

South Hams Special Salcombe Harbour Board



Title:	Agenda								
Date:	Monday, 25th April, 2022								
Time:	2.30 pm								
Venue:	Cliff House, Salcombe								
Full Members:	<p style="text-align: center;">Chairman Cllr Brazil</p> <p style="text-align: center;">Vice Chairman Mr H Marriage</p> <p><i>Members:</i></p> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%;">Cllr Brown</td> <td style="width: 33%;">Mr A Owens</td> </tr> <tr> <td>Cllr Foss</td> <td>Mr C Plant</td> </tr> <tr> <td>Ms A Jones</td> <td>Mr I Shipperley</td> </tr> <tr> <td>Cllr Long</td> <td>Mr I Stewart</td> </tr> </table>	Cllr Brown	Mr A Owens	Cllr Foss	Mr C Plant	Ms A Jones	Mr I Shipperley	Cllr Long	Mr I Stewart
Cllr Brown	Mr A Owens								
Cllr Foss	Mr C Plant								
Ms A Jones	Mr I Shipperley								
Cllr Long	Mr I Stewart								
Interests – Declaration and Restriction on Participation:	Members are reminded of their responsibility to declare any disclosable pecuniary interest not entered in the Authority's register or local non pecuniary interest which they have in any item of business on the agenda (subject to the exception for sensitive information) and to leave the meeting prior to discussion and voting on an item in which they have a disclosable pecuniary interest.								
Committee administrator:	Democratic.Services@swdevon.gov.uk								

1. Urgent Business

brought forward at the discretion of the Chairman

2. Division of Agenda

to consider whether the discussion of any item of business is likely to lead to the disclosure of exempt information

3. Declarations of Interest

In accordance with the Code of Conduct, Members are invited to declare any Disclosable Pecuniary Interests, Other Registerable Interests and Non-Registerable Interests including the nature and extent of such interests they may have in any items to be considered at this meeting;

4. Governance and Duty Holder Arrangements

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Report to: **Salcombe Harbour Board**

Date: **25 April 2022**

Title: **Governance and duty holder arrangements**

Portfolio Area: **Councillor Judy Pearce – Leader of the Council**

Wards Affected: **All**

Urgent Decision: **N** Approval and clearance obtained: **Y**

Date next steps can be taken: 19 May 2022

Author: David Fairbairn Role: **Head of Legal Services and Monitoring Officer**

Contact: **Tel: 01829 861359/email: david.fairbairn@swdevon.gov.uk**

Recommendation:

The Board is recommended to recommend to full Council that responsibility for the Council's functions as harbour authority and the role of duty holder should be that of the Executive with the Harbour Board acting as an advisory board to the Executive.

1. Executive summary

1.1 This report considers where responsibility for the Council's functions as harbour authority and the role of duty holder for the purposes of the Port Marine Safety Code 2016 ("the Code") should sit within the Council's decision-making arrangements and makes recommendations to Council.

2. Background

2.1 The Council is the Harbour Authority for Salcombe Harbour. There is therefore an expectation that it will comply with the Code. The Code requires the Council to have a "duty holder" who is accountable for their compliance with the Code and their performance in ensuring safe marine operations.

2.2 The Council has adopted executive arrangements as its permitted form of governance. This means that the Council has arranged for executive functions to be the responsibility of the Leader of the Council and a cabinet executive ("the Executive"). Executive functions are essentially, all those functions that are not prescribed by law as being functions of the full Council or that the full Council

as a matter of local choice has decided should be the responsibility of the Executive. The Council's harbour authority functions are functions that may be the responsibility of the full Council or of the Executive.

- 2.2 As was reported to the Board at its meeting on 24 January 2022, the Council's current arrangements for the discharge of its harbour authority functions lack clarity as to whether the full Council, the Executive, or the Board, and in particular who is the duty holder. At that meeting the Board did not agree with the recommendation to designate the Director of Place and Enterprise as the duty holder and requested a further report.
- 2.3 On 12 April 2022 members of the Board had workshop with solicitors, Ashfords.
- 2.4 The Council is reviewing its Constitution, which identifies which bodies have responsibility for discharging functions and the Board's recommendation will help to shape the document. The draft Constitution will be considered by the full Council at its meeting on 19 May 2022.

