

Dear Sirs

We refer to the formal objection to the proposed Oban Harbour Revision Order 2024 by the Oban Community Harbour Development Association, dated 9 January 2024. This letter constitutes Argyll & Bute Council's response to the matters set out within the Objection.

The Council welcomes all representations made in respect of the HRO, recognises the interests of a range of parties and stakeholders in the successful management and governance of the harbour at Oban and will continue to engage with all stakeholders as matters progress.

The Council has carefully considered the matters set out within the Objection and sets out its considered position below. It has set out its responses to the matters contained within the Objection in the same order as contained in the Objection.

The terms of the Council's response below are also reflected in the consultation response document that the Council is providing to Transport Scotland in respect of representations made by a variety of interested parties.

1 Procedural objection

OCHDA makes a procedural objection at part 3 of its objection to the extent that the Scottish Ministers have not complied with the requirements of paragraph 3 of Schedule 3 to the Harbours Act 1964 ("the 1964 Act") As a result, it contends that the Council cannot make this application for the HRO.

It is a matter for the Scottish Ministers to consider whether it has complied with the relevant terms of the 1964 Act. However, the Council's position is explained below.

The definition of "project" as contained within paragraph 1 of Schedule 3 to the 1964 Act, and the provisions prohibiting an application for a harbour revision order which authorises a project at paragraph 3 of Schedule 3 are set out within OCHDA's objection at paragraphs 3.1 and 3.2. The Council does not take issue with OCHDA's description of those provisions contained at those paragraphs. Similarly, the Council does not dispute that the draft HRO authorises the Council to "construct, reconstruct, extend, enlarge, alter, replace, relay or demolish structures and works in the harbour" (article 6(1)(b)) and "deepen, widen, dredge, scour, cleanse, alter and improve the bed and foreshore of the harbour and the seaward approaches thereto" (article 10).

However, the HRO does not seek to authorise any specific works falling within the definition of "project" under paragraph 1 of Schedule 3 to the 1964 Act. It is not a works order. The HRO if enacted will give general powers to the Council allowing it to maintain and develop (including to demolish, reconstruct and extend) existing works and structures within the harbour limits and within already authorised limits of deviation. Such powers are necessary to allow the Council to properly maintain and run the harbour at Oban. These powers are standard provisions contained within harbour revision orders conferring general powers on harbour authorities – see for example article 13 of the Eyemouth Harbour Revision Order 2021. These

provisions do not (as set out below) authorise any works beyond the limits of deviation of works which have previously been authorised by order. There is no interference authorised with public rights of navigation. The Council does not agree with the characterisation of the general works powers contained at paragraph 3.24 of OCHDA's objection. The provisions do not authorise specific "projects" or "works" and therefore do not fall within the definition of "project" as contained within paragraph 1.

Similarly, the HRO gives general powers to the Council to dredge the seabed and foreshore of the harbour and approaches to the harbour. Such powers are standard provisions contained within harbour revision orders conferring general powers on harbour authorities – such as article 17 of the Eyemouth Harbour Revision Order 2021. This power is necessary to allow the Council to properly maintain the harbour and to allow vessels and watercraft to utilise the harbour area. It does not authorise specific "projects" or "works" and therefore does not fall within the definition of "project" as contained within paragraph 1.

No specific "works" or "projects" within the meaning of the 1964 Act are authorised as a result of this HRO. Therefore, the provisions of paragraph 3 of Schedule 3 to the 1964 Act are not applicable to this HRO.

2 Community engagement

Comments are made within its objection by OCHDA at Part 4 to the extent that it considers the Council has not properly engaged with the local community in respect of the HRO. The Council's position is that throughout the HRO application process, including the pre-application consultation period, it has complied with the Gunning principles, the Scottish Government's guidance on consultations (referred to by OCHDA) and the Nolan Principles in Public Life. OCHDA has also made comments in respect of (1) a consultative harbour board, and (2) a statutory harbour management committee. Those matters are also considered within this part of the Council's response.

The Council has engaged, as set out in its supporting statement and acknowledged in OCHDA's objection, in an extensive pre-application consultation process between September 2022 and August 2023. That process resulted in both technical and substantive amendments to the draft HRO as set out in the Council's note on amendments to the HRO dated September 2023.

