

## **A&BC BRIEFING NOTE ON OBAN BAY SINGLE HARBOUR AUTHORITY VERSION ONE DATED 23 JUNE 2021 - OCHDA COMMENTS**

The Briefing Note for Council Members was discussed at the OCHDA Committee Meeting held on 6 July and herewith the considered OCHDA response. Our comments below and the contents of the Attachments are intended to be positive and helpful to the joint enterprise we are engaged in with A&BC as we can only make the best decisions over Oban Harbour by working together and with accurate information. OCHDA's original comments dated 10 July 2021 have been tweaked to reflect the response from Kirsty Flanagan, Executive Director A&BC, on 16 July 2021.

We welcome the approach of providing detailed background and a record of decisions as well as outstanding tasks and future steps. However, we find the Briefing is in part factually inaccurate and lacks some of the relevant detail. As such it may mislead Members and requires appropriate correction in order to allow them to make informed decisions. Attachment 1 to this letter details amendments and omissions. Attachment 2 specifically addresses responsibility for management of the Bay with evidence harvested over recent years.

Of particular concern are four significant issues to which we draw your attention:

1. Overall responsibility for the wider waters of Oban Bay (waters previously subject to Oban Harbour Authority);
2. The responsibilities and role of A&BC in approving the proposal for any future Harbour Authority in Oban;
3. The role that is ascribed to OCHDA as a future Harbour Authority; and
4. Multiple points of detail, one example of which is the statement that ferries have “right of way”.

Contrary to the statement in Para 1.1, there is strong and consistent legal advice, including from A&BC's own legal services, that A&BC has inherited the responsibility for the wider waters of the Bay which were previously the responsibility of the Town Council. This view has been accepted by the Oban Bay Management Group (OBMG) and their legal advisers, and is supported by statements on the Oban Harbour website. See Attachment 2 for details.

*A&BC Comment. There is some dubiety around who has overall responsibility for the wider parts of the bay.*

Throughout the document there are references to the Council's decision-making role and powers. The approval of a new Harbour Authority is a matter for Scottish Ministers, advised by Transport Scotland (TS). It is not a matter over which A&BC is itself the decision-maker. The role of A&BC in this process is three-fold: initially as the owner of assets which OCHDA (on behalf of the proposed Trust Board – see next paragraph) is offering to lease in order to provide a working base for the Trust Port; secondly as the owner of historic powers which will either need to be repealed or transferred to the new Harbour Authority; and finally, at the appropriate stage, to be a statutory consultee in the establishment of the Harbour Authority's specific areas of responsibility.

*A&BC Comment. Agreed, and the briefing does not contradict this.*

The function of OCHDA (a voluntary association) is to develop proposals to establish, by Scottish Government Statute, a new Harbour Authority for Oban, which will be run by an independent Board for the benefit of all stakeholders and will re-invest any operating surplus in the Oban Harbour and Community. In the event that the Trust Port option is pursued OCHDA, with support from TS, British Ports Authority, OBMG and other stakeholders, will undertake the recruitment of

the Board and the Chief Executive for the new Harbour Authority. The Board will develop their own business plan, in consultation with all stakeholders, as required by the Scottish Government's "Modern Trust Ports: Guide for Good Governance". To suggest (Para 3.6.1) that OCHDA has, or should have, "proposals for developing and improving the harbour area" is to misunderstand the task we are jointly engaged in. As a properly constituted voluntary body OCHDA could neither become, nor seek automatic representation on, the Board of the Trust Port. Thus our funding model, technical competence, and operational model are neither relevant to the future Harbour Authority nor of legitimate interest to A&BC.

*A&BC Comment. We understand the function of OCHDA and will tweak the wording to make it clear that OCHDA are being asked to provide the information in relation to the Trust Port.*

With regard to an example of incorrect detail, to state that ferries have a "right of way" (Para 1.6) is not only to misunderstand the International Regulations for Preventing Collisions at Sea but is also contrary to the voluntary Code of Practice for Oban Bay which has been the safety mechanism for managing vessel movements for a number of years. The Code of Practice states that "*Large vessels (defined elsewhere as vessels greater than 20m in length and/or have a draft greater than 3 metres) "leaving" Oban Bay shall have the right of way over all vessels "entering" Oban Bay*". Many vessels navigating Oban Bay other than ferries are "Large Vessels" and are required to be given priority when leaving the Bay. In view of the obvious risks at present in Oban Bay, it is worrying to read inaccurate information relating to safety matters in a Council document.

