STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR ECONOMIC DEVELOPMENT REGARDING THE ENFORCEMENT OF A CONTRACT TO USE FACILITIES AT BOULEY BAY (R.24/2015) – RESPONSE OF THE MINISTER

Presented to the States on 8th April 2015
by the Minister for Economic Development

STATES GREFFE

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REPORT

Having considered the comments made in the Report (R.24/2015), I can now advise the States of the action I propose to take.

The Harbour Master is responsible for the administration of the harbours of Jersey under the Harbours (Administration) (Jersey) Law 1961, and particular powers are given to the Harbour Master under the Harbours (Jersey) Regulations 1962. In some matters the Regulations give a role to the Minister for Economic Development, but in most cases the powers are vested directly in the Harbour Master.

Of the harbours for which the Harbour Master is responsible, 2 are commercial, St. Helier and Gorey. The outlying harbours are non-commercial, and these are – La Roque, St. Catherine's, Rozel Bay, Bouley Bay, Bonne Nuit, Grève de Lecq, St. Brelade and St. Aubin. In respect of these, it has always been the case that Harbour Master Directions have been issued under the Regulations, particularly where matters of health and safety are in question. These Directions would be enforced by Ports of Jersey officials, who might be making a routine visit to the harbour or might be visiting in response to a report.

In these harbours, the principal regular users are the boat-owners. It is obviously important to maintain fair and safe access to the harbour facilities. Until recently, it had always been possible to achieve this across all outlying harbours with what might be called light-touch regulation. It is often said that policing should be by consent. If questions of parking, moorings, access to storage and other access to harbour facilities can be answered satisfactorily, it would not be useful for the Harbour Master to seek extra resources to take over from harbour-users themselves. If regulation works well for all parties in practice, it is unwise to interfere.

However, in Bouley Bay, and in Bouley Bay alone, this best of possible approaches to regulation has broken down.

The issue is that a significant number of complaints have been made concerning the conduct of David and Andrew Sullivan. Those complaints were made to the previous Harbour Master who retired in December of last year, and continue to be made to the new Harbour Master. Many complaints concern the use of the facilities in Bouley Bay, which were considered by the Complaints Board; but some concerned issues of fishing regulation or maritime health and safety. Many complaints were made by members of the Bouley Bay Boat Owners' Association ("BBBOA"), and David and Andrew Sullivan have ceased to be members of the BBBOA. Plainly, the sort of consensual policing and light-touch regulation usually employed cannot apply when there is no consensus.

In this situation, it fell to the Harbour Master to take a more direct role. If issues such as using parking facilities fairly and within the rules set by Harbour Master Directions cannot be achieved through goodwill, as in all other outlying harbours, and previously in Bouley Bay, then the Harbour Master must get involved directly. Disputes become legal ones, reports are made and may be investigated. If the report is substantiated, then the Harbour Master may take action.

With this in mind, the previous Harbour Master decided (and the current Harbour Master agrees) to formalise the regulation. There are 3 ways in which this can be done –

- To use more detailed Harbour Master Directions, and enforce them more vigorously with criminal sanctions and removal of boats.

- To designate the facilities as requiring a Permit, to be enforced through criminal sanctions and through the removal and suspension of Permits when appropriate.

- To designate the facilities as usable only by parties to an Agreement, with that Agreement setting out the consequences of breaching its terms. As such an approach would achieve the agreement of all involved, it might be thought of as "medium-touch" regulation.

An Agreement was negotiated over the course of the summer of 2014. Drafts were sent to Andrew and David Sullivan for comment, as well as to the BBBOA. Reasonable suggestions from both sides were incorporated into the draft Agreement.

Nevertheless, Andrew and David Sullivan refused to sign the Agreement. They made a complaint to the Administrative Complaints Board that the Agreement was unfair and discriminatory, particularly that a single, standardised regime of sanctions for all harbour-users would be unfair to them as fishermen. The Administrative Complaints Board agreed with some of their complaints.

Turning now to the findings of the Complaints Board –

1. The principal finding by the Complaints Board is that it is wrong for the policing of Bouley Bay to be largely reactive to reports made by BBBOA members (paragraph 6.2 of the Report).

   Without providing considerably more resources so as to be present when issues arise – and I note that the Board expressly states that more staff resources are not required (paragraph 6.4(c) of the Report) – it is difficult to see how enforcement activity by the Harbour Master will be anything but reactive to reports received. Such complaints will naturally come from harbour-users, as they are the people with sufficient motivation and familiarity with rules to report incidents. Plainly the Harbour Master must consider reports wherever they come from, and I do not take the Board to be suggesting otherwise. In other words, it is impossible to act on this finding without considerable increase in resources. Responding to the reports of interested parties is an inherent part of policing many social situations.

