

Chief Executive: Dr Ann Black

22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Telephone: 01595 744994
Fax: 01595 744999
mail@shetlandcharitabletrust.co.uk
www.shetlandcharitabletrust.co.uk

If calling please ask for
Mary Anderson
Direct Dial: 01595 744992

Our Ref: EMA/TA1/1

Date: 5 September 2012

Dear Sir/Madam

You are invited to the following:

**Shetland Charitable Trust
Room 16, Islesburgh Community Centre, Lerwick
Thursday 13 September 2012 at 10.00am**

Apologies for absence should be notified to Lynne Geddes on 01595 744592.

Yours faithfully

(signed) Dr Ann Black
Chief Executive

AGENDA

- (a) Hold circular calling the meeting as read.
- (b) Apologies for absence, if any.
- (c) Declarations of interest.
- (d) Confirm minutes of meeting held on 28 June 2012 (enclosed).

For Decision

1. Future Governance of Shetland Charitable Trust. Report enclosed
2. Charitable Trust Nominee Directors. Report enclosed.
3. Annual Report and Accounts for the year to 31 March 2012. Report enclosed.
4. Risk Management – Annual Review. Report enclosed.
5. Health and Safety Policy. Report enclosed.
6. Lone Working Policy. Report enclosed.

For Information

7. Service Performance of Funded Organisations. Report enclosed.
8. Windfarms – Health and Property Values. Report enclosed.
9. Payments to Trustees in the year to 31 March 2012. Report enclosed.
10. SIC Unaudited Statement of Accounts 2011/12. Verbal update.
11. Management Accounts – Three Months Ended 30 June 2012. Report enclosed.
12. Fund Management Transactions. Report enclosed.
13. Recommended Disbursements – Social Care. Report enclosed.
14. Recommended Disbursements – Approvals. Report enclosed.

The following items contain CONFIDENTIAL information***For Information***

15. Loans to Local Industry – Agricultural Loan Scheme Update. Report enclosed.
16. Loans to Local Industry – Sums Due But Unpaid Over One Month Old as at 31 July 2012. Report enclosed.



REPORT

To: Shetland Charitable Trust

13 September 2012

From: Chief Executive

Report: CT1209034

Future Governance of Shetland Charitable Trust

1. Introduction

- 1.1 This report, jointly prepared by Legal Adviser, Simon Mackintosh, Turcan Connell and Chief Executive Ann Black is presented for Trustees with recommendations necessary to give effect to the reorganisation scheme submitted to the Office of Scottish Charity Regulator ("OSCR") on 27th January 2012 and approved on 3rd July 2012.

2. Executive Summary

- 2.1 The report provides a summary of the role of OSCR and the Shetland Charitable Trust's engagement with OSCR to date in relation to its governance arrangements. It details the next step which is for Trustees to agree to give effect to the approved reorganisation scheme.
- 2.2 The report reminds trustees of their general duties set out in the Charities and Trustee Investment (Scotland) Act 2005. It informs trustees of the considerations which must be taken into account when considering the "interests of the charity." The report provides advice that Trustees are bound by decisions made and actions taken by their predecessors. It goes on to detail potential actions available to OSCR in the event of a decision not to adopt the approved reorganisation scheme.
- 2.3 In summary, Trustees are recommended to adopt the reorganisation scheme as submitted to OSCR and approved by letter of 3rd July. They are further recommended to authorise the signature of the revised Trust Deed by delegating to three Trustees the authority to exercise the Power of Attorney for that purpose. Trustees are also recommended to instruct the Chief Executive to initiate the process of recruiting the first appointed Trustees. Dependant on progress with this, it is also recommended to consider at a future meeting the precise timing of the implementation of the new Trustee arrangements which in terms of the revised Trust Deed must be in place by 31st March 2013 at the latest.



Shetland Charitable Trust (Scottish Registered Charity SC027025)

Report to Trustees

From

Legal Adviser, Simon Mackintosh, Turcan Connell and Chief Executive, Ann Black

Future Governance Arrangements of Shetland Charitable Trust (“the Trust”)

1 Introduction

This report is presented for Trustees with recommendations necessary to give effect to the reorganisation scheme submitted to the Office of the Scottish Charity Regulator (“OSCR”) on 27th January, 2012 and approved by OSCR on 3rd July 2012.

2 Background

As several Trustees are new in their role, a history of the recent consideration of this topic follows.

2.1 Role of OSCR

OSCR was established by the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”) which conferred a range of functions on it.

It is important to recognise that in its engagement with the Trust, OSCR has principally been acting as the regulator of the Scottish charity sector, particularly in this case discharging its functions in terms of Section 1 of the 2005 Act:-

- “(c) to encourage, facilitate and monitor compliance by charities with the provisions of the [2005 Act];
- (d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct,.....”

In the context of the 2005 Act, “misconduct” includes mismanagement and also any breach of duties under Section 66 of the 2005 Act, covered below.

OSCR also has a quasi-judicial function to deal with applications for reorganisation schemes of the type presented to it by the Trust. In this capacity, OSCR issues authorisation for constitutional changes to charities which would otherwise require the approval of a court.

- 2.2 At the request of the Trust, a meeting was convened with OSCR on 31st October 2008 where, amongst other issues, the governance of the Trust was discussed.
- 2.3 Following that meeting, the Trust established a Governance Review Group, the recommendations of which were presented to a meeting of the Trustees on 11th February, 2010. At that meeting, the Trustees resolved to invite OSCR to a meeting in Shetland to allow individual questions to be asked. That meeting with OSCR took place on 24th June, 2010
- 2.4 Thereafter, the then Chief Executive of OSCR wrote to the Trust on 9th July 2010 setting out OSCR’s then concerns and imposing its tailored monitoring programme using its powers under section 28 of the 2005 Act. (Appendix A)
- 2.5 At their meeting on 8th September, 2010 the recommendations of the Governance Review Group were again presented to the Trustees (Appendix B). The Trustees agreed that the Chief Executive of Shetland Islands Council (“SIC”) and the General Manager of the Trust be asked “to jointly identify the most relevant senior member of the Scottish legal system to determine if the constitution of [the Trust] requires to be changed in light of current OSCR opinion and Trust regulations, and to make such recommendations as are necessary for the future governance of the Trust”. To implement that decision, it was agreed that the opinion of Senior Counsel, Roy Martin QC (“Senior Counsel”) be obtained.
- 2.6 Senior Counsel issued his Opinion (Appendix C) on 25th March, 2011. A Workshop was held by Simon Mackintosh with the Trustees on the Opinion on 14th April, 2011. At a meeting of the Trust on 12th May, 2011 it was reported that the Governance Review Group was continuing to meet in order to come up with detailed proposals. The Trustees accepted that the governance of the Trust would have to change with regard to the composition of the Trustee board, and in particular that the majority of the Trustees should be drawn from outwith the Council (min ref CT/27/11).
- 2.7 As noted at paragraph 2.6, following receipt of Senior Counsel’s Opinion, the Governance Review Group continued to meet, and did so on 5th and 12th May 2011. Thereafter, the then Chairman and Ann Black as General Manager met with representatives of OSCR in Dundee on 29th June 2011 to discuss the findings of the Governance Review Group following which the detailed proposals were presented to an informal meeting of the Trustees for general discussion and debate on 17th August 2011.

2.8 A Special Meeting of the Trust was convened for 21st September 2011 to decide on the future governance arrangements of the Trust. A report of Ann Black was presented to the Trustees (Appendix D). Prior to its consideration, the Trustees decided that "...the Trust should have a referendum in which the public can have their say whether they wish the existing system to continue; or whether there should be an independent Trust; or whether the Trust should go down the route of the proposals in the report."

2.9 In a letter of 24th November 2011, the new Chief Executive of OSCR, David Robb, wrote to the then Chairman of the Trust, and a copy of his letter is annexed (Appendix E). This letter was written against the background of concerns as to lack of substantive action to implement the advice given by Senior Counsel, and the decision by Trustees to hold a referendum on the proposed constitutional changes, including maintenance of the status quo.

OSCR expressed the view that the actions of the Trustees amounted to misconduct for the purposes of the 2005 Act. Possible sanctions were outlined. In order to avoid these, the Trustees were required to give certain undertakings.

The Trustees gave the necessary undertakings in a letter of 7th December 2011 from the then Chairman, a copy of which is attached. (Appendix F)

2.10 At their meeting on 15th December 2011 (Appendix G), the Trustees approved the recommendations of the Governance Review Group (Appendix B) subject to the following:-

- (i) that the appointment of Chair and Vice Chair should be one for the Trustees from time to time with a view to selecting the best qualified person for these posts; and
- (ii) that Trustees should attend 50% of meetings in person at the place where the meeting is being held.

In addition, Trustees agreed that a review of the composition of the Trustee body should be conducted in advance of the SIC elections in 2017.

OSCR was advised of that decision by way of letter of 20th December, 2011 (Appendix H) which, in part satisfaction of the undertakings given in the letter of 7th December, 2011 also attached a "Timeline for Governance Changes". In his letter dated 11th January, 2012, David Robb advised that OSCR was satisfied that the actions taken to date and the Timeline met the undertakings given (Appendix I).

2.11 A reorganisation scheme to implement paragraph 2.10 above was submitted to OSCR on 27th January 2012. Following the end of the period of objection, OSCR published on its website a Summary of Objections to the Proposed Reorganisation Scheme and thereafter approved the reorganisation

scheme on 3rd July 2012. The submitted scheme is attached as Appendix J together with the approval letter as Appendix K.

- 2.12 David Robb wrote to the current Chairman of the Trust on 6th June 2012 about lack of ability to make any amendments to the reorganisation scheme then awaiting OSCR's approval. That letter is attached as Appendix L.
- 2.13 David Robb wrote further to the Chairman on 13th August 2012, a copy of the letter being attached as Appendix M.
- 2.14 The Chairman, Chief Executive and Legal Advisers met David Robb, Laura Anderson and Martin Tyson of OSCR on 22nd August 2012. A copy of OSCR's letter setting out its position is attached as Appendix N.

3. Present Position

- 3.1 The next step envisaged in the process is for Trustees to agree to give effect to the approved reorganisation scheme. Of the undertakings granted on behalf of the Trustees in the letter of 7th December, 2011 the only one outstanding is:-

"4 The [Trustees] will ensure that all necessary action is taken to ensure that the approved timetable is implemented."

According to the timeline submitted to OSCR, the new Trust constitution was intended to be adopted within two weeks' of a decision by OSCR to approve the reorganisation scheme. On the dates set out in that timeline, by 15th November 2012. There is now no legal bar to adopting the changes approved by OSCR and indeed, were the Trustees not to do so OSCR could take the view that they are in breach of the outstanding undertaking.

- 3.2 Under the new proposed constitution, the longstop date for the new trustee body to be in place is 31st March 2013 with an earlier date possible by decision of the Trustees.
- 3.3 On implementation of the approved reorganisation scheme, the revised trustee body will:-
 - Be able to manage conflicts of interest
 - Be able to undertake transactions with SIC
 - Enable Trustees to comply with their duties under the 2005 Act
 - Be able to change its focus from governance to future strategic direction

4 Trustees' Duties

- 4.1 Section 66 of the 2005 Act sets out the general duties of charity trustees as follows:-

"66 Charity trustees: general duties

- (1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular-
 - (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
 - (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
 - (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee-
 - (i) put the interests of the charity before those of the other person, or
 - (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.
- (2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.
- (3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.
- (4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.
- (5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring-
 - (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
 - (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.

4.2 OSCR has placed great weight on these Trustee duties throughout its engagement with the Trust. The Trustees are referred to paragraphs 3 and 4 on page 2 of the letter of 13th August 2012 Appendix M. It is clear that OSCR, as regulator, will treat extremely seriously failure to implement the reorganisation scheme which the Trust submitted to OSCR for approval, in

line with legal advice, and in order to avoid possible regulatory action in December 2011.

It is clear that further intervention is a very real possibility should the approved reorganisation scheme not be implemented.

4.3 Trustees' Duties:

(a) What does "interests of the charity" mean?

OSCR's Guidance for Charity Trustees simply states that:-

"Charity trustees are expected to put the interests of the charity before their own interests or those of any other person or organisation".

The 'Who's In Charge: Control and Independence in Scottish Charities' guidance emphasises that it is usually for the charity trustees to decide what is in the interests of the charity:-

"Charity trustees are best placed to decide what is in the best interests of their charity. It is important that they have the freedom to discharge that responsibility acting within their powers and duties." "When taking advice... the final decision should always rest with the charity trustees and be based on their judgment of what course is in the best interests of the charity."

