has grounds for suspecting that a miscarriage of justice has occurred.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The legal system is entirely separate from MAIB. It is not the function of the MAIB to apportion liability or blame. The use of MAIB powers in cases of miscarriage of justice would fly in the face of the sole objective of MAIB investigations.</li> </ul>
9(1), 9(2) and 9(3)	<p><b>Concern</b></p> <ul style="list-style-type: none"> <li>i. Those obliged to report under 6(2) have no obligation to preserve evidence. This may be of particular concern where a harbour authority has VTS or other records that may be erased.</li> <li>ii. The words "so far as reasonably practicable" have been removed from the new draft regulations. By doing this, there are now duties placed on the "ships owner" (6.1.b) that he cannot fulfil because he is not there. This really is a Master's duty. Suggest re-instate the appropriate words.</li> </ul> <p><b>Proposals</b></p> <ul style="list-style-type: none"> <li>i. In 9(1), only items (c) &amp; (d) refer to an "accident", items (a) &amp; (b) don't make reference to anything at all...the syntax is wrong. If you start in (1) with..."After an accident has occurred..." and remove "accident" from (c) &amp; (d) it makes more sense. Why not simply refer to (d) only?</li> <li>ii. The inclusion of the words "so far as reasonably practicable" would help to reflect reality when considering the preservation of information from the sources listed. We need the words "so far as reasonably practicable" back in 9(3), similar to that in 9(1).</li> </ul>	<ul style="list-style-type: none"> <li>▪ This point was taken up by MAIB, and although there is a risk that VTS monitoring data may be lost, it was felt that the current safety provisions under ISPS were sufficient to cover this issue. This will be included in the Marine Guidance Note for clarity.</li> <li>▪ 9(1) will not be changed, as this refers back to 6(1), which makes clear that the Regulation refers to accidents.</li> <li>▪ 9(4) refers to 9(1), so the words "so far as reasonably practicable" already apply: to restate them would simply be duplication.</li> </ul>
9(5) and 9(6)	<p><b>Support</b></p> <p>The provision is understood and endorsed by many respondents. The practicalities have caused some concern.</p>	<ul style="list-style-type: none"> <li>▪ The draft Regulation will be amended such that 9(7) shall not apply unless there are grounds for concern that access to the vessel, crew or evidence will not be made available to MAIB if the ship were to leave UK waters. No compensation would be offered to the ship</li> </ul>

	<p><b>Concern</b></p> <ul style="list-style-type: none"> <li>i. In the case of a short sea ferry service, this draft regulation might place an unnecessary/unacceptable financial burden on the operator.</li> <li>ii. There is an obvious consequence regarding the availability of berths in port if a vessel is on a berth and is ready to sail, but is detained by MAIB.</li> <li>iii. This power is too great for serious injury.</li> <li>iv. It is not accepted that the MAIB implicitly have these powers. Section 267(4) of the Merchant Shipping Act 1995 does not allow for a power of the CI to detain a vessel in UK waters, and accordingly the draft Regulations are ultra vires.</li> <li>v. Concern regarding the liabilities/cost implications of compensation payments.</li> <li>vi. The time it would take to challenge a perceived unreasonable decision of the Chief Inspector in the courts, as at 9(6), is likely to render such action useless and the ship owner will be unable to recover financial losses.</li> </ul> <p><b>Proposals</b></p> <ul style="list-style-type: none"> <li>i. We would ask that consideration be given to re-wording the draft regulation in such a matter to allow for the detention of a ship <u>only</u> in those circumstances when an investigation cannot be reasonably conducted on passage to a near-continental port, or, if by not detaining the ship it would mean destroying or distorting evidence or making the collection of evidence impractical.</li> <li>ii. Remove reference to "serious injury".</li> <li>iii. Consideration be given to agree that a vessel might be moved off the berth to a suitable anchorage. The Chief Inspector may wish to consider whether it would be of benefit to be able to require a port not to permit or facilitate the departure of a vessel.</li> <li>iv. That means of redress for the owner should be considered in cases where the ship is so delayed.</li> </ul>	<p>owner/operator in this instance.</p> <ul style="list-style-type: none"> <li>▪ The Marine Guidance Note will explain that ships may be moved to a suitable anchorage within or near a port in order to ensure that availability of berths is not affected should this power ever be used.</li> <li>▪ Instances of serious injury will be excluded from this draft Regulation.</li> <li>▪ MAIB's lawyers are satisfied that the Secretary of State has sufficient powers under section 267(3) and (4) of the Merchant Shipping Act 1995 to make this regulation.</li> </ul>