   The real issue is how to obtain sufficient corroboration to avoid investigations degenerating into one person's word against another. The Board did not address this issue of corroboration. Nor did the Board consider whether any particular investigations had led to wrongful allegations being acted upon. Doubtless it could not have done this without relevant BBBOA members being present or represented. But without doing so, the real issue as to the difficulty of policing Bouley Bay was not addressed by the Board.

2. The "*clear antipathy*" of the BBBOA against David and Andrew Sullivan.

   I regret that the Board chose to make such a comment in respect of a body that was unrepresented. It may well be read, although doubtless this was not the intent, as the Board taking sides as regards the many disputes that have arisen between the Sullivans and the members of BBBOA. Plainly the Board would not, and could not, reach any such conclusions without hearing from the BBBOA and relevant members.

   In disputes that are akin to neighbour disputes, talk of antipathy is irrelevant unless it is to suggest that allegations are made in bad faith. Again, I do not suggest that the Board intended to suggest such a thing, but I am concerned that it might be read as such. Any person is entitled to report an incident in good faith: their feelings towards the person they report are neither here nor there. The real question from the policing point of view is whether the Harbour Master is upholding bad complaints, or whether the Harbour Master is requiring a sufficient standard of proof and having sufficient regard to sources of corroboration. There is no suggestion in the report that there are any such failings, nor were there any recommendations as to how corroboration may be better obtained.

3. The Board believed that a "*one sanction fits all*" approach "*could be materially oppressive and unfair, particularly in the case of more intensive users of the facilities*" (paragraph 6.3).

   The advantage of a "*one sanction fits all*" approach – the recent Social Security sanctions regime being an example – is that it is clear and precise. It is ultimately a matter for the Harbour Master as to whether increasing his discretion will help with the enforcement of rules, or would be likely to add a further area for accusations and recriminations. Such things cannot be dealt with in the abstract, but are best considered by the experts who will have to enforce the regime.

   The Board is not clear as to which sanctions ought to be lighter on those who use the facilities most frequently.

   Further, it would be unusual if lay-users were held to stricter standards in terms of rules and regulations than commercial enterprises.

   This recommendation is perhaps related to the one (in paragraph 6.4) that future amendments to the rules around breaches should remove stipulated punishments "*in order that the punishment was appropriate in all the circumstances*". Harbour Master Agreements under Regulation 6 of the Harbour Regulations should operate as contracts. Regulation 6 does not create any offence of breaching an Agreement, precisely because such breaches will be dealt with under the terms of an Agreement. I am advised that indeterminate (unspecified) consequences for breaches of contracts would be an unusual situation in law.

   The creation of what amounts to sentencing powers which are indeterminate up to a maximum, would be more appropriate for a Court. This is a possibility that the Harbour Master could adopt by bringing in a Permit regime, although

such a heavier-touch regime would require greater expense, not least because all enforcement action would be by way of the Courts. It is not something that I would wish to see happen unless lighter-touch alternatives have failed.

4. That the Minister should provide a letter of comfort as to flexibility on sanctions provided that the Andrew and David Sullivan sign the Agreement, abide by the rules and did not obstruct other users (paragraph 6.2(a)).

   This key recommendation has been accepted and already acted upon. Read strictly, the Board's recommendation suggests that flexibility should only be promised to Andrew and David Sullivan, but it would obviously be discriminatory if the Harbour Master took such an unequal approach between harbour-users.

   I take the recommendation to mean that minor non-compliance which does not prevent others from using the facilities ought to be treated flexibly. Read strictly, the Board's recommendation might have been seen as mutually contradictory, given that if rules are "abided by", then sanctions do not arise.

5. Separate terms for commercial and other users (paragraph 6.2(b)), and possibly carrying different sanctions regimes.

   It must be noted, first of all, that the Board is wrong to suggest that a Permit regime may be introduced for some, whilst others are covered by Agreements with the Harbour Master. The Harbours Regulations are clear that the Harbour Master may designate services or facilities as ones that may only be used with a Permit, or may only be used with an Agreement. It would be possible to make concurrent designations, so that anyone using a service of facility must have both a Permit **and** enter into an Agreement. This has been done in matters of significant commercial and operational complexity where an Operating Agreement provides greater detail than the headline Permit. Were it thought appropriate to have different terms for different users, then the appropriate way would be to have different Agreements or different Permits for different categories.

   However, there cannot be a mix of Agreements and Permits for the same facility or service in the sense that the Board proposes.

6. Longer boats for fishermen (paragraph 6.4(b)).

   This is a matter which the Harbour Master has been reviewing, and a commitment has been made to visit the issue this year.

7. Regulatory approach to be applied to all outlying harbours (paragraph 6.4(b)).

   It is not my intention to recommend heavy-touch regulation in harbours where, as I say, there are currently no problems. It would be to commit public money for no gain.