The Charity Commission's guidance for trustees states that:-

"Trustees must act reasonably and prudently in all matters relating to the charity and must always bear in mind that their prime concern is the charity's interests... The trustees of charities with permanent endowment must maintain a fair balance between the interests of present and future beneficiaries, for example when selecting investments."

OSCR refers in its 'Who's In Charge?' guidance to:-

"the overall interests of the charity about how best to fulfil its charitable purposes";

The Charity Commission expresses concern in its remuneration guidance about whether a matter:-

"would be in the charity's best interests and better help it achieve its purposes".

In addition, a parallel can be drawn with the Companies Act 2006 which imposes a duty on company directors to promote the success of the company.

The relevant section of the Companies Act is as follows:-

“s172 Duty to promote the success of the company

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
 - (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.
- (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.”

In summary, the “interests of the charity” are best described as a collection of considerations which can be taken to include at least the following:-

- (i) It is for charity trustees to decide what the “interests of the charity” are;
- (ii) When deciding what those interests are the charity trustees must have regard to:-
 - the purposes of the charity;
 - the beneficiary group;
- (iii) In relation to a particular course of action:-

- whether such a course of action helps better achieve those purposes; (this is similar to promoting the interests of a company in terms of company law);
 - the impact of their decisions on the ability of the body to achieve its purposes;
 - the reputation of the charity; and
 - the beneficiaries both present and future;
- (iv) Further, charity trustees must put the interests of the charity before any personal or other duties.

(b) What about earlier Trustee decisions?

Menzies on Trustees (a major textbook) states at 167 that:

“The acts of a quorum done in due course of trust administration bind the trust estate and all the trustees as such. Not only all the present trustees, but all future trustees, are bound as trustees by the acts validly done by a quorum of the trustees.”

The rule on the validity of the actings of a quorum is subject to the act not being ultra vires, and subject also to the quorum having given all trustees an opportunity to state their views before taking the decision, but is otherwise unqualified.

While the undertakings given to OSCR may not be a contract, Gloag & Henderson (principal general textbook on Scots law) is quite clear that, “The law recognises as a general principle that an obligation may arise from mere consent: that if a person undertakes to do or pay something, or to abstain from some course of action, he has incurred an obligation which may be enforced against him by some form of legal process...” Giving a formal undertaking to OSCR in circumstances where it was understood that a direction would otherwise be issued to the charity would seem to fall squarely within this.

Trustees are therefore bound by decisions made and actions taken by their predecessors.

4.4 Potential action by OSCR in the event of a decision not to proceed with the reorganisation application:

Under Section 31 of the 2005 Act:

— Where it appears to OSCR

- That there has been misconduct in the administration of a charity or
- That it is necessary or desirable to act to protect the property of a charity or to secure its proper application

OSCR

- May suspend those concerned in the management or control of the charity who appear to it
 - to have been responsible for or party to the misconduct
 - to have contributed to or facilitated the misconduct
 - to be unable or unfit to perform their functions for the charity
- May give a direction restricting transactions which may be entered into as payments which may be made without OSCR's consent
- May direct financial institutions not to part with the charity's property without OSCR's consent
- May excuse a person acting honestly and reasonably in relation to the misconduct, whom OSCR considers ought fairly to be excused.

4.5 Potential actions through Court of Session under Section 34 of the 2005 Act:-

If the Court is satisfied, on application by OSCR, that there is or has been misconduct or that it is necessary or desirable to protect charitable property or secure its proper application:-

The Court may:

- grant an interdict (forbidding certain actions)
- appoint suspend and remove Trustees,
- appoint a Judicial Factor (the equivalent of an Administrator in the case of a company) or
- approve the winding up of the charity and the transfer of its assets to another charity.

4.6 OSCR, in the penultimate paragraph of its letter dated 24th November 2011 (Appendix E) expressly reserved "all rights to seek an award of expenses against the charity trustees should court proceedings be commenced." OSCR might therefore decide to pursue individual trustees for its legal expenses and costs of legal action which may not be an allowable cost against trust funds depending on the circumstances in which they are incurred.

5 Financial Implications

There are no financial implications arising directly from this report. However it is acknowledged that there will be a cost associated with the implementation of the approved Reorganisation Scheme. A budget of £20,000 has been set aside to cover the costs of recruiting new trustees.

6 Recommendations

- 6.1 Trustees are recommended to adopt the reorganisation scheme as submitted to OSCR and approved by letter of 3rd July 2012.
- 6.2 Trustees are recommended to authorise the signature of the revised Trust Deed by delegating to three Trustees the authority to exercise the Power of Attorney for that purpose.
- 6.3 Trustees are recommended to instruct the Chief Executive to initiate the process of recruiting the first appointed Trustees.
- 6.4 Dependant on progress with 6.3, trustees are recommended to consider at a future meeting the precise timing of the implementation of the new Trustee arrangements to be in place by 31st March 2013 at the latest.

Reference: AB/SAM/TA38 Report Number: CTI209034

APPENDICES

- A OSCR letter 9 July 2010.
- B Report of Governance Review Group.
- C Opinion of Senior Counsel, Roy Martin QC, 25th March 2011.
- D Report of Ann Black to SCT meeting 21 September 2011.
- E Letter from David Robb and Bill Manson, 24 November 2011.
- F Letter from Bill Manson to David Robb, 7 December 2011 containing undertaking.
- G Minutes of Meeting of 15 December 2011.
- H Letter from Bill Manson to David Robb, 20 December 2011 with "Timeline for Governance Changes".
- I Letter from David Robb to Bill Manson, 11 January 2012.
- J Reorganisation scheme submitted to OSCR with updated revised Deed of Trust following the change of Trustees.
- K Approval letter of 3 July 2012.
- L Letter from David Robb, 6 June 2012.
- M Letter from David Robb, 13 August 2012.
- N Letter from David Robb, 24 August 2012.

The Trustees of Shetland Charitable Trust
c/o Bill Manson, Chair
Shetland Charitable Trust
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

RECEIVED

15 JUL 2010

Our ref: MI/INQ/08-1383

09 July 2010

Dear Mr Manson

Shetland Charitable Trust – SC027025

Further to my letter of 28 June, I now write to inform the trustees of the current position of OSCR's inquiries into Shetland Charitable Trust (SCT). In particular, I will address the following:

1. The status of complaints in respect of SCT
2. SCT's conflict of interest policy and its application in practice
3. OSCR plans for tailored monitoring of SCT and that implications of any issues identified in the course of monitoring

Complaints in respect of the charity

At our meeting with trustees on 24 June, it was stated that OSCR still had 'open' complaints against the charity. It was unfortunate that these complaints remained open for a protracted length of time, but I can now confirm that following our meeting these complaints have been formally closed and the complainers notified in writing of this decision. Copies of my letters to the two complainers are enclosed with this letter on an anonymised basis. In this level of disclosure, we have aimed to balance the respective rights of the complainers and the charity. I confirm OSCR's procedures for handling complaints and inquiry work have been revised significantly since these complaints were received and if similar circumstances were to arise now, we would approach the complaints more formally from the outset. However, you will



INVESTOR IN PEOPLE

see that the substance of the complaints are the governance issues that we have been discussing to date.

Conflict of interest policy

The charity's conflict of interest policy was the subject of discussion at our meetings with the governance review group and the trustee body. We acknowledge that the policy exists but confirm it is the practical application of the policy that is of particular interest to OSCR, given the current governance arrangements of the charity.

In the course of discussions to date with trustees, we have noted that there appears to be an understanding that the management of conflicts of interest is purely focussed on the actual decisions taken by the trustees. We draw your attention to two aspects of your policy which we believe are appropriate and particularly relevant. Firstly, the policy makes clear that the relevant interests also include those of a wide range of associated persons and institutions individually and when taken together - an approach we believe is correct. There is in our view a high systemic risk of irreconcilable conflict where (effectively all) councillors are SCT trustees.

Secondly, the policy identifies,

"the crucial question is not whether a Trustee is, in fact, behaving improperly, the key issue is how his or her behaviour appears to the outside world".

This highlights the importance of taking external perception into account whenever a situation arises that gives rise to a potential conflict of interest (a situation which we believe on a specific basis may also arise more often than has been acknowledged by trustees to date). It is not solely about the way in which the decision is arrived at, but also about how the decision making process and practice appears to others outwith the trustee body.

OSCR tailored monitoring and associated implications

Given there has been no change to the governance arrangements within SCT, we consider there is a real risk both of systemic and specific conflict which will continue to impact on effective compliance with your own policy and the trustees statutory duties, and so on effective and appropriate governance of the Trust.

I therefore outlined to trustees on 24 June, OSCR's plans for a system of tailored monitoring in respect of SCT and consider it useful to formalise these plans here. With immediate effect, using our powers under section 28 of the Charities and Trustee Investment (Scotland) Act 2005 and in addition to information otherwise available in the public domain, e.g. Shetland Islands Council papers and minutes, Accounts Commission reports, OSCR will put the following requirements in place:



INVESTOR IN PEOPLE

- Agendas and papers for every trustee meeting to be sent to OSCR in advance of the meeting
- Draft and final Minutes of every trustee meeting to be sent to OSCR as soon as available
- Whenever a decision is taken by the trustees that involves a potential conflict of interest for councillor trustees, the management of that conflict of interest needs to be clearly demonstrated to OSCR (this may be achieved via the provision of the minutes)

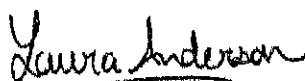
In addition to the above, OSCR will reserve the right to attend any meeting of SCT trustees at any point as an observer.

In terms of the outcome of our tailored monitoring, this will depend on what is identified through this programme. If, for example, OSCR were to identify practices or actions that are inappropriate, we will consider more substantive action including using our powers under section 31 of the Charities and Trustee Investment (Scotland) Act 2005, in relation to both the charity trustees individually and the charity as a whole. Equally, if there were to be positive changes to the governance arrangements, we would review our monitoring.

We trust that we can rely on the full cooperation of SCT in meeting the requirements to provide information to OSCR in a timely and appropriate manner. Nevertheless, we continue to encourage you to move forward to adopt different, less high risk and more appropriate governance arrangements.

A copy of this letter is being sent to Turcan Connell.

Yours sincerely



Laura Anderson
Head of Enquiry & Investigation

Encs (2)



INVESTOR IN PEOPLE



Recommendations of the Governance Review Group

Florence Grains

Jim Henry

Bill Manson

Valerie Nicolson

Frank Robertson

John Scott (resigned 30 November 2011)

Josie Simpson

21 September 2011

Recommendations of the Governance Review Group

Review Group Recommendation	Reasons
Number of Trustees – 15	<p>Why 15?</p> <ul style="list-style-type: none"> • Fifteen is an appropriate number given the breadth of activity funded by the Trust, the value of the funds held, the type of investments undertaken and the required knowledge of the community. • Fifteen is considered large enough to contain the right mix of skills, knowledge and experience, without becoming cumbersome and hence undesirable. • Number suggested in QC Roy Martin's legal opinion. <p>Why Not Less than 15?</p> <ul style="list-style-type: none"> • Smaller Trusts, typically with an income of £3-10m, and often undertaking a single activity have fewer Trustees typically 8-12. • There could be a risk that unless "selected" carefully a board this size may not have sufficient knowledge and experience. It may also struggle to deal with conflicts of interest and quorum issues purely on the basis of insufficient numbers. • Given the responsibility to the community, it may be perceived as too small to be representative of the community and breadth of activities the trust funds. • Fewer Trustees could mean that community funds become dominated by interest groups, and does not serve the best interests of the whole of Shetland. <p>Why Not More than 15?</p> <ul style="list-style-type: none"> • Any more than fifteen could become problematic given, in a small community such as Shetland, the number of people with the time, desire and skills to serve on a number of public bodies is limited. There is also a concern that the experience and expertise that is available to the community is not spread too thinly in a desire to ensure independence. • The time and cost required to administer and manage such large numbers of Trustees must be considered, and whether this represents value for money in relation to the added value additional Trustees would bring.

**Composition of Board of Trustees
– 7 Councillor Trustees and 8 Non-
Councillor (Appointed) Trustees**

Why Councillor Trustees?