10(1-4)	<p><b>Concern</b></p> <ul style="list-style-type: none"> <li>i. The "consequences of an accident" should now be excluded since the fundamental purpose of investigating an accident is to determine its circumstances and the cause: consequence has nothing to do with these aims.</li> </ul> <p><b>Proposal</b></p>	<ul style="list-style-type: none"> <li>▪ The reference to the Merchant Shipping Act will be removed.</li> <li>▪ "Consequences" refers to accidents/incidents subsequent to the initial accident, and does not include legal or judicial proceedings arising from an accident.</li> </ul>

	i. Remove the reference to the Merchant Shipping Act in 10(1).	
10(5) and 10(6)	<p><b>Support</b> The intention of the Chief Inspector is approved of, but an individual's right to have a legal representative in attendance should not be removed. The provision is well intended and can prevent interference with a witness by a third party.</p> <p><b>Concern</b></p> <ul style="list-style-type: none"> <li>i. 10(5) and (6): The right to exclude is really only acceptable if draft Regulation 12(2) can be changed to prevent a court from gaining access to the documents.</li> <li>ii. MAIB inspectors would simply wish to avoid the involvement of lawyers or other professional advisers at an early stage of their investigations.</li> <li>iii. The entitlement to nominate a person to be present at interview is enshrined in Section 259(1)(ii) of the MSA 1995, and in accordance with English law that right should be considered paramount. If a nominee is truly disruptive or intimidatory then there is no reason why the Inspector should not suggest to the interviewee that he change his nominee, but to give the Inspector the power to veto the interviewee's nominee is not necessarily an appropriate solution to the perceived problem.</li> <li>iv. The person to be interviewed should have the right to have whomever they choose to accompany them. This is a fundamental human right and should not be impinged upon</li> <li>v. It is not clear how the proposed substantial reason test would sit with the provisions of section 259 of the 1995 Act in this regard, which appear to give the interviewee the unqualified right to choose.</li> <li>vi. It is unclear how the provisions of this draft Regulation would work in practice. The provision should clarify that the interview will be suspended until the arrival of the replacement nominee. Further, it is not clear whether the Inspector has the right to exclude the second nominee from the interview, nor whether the second nominee can be from the same organisation as the first.</li> </ul> <p><b>Proposals</b></p> <ul style="list-style-type: none"> <li>i. Recommend remove 10(5) &amp; (6).</li> <li>ii. This draft Regulation should be reconsidered, or completely removed.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The draft Regulation will be amended such that an inspector may not exclude a witness's representative if that representative is a solicitor or other professional legal adviser solely representing the interviewee.</li> <li>▪ The draft Regulation will be amended such that both the inspector and the Chief Inspector must agree to the exclusion.</li> <li>▪ The power to veto nominees will be retained, in accordance with the amendment outlined above.</li> <li>▪ An inspector would not be permitted to continue an interview should such a representative have been excluded, until a second or subsequent representative of the interviewee's choosing was present. The MGN will give detail.</li> <li>▪ The wording of draft Regulation 10(6) makes clear that an inspector would be allowed to exclude subsequent nominees under the conditions of 10(5).</li> </ul>
10(7) and 10(8)	<p><b>Concern</b> The removal of the VDR capsule is now a "ship stopper" according to EU Regulations. The removal of the capsule by the MAIB is thus not acceptable</p>	<ul style="list-style-type: none"> <li>▪ VDR information is downloaded by the MAIB. The 28-day time limit for deciding to investigate is being reinstated into draft</li> </ul>