3. The way forward

- 3.1 Following the workshop, where members of the Board informally appeared to support the suggestion that the Executive should be the duty holder and discharge the Council's harbour authority functions, Ashfords have produced a governance paper setting of the options and making an assessment of the potential impacts (see **Appendix A**).
- 3.2 Having evaluated the options, officers consider that the option providing the greatest clarity and certainty, would be for the Council to agree to the Executive having responsibility for the discharge of the Council's harbour functions and being the duty holder for the purposes of the Code.
- 3.3 Under this arrangement, the Board would continue to perform an advisory role, making recommendations to the Executive based on its expertise in maritime matters. As the governance paper suggests this regular interaction with the Executive, strengthening the links between the Board as advisor and the Executive as duty holder.
- 3.4 Members of the Executive will need to be trained on their role and responsibilities in connection with discharging those functions and under the Code.

4. Implications

Implications	Relevant to proposals Y/N	Details and proposed measures to address
Legal/Governance	Y	<p>The Pier and Harbour Order (Salcombe) Confirmation Act 1954 made the Council the Harbour Authority for Salcombe Harbour. As such, the Council has a duty to:</p> <p>a) take reasonable care, so long as the harbour is open for public use, that all who may choose to navigate in it may do so without danger to their lives or property;</p> <p>b) conserve and promote the safe use of the harbour, and prevent loss or injury through the Council's negligence;</p> <p>c) have regard to efficiency, economy and safety of operation as respects the services and facilities provided; and</p> <p>d) take such action that is necessary or desirable for the maintenance, operation, improvement or conservancy of the harbour.</p> <p>While the Board is a committee of the Council, the precise division of roles and responsibilities between the Council, Executive, the Harbour Master and the Board lacks clarity, which the proposals set out in paragraph 3, seek to address.</p>
Financial implications to include reference to value for money		<p>The legal requirement for there to be separate accounts for the harbour would remain and from this point of view the proposal would maintain the current position.</p>
Risk	Y	<p>The failure to formally designate the duty holder would be a breach of the Code and the non-compliance with the Code may provide evidence in court proceedings in the event of an accident or incident.</p>
Supporting Corporate Strategy	Y	<p>In accordance with the principles of the Ports Good Governance Guidance 2016, Salcombe Harbour is in the interests of stakeholders including the local community both for employment and leisure</p>

		purposes.
Climate Change - Carbon / Biodiversity Impact	N	There are no climate change or biodiversity impacts.
Comprehensive Impact Assessment Implications		
Equality and Diversity	N	There are no equality and diversity impacts.
Safeguarding	N	There are no safeguarding impacts.
Community Safety, Crime and Disorder	N	There are no crime and disorder impacts.
Health, Safety and Wellbeing	Y	The proposal seeks to provide clarification as to responsibility for the discharge of the Council's harbour authority functions and in particular the body that is the duty holder. The duty holder is responsible for ensuring safe marine operations.
Other implications	N	There are none

Supporting Information

Appendices:

Appendix A – Ashfords: Governance paper

Background Papers:

There are none

(1) Background

On 12 April 2022, members of the Harbour Board attended a virtual workshop with Lara Moore (Partner, Ashfords LLP), a specialist Ports and Harbours Lawyer. Lara Moore sits on the UK Harbour Masters' Association National Council (elected by Industry) and the firm acts for a large number of statutory harbour authorities made up of Municipal, Trust and Private Ports.

Clients of Ashfords include the following municipal Ports and Harbours; Cornwall Council (10 ports and harbours, including seven statutory harbours), Torbay Council (Brixham, Paignton and Torquay harbours), Dorset Council (Harbours of Weymouth, Bridport and Lyme Regis), Bristol City Council (Bristol Harbour), Portsmouth City Council (Portsmouth International Port) and Exeter City Council (Port of Exeter). The firm regularly advise on duty holder and governance arrangements in municipal ports.