- Councillor Trustees retains the strategic links with SIC. It would help to ensure that the common interests of the Community of Shetland are looked after, avoiding potential duplication and overlap.
- Councillor Trustees ensure accountability of the Trust to the community through elected members representation.
- Councillor Trustees provide a useful source of Trustees given the appointment process. Ideally SIC would nominate individuals with representative geographic spread and an appropriate balance of skills.
- Roy Martin QC in paragraph 77 of his opinion accepts Councillor Trustees. "That OSCR does not regard the fact that some trustees of a trust having charitable status may be local authority councillors as depriving the trust of its character as a charitable trust appears to me to be entirely appropriate. I have not identified any reason why either an equivalent charitable trust, or the Trust in this case, should not be permitted to have, as at least some of its trustees, persons who are elected members of the local authority for the same area."
- Having no Councillor Trustees would address the concerns of independence, control and conflicts of interest in relation to SIC. It may improve the debate between SIC and the Trust, but equally there is a risk that tensions could arise. The Trust may struggle to get the geographic spread; breadth of knowledge or shared common understanding of the needs of the community provided by elected members.

Why Appointed Trustees?

- Appointed Trustees provide the required level of independence from SIC.
- Appointed majority solves the conflict of interest issues when undertaking transaction with SIC. (see suggested quorum arrangements below).

	<p>Why Majority Appointed Trustees?</p> <ul style="list-style-type: none"> • The proposed split addresses the three key issues of accountability, independence and compliance with 2005 Charities Act. • It helps deal with the issue of quorum arrangements and ensures a robust and appropriate decision making process. <p>Why Not Have An Even Greater Number Of Appointed Trustees?</p> <ul style="list-style-type: none"> • The proposed Councillor/ Appointed Trustee split represents a significant shift from the current regime. The split of 4/11 suggested by Roy Martin QC is seen to be too significant a change given the nature of the community and the role the Trust plays in it. There is a risk that too dramatic a shift could undermine the effectiveness of the Trust, and this number is based on an assumed quorum of 8. In fact in paragraph 87 of his legal opinion Roy Martin QC refers to a 7/8 split and states, "My suggested arrangement should therefore not be seen as prescriptive and it may be that the Trustees can devise other arrangements which would produce the same result in terms of independence and appearance of independence. Ultimately, what will be appropriate will be what is acceptable to OSCR at least for the purpose of preserving the status of the Trust as a charitable trust." • There is no legal requirement to go beyond this, as outlined above. • There is a risk that too radical a departure from the current model might have adverse consequences, if changes in investment strategy and disbursements are undertaken without sufficient knowledge/understanding of the Trust and how it operates. • Given there is no payment for the appointments, which at times demand a significant time commitment, it may be difficult to attract sufficient numbers of appropriate candidates.
--	---

<p>Quorum – 6 (Of the 6, a minimum of 3 must be Appointed Trustees)</p>	<p>Why 6?</p> <ul style="list-style-type: none"> • A quorum of 6 Trustees is felt to be a sufficient number to ensure effective decision making and realistic in terms of attendance and ability to participate given the inevitable potential for conflicts of interests in a community the size of Shetland. • Would allow decision-making when Councillor Trustees have a conflict of interest and are unable to participate. It would deal therefore, with the issues of accountability, independence and compliance with the 2005 Charities Act. <p>Why Not More than 6?</p> <ul style="list-style-type: none"> • Given the reduction in number of Trustees to 15, and the potential for 7 Councillors Trustees to be conflicted, it was felt that just over 1/3 made a practical and workable number in order for the Trust to conduct its business. A quorum of 7 or 8, which would be closer to the current 50%, given Appointed Trustees may have conflicts for other reasons was seen to be too high a number. <p>Why Not Less than 6?</p> <ul style="list-style-type: none"> • Any fewer than 6 Trustees could undermine effective decision-making by the Trust.
<p>Chair and Vice Chair – Appointed Trustees</p> <p>Appointed by the Trustees from within the Trustee group</p>	<p>Why Appointed Trustees as Chair and Vice Chair?</p> <ul style="list-style-type: none"> • Appointed Trustees as Chair and Vice Chair would address issues of perceived direct or indirect conflict of interest with SIC. • It would demonstrate true independence from SIC. • It addresses the three key issues of accountability, independence and compliance with the 2005 Charities Act. <p>Why Not Councillor Trustees as Chair and Vice Chair?</p> <ul style="list-style-type: none"> • This could be perceived as giving SIC influence over SCT affairs, and to question the independence of the Trust. <p>No Stipulation – Appointed Purely on Merit</p> <ul style="list-style-type: none"> • The Chair and Vice Chair could be chosen purely for their skills and attributes. But there is a risk that if Councillor Trustees are chosen, the issue of independence would not be properly addressed.

<p>Method of Appointment - a combination of election, selection and appropriate co-opted appointments when required.</p> <p>No serving SIC Councillors eligible to stand for selection</p> <p>(1e 7 elected, 8 selected, with the capacity to co-opt trustees if required to a total of 15)</p> <p>Selection would be carried out by a selection panel, consisting of an independent chair from outwith Shetland with a proven track record in a relevant field, and two trustees selected by the Trustee body at least one of whom should be a appointed Trustee.</p> <p>(please see Appendix 2, which gives more detail on the proposed selection process)</p>	<p>Why a Combination of Election and Selection?</p> <ul style="list-style-type: none"> • Elections through the democratic process provide public accountability, which is tested regularly through the election process. • Selection gives a mechanism by which to ensure particular skills, knowledge and experience required to run an effective Trust board, are captured, thus better enabling the Trustee body to fulfil their duties under Section 66 of the 2005 Act. • Combined election and selection appear to provide a mechanism, which suits the needs given the nature and activities of the Trust. <p>Why Not Election Only?</p> <ul style="list-style-type: none"> • Election process can produce "random" results. There is a risk that the Trust does not get the appropriate mix of skills and experience it requires to have an effective board of Trustees. • Risks not having the balance of skills, experience and interests required to deliver the objectives of the Trust • Not all suitably qualified, experienced and able potential Trustees will put themselves forward as part of an election process, but may be happy to be part of the selection process. <p>Why Not Selection Only?</p> <ul style="list-style-type: none"> • Selection alone may not be perceived as "fair and transparent" and have the accountability to the community associated with election. • Councillor Trustees are democratically elected by all the people of Shetland <p>Co-opted Appointments?</p> <ul style="list-style-type: none"> • This would provide a source of Trustees that have the correct skills and attributes • Could be co-opted from a pre-agreed list • Could be used if unable to recruit sufficient numbers of appropriate trustees though a combination of election and selection
---	--

<p>Duration and rotation of periods of office</p> <ul style="list-style-type: none"> – for Councillor Trustees the term of office is from election to election (normally 4-5 years) - for Appointed Trustees, the term is from mid-point to mid-point of the elected Trustees' term <p>Maximum of two consecutive terms whatever the appointment status</p>	<ul style="list-style-type: none"> • Changing Appointed Trustees at the mid point between Council elections would give continuity. • Restriction to two terms would ensure a fresh inflow of new ideas. • This is considered best practice in public appointments.
<p>Term of office for Chair and Vice Chair</p> <p>Elected from within the Trustee body, by the Trustee body, for one term.</p> <p>Must stand for re-election after one term and serve a maximum of two consecutive terms</p>	<ul style="list-style-type: none"> • Restriction to two terms would ensure a fresh inflow of new ideas. • This is considered best practice in public appointments.
<p>Annual General Meeting</p>	<ul style="list-style-type: none"> • Considered good practice
<p>Attendance Criteria – eg must attend 50% of meetings</p>	<ul style="list-style-type: none"> • Considered good practice
<p>Timescale for implementation – by May 2012</p>	<ul style="list-style-type: none"> • Coincides with the next scheduled SIC elections when Trustees change under the present system. • Allows time for a smooth transition and to recruit new Trustees.

OPINION

Introduction

1. I refer to the Memorial to Counsel sent to me on 7th December 2010 containing joint instructions on behalf of Shetland Islands Council ("the Council") and the Shetland Charitable Trust ("the Trust"). I refer also to the consultations which were held on 16th December 2010, and on 31st January and 24th March 2011.
2. The joint instructions concern the constitution of the Trust and whether it requires to be changed in light of considerations arising from the enactment of the Charities and Trustee Investments (Scotland) Act 2005 ("the 2005 Act"), and if so, what changes ought to be made. At a meeting held on 8th September 2010, the Trust resolved to ask the Chief Executive of the Council and the General Manager of the Trust jointly to seek an opinion on the matters referred to in the joint instructions.
3. In order to give my opinion, I first set out the factual and legal background before addressing the two questions specified in the Memorial.

The Council

4. The Council are a local authority constituted in accordance with the provisions of the Local Government (Scotland) Act 1973 as amended ("the 1973 Act") and of the Local Government etc (Scotland) Act 1994 ("the 1994 Act"). By virtue of each of these Acts, the Council are the statutory successors of previous local

authorities having jurisdiction over the islands of Shetland, in particular the County Council of the County of Zetland ("Zetland County Council").

5. As a local authority, the Council are constituted by their convener and councillors (or "members") in accordance with section 2(1) of the 1994 Act. The Council have a range of statutory powers and duties, including powers and duties many of which relate to the provision of services and facilities to the inhabitants of their area. Examples of these powers and duties which may be said to be relevant for the purposes of this Opinion include:

- (a) The duty as an education authority "to secure that there is made for their area adequate and efficient provision of school education and further education"; Education (Scotland) Act 1980, section 1(1);
- (b) The duty to promote social welfare and to provide and secure facilities for the promotion of social welfare, including the provision of residential and other establishments; Social Work (Scotland) Act 1968, sections 1(1) and 4, and Part II in particular.
- (c) The duty to "ensure that there is adequate provision of facilities for the inhabitants of their area for recreational, sporting, cultural and social activities" and the powers to provide, or to incur expense in the provision of, facilities for those purposes; Local Government and Planning (Scotland) Act 1982, section 14(1), 15 and 16.

The first two are examples of underlying powers and duties and in each case they are supplemented by a range of more detailed powers and duties in relation to the functions in question.

6. There are also certain specific powers and duties which may be noted in the context of the activities of the Trust. Section 69 of the 1973 Act, which is entitled "Subsidiary powers of local authorities", provides in part that:

- "(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the

expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

"(2) ..."

Section 74 of the 1973 Act is entitled "Disposal of land" and provides in part that:

"(1) Subject to... subsection (2) below, a local authority may dispose of land held by them in any manner they wish.

"(2) Except in accordance with regulations under subsection (2C) below, a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained.

"(2A)"

7. Subsections (2A) and following of section 74 were inserted into the 1973 Act by amendments made by the Local Government in Scotland Act 2003 ("the 2003 Act"). Section 1 of the 2003 Act is entitled "Local authorities' duty to secure best value" and it provides in part that:

"(1) It is the duty of a local authority to make arrangements which secure best value.

"(2) Best value is continuous improvement in the performance of the authority's functions.

"(3) In securing best value, the local authority shall maintain an appropriate balance among—
(a) the quality of its performance of its functions;
(b) the cost to the authority of that performance; and
(c) the cost to persons of any service provided by it for them on a wholly or partly rechargeable basis.

"(4) In maintaining that balance, the local authority shall have regard to—
(a) efficiency;
(b) effectiveness;
(c) economy; and
(d) the need to meet the equal opportunity requirements.

"(5) ..."

8. Section 20 of the 2003 Act provides in part that:

"(1) A local authority has power to do anything which it considers is likely to promote or improve the well-being of —

- (a) its area and persons within that area; or
- (b) either of those.

"(2) The power under subsection (1) above includes power to —

- (a) incur expenditure,
- (b) give financial assistance to any person,
- (c) enter into arrangements or agreements with any person,
- (d) co-operate with, or facilitate or co-ordinate the activities of, any person,
- (e) exercise on behalf of any person any functions of that person, and
- (f) provide staff, goods, materials, facilities, services or property to any person.

"(3) The power under subsection (1) above may be exercised in relation to, or for the benefit of—

- (a) the whole or any part of the area of the local authority;
- (b) all or some of the persons within that area.

"(4) The power under subsection (1) above includes power to do anything —

- (a) in relation to, or for the benefit of, any persons or place outwith the area of the local authority; or
 - (b) in any such place,
- if the authority considers that doing so is likely to achieve the purpose set out in that subsection.

"(5) ..."

9. The powers just referred to are powers granted to every local authority. In the case of the Council, they have additional powers which were granted by the Zetland County Council Act 1974 ("the 1974 Act") to Zetland County Council, referred to in the 1974 Act as "the Council". The general duties and powers of the Council are provided in Part II of the 1974 Act which includes section 5(1) and (2) which imposes duties upon the Council in connection with "the provision,

maintenance, operation and improvement of port and harbour services and facilities in... a harbour area", and to take action "for the proper development or operation of the harbour undertaking." The expression "harbour undertaking" is defined in section 3(1) as meaning "the harbour undertaking for the time being of the Council authorised by this Act". Section 67 provides in part that:

"(1) If in respect of any financial year the moneys received by the Council on account of the revenue of the harbour undertaking exceed the moneys expended or applied by the Council in respect thereof, the Council may in respect of that year apply out of the county fund and carry to the credit of a reserve fund in respect of the harbour undertaking such a sum as they consider reasonable not exceeding the amount of such excess.