*A&BC Comment. We acknowledge that you have quoted from the Code of Practice, however, in practice most vessels do work around the ferry timetables and we consider that what we have in the briefing for members (not intended to be a technical maritime document) is not misleading.*

Ross Wilson  
Vice Chair OCHDA

Attachments:

1. OCHDA Comments on A&BC Briefing Note dated 23 June 2021.
2. Summary of recent research into the historic and current jurisdiction of Oban Bay.

Distribution:

Chair Argyll & Bute Harbour Board  
Chair Oban Lorn and the Isles Area Committee

Copy to:

Kirsty Flanagan

**OCHDA COMMENTS ON A&BC BRIEFING NOTE DATED 23 JUNE 2021**

1. General.

- a. Whilst welcome, this Briefing does not provide a realistic overview of governance and is inaccurate in some key details. The Briefing is incomplete in that it fails to inform Members fully regarding the current development and joint work between OCHDA and A&BC. It also fails to state the way ahead clearly, preferably outcome and not output based and with timelines, for progressing the urgent requirement to establish a Statutory Harbour Authority for Oban Bay and Approaches.
- b. Clarification of the respective roles and responsibilities of Transport Scotland, A&BC and the OBMG would assist understanding by all stakeholders. The agreement for joint A&BC and OCHDA working was first stated in November 2019 and OCHDA would welcome the opportunity to assist with drafting a revised Briefing Note.
- c. The following is a series of detailed amendments that are suggested in order that Members can be correctly and fully informed regarding the situation relating to Oban Bay, its current and future status and arrangements, and the work required from both OCHDA and A&BC in order to successfully develop a Trust Port in Oban.

2. Introduction.

a. Paras 1.1 and 1.3 Responsibility for the Bay.

(1) It is OCHDA's view that responsibility for the waters of Oban Harbour rests with A&BC. This view has been reached following work that has been completed by both the OBMG and OBSG and their respective legal advisers, not to mention specific advice that was previously given by the Council's own Legal Services Manager as recently as 2017. It also appears to be confirmed in the opening sentence on the home page of the Oban Harbour website. This information is in the public domain and has been supplied to both Council Officers and Members on a number of occasions. Further details are in Attachment 2.

(2) Thus far the Council has provided no evidence to support the statement made in the Briefing Note.

(3) Whilst the Harbour Authority might be considered by some to be moribund, it is still extant - a view made by two separate legal advisers as part of the review of harbour extents. Whilst the Council may not choose to use the powers that are associated with the wider Authority it does not exclude them from their responsibilities.

b. Para 1.6 Right of Way in Oban Bay and Approaches.

(1) Under international regulations all vessels share a duty to avoid collisions. In specific circumstances one vessel may have a priority over another but this must not be confused with a right of way.

(2) The Code of Practice (CoP) for Oban Bay defines large vessels as those which are more than 20m in length and/or have a draft of >3m. The CoP neither states nor implies that ferries have 'right of way'. Instead, it states that:

“large vessels ‘leaving’ Oban Bay shall have the right of way over all vessels ‘entering’ Oban Bay. Small vessels, including sailing vessels, shall not impede the passage of a large vessel entering or leaving Oban Bay.”

(3) OCHDA is currently undertaking a review of vessel movements within Oban Harbour. At present the results suggest that the ratio of 'scheduled ferry' : 'other large vessel' is approximately 3:1.

### 3. Recommendations.

a. Para 2.1 Sub Para ii. “the Council is required to engage with all parties who could be involved in future options for Oban Bay”. Discussions between A&BC and OCHDA relate only to the lease of assets at the North Pier and the transfer of Council powers relating to the Harbour. Consultation with other parties will form part of the statutory processes of submitting a Harbour Order and is for Transport Scotland to monitor at the appropriate stage.

*A&BC Comment. There was a decision of the Harbour Board in March that the Council engage with all stakeholders and this recommendation is in respect of that decision.*

b. Para 2.1 Sub Para iv. “Note that OBMG have asked OCHDA to bring their proposals to the September 2021 meeting”. The next scheduled OBMG meeting is in August 2021. Following receipt of a letter from the Chair of the OBMG dated 23 June 2021, the Chair of OCHDA provided a progress report to the OBMG including a Schedule of Deliverables required from A&BC and OCHDA to progress the project timeously.

*A&BC Comment. Briefing will be updated to make it clear that the OBMG meeting is on 27 August.*

### 4. Detail.

a. Para 3.2.1 Meeting 14 January 2016. “Request to Officers to bring more detailed report with recommendations as soon as possible”. The request was for Officers to undertake their own option appraisal and report back to the Harbour Board; when was this completed?

*A&BC Comment. A number of reports have been taken to the Harbour Board that have provided updates and moved the position.*

b. Para 3.2.1 Meeting 23 January 2018. Is a copy of the Report which led to Members approving “progression of Option 4” available to the public? Ditto associated Business Plan?

