



REPORT TO INFRASTRUCTURE SERVICES COMMITTEE – 20 JUNE 2019

TERMS OF REFERENCE FOR HARBOUR STEERING GROUP & UPDATE ON DUTY HOLDER

1 Recommendations

The Committee is recommended to:

- 1.1 Approve the Terms of Reference for the Harbour Steering Group at Appendix 1;**
- 1.2 Note the update on the role of Duty Holder under the Port Marine Safety Code; and**
- 1.3 Instruct the Head of Roads, Landscape & Waste Services to report back to Committee at its meeting on 3 October 2019 with recommendations for the Duty Holder role.**

2 Background / Discussion

2.1 At its meeting on 18 March 2019 the Committee considered a report on the findings of a Maritime Coastguard Agency (“MCA”) Health Check. The report recommended a number of actions arising from the Health Check and the Committee instructed Officers to report back on the undernoted matters, in particular the establishment of a Harbours Steering Group and the role of the Committee as the Duty Holder under the Port Marine Safety Code (PMSC).

2.2 Harbour Steering Group

2.2.1 A Harbour Steering Group with membership consisting of the Chairs of the Harbour Advisory Groups was proposed by Officers and agreed by Committee in order to address concerns identified in the Health Check regarding the number of steps in the hierarchy between Harbour Officers and the Committee as Duty Holder. The Committee instructed Officers to report back with a Terms of Reference for the Group which is attached at Appendix 1.

2.2.2 The purpose of the Group is to provide a forum for Officers to consult with elected Members prior to taking decisions on PMSC matters. This is in order to provide assurance to the Committee, as Duty Holder, that full consideration and discussion has taken place in advance of decisions being made.

2.2.3 Accountability will remain with the Committee as Duty Holder, but the Group will provide a key link to the day to day compliance with the Code. The Group will also have the opportunity to engage with key stakeholders, including the Council’s Designated Person, and make recommendations to the Committee where appropriate.

2.2.4 The Steering Group will be responsive, with the ability to set its own meetings and have the facility for consultation to take place by email where it is impractical for a meeting to be called.

2.2.5 It is envisaged that meetings will be attended by the Designated Person, Head of Service and/or Service Manager, Principal Officer, Civil Engineer and Area Harbourmasters as required. It is also envisaged that these meetings will take place biannually or quarterly at a venue that will allow virtual attendance by Skype for any Officer or Member.

2.3 The Role of Duty Holder

2.3.1 The Committee is currently the Duty Holder under the PMSC. The role of the Duty Holder is significant, with responsibility and accountability for ensuring the harbour authority complies with the Code. At its meeting of 18 March 2019, the Committee instructed Officers to commence investigations into the role of Duty Holder with a view to considering alternative options.

2.3.2 The responsibilities of the Duty Holder are stated in section 1.8 of the PMSC. The overarching responsibility is to ensure the organisation complies with the PMSC, however there are specific duties which can be summarised as follows:-

- being aware of the organisation's powers and duties related to marine safety;
- ensuring that a suitable Marine Safety Management Systems (MSMS), which employs formal safety assessment techniques, is in place;
- appoint a suitable designated person to monitor and report the effectiveness of the MSMS and provide independent advice on matters of marine safety;
- appoint competent people to manage marine safety;
- ensure that the management of marine safety continuously improves by publishing a marine safety plan and reporting performance against the objectives and targets set; and
- report compliance with the PMSC to the Maritime and Coastguard Agency (MCA) every 3 years.

2.3.3 The PMSC does recognise that some elements are better suited to municipal ports than local authority ports. It explicitly states that where the management team or board of an authority is not directly accountable for marine safety, or has limited decision making powers, it is acceptable for the role of duty holder to reside elsewhere and gives the example of a local authority Committee.

2.3.4 However there are still areas in which the PMSC does not fit well with the local authority structure. This was previously highlighted to Members in the report to Committee on 18 March 2019 in relation to the perceived conflict between the Duty Holder role and Members' duties under the Councillors Code of Conduct which prevents involvement with operational matters.

2.3.5 As a result, there has been a mixed approach to the Duty Holder role across other harbour authorities in Scotland. The table below outlines where the role sits in each authority.

Highland Council	Director of Community Services
Western Isles Council	Transport & Infrastructure Committee
Argyll & Bute Council	Director of Development & Infrastructure
Angus Council	Communities Committee
Moray Council	Economic Development & Infrastructure Services Committee
Orkney Council	Harbour Authority Sub Committee (compromising five Elected Members)
Dumfries & Galloway Council	Harbours Sub Committee of the Economy, Environment & Infrastructure Committee
Perth & Kinross Council	Investment Manager - Planning & Development

2.3.6 The PMSC also provides that a harbour authority can have multiple Duty Holders, therefore having a Duty Holder for each harbour would be possible under the terms of the Code.

2.4 Duty Holder Liability

2.4.1 At the meeting on 18 March 2019, Members of the Committee expressed concerns regarding their potential exposure to liability as the named Duty Holder under the PMSC.

2.4.2 The PMSC applies across the UK and sets a standard for port safety that harbour authorities are expected to follow. Although it is not a legally binding document, it does codify the legislative requirements and all harbour authorities should therefore comply. Failure to do so may lead to prosecution under harbour legislation.

2.4.3 The PMSC would therefore be of relevance in providing evidence in the determination of liability and failure to comply could create an evidential basis for a claim of breach of legal duties imposed on the Council as harbour authority. However the provisions of the PMSC, including the requirement for a Duty Holder, do not themselves create any separate legal obligations.