"(2) ...

"(3) Any reserve fund provided under this section may be applied –
(a) ...
(e) for any other purpose which in the opinion of the Council is solely in the interests of the county or its inhabitants."

10. These provisions demonstrate that there is a range of powers which the Council may exercise to provide services and facilities, to dispose of property and to expend funds for the benefit of their area and the inhabitants of their area. The exercise of any of these powers will involve an exercise of discretion by the members of the Council as well as compliance with the statutory limitations or restrictions which are applicable to the particular exercise of the power in question.

The Trust

11. The original charitable trust was established in 1976 as the Shetland Islands Council Charitable Trust. The reasons for the establishment of such a trust arose out of the negotiation of a Disturbance Agreement by Zetland County Council with the oil industry at the time of the passing of the 1974 Act. Payments were to be received as a result of oil related development which were known as "Disturbance Payments". Zetland County Council (or their statutory successor as

local authority in 1976) determined to allocate such funds to the Shetland Islands Council Charitable Trust. The reasons for this were recorded in 1978 as having been concerns at the time about the consequences of such funds being received and held by the Council's predecessor, including the possible consequence of the nationalisation of port facilities which could lead to the loss by the Council's predecessor of the ability to distribute funds from the Reserve Fund held by the Council's predecessor for local purposes using the power given by section 67(3)(e) of the 1974 Act. The Disturbance Agreement ended on 1st September 2000.

12. The Trust was established by a Deed of Trust dated 10th September 1997 ("the Trust Deed") and became known as the Shetland Charitable Trust in 2003. The Trust Deed was granted by the Council in favour of all of the elected members (or councillors) of the Council, the Headmaster of Anderson High School, Lerwick and the Lord Lieutenant of Shetland, all as Trustees *ex officio* (hereinafter the "Trustees"). The Council currently has twenty two elected members, one of whom has resigned as a Trustee, and there are presently twenty three Trustees in total.
13. The sum of one pound was assigned to the Trustees in the Trust Deed and it was stated:

"And we declare that the said sum of One Pound Sterling and any other property heritable or moveable real or personal which may hereafter be made over by us or by others to the Trustees for the purpose of the trust hereby created and the investments and property representing the same from time to time all hereinafter referred to as "the Trust Fund" and shall be held in trust for the purposes hereinafter written..."

Within those purposes, the "Objects of Trust" were stated as follows:

"(SECOND) The Trustees shall hold the Trust Fund at their sole discretion to make grants or loans with or without interest out of the income or capital of the Trust Fund for any purposes which in the opinion of the Trustees are solely in the interests of the area administered by the local or other governmental authority for the time being of the Shetland Islands or of the inhabitants of the said area (hereinafter referred to as "the

community") and provided that any such grant or loan is for charitable purposes; Declaring that without prejudice to the generality of the foregoing such grants or loans may be made towards all or any of the following purposes:-

- (a) In carrying out developments on or in connection with the said area calculated to promote the welfare of the community;
- (b) In encouraging and assisting the holding of meetings of members of the community for purposes of recreation, instruction or education;
- (c) In improving, maintaining and encouraging the improvement and maintenance of means of communication in the said area, and in particular by (i) building or improving or maintaining ports, harbours, piers, roads, bridges or aerodromes; (ii) hiring or chartering or purchasing and operating any boat, ship, vessel, aeroplane or any kind of land, sea or air vehicle; (iii) ...;
- (d) In promoting directly or indirectly the development of any industry or industries among the community for its benefit in any manner in which the Trustees consider desirable;
- (e) In promoting directly or indirectly the development of agriculture among the community for its benefit;
- (f) In encouraging the education of the community by such means as the Trustees may consider desirable;
- (g) In improving the medical service to the community by such means as the Trustees may consider desirable;
- (h) In the preservation and improvement of the said area in a manner which in the opinion of the Trustees is most conducive to promoting the said area for the benefit of the community and of the Nation;
- (i) In the founding, endowing and equipping of schools, colleges, institutions, laboratories, experimental stations, libraries, sports centres, welfare centres or technical education centres for the community;
- (j) In encouraging the study and practice of any useful branch of human knowledge by the provision of buildings, equipment or otherwise as the Trustees may consider desirable;
- (k) In the doing of all such other things as are incidental to any of the foregoing purposes:..."

In my opinion, these Objects of Trust demonstrate that the Trust is a public trust although that is not critical for the purposes of the questions before me. The fact that the Objects of Trust may be exercised only for charitable purposes is emphasised by reference to the scope of any Supplementary Deed in purpose (FOURTH) and by the limitation stated there upon the exercise of the specific powers set out in the Schedule of Powers which is annexed to the Trust Deed.

The activities of the Trust

14. The Trust has been administered as a charitable trust. Following the passing of the 2005 Act, the Office of the Scottish Charities Regulator ("OSCR") was established in accordance with section 1(1) of the 2005 Act. The Trust has been registered as a charity by OSCR (with registered number SC027025). OSCR has a duty to keep a public register in accordance with sections 1(5) and 3 of those bodies which meet the "charity test" set out in section 7(2).
15. The funds held by the original Shetland Islands Council Charitable Trust were transferred to the Trust and have been administered as part of the Trust Fund. The Trust also received the Disturbance Payments until that source of income ended in August 2000. The income of the Trust since then has been primarily from investments and rental income. The value of the Trust Fund in March 2008 was of the order of £230m although it has fluctuated upwards and downwards, both before and since, in light of prevailing financial circumstances. In March 2010, the value was £210m.
16. The Trust has its own staff. I am instructed that the Trust "endeavours to 'top up' public services, in line with the community's needs, which are complementary to those provided by national and local taxation." The Trust seeks to ensure that both the Council and the Trust "follow the same strategic direction and avoids any duplication of effort in assessing if projects or activities are suitable for funding." The Trust seeks advice and recommendations from senior managers of the Council on funding issues in order to avoid duplication, for example from social workers of the Council. Grant assistance is provided to organisations providing a range of social, leisure, cultural, heritage and environmental activities. The Trust provides support to charitable projects involving the disabled, community support and bus services. The Trust has invested in and maintains community facilities and equipment.

17. The Trust receives rental income from the leasing of properties which are owned by Shetland Leasing and Property Limited ("SLAP") which is a wholly owned subsidiary of the Trust. There are thirty five leases of property of which one-fifth are leases to the Council. All of the rents are calculated to deliver a commercial return, and of the total rental income the proportion received from the Council is about forty per cent. The principal properties are an airport, an engineering base and two colleges, the latter two of which are tenanted by the Council. SLAP also leases a small aeroplane to the Council.
18. The Trust provides buildings under a partnership agreement with the Council for the delivery of care in rural areas and the care is provided in these buildings by the Council. (Within Lerwick, both the buildings and the delivery of care are provided by the Council.) The Trust supplies heat to about one thousand domestic properties through another wholly owned subsidiary, Shetland Heat Energy and Power Limited.
19. The Trust receives rental income from the lease to the Council of the Sullom Voe oil terminal, which in turn is sub-let to the oil industry. The sale of Sullom Voe by the Council occurred in 1997 and it was sold to the former Shetland Islands Council Charitable Trust.
20. The Council sold to the Trust in 2007 a 90% interest in Viking Energy Limited ("VEL") which company subsequently entered into a partnership agreement with Scottish and Southern Energy to develop a windfarm in central Mainland. The principal reason for the sale by the Council of their interest in VEL to the Trust was the then prohibition on local authorities selling electricity generated by wind power. The shares in VEL were sold at what was considered to be fair value at the time.

21. The Trust and SLAP receive services from the Council under Service Level Agreements for purposes such as banking, payroll management and administration.
22. The Trust has prepared Administrative Regulations which were adopted on 18th March 2010 ("the Administrative Regulations"). These address the constitution, management and conduct of the business of the Trust, as well as the arrangements for the Trustees. Paragraphs 6.1 to 6.5 refer to circumstances which may give rise to a conflict of interest on the part of the Trustees and the steps to be taken in such circumstances.
23. It should be noted that in addition to the circumstances of the Trust, I have also been provided with information concerning other charitable trusts which have been set up by the Council, namely the Shetland Recreational Trust, the Shetland Amenity Trust and the Shetland Arts Development Agency. In each case, these have been registered by OSCR as charitable trusts. Although the Shetland Recreational Trust was established with trustees who were members and officials of the Council, all of the elected members have recently declined to act as trustees and arrangements are being made to identify trustees by a process of application from members of the public. In the case of the other two of these trusts, neither has a substantial number of members of the Council as trustees.

The issue

24. The issue which arises is the result of the fact that almost all of the Trustees are simultaneously councillors of the Council. This issue has three aspects as set out in the Memorial. The first is the accountability of the Trust to the community of Shetland, the second is the independence of the Trustees, and the third is the potential effect on charitable status following the passing of the 2005 Act.
25. OSCR has the function of monitoring charities in accordance with section 1(5)(c) of the 2005 Act, and the Trust requires to satisfy OSCR that it can continue to

meet the charity test, and that the Trustees are able to fulfil the duties of charitable trustees, all as set out in the 2005 Act and in guidance issued by OSCR. There have been meetings between the Trust and OSCR, and in a letter to the Trustees dated 9th July 2010, OSCR stated:

"The charity's conflict of interest policy was the subject of discussion at our meetings... We acknowledge that the policy exists but confirm it is the practical application of the policy that is of particular interest to OSCR, given the current governance arrangements of the charity."

"Given there has been no change to the governance arrangements within [the Trust], we consider there is a real risk both of systemic and specific conflict which will continue to impact on effective compliance with your own policy and the trustees statutory duties, and so on effective and appropriate governance of the Trust."

In the same letter, OSCR imposed immediate requirements using its power under section 28 of the 2005 Act to make a direction following inquiries which related to the sending of agendas and minutes to OSCR and the management of conflicts of interest. OSCR also stated that after monitoring it might use its powers under section 31 "in relation to both the charity trustees individually and the charity as a whole."

26. Section 31 provides in part that:

"(1) Subsections (4)... apply where it appears to OSCR, as a result of inquiries under section 28 –
(a) that there has been misconduct in the administration of –
(i) a charity...

"(2) ...

"(4) OSCR may, by notice, suspend any person concerned in the management or control of the charity or body who appears to it to –
(a) have been responsible for or privy to the misconduct,
(b) have contributed to, or facilitated, the misconduct, or
(c) be unable or unfit to perform that person's functions in relation to the property of the charity or body.

"(5) OSCR may direct –
(a) the body representing itself as a charity,
(b) ...

to stop doing so.

"(6) ..."

OSCR also has the power following inquiries under section 28 to remove a charity from the register in terms of section 30(1)(b).

27. It is therefore apparent that OSCR is giving serious consideration to whether or not the Trust may lawfully continue as a charitable trust. Having said that, the letter from OSCR also stated that "If there were to be positive changes to the governance arrangements, we would review our monitoring."
28. The result is that the Trust wishes to consider its governance arrangements, in particular the composition of the Trustees. The focus of this consideration is clearly the position which has been stated by OSCR but it appears to me that if that is resolved the aspects of accountability and independence will also be addressed.

The legislation and guidance

29. Section 66 of the 2005 Act, which is entitled "Charity trustees: general duties", provides in part that:

- "(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
 - (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
 - (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee —
 - (i) put the interests of the charity before those of the other person, or
 - (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the

matter in question.

- "(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.
- "(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.
- "(4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.
- "(5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—
 - (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
 - (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee."

30. Aside from the nature of the duties which fall upon the Trustees of the Trust by virtue of subsection (1) of section 66, subsections (2) and (4) mean that each Trustee could be responsible individually in the event of actions which were deemed to be misconduct (as that expression is defined in section 66(4)), although subsection (5) does give each of the Trustees an opportunity to correct any breach by virtue of the duty imposed in subsection (5)(a). The steps which the Trustees are taking to consider the constitution of the Trust are in my opinion at least a first step in the fulfilment of their duties under the 2005 Act.

