Annex 1: Initial DfT Response to Mr Greenhill’s points

General
The Department accepts that there is a backlog of legislation but can give assurance that it does not allow this to make a material difference to UK ship standards, which are among the highest in the world.

Question 1. SI 2018/68 will implement the revised Annex II to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL). The revision was adopted in 2004 and entered force in international law on 1 January 2007. This seems an extraordinary delay.

Answer 1. The Department accepts this is a long delay between entry into force of the international requirements in the revised Annex II (Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk) to the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL Convention), and implementation of these Regulations. This delay has not prevented UK registered vessels from meeting the revised Annex II requirements as they trade in an International arena. Therefore, shipping companies will ensure they fully comply with the latest international requirements and can trade without hindrance.

The Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996 (SI 1996/3010) (“the 1996 Regulations”), which implemented the earlier Annex II requirements and are revoked by the Merchant Shipping (Prevention of Pollution from Noxious Liquid Substances in Bulk) Regulations 2018, contained powers to enforce the revised Annex II. This means that in the event of a pollution incident concerning noxious liquid substances, powers have been available to enable appropriate action to be taken. In the past ten years the UK has successfully prosecuted polluters on two separate occasions using the powers in the 1996 Regulations.

When comparing MARPOL Annex II, pre-2007 with the amendments post 2007, the key change has been to the re-categorisation and classification of chemicals carried by chemical ships internationally.

The only other change has been to the tightening of the quantity of noxious liquid substances remaining in the tank after discharge, from 100 litres to 75 litres. All other requirements from the previous MARPOL Annex II remain in place, with some updating. So, there are few inconsistencies between the standards imposed by the revised Annex II and those currently in UK law.

Question 2. SI 2018/155 belatedly implements international amendments to the International Load Line Convention of 1966. The Convention’s implementation seems not to have been amended in UK law since the 1988 Protocol to the Convention (which came into force in 2000) was implemented in UK amending regulations in 1998. The 2018 SI implements International Maritime Organization (IMO) resolutions MSC.143(77), MSC.172(79), MSC.223(82), MSC.270(85), MSC.329(90), MSC.345(91), MSC.356(92) and MSC.375(93). The earliest of these amending resolutions was adopted by the IMO on 5 June 2003 with effect from 1 January 2005. This seems an extraordinary accumulation of unimplemented international commitments over many years in such an important regulatory field.

Answer 2. Again, the Department accepts that there has been a significant delay between the entry into force of the various amendments to the International Load Line Convention 1966 and its Protocol of 1988 and the introduction of these Regulations. However, changes are generally incremental enhancements to already high standards.
The global nature of the maritime sector results in a high level of international obligations emanating predominantly from the International Maritime Organization (IMO) (the only United Nations Agency based in London) and The International Labour Organization (ILO); each of which the UK is a member. There is also an extensive programme of EU legislation on maritime matters which the UK has been required to transpose, although many of these duplicate, at least in part, the content of international Conventions.

The maritime sector is highly regulated and over the last 20 years the Secretary of State for Transport has made 250 pieces of UK maritime secondary legislation. This number comprises the implementation of international obligations and EU legislation as well as the development of domestic legislation. The legislative programme has been prioritised according to safety, commercial and legislative need.

The majority of amendments to international conventions are complex and highly technical in nature and transposing such amendments into domestic law by way of secondary legislation is very time consuming and resource intensive, involving many policy officials, lawyers, economists and staff in parliamentary functions. The Deregulation Act 2015 amended the Merchant Shipping Act 1995 to include a power for the Secretary of State to include an ambulatory reference in secondary legislation implementing amendments to international conventions. This will enable subsequent amendments to conventions to come (automatically) into force domestically at the same time as they come into force internationally. It also makes the process more efficient for industry, which will have one set of technical obligations to become familiar with instead of two, and receives the authoritative mandatory text at an earlier stage. Thus, during the Red Tape Challenge, the Chamber of Shipping requested the UK government to use ambulatory reference.

**Question 3. The Impact Assessment for SI 2018/155 states in paragraph 2.4:** "The UK currently has a backlog of some 40 separate items of maritime regulation. Without changes to current resourcing or practice, this backlog is unlikely ever to be eliminated and, indeed, can be expected to grow." While this is mitigated by the SI's novel use of ambulatory references to IMO obligations (automatically importing any future amendments to the Convention, made possible by the Deregulation Act 2015), it is unclear to what extent this backlog will continue to exist in respect of other maritime regulations even after the above SIs come into force.

**Answer 3.** The introduction of ambulatory reference will mean the UK will be compliant with its international obligations on entry into force internationally.