2.4.4 In 2016 Highland Council sought an opinion from Counsel on the extent of the Duty Holder's liability. The opinion confirmed, as expected, that the principal responsibilities under the harbour legislation would remain with the Council as harbour authority in a corporate sense. Even in those remote scenarios where it can be established that the Duty Holder was acting in bad faith, Counsel's view was that the Council would still be liable on a vicarious basis.

2.5 Options for Duty Holder Role

2.5.1 From initial investigations and having regard to the structure of the Council, it would appear that the Duty Holder role could be fulfilled in the following ways:-

- i) By continuing with the status quo with the Committee as Duty Holder and the Steering Group acting as a link between the Duty Holder and Harbour Officers;
- ii) By delegating the Duty Holder to a senior Officer. In this scenario the Steering Group could still act as a forum for the Duty Holder to consult with Elected Members on PMSC matters;
- iii) By delegating the Duty Holder role to Area Committees, with each Area Committee having the responsibility for the harbours within their Area.

2.5.2 The implications, practicalities and resourcing of each option will require to be explored further and considered carefully by Officers in advance of putting a recommendation to Committee. It is therefore proposed that Officers undertake further scoping on the options and report back to the Committee at its meeting on 3 October 2019 with proposals.

2.5.3 If amendments are required to the Scheme of Governance as a result, these can be put to Procedures Committee at its meeting on 10 November 2019 for consideration, with a view to reporting to Full Council thereafter with recommendations.

2.5.4 The Head of Finance and Monitoring Officer within Business Services have been consulted in the preparation of this report and had no comments to make and are satisfied that the report complies with the Scheme of Governance and relevant legislation.

3 Scheme of Governance

3.1 The Committee is able to consider and take a decision on this item in terms of Section F.1.1d as it relates to Roads, Landscape & Waste Services and Section F.3.1 which relates to the establishment of sub-committees and working groups.

4 Implications and Risk

4.1 An equality impact assessment is not required because this report relates to the establishment of a working group and the decision the Committee has been asked to take does not have a differential impact on any of the protected characteristics.

4.2 There are no staffing and financial implications at this time. The report to Committee on 3 October 2019 will be clear on what the implications of each option will be.

4.3 The following Risks have been identified as relevant to this matter on a Corporate Level:

ACORP002 - Changes in government policy, legislation and regulation

The Port Marine Safety Code is not presently mandatory but is endorsed by the UK Government, the devolved administrations and representatives from across the maritime sector and these bodies have a strong expectation that all harbour

authorities will comply. It is possible in the future the Port Marine Safety Code will become mandatory.

4.4 No Risks have been identified as relevant to this matter on a Strategic Level.

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Director of Infrastructure Services

Report prepared by Ruth O'Hare, Principal Solicitor – Democratic Services
Date 4 June 2019

HARBOURS STEERING GROUP

TERMS OF REFERENCE (DRAFT)

1 Constitution

The Council has appointed Infrastructure Services Committee (“ISC”) as Duty Holder under the Port Safety Marine Code with responsibility for ensuring compliance with the Code.

The Steering Group is established by Infrastructure Services Committee in terms of Section F.3.1 of the List of Committee Powers in Part 2A of the Scheme of Governance. The Group will act in an advisory role and has no decision making powers.

2 Purpose and Remit

The purpose of the Steering Group shall be to provide direction to Officers in the carrying out of their duties relating to the safe operation and management of the Council’s harbours and the Council’s compliance with the Port Marine Safety Code (“the Code”). The Steering Group will therefore create a forum for Officers to undertake consultation with elected Members, prior to taking key operational decisions to provide assurance to ISC as Duty Holder that the decisions have been fully considered and discussed.

For the avoidance of doubt responsibility and accountability for compliance with the Code will remain with ISC as Duty Holder.

In particular the remit of the Steering Group shall be as follows:-

- 2.1 To give direction to Officers on operational matters arising from harbour operations, and in particular the Council’s compliance with the Port Marine Safety Code;
- 2.2 To review and discuss safety matters arising from harbour operations;
- 2.3 To engage with relevant stakeholders in the performance of their role, including the Council’s Designated Person; and
- 2.4 To report to ISC as appropriate on matters relevant to the Duty Holder role.

3 Membership:

3.1 The Steering Group shall comprise:-

- 3.1.1 The Chair of the Banff Harbour Advisory Committee
- 3.1.2 The Chair of the Macduff Harbour Advisory Committee
- 3.1.3 The Chair of the Portsoy Harbour Advisory Committee
- 3.1.4 The Chair of the Rosehearty Harbour Advisory Committee
- 3.1.5 The Chair of the Gourdon Harbour Advisory Committee
- 3.1.6 The Chair of the Johnshaven Harbour Advisory Committee
- 3.1.7 The Chair of the Stonehaven Harbour Advisory Committee

3.2 The Steering Group shall appoint a Chair and Vice Chair at its first meeting.

4 Substitute Members

If members are unable to attend meetings of the Steering Group, they may be represented by a substitute in their place.

5 Meetings

5.1 The Steering Group shall meet as and when required. Meetings shall be called by the Director of Infrastructure Services following consultation with the Chair.

5.2 The Steering Group may fix the venue and frequency of meetings as appropriate.

5.3 Where there is not sufficient time to call a meeting and a decision is required urgently, Officers may undertake consultation with Group Members by email.