The Council engaged in a pre-application public consultation between 15th July and 26th August 2022.

It publicised its draft HRO on its website, promoted engagement through the 'Keep in the Loop' service which contacted over 1,000 addresses and invited comments from members of the public. The Council also sent copies of the HRO directly to CMAL, the Commissioners of the Northern Lighthouse Board, the Maritime and Coastguard Agency, CFL, and the Oban Community Harbour Development Association (OCHDA) for comment.

Finally, the Council has also consulted Transport Scotland on the drafting of the HRO prior to application being submitted formally

The Council therefore considers that it engaged in meaningful pre-application consultation.

The time period for objections and/or representations to be made in response to a HRO application under the 1964 Act is set by paragraph 10(2)(f) of Schedule 3 to the 1964 Act as being 42 days. The Council does not have discretion to vary that time period. It is not contrary to any recognised principles or good practice relating to public consultations for such consultations to include public holidays such as Christmas and New Year. Delaying the commencement of the HRO application period until after the New Year would have meant delaying the process for approximately two months. In circumstances where the Council has extensively engaged and consulted with relevant external stakeholders, including members of the local community, over a lengthy period, the Council did not consider a further delay appropriate in the circumstances. The manner in which the consultation was carried out was entirely consistent with the terms of the 1964 Act, and the Council has fulfilled all of its obligations in that respect.

2.1 Consultative harbour board

At paragraph 4.8 onwards of its objection OCHDA criticises the lack of provision made within the HRO for a statutory consultative board in respect of the harbour at Oban. OCHDA previously proposed, during the pre-application consultation, that the HRO should provide for a consultative harbour board that the Council would require to consult in the exercise of its statutory functions as harbour authority. The Council carefully considered this proposal when drafting the HRO. However, it determined not to make provision for such a body.

At paragraphs 3.4 and 3.5 of the supporting statement, the Council set out its position as follows:

"The Council has not provided for such a body within the HRO. The purpose of the Order is to set out the Council's rights and duties as statutory harbour authority. It would not be appropriate to include provision for a consultative body that does not have statutory powers/obligations within the Order. Similarly, the Council's powers as SHA cannot be unduly fettered by the existence of a separate statutory board.

However, the Council, as harbour authority for Oban, has a continued commitment to continue to consult on the governance, management and operation of Oban harbour with interested bodies, community groups and members of the community. Such commitment is in accordance with recognised principles of good governance and consultation. The Council will have regard to the Scottish Government's Consultation Good Practice Guidance in engaging in such consultations."

The Council reaffirms its position as set out within the supporting statement, including its commitment to continue to consult on the governance, management and operation of the harbour at Oban with stakeholders in accordance with recognised principles of good governance and consultation.

Modern Trust Ports for Scotland: Guidance for good governance ("the Guidance") is the guidance applicable to Scottish harbour authorities. The Guidance sets out Transport Scotland's expectation that trust ports are able to identify their stakeholders and to include them in formal consultation on significant decisions where appropriate (paragraph 1.4.2). However, it also states that "[I]t is not intended that trust port boards are faced

with multiple irreconcilable demands from stakeholders, or that each and every decision must be consulted on in depth. Boards must be free ultimately to make commercial decisions on all issues facing the port, having weighed the various representations and advice received. The board is best placed to judge the overall impact of any recommendation" (paragraph 1.4.3).

The Council's proposed approach – of consulting with interested parties and stakeholders where appropriate, and in line with recognised principles of good governance – is in accordance with the Guidance and the Port Marine Safety Code.

The Council considers that it would not be appropriate to include provisions within the HRO containing general obligations to consult in respect of the exercise of any of its statutory functions. The Council as harbour authority requires discretion as to how it exercises its powers. The manner in which it exercises its powers may be subject to consultation when appropriate with reference to the Scottish Government's Consultation Good Practice Guidance and the Gunning Principles. As noted above such an approach is in accordance with the Guidance.

There may be occasions in respect of the management of the harbour where it is not appropriate for the Council to consult stakeholders or to engage in only limited discussion before taking a decision – for example where time-critical action is required on the part of the Council as harbour authority. That must be a matter for the Council, acting reasonably, to determine when exercising its statutory functions. To impose a general duty on the Council to consult with a statutory consultative harbour board would impede the efficiency of the Council in carrying out its statutory functions. Again, it is not envisaged within the Guidance that harbour authorities should be subject to such a statutory duty. Indeed, consultation is expressly envisaged as being a matter left generally to the harbour authority's discretion.