	<p>unless they provide a replacement.</p> <p><b>Proposals</b></p> <ol style="list-style-type: none"> <li>i. Many port systems overwrite themselves within a relatively short period of time and therefore early notification of the proposed investigation is imperative.</li> <li>ii. A preliminary investigation should not exceed 28 days, and a decision to carry out a full investigation should not exceed a further 28 days. It is important that a full investigation, if decided upon, should be at an early stage and the threat of such should not hang over individuals for an inordinate time.</li> </ol>	<p>Regulation 7(1).</p> <ul style="list-style-type: none"> <li>▪ The preliminary examination is part of the investigation (see Regulation 2), so is not subject to the 28-day decision process time limit as proposed.</li> </ul>
11	<p><b>Support</b></p> <p>Welcomed the proposal for co-operation with other States, where an investigation is conducted under these draft Regulations and involves a ro-ro ferry or high-speed passenger craft, and the reference to resolution A.849(20) as amended.</p>	<ul style="list-style-type: none"> <li>▪ This support is gratefully acknowledged.</li> </ul>
12(1) and 12(2)	<p><b>Support</b></p> <p>The new proposals that only the courts will be able to order the release of documents and records to interested parties are supported. This draft Regulation reflects the current trend for more co-operative ways of working between investigators, by allowing disclosure of a wider range of material. At the same time, it continues to protect that anonymity of witnesses that is so crucial to encouraging candour and willingness to participate.</p> <p><b>Concern</b></p> <ol style="list-style-type: none"> <li>i. Why should a published report ever need to disclose the names/address etc of anyone who has given evidence?</li> <li>ii. Which court shall be so empowered?</li> <li>iii. A reduction in the list of documents or records requiring a court order for their release to other interested parties is not justified.</li> </ol> <p><b>Proposal</b></p> <ol style="list-style-type: none"> <li>i. That 12(1) is amended to remove the exception as to when names and addresses can be published.</li> </ol>	<ul style="list-style-type: none"> <li>▪ The draft regulation will be amended to remove the exception contained within it, as it is MAIB policy never to publish the names and addresses of those involved in an accident.</li> <li>▪ "Court" is defined under draft Regulation 2.</li> <li>▪ The draft Regulation will be amended to state explicitly that only independent analysis commissioned by the Chief Inspector can be released.</li> <li>▪ The MAIB is never in a position to protect physical evidence seizable under Police powers at any time. Under these circumstances, the intention of draft Regulation 12(2) is to protect all evidence that has been collected under the powers of the MAIB inspectors, which differ to those of the police force.</li> </ul>
12(6)	<p><b>Concerns</b></p>	<ul style="list-style-type: none"> <li>▪ The draft Regulation will be amended to make clear that only recordings pertinent to the</li> </ul>

	<ul style="list-style-type: none"> <li>i. To suggest that the MAIB may release confidential information to the police or other official authorities flies in the face of what is stated to be the objective of investigation under draft Regulation 5. There is no reason why the police or "other authorities", whoever they may be, should not apply to the court in the same way as others as in 12(2). Co-operation will be lost if the MAIB comes to be in any way perceived as performing an evidence-collecting function on behalf of the police or other prosecuting authorities.</li> <li>ii. It appears that there are to be different tests being applied for disclosure, without any indication as to the factors to be applied in each set of circumstances. One is disclosure by the Court. A second is disclosure "if the CI considers it <u>appropriate</u> to do so" and a third is "at the <u>discretion</u> of the CI". These phrases need to be tied down much more clearly.</li> <li>iii. Concerns have been expressed with regards to the apparent intention to make information and documentation that would otherwise be confidential to a particular ship interest publicly available.</li> <li>iv. There is no provision for a declaration or statement taken from a person by an Inspector to be released with the written approval of that person.</li> </ul>	<p>accident in question, not interviews subsequent to the accident, are included.</p> <ul style="list-style-type: none"> <li>▪ Police and the MCA enforcement unit could seize such data before MAIB obtained it. This Regulation is designed to ensure that MAIB can access all data, as well as the Police etc.</li> <li>▪ Any Court decision to make information available will have to take into account public interest and the effect on future investigation.</li> <li>▪ Amendments will be made to allow a person to release their own declaration.</li> </ul>