8. Officer of Ports of Jersey to be given direct responsibility for Bouley Bay (paragraph 6.4(c).

   Currently this is the Harbour Master. He has written to harbour-users to make this clear.

9. No need for extra staff (paragraph 6.4(c)).

   The Board's central complaint with the policing of Bouley Bay is that the Harbour Master is largely reactive to complaints from BBBOA members. Without extra staffing, it is difficult to see how the Harbour Master will be likely to hear about possible infractions save through the reports of interested parties.

10. End reliance on BBBOA in respect of policing (paragraph 6.4(c)).

    It should first be noted, as explained in the hearing, that the BBBOA does not police in any way the activities of Andrew and David Sullivan. Members of the BBBOA may from time to time make reports, but this is their right. There is no suggestion, nor could there be, that reports from BBBOA members ought to go uninvestigated or otherwise be discounted.

    It appears that the Board do not believe the BBBOA should have any role in terms of policing its own membership. The Board mentions the possibility of "discrimination", which I take to mean a fear that the BBBOA will not enforce the Agreement against its own members, whilst the Sullivans would find the Agreement enforced against them by the Harbour Master. Were this the case, even though the Harbour Master acted correctly against the Sullivans, the position would be unfair and discriminatory.

    Currently, the Agreement will in the first instance be enforced by the BBBOA over its own membership as "club rules", but this will be subject to the oversight of the Harbour Master. Should the BBBOA act unfairly so that any or all of its members are not properly sanctioned for breaches, then the Harbour Master would need to take action. There is no evidence before the Board that this position has been reached, nor could the Board have made any such conclusion in the absence of BBBOA representation. The Board appear to have approached it as an abstract problem – that, as a matter of principle, administration ought not to make use of private bodies so that local issues can be substantially administered locally and by consent. That is not a view that I share. Such a model has broken down, as between the Sullivans and other harbour-users – but it has not broken down completely such that the States, through the Harbour Master, must take on board all administrative costs.

    Indeed, it may be that, because the consensual model of policing applies as between the BBBOA and its members, the rules of the Agreement are more reliably enforced as against BBBOA members than as against the Sullivans, where all matters are subject to dispute.

11. Direct telephone for the nominated Officer (paragraph 6.4(c)).

    This recommendation is accepted as it represents present practice.

    All harbour-users have been reminded that the Ports of Jersey Officer responsible for Bouley Bay is contactable by way of the Coastguard. This number could be used to notify the Harbour Master of any emergencies.

12. Possibility of prior approval (paragraph 6.4(d))

    The Board recommended that it should be possible for harbour-users to get Ports of Jersey prior approval to do something that would otherwise be breach, for example, to conduct necessary repairs to a boat.

    This recommendation has been accepted by the Harbour Master and the Agreement amended accordingly.

    However, the Harbour Master is of the view that neither this (nor any telephone presence) addresses the central difficulty in policing. In the absence of a greater physical presence on the part of Ports of Jersey, investigations of reports will be hampered through the difficulty of corroboration. An individual may have prior approval to do something, but that does not mean that problems cannot arise if a report comes in that they have in fact done something quite different. The useful suggestions that the Board make as regards Ports of Jersey being readily accessible by telephone will work best where everyone acts in good faith.

General comments

It follows that I have accepted and acted upon (although on occasions this meant reminding harbour-users of the existing position) the following –

- Letter of comfort to all Bouley Bay users as regards flexibility and sanctions (6.4(a)).
- Officer of Ports of Jersey with direct responsibility for Bouley Bay (6.4(c)).
- Direct telephone number for such Officer – although practicality dictates that the Coastguard number continues to be used (6.4(c)).
- Prior approval possible where individuals have reasonable need to act contrary to ordinary rules (6.4(d)).

I must stress that the Harbours (Administration) (Jersey) Law 1961 and the Harbours (Jersey) Regulations 1962 make the Harbour Master the primary decision-maker in these matters, and not me as the Minister. The Board has raised various problems that might arise when the Agreement is brought into effect – but unless there are specific examples of reports being made in bad faith, such issues remain abstract.

Should those problems be realised, it might well be necessary for the Harbour Master to abandon the attempt to regulate Bouley Bay by way of this semi-consensual or medium-touch route for regulation in favour of something heavier. The issues raised by the Board as to the desirability of having wholly flexible sanctions so as to meet the

seriousness of the offence is one that would doubtless be best met by introducing the more heavy-touch regulation of permits. In such circumstances, it would be necessary to consider issues such as permit charges, and possibly giving different rights to high-frequency users would lead to a similar approach in terms of differential charges.

Fortunately, such time and expense has not been necessary in respect of the other outlying harbours. As such, I cannot accept the Board's recommendation that such regulation should be introduced in respect of those outlying harbours where there is no evidence of any necessity.