The Scottish Ministers are required not to make a harbour revision order in terms of section 14(2)(b) of the 1964 Act unless the Ministers are satisfied that "*the making of the order is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner...*". The Council considers that making statutory provision for a consultative harbour board would not be in the interests of securing the management of the harbour in an efficient and economical manner for the reasons set out above.

Reference is made by OCHDA to the UK Department for Transport's *Ports Good Governance Guide* (March 2018) ("the Good Governance Guide"). The Good Governance Guide is not applicable in Scotland. However, the Council considers that the HRO is compliant with the principles of consultation set out in the Good Governance Guide. In particular, the Council notes that the Good Governance Guide provides that there are a range of acceptable approaches that harbour authorities can consider using to engage with stakeholders at paragraph 2.15. One approach is a formal advisory committee or an advisory committee for local communities. However, others referenced include public forums and meetings, and consultation on specific projects or subjects. These are approaches which are adopted by the Council in respect of the harbour at Oban and which it will continue to pursue if the HRO is enacted.

At paragraph 2.16, the Good Governance Guidance notes that "*SHAs [statutory harbour authorities] are best placed to determine which of the above approaches and which others are best suited for effective stakeholder engagement for their particular circumstances.*" It is therefore clear that the UK Department for Transport envisages that it is a matter for individual harbour authorities as to how they engage with stakeholders. This is consistent with the approach of Transport Scotland as outlined in the Guidance.

The Council is committed to creating mechanisms for stakeholder engagement in respect of the management and operation of the harbour at Oban. However, it considers for the reasons set out above, that those mechanisms should not be set out within the HRO, and should instead be a matter for further consultation and agreement.

There are specific provisions requiring consultation with certain bodies within the HRO. As a general rule HROs require the harbour authority to consult with particular bodies in respect of general directions governing the use of vessels within the harbour. The existing provisions concerning general directions are in accordance with that rule.

The Council has included specific provision to consult with CMAL in respect of an appropriate safety management system for the harbour at Oban due to the existence of CMAL as a separate harbour authority at Oban, whose jurisdictional limits are "nested" within the harbour limits applicable to the Council under the HRO. It is therefore appropriate, as the other body which is a statutory harbour authority within Oban Bay, that there is an obligation on the Council to consult with CMAL on safety management. It may be appropriate to consult with other bodies (including bodies representative of harbour users) in the implementation of a safety management system but that is a matter that should be left to the Council's discretion.

2.2 Statutory harbour management committee

OCHDA also make reference at paragraphs 4.17 to 4.20 of the Objection to the creation of a harbour management committee for the harbour at Oban. This appears to be suggested as an alternative to a statutory consultative committee.

Under the HRO, the Council is the harbour authority in respect of the harbour at Oban. At present, the Council's functions as harbour authority in respect of Oban and other harbours in its area are exercised by the Argyll & Bute Harbour Board ("the Harbour Board"), which is constituted as a committee of the Council in accordance with the terms of the Local Government (Scotland) Act 1973 and the Council's Scheme of Delegation. That delegation of authority will continue if the HRO is enacted.

The members of the Harbour Board are elected members of the Council, appointed in accordance with the Council's Standing Orders. However, the Harbour Board is not a legal entity separate from the Council. The Council is the statutory harbour authority in respect of Oban and retains legal responsibility for the management and operation of the harbour.

The Council intends that the current management of the harbour at Oban by the Harbour Board will continue if the HRO is enacted. The Harbour Board will continue to be constituted in accordance with the 1973 Act

and other relevant enactments. The Council does not consider that it is within the scope of the 1964 Act for the Scottish Ministers to make provision within the HRO for the composition of any committee of the Council under the 1973 Act in circumstances where the Council remains the harbour authority.

3 Harbour limits (article 4)

OCHDA (along with other persons making representations) has made comments to the extent that article 4 does not clearly incorporate the "harbour premises" within the harbour limits and definition of harbour, or clearly set out the land, premises or shore facilities to be considered part of the harbour under the HRO. The Council had previously set the limits of the harbour to exclude the landward premises.