The IMO programme of regular amendments to international maritime conventions provides an extensive volume of predominantly minor and technical changes. At the same time, there are significant amounts of legislation emanating from the EU as well as a large programme of domestic legislation, which more recently has included the preparation of legislation to correct deficiencies arising from the UK's exit from the EU. As explained above, transposing amendments to international conventions into domestic law by way of secondary legislation is very time consuming and resource intensive, involving many public servants. As further explained above, the Deregulation Act 2015 amended the Merchant Shipping Act 1995 to include a power for the Secretary of State to include ambulatory references in secondary legislation implementing amendments to international conventions. Both the Merchant Shipping (International Load Line Convention) (Amendment) Regulations 2018 and the Merchant Shipping (Prevention of Pollution from Noxious Liquid Substances in Bulk) Regulations 2018 include ambulatory references and are the first of what is hoped to be a number of statutory instruments which will include references which refer to the text of an international convention as amended from time to time. In the implementing legislation for each convention which includes an ambulatory reference, this efficiency will apply, meaning
that the UK will never again be behind with implementing technical amendments to that particular convention. Amendments being incorporated in this way will be announced in parliament by Ministerial Statement. An implementation programme of statutory instruments is continuing, coordinated by the Maritime and Coastguard Agency (MCA), to address the backlog and to bring about these efficiencies.

**Question 4. Paragraph 2.5 of the above Impact Assessment states: "While the ILLC/ILLP is not transposed into UK law the UK does not have the legal authority to certify its own ships to the relevant standards. Failure to do so makes it much more likely that a UK ship will be detained in a non-UK port for non-compliance, leading to expensive delays and inconvenience for UK flagged ships trading internationally, and to global criticism and the UK’s loss of status as a leading maritime nation. “ So there are serious external as well as internal implications of DfT’s failure to keep pace with international maritime regulation. And DfT reveals that the UK is currently unable even to certify its own ships to relevant standards (and will remain unable to do so until the SI comes into force on 9 March), putting UK-flagged ships at risk of detention abroad.**

**Answer 4.** The UK’s power to certificate its ships to international convention standards is based on UK domestic law (ie which reflects the conventions as last transposed). For load lines, the Secretary of State has approved Assigning Authorities to assign the load lines and issue certification. The Assigning Authorities are commercial Classification Societies, and in practice they apply the latest international standards. Shipowners are keen to comply with the latest standards, as failure to do so will result in non-compliance in port State Control inspections when they visit foreign ports.

The MCA is also available to assist and advise on compliance in practice with the Load Line Convention in its most up to date form. It is also notable that newer standards generally apply only to newer ships, and are not retrospective in application, not least as some revisions cannot be accommodated into the design of older ships. Shipbuilders always build to the current international standards. As may be seen from Annex A to the Impact Assessment accompanying the 2018 Load Line Regulations, changes are generally incremental enhancements to already high standards. It would therefore be incorrect to say that UK ships do not meet or are not certificated to high safety standards.

**Question 5. More generally, in relation to both SIs, your Committee might consider that the House of Lords would be interested to compare the Government’s Brexit policy with the Secretary of State for Transport’s decision to use ambulatory references to delegate UK law-making powers to a supranational body (namely a two-thirds majority of the Maritime Safety Committee of the IMO which is empowered to further amend the above Conventions). Does Her Majesty’s Government consider this to be a surrender of sovereignty or a pragmatic regulatory alignment?**

**Answer 5.** UK law-making powers on maritime safety have not been delegated to the IMO or any other international body, but are fully retained in Westminster, where they reside as a reserved matter. Any convention amendment proposed in the IMO is the subject of considerable debate and close scrutiny. The UK also has strong influence in the IMO. The UK position is always determined in consultation with industry and union representatives.

Further, for amendments which have been adopted by the IMO, the amendment procedure in a convention will allow for objections and that is the case even with the tacit acceptance procedure (which generally requires two-thirds of members not to object in order for an amendment to come into force).

The UK may also make a declaration that it does not accept a proposed amendment or lodge a reservation at the IMO in respect of the amendment to ensure that the amendment does not
come into force in relation to the UK (pre-EU exit, this continues to be subject to EU-alignment in matters of EU competence). This also means that an amendment cannot come into force in the UK by way of an ambulatory reference provision. However, in practice, this is expected to happen rarely, if ever, because the UK is generally supportive of safety enhancements, not least those which have been agreed internationally and which the UK was active in agreeing. Paragraph 4.7 of the Explanatory Memorandum on the Merchant Shipping (International Load Line Convention) (Amendment) Regulations 2018 also contains information on the IMO amendment process (http://www.legislation.gov.uk/uksi/2018/155/pdfs/uksiem_20180155_en.pdf) as well as Box 3 (Ambulatory Referencing) on page 8 of the Final Impact Assessment on the Merchant Shipping (International Load Line Convention) (Amendment) Regulations 2018 (http://www.legislation.gov.uk/ukia/2018/33/pdfs/ukia_20180033_en.pdf).

Supplementary Question 1. Your initial response said “It would therefore be incorrect to say that UK ships do not meet or are not certificated to high safety standards.” The issue is not whether UK ships are compliant but whether the UK (government) has the legal authority to certify ships at all.

Supplementary Answer 1. The legal basis for the certification of UK ships is contained in the Merchant Shipping (Load Line) Regulations 1998. These Regulations implement the comprehensive survey and certification regime provided for by the Load Line Convention and which has not been amended at any stage. The certification can currently only be carried out under the 1998 Regulations to the standards implemented by those Regulations. The same certification regime is contained in the 2018 Regulations and will be used to certify ships to the amended international standards when the Regulations come into force but until the Regulations come into force the UK does not have legal authority to certify ships to the amended international standards. That said, in practice ships trading internationally already comply with the updated incremental changes to standards in order to avoid difficulties with port State control in foreign ports.