13	<p><b>Support</b></p> <p>The provision that a Court Order or Court Approval would be required before an MAIB report is used in any judicial proceedings for which it was not originally intended is endorsed. These new rules regarding the publication of reports are welcomed, and should ensure improved transparency of MAIB business. The clear distinction between the MAIB investigation and other proceedings corresponding more to a blame-apportioning nature will ease the release of the outcome of investigations.</p> <p><b>Concerns</b></p> <ul style="list-style-type: none"> <li>i. The draft regulation allows for persons or organisations affected by a report to consider the "facts or analysis" contained in the report and make representation to the Chief Inspector within 28 days of any notice served. This does not appear to allow for representation to be made in respect of any recommendations made in the report.</li> <li>ii. The provision that any person or organisation whom the Chief Inspector considers may find the report useful and of interest be supplied with such, is questioned (13(8)(f)). The definitive list of the persons of which a report can be sent is entirely acceptable; the issue is as to how these persons or organisations are to be determined.</li> <li>iii. It is of importance to industry that any recommendations are practical and</li> </ul>	<ul style="list-style-type: none"> <li>▪ Final reports are made available to anyone who wants to see them. They are sent to all those on MAIB's distribution list as a matter of course. Anyone can be added to this list by request.</li> <li>▪ MAIB rejected the proposal to consult on recommendations. Consultation is for the express purpose of allowing persons whose reputation may be damaged by a report to make representations as to the facts or analysis within a report. Recommendations do not impugn any person or body, and are the personal responsibility of the Chief Inspector.</li> <li>▪ Draft Regulation 13(10) will be altered to exclude 12(4)(a) from the reference.</li> <li>▪ Arbitral proceedings are already covered by the definition in draft Regulation 13(12).</li> </ul>

	<p>will achieve the objective of prevention of future accidents. They should therefore be consulted.</p> <p>iv. The factors to be considered by the Court should not be by reference to draft Regulation 12(4). These are not entirely relevant in the context of a report that has already been published.</p> <p>v. It is not clear from the definition in 13(11) as to whether arbitral proceedings are intended to be included in 13(10).</p> <p><b>Proposals</b></p> <p>i. Amend draft Regulation 13(3)(b) to include allowance for representations to be made in respect of any recommendations made at the draft stage. Industry should be consulted regarding recommendations at the appropriate stage in the investigation and due cognisance taken before any report is made public.</p> <p>ii. Review provisions in 13(10) to amend reference to 12(4).</p> <p>iii. The definition in draft Regulation 13(11) should be amended to expressly include arbitral proceedings.</p>	
15	<p><b>Support</b> There is support for the closed-loop recommendations system. Indeed, some feel it has not gone far enough! The practicalities of the system are questioned by some:</p> <p><b>Concern</b></p> <p>i. Can MAIB require an international organisation or foreign administration to act as 15(3) demands?</p> <p>ii. Can MAIB require an organisation with no regulatory role to do as 15(3) demands?</p> <p>iii. Is a positive response requirement taking follow-up far enough? Should the MAIB be doing more to check that its recommendations are complied with?</p> <p>iv. Too much flexibility is given to the CI in 15(4).</p> <p>v. We would question whether there really is a need to implement a "closed loop" system when the statistics are that only one out of every 14 recommendations is not being responded to.</p> <p>vi. The power to make information publicly available in respect of recommendations, apparently on a "name and shame" basis, is not appropriate.</p> <p>vii. If recommendations are to be a component part of the report, there should be an opportunity to make representations with regard to those</p>	<ul style="list-style-type: none"> <li>▪ All organisations subject to UK Law will be required to comply with this Regulation. It is hoped that all other organisations will also do so, in the common interest of maritime safety.