However, the Council has carefully considered the representations made in respect of the landward limits of the harbour. The Council is content to include a definition of "harbour land" within the draft HRO and thereafter to incorporate "harbour land" within the boundaries of the harbour.

OCHDA have made representations which note its disagreement with certain other elements of the harbour limits. However, the Council has considered the issue of harbour limits very carefully. It has considered what is operationally deliverable. In the process of raising the HRO there was a requirement for a Navigational Risk Assessment (NRA) as part of the assessment process to understand the current level of marine risk and proposed mitigation for reducing the risk. This follows the requirements of the Port Marine Safety Code (DfT, 2016).

The NRA will be reviewed by the Maritime and Coastguard Agency (MCA) as the competent authority with a marine safety remit for Oban Bay as most of the area is currently outside of a statutory harbour area. It is used to inform, and provide justification for, the external limits and jurisdiction of Oban Harbour as well as the required degree of traffic monitoring and therefore staffing levels.

Summer observations were completed over the busiest period of traffic from 18th to the 31st July 2022 and also included engagement with users as well as a Hazard Identification session (HazID) where users could comment and provides additional input to augment the observational data. A second survey was arranged to characterise a quieter period between Saturday 3rd to Friday 16th December 2022.

The NRA establishes a navigational baseline on which a decision can be made on the external limits of the Harbour. It is incumbent on the HRO applicant to justify any extension to the jurisdiction of its Harbour area in terms of improving safety for users and the data gleaned from the busiest period of the summer fulfils that need.

The data gathered during this process by ABPMer confirms that the proposed external limits put forward by Argyll & Bute Council are justified and they then formed part of the HRO application.

The responses received have been helpful in looking at how the Harbour Limits are described and we have revised the format in the draft HRO to set that out in a manner that we consider will be more easily read and understood. In addition CMAL has provided further information to more accurately define their nested area

and this does not materially alter the Harbour Limits or the intended effect in the draft HRO. The limits of the harbour as set out are clear, logical and safely manageable based on the assessments carried out by and on behalf of the Council.

4 Moorings (article 15)

Objection is made by OCHDA and others to providing powers to the Council as harbour authority in respect of moorings. The purpose of this provision is to manage moorings within the harbour limits and to ensure that moorings are not a hazard to navigation within the harbour area. A properly licensed and consented mooring system provides security of tenure for boat owners while protecting the interests of marine users and rights of public navigation.

The Council will not take the role currently carried out by Crown Estate Scotland, who will remain the owners and managers of the sea bed within the harbour limits. Licences issued by Crown Estate Scotland for moorings will remain valid, and renewal of such existing licences will not be subject to charge. Any new mooring applications where licences have been granted by Crown Estate Scotland will normally be approved provided that there are no substantive objections or hazards to public navigation.

The Council will, in respect of mooring applications, allow a period for public consultation (including the lodging of objections). The Council will thereafter consider any objections made and any potential hazards to public navigation before reaching a decision on approval or otherwise of any such applications. It should be a matter for the Council and where appropriate its officers, acting under delegated authority, to approve moorings applications based on such governance arrangements as are deemed necessary and appropriate by the Council.

The HRO provides for mooring licences to be granted for either one year or any longer period as deemed desirable by the Council. This is in line with standard HRO provisions concerning moorings, and gives the Council flexibility to allow for a longer period of licence where it deems appropriate. Such flexibility is necessary for the Council to maintain appropriate control over moorings within the harbour limits.

The Council does not propose any changes to this article.

5 Restrictions on Works and Dredging (article 10)

OCHDA has made representations concerning the extent of article 10 which prohibits the carrying on of works or dredging within the harbour limits without the approval of the Council. The provision in question is a standard provision regularly found within harbour revision orders. Except for those provisions specifically relating to CMAL the provision is in standard terms.

The provision in question is necessary to ensure that the Council controls works and dredging activities within the harbour limits. It is by no means unusual to have licensing or consenting regimes running in parallel – for example, planning and building standards. Having the marine licensing and works/dredging licensing regimes run alongside each other will not impose any unreasonable burdens on applicants. The

absence of this provision would mean that the Council would be unable to control the construction of works or dredging activities within the harbour limits – which may have implications for the safety of vessels within the harbour.