31. In September 2010, OSCR published a document entitled "Guidance for Charity Trustees" ("the 2010 OSCR Guidance"). Although it is written principally for "the charity trustees of small to medium sized charities", it is stated that "the guidance should also prove useful to charity trustees of larger charities"; paragraph 1.2. For present purposes, the following passages in the 2010 OSCR Guidance may be said to be relevant. Paragraph 3.3 provides three possible scenarios "which may give rise to conflicts of interest" but emphasises that these "should not be seen as the only areas where conflicts of interest can arise, but are

provided as examples of the most common." The third possible scenario provides that:

"... there may be the possibility of a conflict of interest between the concerns of two different organisations to which a charity trustee is affiliated. The trustee should declare a conflict of interest to the other charity trustees, and refrain from participating in any discussion or decision-making process about the subject in question. An example might be where a charity trustee is a member of two different organisations which are applying to the same trust for a grant. The conflict of interest should be disclosed... and the charity trustee should not take part in any discussion or decision-making."

In respect of each of the three scenarios, the 2010 OSCR Guidance provides that:

"It is not only the responsibility of individual charity trustees to act only in the interests of the charity and avoid conflict of interest, but also the duty of their fellow charity trustees to take reasonable steps to ensure that they do so."

32. In March 2011, OSCR published guidance entitled "Who's In Charge: Control and Independence in Scottish Charities" ("the 2011 OSCR Guidance") which includes not only advice to charity trustees by reference to the requirements of the 2005 Act, but also contains a number of case studies which describe the circumstances of identified charitable trusts and action which has been taken by OSCR. These case studies include one relating to the Trust. At page 7, it is stated that:

"This guide will be of particular use to:

- the charity trustees of large and complex charities
- the charity trustees of charities with close connections with local authorities...
- people and bodies advising such charities
- ...
- local authorities... or other bodies which have close links to charities or work in partnership with them."

The 2011 OSCR Guidance is therefore relevant to the Trustees, to those who are advising the Trustees, and also to the Council.

33. For present purposes, the following particular passages in the 2011 OSCR Guidance may be noted. Chapter 2 is entitled "What to watch out for" and a number of "Key points" are set out throughout the Chapter. In the opening to Chapter 2 on page 10, it is stated that the guidance is looking at "those structures and situations where charity trustees should take particular care to ensure they remain in charge." A number of situations are set out including the following on page 12:

"B. A charity has links to another body

"Many charities have links to other bodies. Sometimes these relationships can be very close and significant to the charity, example where:

- The two bodies share personnel and either:
 - All the charity trustees serve on the Board of the other body
 - The majority of the charity trustees have a duty to the other body as members or employees
- The other body was instrumental in setting up the charity
- ..."

There is then reference to particular risks which OSCR has identified in respect of such charities.

34. At page 14, the 2011 OSCR Guidance states that:

"b. A charity with links to another body must actively manage conflict of interest

"When a charity's trustees are all or mostly members or employees of another body they are likely to face situations where their ability to take independent decisions is called into question.

"Establishing an appropriate structure and governance arrangements for a charity is only the first step. Charity trustees should demonstrate through day-to-day practice that they are acting in the best interests of the charity. They should show publicly that:

- They are aware of, and managing, any conflict of interest and can demonstrate this
- Where there is a conflict, that the decision on the matter was taken in the charity's best interests
- In any situation where a charity trustee is unable to give priority to the charity's interests, he or she should consider withdrawing in

order for the decision to be made by other charity trustees who are not affected by such conflicts

- The charity remains able to carry on its business. The charity should have a governance structure in place which would allow quorate decisions to be made even if a number of trustees had to withdraw."

35. At this point in the 2011 OSCR Guidance, the "Case study" relating to the Trust is set out. There is a description of the circumstances of the Trust and the concerns which OSCR has expressed in the correspondence referred to above.

36. At page 15, the following are set out:

"Key points for charity trustees and other bodies

- The make-up of the Board, where it is dominated by members from a linked body, can lead to an inherent risk of recurrent conflicts of interest
- Conflict of interest policy should be applied in all situations where there is a conflict or potential conflict
- The charity should consider whether it is advisable to maintain a Board where conflict of interest arises so frequently that charity trustees must withdraw thus preventing effective management of the charity
- Charity trustees should always demonstrate that they are behaving in the best interests of the charity and be conscious of how their actions appear to the public."

37. At page 17, it is stated:

"Key points for charity trustees and other bodies

- Bodies that set up or forge strong links with a charity should be aware that this does not necessarily give them control over all of the charity's activities. Where bodies such as local authorities set up bodies which are intended to seek charitable status, the bodies' structure and the nature of their activities must allow them to pass the charity test and enable their charity trustees to fulfil their duties to the charity
- A majority of charity trustees in a charity established by another body should ideally be independent of that body, that is, the majority should neither be its members nor its employees

- If linked and independent charity trustees are evenly balanced on the Board, it is good practice that the Chair be one of the independent charity trustees
- Contracts and property arrangements between the bodies should be clearly in the interests of the charity whether it is making use of another body's assets, or supplying its assets for use by another body."

38. In Chapter 3 of the 2011 OSCR Guidance, which is entitled "Ensuring independent decision-making – a practical guide", the following statements are relevant. At page 24, in two separate passages it is stated that:

"The appointments process for charity trustees should be designed to identify the best people for the needs of the charity. What the needs of the charity are will depend on its context and activities, and these may make it appropriate to bring in charity trustees who can provide links to stakeholders, whether beneficiaries or other bodies with whom the charity is involved. Such charity trustees must act in the interests of the charity, as must all charity trustees. Where there are links to another body, a transparent arm's length selection process for independent charity trustees, such as an independent nominations committee may be appropriate and help to ensure real and perceived independence...."

"The law does not prevent a linked body from appointing some or all of a charity's trustees, nor prevent the appointment of charity trustees ex-officio (that is, because of another post or role they have). However, a charity trustee, once appointed, must act only in the charity's best interests and cannot act merely as a delegate from another body or group of stakeholders."

39. There are other aspects of the 2011 OSCR Guidance which are relevant to the Trustees, in particular the advice on "How can a charity show it is taking decisions independently?" beginning at page 28. At page 29, an appropriate conflict of interest policy is required of a charity, and it is stated:

"When should a charity trustee consider withdrawing from a meeting?

"The charity's constitution or other governing documents should set out the procedure when there is a conflict of interest such as those detailed above, or state that the procedure will be regulated by a code of conduct or standing orders.

"Where a charity trustee is aware that he or she is subject to a conflict of interest between the interests of the charity of those of another person or body who appointed them, and where they are unable, because of their duty to that other person or body to put the interests of the charity first, then they must withdraw from the discussion or decision concerned. It may also be appropriate for charity trustees to withdraw from discussions in other circumstances of conflict of interest. Where they do not do so, they should be able to demonstrate that they have acted in the interests of the charity..."

At page 30, the following is stated:

"What happens if a charity trustee has to withdraw from decisions frequently?

"A charity trustee will have to consider whether their interests mean that conflicts will be regular and recurring, and, particularly if, in terms of the charity's constitution or code of conduct or of good practice they find themselves frequently having to withdraw from significant charity decisions. Is this preventing them from usefully carrying out their charity trustee duties? In such a situation, it may be appropriate for them to stand down and be replaced by a charity trustee who does not have the same conflicts.

"There is no legal reason why charity trustees may not have an interest in another connected body as long as they are able to give priority to the interests of the charity. It is up to the individual charity trustee then to decide in the light of the circumstances whether the scale of the conflict means they should not join, or remain, on a charity Board."

40. There can be no doubt that the particular passages quoted, as well as the 2011 OSCR Guidance generally, are relevant to the situation of the Trustees and the governance of the Trust. In summary, they suggest that where a charitable trust has a link to a local authority, such as where the trust was set up by the local authority, the particular governance considerations arise. Such a charity requires to have a governance structure which allows decisions to be made even where a number of trustees have to withdraw because of a conflict of interest. Where withdrawal of trustees because of a conflict of interest is regular, the trust ought to reconsider its board structure and the individual trustees in question should consider whether they should remain as trustees. Where a trust has been

established by a local authority, the majority of the trustees should be independent and the trustee occupying the chair should be an independent trustee. Although there is no prohibition as a matter of law upon a local authority appointing some (or even all) of the trustees of a charitable trust, if that were to mean that the trustees so appointed had a conflict of interest such that the working of the trust became impossible, the practical result would be that a sufficient number of independently appointed trustees would have to be appointed in addition to the local authority appointed trustees.

The first question:

Does the constitution of the Trust require to be changed to comply with current law and practice?

41. Having regard to all of the matters referred to above, it is my opinion that the constitution of the Trust as presently established, or at least the way in which it requires to function, may not in all circumstances be able to satisfy current law and practice. As a result, it would be advisable to alter the arrangements for the appointment of Trustees in order to address that concern.
42. The critical matter is the fact that almost all of the Trustees are members of the Council, and as a result the Trustees may not in every situation be able to comply with the duties imposed by section 66(1) of the 2005 Act, and the common law duties preserved by section 66(3), at least without making the functioning of the Trust unworkable.
43. The fact that a person who is a trustee of a charitable trust may have interests in connection with another organisation, which interests can result in a conflict of interest arising in relation to the person's duties as a trustee of the charitable trust, does not mean that that person is automatically disqualified from being a charitable trustee, nor that the charitable trust in question is acting unlawfully if such a person remains as a trustee. This is confirmed by the 2011 OSCR Guidance. In such a situation, the remedy is for the trustee in question to declare

a conflict of interest and thereby to comply with the duty imposed by section 66(1), and to take no further part in the discussion or decision-making on the matter in question and, in the case of the Trust, thereby to comply with section 6 of the Administrative Guidance, which in turn is required by what is said at page 14 of the 2011 OSCR Guidance (as well as being consistent with paragraph 3.3 of the 2010 OSCR Guidance).

44. The problem in the case of the Trust is that the requirement that a Trustee who is also a member of the Council has to consider and act upon a conflict of interest where the Council is concerned applies to almost all of the Trustees. If each of these Trustees were required to act in the manner described, then the Trust would be incapable of making a decision on the matter in question. This is because if all of the Trustees who were councillors were required to retire from a meeting where a relevant decision was to be taken, the business in question could not be transacted because the quorum of a meeting of the Trustees is twelve by reference to paragraph 10.5 of the Administrative Guidance.
45. Although it is not related to the issue of whether or not the Trustees can comply with their duties under the 2005 Act in a way which permits the Trust to function as a charitable trust, the same considerations will apply to the same individuals in their positions as members of the Council. As noted in paragraph 4.2.3 of the Memorial, members of the Council require to comply with the obligations set out in the Code of Conduct for Councillors which has been issued by the Scottish Ministers in accordance with section 1(1) of the Ethical Standards in Public Life etc (Scotland) Act 2000. If each of the (presently) twenty one out of twenty two members of the Council were to have to declare a conflict of interest in a situation where they had potentially conflicting duties as Trustees of the Trust, the Council would be likely to be unable to function in relation to a particular topic where a decision had to be made by the members. This conclusion may depend upon the standing orders of the Council which have not been before me for consideration

but it appears to be a logical consequence of the fact that the vast majority of both the Trustees and the members of the Council are the same individuals.

46. From the point of view of the Trust, the critical question is whether there will exist a conflict of interest where a Trustee who is a member of the Council is considering a decision which might be said to impact sufficiently on the interests of the Council. This question arises in three parts: first, what is the legal concept of such a conflict of interest; secondly, what are the practical circumstances in which the Trustees are required to make decisions in accordance with the Trust Deed; and thirdly, would the making of decisions in these circumstances give rise to a conflict of interest?

The concept of a conflict of interest

47. The obligation of trustees in a situation which may give rise to a conflict of interest was explained in the case of *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461 which was a decision of the House of Lords. The circumstances were that Blaikie Brothers, a firm of iron founders, were seeking to enforce the performance of a contract for the delivery of a consignment of iron chairs to the appellants who were a railway company. The principal defence for the railway company was that at the time of the contract, the managing director of Blaikie Brothers was simultaneously a director and the Chairman of the railway company. For the purposes of my Opinion, it is worth quoting the Opinion of the Lord Chancellor (Lord Cranworth) at some length. In two passages at pages 471 to 474, he said the following:

"This, therefore, brings us to the general question, whether a Director of a Railway Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner.

"The Directors are a body to whom is delegated the duty of managing the general affairs of the Company.

"A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed

to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

"So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

"It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the... trust, which it was possible to obtain.

"It may sometimes happen that the terms of which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been so good as could have been obtained from any other person, — they may even at the time have been better.

"But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform."

"...
"Was then Mr Blaikie so acting in the case now before us? — if he was, did he while so acting contract on behalf of those for whom he was acting with himself?

"Both these questions must obviously be answered in the affirmative. Mr Blaikie was not only a Director, but (if that was necessary) the Chairman of the Directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the Company.