*A&BC Comment. The reports were restricted by virtue of paragraph(s) 9 of Schedule 7A of the Local Government (Scotland) Act 1973.*

c. Para 3.2.1 Meeting 5 December 2019. Harbour Board recommended that two named Council Directors develop and agree a Memorandum of Understanding to explore the possibilities of establishing a Trust Port with Oban Community Harbour Development Association (not “Authority”). In March 2021 a draft MoU was produced by Council Officers but this was not fit for purpose. It was agreed that OCHDA would draft an MoU within one week for discussion. This was completed on schedule (26 April 2021), along

with proposals for tasks to be undertaken by A&BC and OCHDA respectively. There is still no MoU in place and work is progressing (albeit slowly) with the Schedule of Deliverables.

d. Para 3.2.1 Meeting 4 March 2021. The Board agreed that a meeting would be arranged as a matter of urgency between “all stakeholders” which was expected to be A&BC Elected Members, Officers and OCHDA Reps in order to identify obstacles and plan how to overcome them. This is not how the minutes appear to have been interpreted. No meeting has been arranged.

e. Para 3.3. The list of assets on the North Pier appears incomplete, missing the restaurants EEUsk and Piazza, and the Clock Tower?

f. Para 3.4.2. It should be noted that the options listed in the December 2019 report included the Municipal Port option which has not been supported by A&BC Councillors and Officers, most recently at the A&BC/OCHDA Reps meeting on 29 June 2021.

*A&BC Comment. The Council has not made a decision on the preferred option at present.*

g. Para 3.5 OCHDA’s role.

(1) Members need to be clear that the process of approving a Trust Port is a matter for Scottish Government, not for A&BC. A&BC will be one of the statutory consultees in the process.

(2) The options for Oban Bay which are currently under consideration are: a council-run Municipal Port with CMAL 'nested'; a commercially-run state port run by CMAL on behalf of the Scottish Government with North Pier 'nested'; or, an independent Trust Port, established by statute, run by a specialist Board, and obliged to consider all stakeholders’ interests and invest any operating surplus in the local community, with CMAL 'nested'.

(3) In the event that a Trust Port is the preferred option, it will not be “operated” by OCHDA or any other existing party; OCHDA’s task is to explore with all parties the possibilities of establishing a Trust Port and to submit appropriate proposals to Transport Scotland.

h. Para 3.5.3 Public meeting February 2020. Members may recall that each organisation represented at the meeting stated their support for the pursuit of the Trust Port option, in the absence of the Municipal Port option, as recorded in the meeting record that was prepared by the NLB.

i. Para 3.5.5 Consultation with stakeholders. Initial consultation with stakeholders in relation to the overall limits of the proposed Harbour Authority, a necessary precursor to drafting a Harbour Order, was undertaken in December 2020 and reported to Transport Scotland, the OBMG and to A&BC. Formal consultation is a part of the submission process.

j. Para 3.5.6 Business Plan and appraisal. OCDA is awaiting information in order to develop a business plan (financial viability, conservancy charges etc). Asset lease negotiations have yet to commence, and it would be irresponsible for OCHDA to attempt to produce a business plan until the remaining information has been provided by A&BC and preliminary Heads of Terms have been agreed. OCHDA’s business plan will be scrutinised by Transport Scotland for viability and sustainability as already stated, and this will also be provided to all statutory consultees including A&BC.

k. Para 3.5.8 Formal submission. A&BC Officers have repeatedly stated that there has been no formal approach to the Council in regard to the lease for buildings and the transfer of powers. Despite this reported lack, the Harbour Board and other Committees have been discussing the matter since at least December 2019. At the recent Oban Lorn and Isles Area Committee meeting, the A&BC Officer present was unable to explain what the form of a submission must be to be regarded as formal. Despite his commitment to providing clarification, none has been received. The “Informal Expression of Interest” referred to is Step 1 of A&BC’s process for submitting Asset Transfer requests under the Community Empowerment Act. This submission was made at the request of A&BC Officers despite it being clear that no Community Empowerment Act Asset Transfer is being sought. It is therefore hard to understand the request to produce the Expression of Interest and the repeated statement that no formal submission has been made.

l. Para 3.5.11 Appraisal of the proposal by the Council. Inter alia the A&BC Officer has proposed adoption of the Treasury’s Green Book 5 Case’ model – a process designed for major government-funded capital-intensive infrastructure projects. In response OCHDA requested from A&BC Officers guidance and/or examples regarding the use of this process for a project of this sort. A&BC Officers were unable to provide any examples or suggest any specific guidance. At present OCHDA is of the view that a robust Business Plan, which will contain much of the detail identified in the Green Book, will be more meaningful and relevant to this project. Both Transport Scotland and individual members of the OBMG (who are familiar with the Green Book) have agreed that this would be more appropriate in this case.