Supplementary Question 2. I would also ask for clarification of your response in respect of paragraph 2.6 of the IA which says “while the ILLC/ILLP is not transposed into UK law the UK is unable to take enforcement action against non-compliant ships because it does not have legal authority to require compliance.” Your response says “For load lines, the Secretary of State has approved Assigning Authorities to assign the load lines and issue certification. The Assigning Authorities are commercial Classification Societies, and in practice they apply the latest international standards. Shipowners are keen to comply…” Again this appears to be a distraction from the point at hand. What you are saying is that compliance has been turned into a civil, possibly even a commercial matter – I assume that if the Classification Societies are not satisfied then they will not issue/renew the ship’s certificate to operate but that would be at the time of their initial construction or “MOT” survey. However I would like clarity on whether the government has the power to prosecute a ship found to breach the regulations –
say the Navy went to the assistance of a foundering ship in the English Channel which was overloaded – who would or could prosecute the owner?

Supplementary Answer 2. Until the 2018 Regulations come into force, the UK cannot enforce the higher standards in the Load Line Convention. The UK currently has powers under the Merchant Shipping (Load Line) Regulations 1998 to prosecute UK ships wherever they are and non-UK ships in UK territorial waters for breaches of those Regulations to the standards of the Load Line Convention as last transposed into UK law. Therefore, if the load line is submerged, demonstrating a ship is overloaded, UK authorities can bring a prosecution. The 2018 Regulations contain the same powers to bring prosecutions for breaches of the Regulations. The reference in the Load Line Impact Assessment to enforcement action should be understood in the context of bringing prosecutions under a new set of Regulations which contain marginally higher standards for newer ships.

These incremental improvements to safety are made on a continuous basis, and generally apply to ships built after a certain date. This does not mean the older ships are unsafe - it just means that improvements are reflected in new vessels. For instance, the most significant amendments to the Load Line Convention require that newer ships are built with additional strengthening to hatch covers and portable beams compared with older ships.

In the specific case cited in the question, i.e., of prosecuting an overloaded ship in the English Channel: provided the ship is a UK ship, or is in UK territorial waters, the existing powers under the 1998 Regulations, and shortly the 2018 Regulations, would be sufficient to prosecute in such a case. Under international law, the UK does not have the power to legislate for foreign ships outside UK territorial waters.

Supplementary Question 3. And to be absolutely clear: on the MARPOL regs you say “In the past ten years the UK has successfully prosecuted polluters on two separate occasions using the powers in the 1996 Regulations.” Were there any cases that failed or could not be prosecuted because the 1996 Regulations were not up to date? For example was any ship found to have discharged 90 litres of noxious liquid substances and has not been prosecuted because the amendment from 100 litres to 75 litres had not been implemented.

Supplementary Answer 3. The Department has not brought any unsuccessful prosecutions in the past ten years and has not identified any cases where there was no prosecution because the 1996 Regulations were not up to date.

The Department has identified that out of date references in the 1996 Regulations could pose a risk to a successful prosecution in a narrow range of cases where the terminology for product categorisation or classification has changed internationally. In practice this issue has not arisen and the matter has not therefore been tested in law. The 2018 Regulations will close this potential gap.

Department for Transport 23 February 2018
Section 106: Ambulatory references to international shipping instruments

493. This section amends the Merchant Shipping Act 1995 (the “1995 Act”) so that the powers to make secondary legislation wherever they appear in the 1995 Act can be exercised so as to provide for a reference in the legislation to an international instrument to be interpreted as a reference to the instrument as modified from time to time (and not simply to the version of the instrument that exists at the time the secondary legislation is made). The definition of “international instrument” in subsection (6) of the new section 306A inserted into the 1995 Act by the section excludes an EU instrument.

494. The current practice of implementing international maritime conventions, and regular changes to them, by means of a mixture of primary legislation and secondary legislation has resulted in a complex regulatory structure that is confusing to industry and the regulator alike. It is also time consuming and resource intensive, leading to delays in implementation – which in turn can result in ships being challenged during inspections in foreign ports leading to delays and inconvenience to UK ships.

495. The new section 306A to be inserted in the 1995 Act provides a mechanism that will allow changes to international instruments in the maritime sector, to which the UK is a party, to take effect in UK law without the need to make further legislative or regulatory provision.

496. The practical effect of this section would be that where the power has been applied through secondary legislation the government would not need to make further secondary legislation or publish any other regulatory document in order to give effect to changes to international obligations and standards; changes to the text of an international instrument would be automatically incorporated into UK law in the circumstances specified in the secondary legislation.

497. The section forms part of the law of England and Wales, Scotland and Northern Ireland.

498. The provisions of the section come into force at the end of the period of 2 months beginning with the day on which the Act is passed.\(^1\)

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\(^1\) The Act gained Royal Assent on 26 March 2015.