"While he filled that character... he entered into a contract on behalf of the Company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the Company imposed on him the obligation of obtaining these chairs at the lowest possible price.

"His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed, and I see nothing whatever to prevent its application.

"I observe that Lord Fullerton [in the Inner House of the Court of Session: see (1851) 14 D 66, at page 72] seemed to doubt whether the rule would apply where the party whose act or contract is called in question is only one of a body of Directors, not the sole trustee or manager."

"But, with all due deference, this appears to me to make no difference. It was Mr Blaikie's duty to give to his co-Directors, and through them to the Company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle.

"The same observation applies to the fact that he was not the sole person contracting with the Company; he was one of the firm of Blaikie,

Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the Company as he could induce them to make.
"It cannot be contended that the rule which I have referred to is one confined to the English law, and that it does not apply to Scotland."

The Lord Chancellor thereafter referred to authority in support of the proposition that the laws of Scotland and England were the same on this matter, a view confirmed in the opinion of Lord Brougham at page 478 *et seq.*

48. The decision in *Aberdeen Railway Company* has been referred to and relied upon in many subsequent cases. For example, in *Regal (Hastings) Limited v Gulliver*, decided in 1942, and reported in a Note at [1967] 2 AC 134, reference was made in the speech of Viscount Sankey at page 138 to the opinion of the Lord Chancellor in *Aberdeen Railway Company* where he said that: "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting". At pages 144 and 145, Lord Russell of Killowen said:

"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profits for the plaintiff, or whether he took a risk or acted as he did the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

In *Boardman v Phipps* [1967] 2 AC 46, at page 105, Lord Hodson said that:

"The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in a fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person."

In *Inglis v Inglis* 1983 SC 8, at page 15, the Lord Justice Clerk (Wheatley), having referred to *Aberdeen Railway Company* and Boardman, said:

"Put in its widest form the doctrine means that the trustee may not place himself in a position where his interests *may* conflict" (emphasis in the original).

Finally, a recent example in Scotland of reference to the principles in *Aberdeen Railway Company* is the case of *Earl of Cawdor*, *Petitioner* 2006 SLT 1070.

49. These and other cases subsequent to *Aberdeen Railway Company* have involved their own particular facts but for the purposes of the matters considered in this Opinion, I regard the principles set out above from the opinion of the Lord Chancellor as giving the necessary guidance for a consideration of the position of the Trust and the Trustees.
50. In my opinion, the following are the principles which may be identified having regard to the present circumstances. First, a trustee cannot make a lawful decision which may be of benefit to him in his personal circumstances however much it may be shown that he acted with the best of intentions and in good faith. Secondly, it does not matter if he is acting in either capacity as only one of a number of trustees because it is the interests of the body of which he is a trustee which are relevant rather than his direct personal interest. Thirdly, the precise capacity in which the person is acting is not critical, whether that might be as a trustee proper, as a director of a limited company, or in some other fiduciary capacity, as long as it may be said that in the capacity in question the person owes fiduciary duties to his principal. Lastly, the only way in which a particular transaction which has taken place in circumstances contrary to these principles may be allowed to stand, is if the person against whose interest the trustee has acted has consented.
51. I do not regard that last principle as having any application in a situation where one is considering a prospective conflict of interest, rather than an existing

concluded contract which has been challenged. In any event, it is difficult to envisage a situation where either a local authority or a trust having public purposes could properly consent to something which had occurred in a situation of a conflict of interest, not least where the fundamental problem was the fact that it was the position of the individual decision-makers in each case which had brought about the conflict in the first place.

52. I therefore turn to consider the application of the remaining principles identified above to the circumstances of the Trust.

The practical circumstances in which the Trustees are required to make decisions

53. The Trustees are entitled by virtue of purpose (SECOND) of the Trust Deed to expend the Trust Fund to make grants or loans "for any purposes which in the opinion of the Trustees are solely in the interests of the area administered by the local or other governmental authority for the time being of the Shetland Islands or of the inhabitants of the said area (hereinafter referred to as "the community") and provided that any such grant or loan is for charitable purposes." By reference to the specific purposes identified in purpose (SECOND), the following may be noted: the promotion of the welfare of the community in specific purpose (a); the promotion of meetings for purposes of recreation, instruction or education in specific purpose (b); the maintenance of means of communication, in particular the provision of ports and harbours, in specific purpose (c); the encouragement of education in specific purpose (f); and the endowing and equipping of schools and colleges in specific purpose (i). The other specified purposes, and the overall objects of purpose (SECOND), are to the effect that the Trustees may expend the Trust Fund for the benefit of the community.
54. It is my opinion that the nature and scope of these purposes are comparable with, and may impact upon, the functions which the Council may perform, and in certain cases are required to perform, out of the funds available to the Council as a local authority. Obvious examples in the case of the Council are the provision of

education and facilities for education under the Education (Scotland) Act 1980, provision for social welfare under the Social Work (Scotland) Act 1968, provision for recreation, sporting, cultural and social facilities under the Local Government and Planning (Scotland) Act 1982, and the particular provision which the Council may make for ports and harbours under the 1974 Act. I do not repeat the specific statutory provisions which are referred to above. In addition, the entitlement of the Trustees to expend the Trust Fund generally for the benefit of the community may result in their making provision for services and facilities which might otherwise be provided by the Council under section 69 of the 1973 Act, section 20 of the 2003 Act, or otherwise. In all such cases, and by definition in accordance with purpose (SECOND) of the Trust Deed, the Trustees are entitled to expend the Trust Fund within the local government area which applies to the Council and for the benefit of the inhabitants of the area served by the Council.

55. These are some, although not necessarily all, of the general examples of where the Trustees may expend the Trust Fund for the provision of services and facilities in a manner which may affect the necessity for the Council to provide equivalent services and facilities. In paragraphs 16 to 21 above, I provided a description of the actual services and facilities which the Trustees have provided. It appears to be the case that the provision of certain of those by the Trust will have rendered it unnecessary for the Council to consider the provision of equivalent services and facilities which they might otherwise have felt obliged to provide in the interests of the inhabitants of the area served by the Council and in the fulfilment of their statutory functions; powers and duties as a local authority.
56. In situations where a contractual relationship has come about between the Trustees and the Council, the interests of the Trust and the interests of the Council may be said to be directly opposed in the manner described by the Lord Chancellor in *Aberdeen Railway Company*. In the case of decisions on the part of the Trust through SLAP to lease premises to the Council, it would have been in the interests of the Trust to obtain the maximum rent whereas the interests of the

Council would have been the direct opposite. The same would have been the case in relation to the sale by the Council to the Trust of the shares in VEL. In the arrangements for Service Level Agreements, the Trustees will have a duty to obtain these services at the minimum reasonable cost to the Trust, whereas the Council will have duty to obtain the best return for these services.

57. It is also conceivable that were the Trust to acquire an interest in land from the Council, the primary duty of the Council would be to obtain the best consideration in fulfilment of section 74(2) of the 1973 Act. This may not at present be an issue which arises but it could occur in the future. It may have been an issue when the Council sold the Sullom Voe oil terminal although it must be recognised that that was not a transaction with the Trust because it was carried out with its predecessor, Shetland Islands Council Charitable Trust, as well as being entered into before the enactment of both the 2003 Act and the 2005 Act.
58. These are just the obvious examples which are apparent to me of where the interests of the Trust and the interests of the Council could be said to conflict.
59. I understand that it may be said that the Trust cannot fund the Council's statutory functions and I assume that this is because the purposes of the Trust are restricted to the making of grants of loans "for charitable purposes" as set out in purpose (SECOND). Whilst this is the case, it does not in my opinion prevent the providing of a service or facility by the Trust from being of potential advantage to the Council. The Trust will not be fulfilling a statutory function of the Council in any direct sense but the result may be that the Council has less reason to provide an equivalent service or facility using its statutory powers. This is not a feature unique to the activities of the Trust because similar consequences may exist in relation to other charitable trusts. For example, many providers of independent education and independent social welfare services are registered as charities and their provision of services may relieve the relevant local authority of the need to provide the same services to the same extent. There may therefore be an overlap

in the provision of facilities and services, both generally and in the case of the Trust and the Council, but that does not mean that a charitable trust is performing the functions of a local authority. It is this potential overlap which gives rise to a potential conflict of interest on the part of the Trustees who are councillors.

Does the making of decisions in these circumstances give rise to a conflict of interest?

60. I am in no doubt that the answer in the circumstances before me is in the affirmative.
61. In my opinion, the potential for a conflict of interest between the interests of the Trust and those of the Council may arise in both a direct and an indirect sense. In a direct sense, the Council have a duty in performing their functions to obtain best value by reference to section 1(1) of the 2003 Act and to minimise their expenditure in the public interest. The Council have particular duties to obtain the best consideration, for example when disposing of land or an interest in land by reference to section 74(2) of the 1973 Act. The duties of the Trustees are in effect the same. The Trustees each have a fiduciary duty to conserve and maximise the value of the Trust Fund and to expend it only to the minimum extent necessary to meet a particular purpose which they have identified. This duty exists both at common law and in accordance with section 66(1) of the 2005 Act.
62. In these respects, the duties of those who are councillors of the Council and of those who are Trustees of the Trust in a situation where something is to be provided directly by the Trust to the Council, or in the case of the services to be provided by the Council to the Trust, are potentially in conflict.
63. Indirectly, the situation is the same. The Council has the general power under section 69 of the 1973 Act to pursue purposes which are in the interest of their area. Under section 20 of the 2003 Act, they are entitled to consider steps to be taken for the well-being of their community. Under section 67(3)(e) of the 1974

Act, the Council as the successors of Zetland County Council have a particular entitlement to expend funds for the benefit of the community.

64. The Trust has Objects of Trust which are in effect the same or similar. The Trustees may decide to expend the Trust Fund in the interests of members of the same community which is served by the Council. The Trustees may expend those funds to provide community facilities of a type similar to those which might be provided by the Council. The result is that in considering both the duties of the Council as the local authority, and the purposes of the Trust, the councillors and the Trustees respectively will be looking potentially to providing the same or similar benefits to the same community.
65. In this indirect sense, I regard it as foreseeable that a Trustee in deciding that the Trust should provide a particular community facility or service might have in his mind the fact that such provision would save the necessity for the Council to consider the provision of the same facility or service. This situation is equally easy to envisage in reverse because the provision of a service or facility by the Council might allow the Trust to save part of the Trust Fund which could then be used for other purposes.
66. The Trustees are required to exercise their discretion and judgement in the dispensing of the funds of the Trust and in making other arrangements with the assets of the Trust. In doing so, the Trustees owe duties as custodians of the Trust Fund and to the community and inhabitants of Shetland to dispense the Trust Fund for the objects set out in purpose (SECOND) of the Trust Deed.
67. At the same time, an overwhelming majority of the Trustees are required separately to exercise the duties of members of the local authority which exercises the functions of a local authority over the same geographical area and in respect of the same community and inhabitants. In their capacity as councillors, those who are also Trustees of the Trust will have to make decisions about how to

allocate the resources of the Council for the same or similar purposes as they are considering for the dispensation of the funds of the Trust.

68. I am therefore satisfied that the constitution of the Trust requires to be changed. This is because in a situation where the interests of the Trust and the interests of the Council may be said either to be in potential conflict, or where the provision of a facility or service by one may be to the potential advantage to the other, the Trustees who are councillors will have a conflict of interest which they require to declare and act upon as Trustees in order to comply with the duty provided by section 66(1)(c)(ii) of the 2005 Act. In that situation, the problem is a practical one because of the fact that there are so many Trustees who are councillors with the result that in that situation no decision can be made by the Trustees. This means that I agree with what has been said by OSCR in the first paragraph of the letter quoted at paragraph 25 above; the problem is the practical application of the conflict of interest policy given the current governance arrangements of the Trust.

69. For all of these reasons, I answer the first question in the affirmative.

The second question:

If the answer to the first question is yes what changes does senior counsel consider would be necessary to meet the minimum requirements of achieving compliance with current law and procedure?

70. Each of the Trustees is a "charity trustee" for the purposes of section 66 of the 2005 Act. As such, each Trustee has a duty in circumstances capable of giving rise to a conflict of interest between the charity and any other person, to declare that conflict of interest and to take no part in the decision in question. In the situations described above, each Trustee who is at the same time a councillor of the Council is subject to a conflict of interest which means that he ought not to participate in any decision on the matter in question in order to comply with the requirements of both section 66(1) and the 2011 OSCR Guidance.