*A&BC Comment. The Treasury’s Green Book 5 case model was offered as a suggestion of a model OCHDA could follow, in order to be helpful. It is not a requirement.*

m. Para 3.5.13 Business case submission. Following a productive meeting between A&BC Finance Staff and OCHDA on 8 July 2021, income and expenditure for the North Pier operation is now better understood by all. This is useful progress towards completing a business case which still requires other details including lease costs.

n. Para 3.6.1 Additional “key next steps” required from A&BC include:

- (1) A&BC Officers working with OCHDA to agree the MoU directed by the Harbour Board in December 2019 using the draft prepared by OCHDA in April 2021 as the starting point.
- (2) A&BC acknowledging receipt of documents from OCHDA and providing feedback.
- (3) A&BC clarifying their role and responsibility, compared to those of the OBMG and Transport Scotland, in approving the Trust Port proposal.
- (4) A&BC providing the remaining information detailed in the Schedule of Deliverables.
- (5) A&BC agreeing Heads of Terms for the commercial lease (costs, duration & conditions).
- (6) A&BC clarifying the “formal” process for applying for a lease.

- o. Section 5 Implications.
  - (1) 5.3. As a key part of the process is for a transfer of powers relating to the North Pier and Oban Harbour from the Council to the Trust Port, then we feel this should read “Any agreement with OCHDA must ensure that the Council’s interests are protected”.
  - (2) 5.4. There are potential HR/staffing issues that will need to be addressed.
- p. Glossary of terms.
  - (1) OSG should be OBSG - Oban Bay Stakeholders Group.
  - (2) SHA: this is usually taken to mean Statutory Harbour Authority.
  - (3) SHO: as A&BC have used this in their briefing note, it might be helpful to include this, not least because it differentiates between SHA and SHO - Single Harbour Order as referred to in the Note.

## **SUMMARY OF RECENT RESEARCH INTO THE HISTORIC AND CURRENT JURISDICTION OF OBAN BAY**

### **1. Introduction.**

This Attachment provides a very brief overview of the research which has recently been carried out relating to the existence of a Harbour Authority responsible for the waters of Oban Bay. All of the information summarised in this document has been presented to either the Oban Bay Management Group (OBMG) or its predecessors, the Oban Harbour Development Group and the Oban Harbour Management Group (OHMG).

### **2. Retired Scottish High Court Judge, Lord Bruce Weir.**

Prior to the formation of the Oban Bay Stakeholder Group (OBSG), the main mechanism by which users of Oban Harbour had any meaningful input into the (then) OHMG was via the Oban Harbour User Group, chaired by Alasdair Henderson of CalMac. Lord Weir took part in these meetings on behalf of RYA Scotland and made a number of recommendations and observations, some of which were approved and recorded in subsequent meeting notes of the OHMG and the OBMG.

One of these observations, made at a meeting held at the Cuan Mor in 2018, was with regard to the relevance of historic legislation to Oban Bay. Lord Weir advised that, until such time as it was formally repealed, the historic legislation was still valid - irrespective of whether or not the current pier owner/operator chose to recognise it.

This principle was recently demonstrated in March 2019 when the then speaker of the House of Commons, John Bercow, used legislation which had first been used on 2 April 1604, and most recently in 1920, to prevent a parliamentary debate related to the Brexit vote from taking place. As this Attachment will demonstrate, in the case of Oban there is documentary evidence that the former Harbour Authority was operating much more recently than that, and that it had done so for more than a century.

### **3. Former Oban Assistant and Temporary Harbour Master, Fergus Gillanders.**

Fergus Gillanders carried out an extensive search of the Argyll and Bute Council (A&BC) archives during 2017 and 2018 and discovered a significant amount of material which confirmed the formation and operation of a Harbour Authority for Oban Bay. The most recent records were to the late 1980s and early 1990s, and were included as an Appendix in the jurisdictions paper that was subsequently prepared by the OBSG (see later). The result of the work that was completed by Fergus has been used by others to inform their own research and considerations.

### **4. Retired solicitor and RYA Scotland Cruising Committee Member, Boyd Holmes.**

Boyd Holmes was asked by RYA Scotland to provide a legal opinion of the historic information that had been collated by Fergus Gillanders, and compare that to the preliminary findings of Monica Peto of Eversheds Sutherland who had been commissioned by the OBMG to undertake a review of historic jurisdictions in Oban Bay.