The Council does not propose any changes to this article.

6 General works powers (article 5(2)(b))

OCHDA makes an objection to the extent that the general works powers set out in article 5(2)(b) of the HRO authorise the Council to interfere with public rights of navigation and public rights of way, and to carry out unspecified and unrestricted works within the harbour limits.

The powers conferred on the Council under article 5(2)(b) are standard general powers which can be found in other non-works harbour orders – including the Eyemouth Harbour Revision Order 2021 and the Tobermory Harbour Empowerment Order 2017. Reference is made to part 1 above. This article does not authorise any interference with public rights of navigation or public rights of way. The only works which can be undertaken under article 5(2)(b) are those within existing limits of deviation where public rights of navigation or public rights of way have already been extinguished. Such powers are necessary to ensure that the Council can maintain and develop existing works and structures within the harbour – including reconstructing such works and structures where necessary, such as if such structures were to be damaged or destroyed – without requiring a fresh harbour revision order.

There is no authorisation contained within the HRO allowing the Council to extinguish public rights of navigation. The Council would require to make explicit provision within the HRO in order to extinguish any public rights of navigation. Similarly the HRO does not extinguish any public rights of way.

The Council does not propose any changes to this article.

7 Exemptions from charges (article 36)

The Council has received representations from OCHDA (and other parties) to the extent that the effect of article 36(3) could be to exempt persons operating ferries passing through the harbour limits to and from the railway pier from liability from charges. The Council has carefully considered those representations.

It has always been the intention of the Council to ensure that persons operating ferries passing through the harbour limits to and from the railway pier are liable for charges. However, having received helpful comments, the Council considers there is a risk that article 36(3) could be interpreted as exempting such persons from charges. As a result, the Council has therefore inserted a new article 36(4) to provide that article 36(3) will not apply to vessels passing through the harbour limits to and from the railway pier. The Council and ferry operators will reach separate agreement on the appropriate levels of charges.

8 Annual statement of accounts (article 18)

You and others have made representations to the extent that you consider article 18 (concerning publication of the Council's annual statement of accounts) is not compliant with section 42 of the 1964 Act. The Council has carefully considered those representations.

The Council as harbour authority is bound by the terms of section 42 of the 1964 Act. The Council does not therefore consider it necessary to make further amendments as to the extent of any statement of account rendered under article 18. It notes that, in the event future legislation were to amend section 42 of the 1964 Act, adopting suggested amendments within the HRO might mean that article 18 was no longer compliant with the terms of the 1964 Act where there was an inconsistency in terms between the statutes.

The Council will produce required accounts with its annual accounts which are published on the Council's website.

9 Combined reserve fund (article 38)

OCHDA has made representations within the Objection regarding the Council operating a combined reserve fund in respect of the harbour undertaking and the other harbours in respect of which the Council is the harbour authority. OCHDA considers that the revenues derived from the harbour undertaking at Oban should be solely applied in respect of Oban, and not be used in respect of other harbour undertakings.

The Council has carefully considered the representations made. It does not intend to make any amendments to article 38.

As is noted by OCHDA, a number of other local authorities in Scotland which are harbour authorities in respect of a number of harbours operate or have the right to operate combined reserve funds in the manner provided for within the HRO. Some of those are Comhairle nan Eilean Siar (formerly Western Isles Council), Highland Council, Dumfries and Galloway Council, and the successors to the former Grampian Regional Council, namely Aberdeenshire and Moray Councils. These local authorities cover large rural areas with lengthy coastlines, and are harbour authorities in respect of a number of harbours or ports of various sizes. Many of the harbour undertakings falling under their jurisdiction are small harbours which bring in limited revenue. As a result, the local authorities noted above operate combined reserve funds in order to apply combined funds for the maintenance of their harbour undertakings.

Argyll & Bute Council is in a similar position to the above mentioned local authorities. It is the harbour authority in respect of 8 separate harbour undertakings within its area. Those harbours are of a variety of sizes and bring in revenue streams of varying levels. It is appropriate, in respect of those harbour undertakings, that the Council has the discretion to operate a combined reserve fund in order to allow the Council, if it deems appropriate, to apply surplus revenue towards expenditure in respect of one or more harbour undertakings as set out at article 38(3). The purpose of a combined reserve fund is to provide a contingent fund so that revenue can be utilised in a flexible manner, and can flow to and from harbours (including Oban) as necessary and appropriate.