71. Given that that virtually all of the Trustees fall into that category because they are simultaneously members of the Council, this means in my opinion that the inevitable consequence is that in order to allow it to function, the constitution of the Trust must be altered so that it be composed of Trustees who in the main are not subject to that conflict of interest.
72. There are two aspects to the identification of an appropriate level of Trustees who are not likely to be subject to that conflict of interest. The first is the need for the Trust to be able to make proper decisions on all matters without the existence of conflicts of interest on the part of a number of Trustees at a level which makes that decision-making impossible. The second is the need for the Trust to satisfy the requirements of OSCR in accordance with the 2005 Act in order that it may remain as a charitable trust. These aspects do not necessarily lead to the same result, but they are certainly not incompatible. Likewise, the satisfaction of these aspects will bring about a situation in which both the accountability of the Trust to the inhabitants of Shetland and the independence of the Trustees as referred to in paragraphs 4.1 to 4.3 of the Memorial are addressed.
73. By reference to previous examples, it appears that in the case of a charitable trust which is serving purposes which may be of benefit to a local authority, there is no reason why a substantial number of the trustees of such a trust may not be elected members of the local authority in question. This is confirmed by the 2011 OSCR Guidance. Within the papers provided to me, there are the details of two charitable bodies, namely "Culture and Sport Glasgow" and "Pife Sports and Leisure Trust Limited" which are companies limited by guarantee set up by the respective local authorities for the areas in question. In the case of Culture and Sport Glasgow, there are three categories of directors, one of which is "Partner Directors" who are elected members of Glasgow City Council. The maximum number of directors is eleven, of whom no more than six may be Partner Directors. The quorum is six.

74. In the case of Fife Sports and Leisure Trust Limited, there are also "Partner Directors" who are elected members of Fife Council, and of whom there may not be more than six. The maximum number of directors is thirteen. The quorum is four unless another number is fixed. This company was the subject of a case study at pages 16 and 17 of the 2011 OSCR Guidance. This narrates that the constitution of the company allowed the local authority to be its sole member and:

"As such, the council would be able to change the governing rules of the company and appoint or dismiss all of its directors. Best practice would have been for a majority of directors to be selected independently of the council, perhaps through an impartial nominations committee..."

Nevertheless, OSCR decided that the company should be granted charitable status "on balance" because:

"the existing arrangements did not necessarily prevent its charity trustees from acting independently, given other factors in its governance."

These factors included the fact that there was a majority of non-councillor directors, that the Chairperson was one of the independent directors and that the company had clear conflict of interest provisions.

75. There are also details of "Enjoy East Lothian Limited". It does not appear to have prescribed numbers of directors in different categories but it does envisage that directors may be "representatives of the district of East Lothian".
76. It appears that each of these organisations has been set up by the respective local authority and is presently registered as a charity by OSCR, which registration in the case of Fife Sports and Leisure Trust Limited at least has been confirmed after investigation. That suggests that even where a significant number of trustees of a trust or body are elected members of the local authority having responsibilities within the same area, OSCR will not regard the trust or body in question as being unsuitable for charitable status. Having said that, it is clear that in the case of these trusts, their primary or sole source of income is derived from the local authority in question and that is a situation which is different from that of the Trust.

77. That OSCR does not regard the fact that some trustees of a trust having charitable status may be local authority councillors as depriving the trust of its character as a charitable trust appears to me to be entirely appropriate. I have not identified any reason why either an equivalent charitable trust, or the Trust in this case, should not be permitted to have, as at least some of its trustees, persons who are elected members of the local authority for the same area.
78. By reference to the Administrative Regulations at paragraph 10.5, it is presently the case that a decision at a meeting of the Trustees requires a quorum of twelve. This means that with a total potential component of twenty four Trustees, an appropriate quorum is regarded as one half of that number. This seems to me to be reasonable in the interests of the proper accountability of the Trustees to the community for their decisions and the size and nature of the Trust Fund which they are required to administer.
79. At the meeting of the Trust which took place on 8th September 2010, it appears to have been agreed that an appropriate number of Trustees of the Trust in the future would be fifteen; see the Minute of the meeting at page 8. I do not regard that number of Trustees as critical, and it might be more or fewer, but I proceed upon the prospect of fifteen Trustees as the desirable total. In that situation, and in order to reflect the existing approach to an appropriate quorum, the result would be a quorum of eight Trustees.
80. In my opinion, the issue then becomes one of the ability of the Trust to function adequately in relation to all of the decisions which it will require to take including those which may affect the interests of the Council. The Trust comprises a Trust Fund which does not depend upon income from the Council, other than commercial income from rents and the like. Although I have no precise details of this, the capital of the Trust Fund appears to have come in substantial part from the Disturbance Payments and from payments made by the Council under the

unique power which the Council have by virtue of section 67(3)(e) of the 1974 Act. The Trust is therefore unlike the other trusts established by local authorities which are referred to above. The Trust has a more separate and independent existence than those other trusts and in my opinion it is important that this is demonstrated potentially beyond what might be required by OSCR.

81. In order to comply with section 66 of the 2005 Act, with the 2011 OSCR Guidance, and with the principles of law discussed above, I have already said that it is my opinion that any of the Trustees who are members of the Council will have to consider declaring a conflict of interest and withdraw from decision-making where a decision of the Trustees may have an effect on the interests of the Council and for which those same Trustees will have a responsibility as members of the Council.
82. Taking all of these considerations into account, it is my opinion that with a total number of Trustees of fifteen, and a quorum of eight, no more than four Trustees should be members of the Council. This would allow a decision in which the councillor Trustees had declared an interest still to be made by a substantial body of the Trustees and beyond the minimum number required by the quorum. It would demonstrate the functional independence of the Trust from the Council, both in relation to individual decision-making and also in the interests of the community who should thereby be assured that it was the best interests of the Trust in serving the purposes of the Trust which were bringing about the decisions which were being made.
83. Whilst the number of councillor Trustees will be a matter of debate, and I note that at the meeting of the Trust referred to above, seven councillor Trustees were proposed, I have reached the conclusion taking into account the independence of the Trust from the Council, the need for the Trust to be accountable for the decisions which are made, and the desirability for such decisions to be seen as having been made free from the actual or perceived influence of the Council, that

simply to have a bare minority of councillor Trustees would not by itself be sufficient to achieve these objectives.

84. A maximum of four councillor Trustees, when taken along with a quorum of eight, would mean that in no circumstances could the Trustees make a decision without the support of at least one of the non-councillor Trustees, even in a situation where the potential interests of the Council were not an issue. In my opinion, this would be an important factor in affirming and demonstrating the independence of the Trust from the Council in all circumstances and of the fact that its decisions were being made entirely in the interests of the Trust and not because of the particular interests of those Trustees who were members of the Council.
85. Having said that, I am conscious of a desire on the part of the Trustees that because there are seven wards within the Council area, there should be seven councillor Trustees. If that were to be the situation, it is my opinion that the principles and appearance of independence in the making of all decisions by the Trustees could be achieved in other ways. With seven councillor Trustees, one solution would be to increase the total number of Trustees to twenty nine with a quorum of fifteen. This would obviously be cumbersome and undesirable and I can well understand why the Trustees would not wish it, not least because of the desire which they have already stated to reduce the existing number of Trustees.
86. In that situation, there may be other ways of addressing the same principles and appearance of independence. If, for example, the proposed quorum were to be increased to say nine or ten, and the Administrative Regulations were to be amended to require that no decision could be taken unless at least a minimum number of non-councillor Trustees had voted in favour of the decision, then it would be seen that in no situation could a decision be taken by the councillor Trustees alone. Such an arrangement would require that the total number of Trustees be increased from fifteen to eighteen so that in a situation where all of

the councillor Trustees had declared an interest, there would still be sufficient non-councillor Trustees to form a quorum.

87. This is simply one way in which it appears to me that a desire for seven councillor Trustees could be accommodated without departing from what I regard as necessary both to satisfy OSCR and to address the wish for independence and accountability. The fact that OSCR will look at the individual governance arrangements of a charitable trust and make a decision based upon all of the circumstances is demonstrated by what is said in the 2011 OSCR Guidance in the case study of Fife Sports and Leisure Trust Limited. My suggested arrangement should therefore not be seen as prescriptive and it may be that the Trustees can devise other arrangements which would produce the same result in terms of independence and appearance of independence. Ultimately, what will be appropriate will be what is acceptable to OSCR at least for the purpose of preserving the status of the Trust as a charitable trust.
88. I have been provided with a copy of a paper prepared in 1988 for the purpose of nomination of the two *ex officio* trustees. This is clearly of historical interest only, but to the extent that it indicated potential constituencies of the local community from whom non-councillor Trustees might come, the categories suggested appear to me to be reasonable. Having said that, the purpose of this Opinion is to consider the categories of Trustees who might be subject to a conflict of interest rather than who new Trustees might be, and I do not offer any definitive advice on how a new body of Trustees might be constituted.
89. I have noted that it is generally considered to be a good thing that the Trustees who are councillors have a mandate to act as Trustees by virtue of their election as members of the Council. Whilst this is a reasonable view, the problem is that upon becoming Trustees, all of the Trustees owe their fiduciary obligations in accordance with the Trust Deed to the Trust both in accordance with section 66(1) of the 2005 Act and at common law. This is confirmed on page 24 of the 2011

OSCR Guidance. Those who are simultaneously members of the Council owe separate fiduciary duties to the Council as a statutory body having statutory powers and duties. It is the potential conflict between those duties which is critical and the fact that those who become Trustees may be said to have received an electoral mandate through being elected as councillors does not matter.

90. In my opinion, an arrangement such as suggested above would serve the three aspects set out in the Memorial. It would demonstrate that the Trust was accountable as an individual institution to the community of Shetland and was separate from the local authority serving the same area. It would demonstrate that the Trustees who made all decisions were independent of the actual or perceived interests of the Council and thereby demonstrate the independence of the Trust itself. It should allow the question with OSCR regarding the governance of the Trust to be resolved in a way which secures the continued registration of the Trust as a charitable trust under the 2005 Act.
91. As far as the procedure which would be necessary to bring about the desired changes in the constitution of the Trust, it appears that an alteration to the constitution to the Trust which would result in there being fewer trustees who were members of the Council and more Trustees who were not, would satisfy the "reorganisation conditions" set out in section 42(2)(b) and (c) of the 2005 Act. In this situation, the Trust may make an application for approval of "a reorganisation scheme" in terms of section 42(3)(a), and OSCR may approve such an application in accordance with section 39(1), or OSCR (or indeed the Trustees in their own right) may apply to the Court of Session who may approve the application in accordance with section 40(2).
92. It should be noted that the agents for the Trust provided to me a copy of an interlocutor in a Petition by *The Cowana's Hospital Trust* which was pronounced in the Outer House of the Court of Session on 27th January 2011. Although that interlocutor approves a Scheme for the administration of the trust in question, the

application to the Court was for the approval of a cy pres scheme rather than an application made under the 2005 Act. If it were thought to be desirable, such an application could be made by the Trust as apposed to an application under the 2005 Act because the right to do so is preserved by section 42(4).

Concluding observations

93. I have reached the views expressed above having regard to how the body of Trustees should be structured in the future following a consideration of the Trust and its purposes and administration, the requirements of the 2005 Act and the 2011 OSCR Guidance, and the relationship between these and the functions, powers and duties of the Council. Having said that, a situation where a majority of the Trustees should always be able to be quorate and to be able to make a decision even if all of the Trustees who are also members of the Council declare a conflict of interest, is similar to the circumstances in the case of *Maldment and Ryan v The Charity Commission for England and Wales* [2009] UKFTT 377 (GRC), a decision of the First-Tier Tribunal (Charity) given on 16th November 2009.

94. The practical circumstances in that case concerned a Scheme for a charitable trust relating to the management of an area of land which was used as a public park (referred to as "the legacy land") and where the local authority, Dartford Borough Council ("DBC"), were the trustee. In the Reasons for the Tribunal's Decision, it was stated that:

"5.28 The Tribunal heard that DBC had proposed to the Respondent [the Charity Commission] that it should appoint "up to three" individuals onto its "Deed, Trust and Obligations Committee" which manages the legacy land. It was proposed that these persons should be nominated by the party political leaders in the Council and by Groundwork Kent and Meadway [sic], as they would have relevant horticultural experience. It had, perhaps surprisingly, not been suggested that they should be residents of Dartford...

"5.29 The Tribunal has considered this issue very carefully. On balance it sees no reason to disturb the present trustee arrangements provided that the arrangements for managing future conflicts of interest are robust. The

Tribunal notes that the Committee of DBC which administers this charity will need for the future to manage situations in which a conflict of interest inevitably arises. The Tribunal takes the view that all members of the Committee who are elected members of the local authority (ie not just members of the ward in which the legacy land is situated) or who are otherwise connected to DBC, would have to declare their interest and not vote on any issue where such a conflict arose. If (as is apparently being suggested) the Committee should be constituted so that its non-conflicted members could not form a quorum, then DBC would in future need to approach the Respondent to authorise all future transactions affected by the conflict of interest. This is clearly undesirable."