The workshop and this paper cover the following areas:

1. The Port Marine Safety Code and Role of the Duty Holder.
2. Where the role of the Duty Holder could sit within the Council.
3. The recommendations of the Ports Good Governance Guidance regarding Harbour Management Committees
4. Future Governance arrangements in relation to the Harbour Board.

(2) The Port Marine Safety Code and Role of the Duty Holder

The Port Marine Safety Code ("PMSC") sets out a national standard for Port Marine Safety. It applies to all statutory ports and harbours and other non-statutory marine facilities, berths and terminals. The PMSC is best practice guidance rather than 'law'. However, statutory ports and harbours are expected to comply and failure to do so can lead to prosecution (for example under section 3 Health and Safety at Work Act 1974).

The PMSC requires that all statutory harbour authorities have a "Duty Holder" who is accountable for compliance with the PMSC and ensuring safe marine operations. The Duty Holder is publicly accountable for marine safety under the PMSC, both individually and collectively (where the Duty Holder is more than one person). The responsibility of the Duty Holder (once appointed) cannot be delegated.

The key duty of the Duty Holder is to ensure compliance with the PMSC. Requirements under the PMSC to discharge the duty include, that the Duty Holder should:

- be aware of the organisation's powers and duties related to marine safety;
- ensure that a suitable Marine Safety Management System is in place;
- appoint a suitable 'Designated Person' (the person who provides audits and monitors compliance and provides independent assurance that the MSMS is being effective in ensuring compliance with the PMSC);
- appoint competent people to manage marine safety;
- be responsible for publication of a marine safety plan and reporting of performance against objectives and targets set; and
- report compliance with the Code to the MCA every 3 years.

The Duty Holder will need:

1. Training - role and responsibilities;
2. Access to the Designated Person (and vice versa);
3. The financial authority to ensure compliance with the PMSC; and
4. The ability to make decisions quickly if necessary.

(3) Where the role of the Duty Holder could sit within the Council

1. The Harbour Board?

Harbour Boards may either be advisory in their capacity (making recommendations which are then ratified) or, if they have decision making powers, they usually operate under an approved budget and to have limits on the level of financial transaction they can authorise without further approval from its Council. For this reason, Ashfords does not usually recommend that the Harbour Board fulfils the function of Duty Holder as it may not have the financial authority to ensure compliance with the PMSC.

2. An individual person (for example the Portfolio Holder)?

Whilst this is possible, it is less common and Ashfords considers that it is usually better for the role to be fulfilled by more than one person jointly and severally. This mitigates issues associated with absence for illness etc. by the Duty Holder and by allocating the duty to more than one person it can aid visibility of the role and understanding of its importance.

3. Full Council?

In some municipal ports, Full Council, is the Duty Holder. This can work well, but requires all members of Full Council to receive Duty Holder training and to be properly aware of their roles and responsibilities as the Duty Holder (as outlined above). The larger the number of people that require training and a good understanding of their responsibilities and the role, the more challenging/ expensive it can be. In addition, the cycle of Full Council meetings and requirements re publication cut offs for meeting papers etc. can mean that it is more difficult to make decisions quickly.

4. Executive?

In some municipal ports, the Executive/ Cabinet is the Duty Holder. The advantages of this arrangement are that there is more than one person appointed (mitigating issues associated with absence for illness etc. by the Duty Holder) but that the number of people to be trained and required to have a good understanding of their responsibilities and the role is lower than full Council, and a smaller group may feel more accountable in the role. In addition, constitutional arrangements usually mean that the Executive can meet more quickly if necessary than Full Council.

(4) The recommendations of the Ports Good Governance Guidance regarding Harbour Management Committees

The Ports Good Governance Guidance recommends that *“The Harbour Management Committees should ideally comprise:*

- *approximately 50% LA elected members of a constituent authority. These do not all have to be LA councillors, but can be co-opted representatives who are appointed by the LA or provide specific skills in support of port management;*

- *the port chief executive/harbour master should have access to the HMC in an advisory role, but as an officer of the Council they cannot serve on the committee or have voting rights;*
- *external appointees who are stakeholder representatives or individuals with valuable skills and experiences;*
- *a Chair appointed on merit, skills and suitability;*
- *external members should be appointed by public advertisement using the guidance applicable to public appointments, in line with the advice given above.*

The HMC Chair should ideally be an elected representative of the LA as this will automatically maintain reporting lines and accountability to the Council. Should the LA favour the appointment of an independent Chair, it is important that reporting lines and voting arrangements are clear and in line with LA corporate governance practice. Before recruiting, local authorities should undertake a skills audit to assess the balance of skills required to effectively govern the port and deliver against the business plan.