</li> <li>▪ Recommendations are not mandatory, and compliance is optional.</li> <li>▪ Draft Regulation 15(4) will be amended to require the Chief Inspector to publish take-up of recommendations.</li> <li>▪ As in the aviation industry, it is considered that information regarding compliance with recommendations should be published.</li> <li>▪ MAIB rejected the proposal to consult on recommendations. Consultation is for the express purpose of allowing persons whose reputation may be damaged by a report to make representations as to the facts or analysis within a report. Recommendations are not intended to impugn any person or body, and are the personal responsibility of the Chief Inspector. In the interest of safety,</li> </ul>

	<p>recommendations in accordance with draft Regulation 13(6). Also, if a recommendation is to form part of a report, then it follows that it should be inadmissible in judicial proceedings pursuant to draft Regulation 13(1). This is not reflected in draft Regulation 15.</p> <p><b>Proposals</b></p> <ol style="list-style-type: none"> <li>i. It may be this draft Regulation should reflect the "courtesy" arrangement that currently exists in the areas indicated and a requirement in the areas falling within the Chief Inspector's statutory remit. Thus, international organisations would use wording to the effect of "XXXX takes note of the recommendation of the MAIB in respect of YYYY and will draw its members' attention to this at the earliest convenient opportunity".</li> <li>ii. There should be a firm obligation on the Chief Inspector, and draft Regulation 15(4) should be reworded to read "the CI <i>shall</i> annually or at more frequent intervals make information available".</li> <li>iii. It should be clarified that the right to make recommendations at any time should be restricted. Other recommendations should be clearly made subject to the provisions of draft Regulations 13(6) and (10).</li> </ol>	<p>there is no intention to "restrict" the Chief Inspector's current power to make recommendations at any time.</p>
16	<p><b>Concern</b> The CI may only extend the 28-day consultation period for draft reports in exceptional circumstances.</p> <p><b>Proposal</b></p> <ol style="list-style-type: none"> <li>i. The criterion for the exercise of the Chief Inspector's discretion should remain as provided by Regulation 13 of the 1999 Regulations.</li> </ol>	<ul style="list-style-type: none"> <li>▪ It is important to safety that MAIB reports are published as soon as possible after the accident. Currently there are many requests for extensions to the consultation period for trivial or manageable reasons. However, in response to consultation, the wording will be modified from "exceptional circumstances" to "good reasons".</li> </ul>
18	<p><b>Concern</b></p> <ol style="list-style-type: none"> <li>i. The way the draft Regulations are written make it appear that an individual who releases their declaration will be in contravention of the draft Regulations and liable to a penalty by Law.</li> <li>ii. The penalties for not responding in a timely manner seem somewhat uncompromising.</li> </ol>	<ul style="list-style-type: none"> <li>▪ This will be amended such that an individual may release their own declaration.</li> <li>▪ The penalties are designed to ensure timely completion of reports.</li> </ul>
MGN	<p><b>Concerns</b></p> <ol style="list-style-type: none"> <li>i. Concerns included in the comments on the draft Regulations are repeated here where wording required amendment.</li> <li>ii. The voluntary reporting of hazardous incidents is fully supported, but this will not happen until the integrity of the MAIB to maintain anonymity is proven.</li> </ol>	<ul style="list-style-type: none"> <li>▪ The MGN has been amended according to the amendments to the draft Regulations.</li> <li>▪ MAIB continue to make every effort to reassure people that they will maintain anonymity.</li> </ul>



RIA	<b>Concerns</b> <ul style="list-style-type: none"><li>i. MAIB do not have sufficient resources in order to meet the ever-increasing demands placed upon them.</li><li>ii. One of the most effective ways to communicate between MAIB and the Ports industry is to have face-to-face meetings, and the Marine/Pilotage Working Group could be a useful forum for this purpose.</li></ul>	<ul style="list-style-type: none"><li>▪ MAIB strive to fulfil their remit with the allocated resources.</li><li>▪ The Marine/Pilotage working group will be used as a forum for co-operation.</li></ul>
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