Mr Holmes reported that, in contrast to the then view of Ms Peto, he considered that the information and legislation did support the view that there was a Harbour Authority for Oban Bay, albeit one

that was no longer operating. Boyd was the first person to describe the Harbour Authority as being 'moribund but extant' and, like Lord Weir, advised that it would remain so until the relevant legislation was repealed.

## 5. **Oban Bay Stakeholder Group.**

The OBSG collated the work that had been completed by both Fergus Gillanders and Boyd Holmes, together with the initial report which had been prepared for the OBMG by Monica Peto, and combined this with historic Admiralty charts held by the National Library of Scotland. The resultant document, referred to as 'the jurisdictions paper', was first presented to a stakeholder meeting held at the Glencruitten Hall and then again at a public meeting hosted by the OBMG at the Argyllshire Gathering Halls in March 2019.

Whilst the report confirmed the geographical extents of the areas of jurisdiction around the existing harbour structures, and identified specific points of agreement and those which were still to be resolved, it also made the following statements with regard to the outer part of Oban Bay:

- A general harbour master for Oban Bay was appointed as a result of the 1878 Act;
- The 1878 Act led to the formation of the Oban Harbour Authority (OHA);
- There is documentary evidence that the OHA was active until at least the late 1960s or early 1970s;
- There is circumstantial and documented evidence that the role of the OHA has been acknowledged more recently.

These findings were acknowledged by Monica Peto in her final report to the OBMG prior to the March 2019 public meeting.

## 6. **Monica Peto of Eversheds Sutherland.**

As already stated, Monica Peto was commissioned by the OBMG to provide a legal review of the legislation and jurisdictions in Oban Bay. This was published in late 2018, following which both Boyd Holmes and then the OBSG provided detailed feedback and comment. Correspondence between the author of the OBSG and Monica led to a general consensus being reached on all points other than the detail of the boundary between different harbour areas in the vicinity of the South Pier (this has subsequently been agreed between OCHDA, CMAL and members of the OBMG in 2020). Monica confirmed that consensus had been reached in her final report to the OBMG in February 2019, with the OBMG minute stating the following:

*The legal status of the SHA at the North Pier and Railway Pier has been agreed, along with more accurate boundary positions. There is a grey area of the exact legal status of the area of jurisdiction associated with the South Pier, although this is thought to be of small consequence as this can be clarified with the required new legislation for a wider SHA. The original South pier boundary has also been identified.*

*The area outside of these SHA areas, up to the Dog Stone - Brandy Stone line, has limited HM powers under the 1847 and 1878 acts; these powers relate to a general HM that could be jointly appointed by the owners of the Railway, North and South Piers and the Council. Again new legislation will be required for a wider SHA to be effective which would supersede this legislation.*

This is entirely consistent with the findings of both Boyd Holmes and the OBSG jurisdictions report, the latter concluding with the following statement:

*The way forward to secure a compliant harbour authority is for ABC and CMAL to acknowledge that they are the inactive guardians of the moribund but extant old-style trust port, OHA, and to discharge their obligations by seeking the necessary authorisation for the conversion of that body to a modern trust port whilst incorporating an extension of its geographical limits of jurisdiction.*

This is exactly what OCHDA is trying to achieve on behalf of all stakeholders, including both A&BC and CMAL.

**7. Argyll and Bute Council Legal Services Department, Mr D Kelly, and the Oban Harbour website.**

In March 2017 Mr Donnie Kelly, Legal Services Manager of A&BC, advised Council Officers and Members of the OBMG that:

*This Council as successor to the Oban Harbour Authority is the harbour authority for the wider area of Oban Harbour and as well as that as owner/operator of the North Pier also has responsibilities for the specified area off the North Pier.*

This view appears to be reconfirmed on the home page of the Oban Harbour website which starts with the statement that:

*The lead provider of marine safety and related services for Oban Harbour is Argyll & Bute Council with support from CalMac Ferries, the Northern Lighthouse Board and Caledonian Maritime Assets Ltd.*

There is additional supporting evidence to further confirm that A&BC considers itself to be responsible for controlling the waters of Oban Bay (for example, making what appear to be complaints through the OBMG meetings that the CMAL Pier-master told vessels that were anchored in the harbour to move). Similarly, both historic Admiralty charts and those produced by others also show the outer harbour boundary. However, the information contained in this Attachment, together with the documents to which it refers, all demonstrate that there is historic legislation and documentation which confirms the existence of a Harbour Authority for Oban Bay. This legislation will need to be repealed in order for a new Statutory Harbour Authority to control the waters of both Oban Bay and its approaches.