These skills should be considered for all committee members. In order for the HMC to operate effectively a formal memorandum of understanding could be established between the harbour committee and the local authority. The memorandum of understanding could set out the recommended ground rules for a framework between the port and its authority.”

(5) Future Governance arrangements in relation to the Harbour Board

Ashfords has considered the Department for Transport’s ‘Ports Good Governance Guidance’ (March 2018) and key relevant principles of the ‘Port Marine Safety Code’ as well as the governance arrangements of a number of other municipal harbours and ports that already operate a successful HMCs as part of their governance arrangements. Cornwall Council (which owns 7 statutory harbours and ports) in particular has been operating a very well-respected HMC for a number of years. The core structure of the HMCs Ashfords has considered are broadly in line with current PGGG and can be summarised as follows:

- a) They consist of between 10 and 12 voting members.
- b) The harbour master / port chief executive attends HMC meetings in an advisory capacity but is not a committee member and does not have voting rights.
- c) Approximately 50% of the voting members are local authority elected members of the constituent authority.
- d) Approximately 50% of voting members are external appointees, selected for their skills and experience.
- e) The Chair of the HMC is elected by the HMC, but only those persons who sit on the HMC that are also members of the Council are eligible for election.
- f) In most cases the HMC is not the ‘Duty Holder’ for the purposes of the PMSC (see further below) but has a direct line of communication to the Duty Holder.
- g) If the HMC has decision making powers it is required to operate within a budget approved by the Council, with restraints on the level of expenditure that can be approved by the HMC. The disposal of assets (particularly land) also generally requires approval by the Council. The Council must act within the constraints of its statutory harbour powers and duties when approving the budget and expenditure. In the interests of good governance, the financial regulations and the contract standing orders of the Council are applied in so far as they relate.

- h) The HMC advises in relation to, or manages the harbour, in line with a business plan created for the harbour (normally 5 year but with a section on longer term matters) which is updated and reviewed as required. The HMC reports on progress against the business plan annually. In accordance with PGGG guidance the business plan should seek to establish and implement a strategy to put harbour operations on a commercial basis wherever this is possible (without continuing subsidy from Council general funds).
- i) Separate accounts for the harbour are prepared annually.
- j) The HMC prepares and conducts meetings in accordance prescribed rules.

(6) Basic Structure of the Terms of Reference and MoU

Two documents are required to clearly articulate the governance arrangements for the Harbour Board.

1. Terms of Reference for incorporation into the Council's Constitution.

2. A Memorandum of Understanding (MoU).

Depending on where the statutory harbour function sits within the Council's constitutional arrangements, a Harbour Board may be 'Advisory' in capacity or it may have delegated authority to make some decisions relating to the harbour. Those decisions will almost always be restricted in financial value and only be able to be made in accordance with pre-approved budgets, policies and plans. The decision as to where the statutory harbour function sits within the Constitution rests with Full Council, and it is possible for the function to be split between Full Council and the Executive.

A Harbour Board with delegated authority to make some decisions under the MoU and Terms of Reference applying to it is a Committee of the Council, meaning that all or the majority of the harbour authority function is reserved to Full Council (rather than the Executive).

If the Executive holds all of the of harbour authority function then the Harbour Board would be 'Advisory' in its capacity, i.e. it can make recommendations but any decisions would be taken by the Executive. This would mean that the Executive would have regular interaction with the Harbour Board which may strengthen the links between the two and the understanding of 'harbours' within the Executive. It may also make the approval of recommendations of the Harbour Board more streamlined (for example approval of the annual Budget and Schedule of Charges the Harbour Board recommends) than if part or all of the function were to remain with Full Council.