The Council notes the position adopted by OCHDA in respect of the Common Good of Oban. It does not, however, consider that such observations are applicable to the harbour at Oban. The Council derives income from the harbour undertaking at Oban as a result of its statutory powers as statutory harbour authority allowing it to levy rates and charges. The HRO allows the Council to continue to levy such rates and charges and to do so over a wider area. The harbour undertaking's income arises as a result of those statutory powers and not as a result of any common good status of any harbour land.

10 Miscellaneous provisions

10.1 Use of the phrase "authorised officer (article 7)

OCHDA has made representations to the effect that the use of "duly authorised officer" in article 7 is not necessary. The Council is content to remove "or other duly authorised officer of the Council" from the terms of article 7(2) and (3) on the basis that the definition of "harbour master" allows for the Council to appoint persons other than the harbour master to act in the capacity of harbour master.

10.2 Ownership of the Railway Pier (article 2)

OCHDA has made representations to the effect that the definition of CMAL should be amended to cater for future and different ownership of the railway pier. The Council is content to accept that representation and has amended the definition of CMAL accordingly.

10.3 Definition of ferry operator (article 2)

The definition is distinct to the CHIFS network, which does operate a ferry to Kerrera and as the other 'private' operators may change or come and go. It is the view of the Council that as operators, business owners and users the Kerrera ferry to North Pier will have a significant stakeholder voice in any case.

10.4 Sea Planes

OCHDA considers that insufficient consideration has been given to the regulation of sea planes within Oban bay.

The definition of "vessel" includes "a sea plane on the surface of the water". The Council therefore has powers as harbour authority to regulate sea planes on the surface of the water in the same way that it has powers to regulate other vessels. It does not propose any further changes in respect of sea planes.

10.5 Aids to navigation

As statutory harbour authority, the Council is the local lighthouse authority ("LLA") in terms of section 193(2) of the Merchant Shipping Act 1995. Its functions as the LLA are governed under that Act. The Council will become LLA for the extended harbour area if the HRO is enacted. It will engage with the Northern Lighthouse Board as appropriate in order to ensure that its functions are fulfilled.

The Council does not consider that any further amendments are necessary.

10.6 Repeals and revocations

The Council has carefully considered the representations made by OCHDA and others concerning the repeal of article 29 and the remaining extant provisions of the Oban Piers Order 1896 (contained within the Piers and Harbour Orders Confirmation (No. 5) Act, 1896) ("the 1896 Order"), and sections 40 to 42 of the Callander and Oban Railway Act 1878 ("the 1878 Act").

Article 29 of the 1896 Order makes saving provisions for sections 40 to 42 of the 1878 Act. Sections 40 to 42 of the 1878 Act make provision in relation to the Council and CMAL's powers to appoint a harbour authority in respect of Oban Bay. However, that power is discretionary and can only be exercised with the agreement of both CMAL and the Council. At present, the Council and CMAL have made no such agreement.

The Council had previously decided not to repeal any part of the 1878 Act as it is that statute which underpins CMAL's position as statutory harbour authority in respect of the railway pier. The Council did not wish to repeal any provision of that statute in order to avoid any unintended consequences for CMAL's powers as harbour authority over the railway pier. For the same reason, the Council had determined not to repeal those provisions of the 1896 Order which had some bearing on CMAL and the railway pier. Any repeal of those provisions is a matter for CMAL.

CMAL has, however, now confirmed that it is content for sections 40 to 42 of the 1878 Act to be repealed. On that basis, the Council is now content to seek repeal of those provisions through the HRO, and also to repeal article 29 of the 1896 Order.

The amendments proposed above amount to a repeal of largely superseded or inactive legislative provisions. They do not have any material effects on the HRO.

I hope that this reply is helpful and, in light of this, would be grateful if you would confirm whether you wish to maintain an objection to the proposed HRO.

Please confirm before 28th June 2024 by emailing: MarineConsultation@argyll-bute.gov.uk

Thanks again for taking part in the consultation.

Best regards

Marine Consultation
Argyll & Bute Council