Another option would be for the majority of the harbour authority function to be reserved to Full Council and for only part of it to sit with the Executive (for example the role of the Duty Holder and any powers required for the Executive to be able to fulfil that function). This would mean in respect of the functions reserved to Full Council the Harbour Board could be delegated some decision making powers. The Duty Holder is not able to delegate its responsibilities in any event, so whether Full Council or the Executive holds the role, the Harbour Board will only be able to provide advice (rather than have decision making powers) in respect of that function in any event. The downside of splitting the function between the Executive and Full Council is the increased difficulties in having clear reporting lines within any constitutional arrangements put in place which would increase complexity of decision making.

Terms of Reference for incorporation into the Council's Constitution

The Terms of Reference broadly reflect the provisions of the MoU but are necessarily much shorter as they are adapted to make them appropriate for incorporation into the Constitution. The primary purpose of the Terms of Reference is to set out the purpose of the Harbour Board. Usually:

1. **Introduction:** Including where in the Council responsibility for the Harbour is located (i.e. Full Council or the Executive).

2. **Purpose of the Committee (Harbour Board):** It usually sets out:

- The functions the Harbour Board is to advise (or have some decision making powers) in respect of (usually those within the scope of the Harbours Act 1964, Harbours Docks and Piers Clauses Act 1847 (as incorporated) and local harbour legislation (including byelaws / directions made under it)).
- That the advice is to be given/ discharge of these functions is to take place in accordance with approved policies and budgets and the Business Plan as set out in the Memorandum of Understanding between the Harbours Board and the Council.
- If the Board has decision making powers, that decisions regarding the management, acquisition and disposal of assets shall only be made in accordance with the Council's acquisitions and disposals policy, financial procedure rules and contracts procedures rules and you would expect it to include specific rules relating to the disposal and acquisition of property assets.
- That the Board will review and then recommend an annual budget, and an annual schedule of charges and dues for the Harbour and these will be determined by the Full Council/ Executive (as appropriate).
- That the Committee will monitor performance against approved budgets and make a reports to the Full Council/ Executive (as appropriate).
- That there will be an approved Harbour Business Plan and that it and other plans should, in line with the Ports Good Governance Guidance, promote the Harbour to be financially self-sustainable in the long term, reducing the risk of the need to call upon the Council's General Fund.

3. **Form and Composition of the Committee:** This sections sets out the number of members of the Committee including the split between elected members and non-elected members co-opted on to the Committee, and which members have voting rights. Requirements for the Chair and Vice Chair, appointment of co-opted Committee Members including the length of their terms.

4. **Meetings:** This section sets out arrangements for meetings, including the minimum number of meetings per year, any arrangements regarding an Annual Meeting, quorum requirements and that all members of the Committee must abide by the Council's Code of Conduct.

Memorandum of Understanding

The MoU is usually split into 6 sections (the main body of the document and five appendices).

The main body of the document sets out the purpose of the MoU and a brief explanation of the PGGG before going on to lay down the commitments and agreements of the Council/Executive and the HMC in respect of the nature of the HMC (advisory or decision making) and the running

and management of the Harbour. It usually also expressly states where the Duty Holder function sits and includes provisions related to the length of the MoU and Confidentiality.

The Appendices would usually contain:

1. **An Extract from the Ports Good Governance Guidance about Harbour Management Committees.**
2. **A basic 'action plan' for the Harbour Board.** This would set out any key tasks that will need to be completed as part of the more structured governance arrangements.
3. **An Asset Register for the Harbour.**
4. **Harbour Board Guidance Notes.** The Guidance Notes are effectively a more detailed version of the Terms of Reference. They set out how members are appointed to the Harbour Board, the purpose of the Harbour Board and the conduct of Harbour Board meetings etc.
5. **Organisational Structure.** The final appendix will contain, once populated, a clear organisational structure that shows the reporting lines between the Harbour Board and Council (including the Duty Holder) and the Designated Person. Again, this is important to ensure the proper functioning of the Harbour Board and the harbour and to add compliance with the PMSC.



Ashfords LLP

20 April 2022