The Tribunal then addressed specific circumstances which had arisen and continued:

"5.31 Other situations in which a conflict of interest would inevitably arise would be decisions concerning the future use or development of the legacy land and/or adjoining land; the payment of legal costs by the charity in relation to proceedings arising from DBC's breach of trust; or the granting of a lease or easement over the legacy land to DBC. In the circumstances, the Tribunal is concerned to see governance arrangements put in place which will provide for the Committee of the Council which administers the charity to be able to make quorate decisions in the absence of those affected by a conflict of interest... It therefore seems to the Tribunal that the important issue for the Respondent to provide for in amending the Scheme is the number of independent (ie non-conflicted) persons who are able to form a quorum of the Committee under its standing orders, rather than merely the number of independent persons who are appointed to that Committee, but unable to form a quorum. The Tribunal concludes that this issue should be addressed in providing a machinery of governance for the charity and these appeals therefore succeed in relation to this issue...."


The Tribunal then set out a procedure as to how the Scheme in question should be altered and stated at paragraph 6.1(iii):

"so that the Committee of DBC which administers the charity is required to be constituted so as to provide for a quorum of individuals who do not suffer from a conflict of interest in relation to DBC and its dealings with the charity."

I regard the reasoning and result in *Maidment* as confirming the approach and the outcome which I have described in the circumstances relating to the Trust. It looked at how the trust in question was actually administered and the need for that administration to be, and be seen to be, independent of the local authority in

question. It would, in my opinion, provide useful support for an alteration to the constitution of the Trust in the manner which I have suggested.

THE OPINION OF



Roy L. Martin QC,
Terra Firma Chambers,
Parliament House,
Edinburgh,
25th March 2011.

REPORT

To: Shetland Charitable Trust

21 September 2011

From: General Manager

Report: CT1109061

Future Governance Arrangements of Shetland Charitable Trust

1. Introduction

- 1.1 This report is presented to seek Trustee approval for the recommendations of the Governance Review Group with regard to the changes to the new governance arrangements of the Trust.

2. Background

- 2.1 At their meeting in February 2009, Trustees agreed to review the governance arrangements of the Trust in the light of current regulatory and legislative framework.
- 2.2 At their meeting on 12 May 2011, after considering the legal advice from Senior Counsel, Trustees agreed that the governance of the Trust should change with regard to the composition of the Trustee Board, and in particular that the majority of the Trustees should be drawn from outwith the Council (Min Ref CT/27/11).
- 2.3 A seminar was held on 17 August 2011, which discussed recommendations from the Governance Review Group. Trustees had a constructive discussion at which a number of valuable points were raised.

3. Present Position

- 3.1 The Governance Review Group now presents their recommendations with regard to the new Trustee body. These are set out in table form in Appendix 1.
- 3.2 Trustees requested further information on the selection process, and this is provided in Appendix 2.
- 3.3 In response to a request from Trustees, the public have been asked to comment on the proposals, and the response will be summarised and tabled at the meeting.
- 3.4 Any change to the governance arrangements of the Trust will be by way of an application to the Office of the Scottish Charity Regulator

in terms of the Charities Reorganisation (Scotland) Regulations 2007 ("the Reorganisation Regulations"). As part of the procedure involved in such an application, OSCR is obliged to publish notice, in the format prescribed by the Reorganisation Regulations on its website for a publication period of not less than 28 days and not more than 42 days. In addition, since the gross income of the Trust exceeds £250,000, the Trust will be obliged within the first 14 days of the publication period to arrange for a notice in prescribed form to be published once in a newspaper circulating in the locality. This will give the public a further opportunity to comment on the Trust's proposals.

4. Financial Implications

- 4.1 There are no financial implications arising directly from this report. However it is acknowledged that there will be a cost associated with the transition process.

5. Recommendations

Trustees are recommended:-

- 5.1 to approve the recommendations of the Governance Review Group as follows:-
- a) the number of Trustees to be fifteen;
 - b) the composition should be seven councillor Trustees and 8 appointed Trustees, all resident in Shetland;
 - c) the appointed trustees should be selected, following recommendation of a selection panel for final approval by the Trustees;
 - d) the quorum should be six, with a minimum of three appointed Trustees;
 - e) the Chair and Vice Chair should be appointed trustees, elected by the Trustees for one term, and may stand for a second term;
 - f) the term of office of a trustee should normally be
 - for Councillor Trustees, the term of office from one Council election to the next;
 - for appointed Trustees, from mid point to mid point of the elected Trustees' term;
 - for the appointments in 2012, half should serve for 2 1/2 years, and half for 6 1/2 years, both of which will count as one term. This will establish rotation and provide for some continuity so that at no point could the entire body of Trustees need to be replaced;
 - g) no Trustee should hold office for more than two terms without a break of at least two years;
 - h) there should be an Annual General Meeting, published as such and open to the public;

- i) there should be a requirement for Trustees to attend a minimum of 50% of meetings.

5.2 Subject to approval of 5.1 above

- a) to agree that the selection referred to in 5.1 c) above be carried out by a selection panel consisting of an independent chair with a proven track record in a relevant field, and two trustees selected by the Trustees. At least one of the Trustees should be a non-Councillor Trustee;
- b) to authorise the General Manager to engage a specialist firm to manage the selection process up to final interview stage, as detailed in Appendix 2;
- c) to authorise the General Manager to approach a suitably qualified professional from outwith Shetland with a proven track record in a relevant field, to chair the selection panel;
- d) to agree that the new trustees should be in post by May 2012 and
- e) to instruct the Trust's legal advisers, Messrs Turcan Connell
 - (i) to prepare the necessary application for a Reorganisation Scheme, in consultation with the General Manager, and
 - (ii) thereafter to submit such application to OSCR.

Reference: AB/EMA/TA38

Report Number CT1109061-f

The Trustees of Shetland Charitable Trust
c/o Mr Bill Manson
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Our ref: MI/INQ/08-1383

24 November 2011

Dear Charity Trustees

Shetland Charitable Trust – SC027025
Actions to be taken

On 24 October, I took over from Jane Ryder as Chief Executive of OSCR. The team here has fully briefed me on the background to the dispute and the OSCR Board have been made aware of recent developments. OSCR first became involved with the charity more than three years ago following a number of complaints received from members of the Shetland public. As regulator, our objectives here, as with any intervention that we make, are to protect the charity, its reputation and its beneficiaries from significant damage and to safeguard the charity's assets. I hope that we can now move quickly to a resolution that meets these objectives.

This letter is further to our holding letter of 10 October 2011 following receipt of the draft minute of the charity trustees' meeting of 21 September at which the decision was taken to hold a referendum. As explained at that time, OSCR has been considering the range of powers available to it in response to that decision.

The current position

You are in receipt of clear advice from OSCR as well as your own legal advisers and Senior Counsel in relation to changes that require to be made to ensure that a transparent and fit for purpose governance structure is in place for Shetland Charitable Trust (SCT). Despite having received advice from Senior Counsel in March this year, we understand that to date you have undertaken no substantive action to implement its terms. In this light, the decision taken by the charity trustees

on 21 September to hold a referendum on the proposed constitutional changes has caused significant concern for OSCR.

Misconduct

OSCR considers the actions of the charity trustees to date to amount to misconduct for the purposes of the 2005 Act. The rationale for this conclusion is set out in the attached annex.

OSCR has sought and received independent legal advice on this and also as to what further actions we ought to take under section 31 and/or section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) to ensure that the required changes to SCT's governance structure are made as soon as possible.

In the spirit of our engagement with SCT to date, OSCR would, of course, prefer that matters are resolved without the use of our statutory powers of suspension and direction and without resort to litigation. However we are mindful of the protracted discussions we have already had and the absence of adequate action on the part of the charity trustees over the past three years. Given this, we will not hesitate to take the necessary action including seeking the necessary orders from the courts if matters cannot be resolved to our satisfaction within a reasonable timescale.

Action by Trustees

Taking all of the above into consideration, the charity trustees should now provide an undertaking in the following terms within 14 days from the date of this letter:

1. That a copy of this letter has been sent by SCT to all SCT trustees and that each charity trustee has acknowledged receipt of a copy of this letter to the General Manager of SCT.
2. That the charity trustees will take no further action to implement the terms of the motion passed at their meeting of 21 September 2011 and in particular that the referendum in the terms noted in the minutes of that meeting will not be held and no SCT funds will be applied in furtherance of such a referendum.
3. That the charity trustees will provide to OSCR within 28 days from the date of this letter a timetable for OSCR's approval that sets out the steps that will be taken by them to implement the required changes to the charity's constitution. OSCR's approval of any timetable provided will be based on its assessment of both substantive action proposed and the timeframe within which change would occur.
4. That in the event that OSCR provides such approval and on receipt of this, the charity trustees will ensure that all necessary action is taken to ensure that

the approved timetable is implemented as outlined and in line with OSCR's expectations.

In the event that such an undertaking is not received within 14 days, OSCR will immediately proceed with any or all of the following actions:

- Issue a direction to the charity under section 31(6) of the 2005 Act to restrict the use of the charity's funds in connection with holding a referendum without OSCR's consent.
- The presentation of a petition to the Court of Session pursuant to our powers under section 34 of the 2005 Act without further reference to SCT or the charity trustees.

OSCR expressly reserves all rights to seek an award of expenses against the charity trustees should court proceedings be commenced.

Accordingly, we look forward to receiving your undertaking on these terms shortly and in any event within 14 days.

Yours faithfully,

David Robb
Chief Executive

Annex – Misconduct for the purposes of the 2005 Act: Shetland Charitable Trust - SC027025

Legislative position

- 1.1 The Charities and Trustee Investment (Scotland) Act 2005 section 66(1) states as follows:

"Charity trustees: general duties

- (1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular –
- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
 - (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
 - (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee –
 - (i) put the interests of the charity before those of the other person, or
 - (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question."

- 1.2 Section 66 (4) of the 2005 Act states *inter alia* that any breach of the duty specified in Section 66(1) noted above is to be treated as being misconduct in the administration of the charity.

Background facts

- 1.3 The following have been taken into account when considering whether the conduct of the charity trustees constitutes misconduct:
- The charity trustees have been in discussions with OSCR for three years in relation to concerns arising from the current governance structure and the systemic risk of conflict which arises as a result of the current governance structure.
 - As a result, SCT has sought and received clear and unequivocal legal advice from SCT's solicitors, Turcan Connell, and from Roy Martin QC in relation to the systemic conflict issue and the steps which ought to be taken by the trustees to address that issue.

- SCT appointed a sub-committee (the Governance Review Group) in February 2009 to examine and recommend changes to the present governance structure. At this time, OSCR made its position clear on the required changes to the constitutional structure of SCT.
- The charity trustees accepted, at their meeting of 12 May 2011, that changes to the governance structure would have to be made and that allowing the Governance Review Group to continue to prepare proposals would be appropriate.
- The recent vote in favour of a referendum is therefore contrary to earlier decisions by the charity trustees.
- In addition, it is proposed to provide an option in the referendum that the status quo be retained for the charity's governance structure when that is in clear contravention of advice received. We also note that one of the options put forward is that the charity should become "independent" and are concerned that the implication of this is that SCT is not currently independent from Shetland Islands Council.
- On 16 November 2011, we were provided with the draft minute of the charity trustees' meeting of 10 November as part of our monitoring of SCT. We note that some trustees expressed concern that SCT had yet to action their decision to hold a referendum despite preliminary advice from the trust's legal advisers (Turcan Connell's letter of 6 October) indicating that as a matter of process, the motion to hold a referendum was not authorised by the Administrative Regulations of SCT and that the content of the motion proposes a course of action which SCT could not properly follow.

Basis of conclusion

- 1.4 By failing to address the potential for conflict between the duties of the charity trustees as trustees and the duties of those same individuals as councillors ("the systemic conflict issue"), as identified by their legal advisers, Senior Counsel and OSCR and taking the decision to hold a referendum, despite the advice of their legal advisers, OSCR considers that the conduct of the charity trustees constitutes misconduct.
- 1.5 More specifically, and inter alia, we consider that the conduct of the charity trustees amounts to a failure to act in accordance with the duties set out at section 66(1)(b) of the 2005 Act. The charity trustees are aware of the concerns expressed by OSCR and have applied the assets of SCT to obtain legal advice. They have obtained clear and unequivocal advice that they have not disputed. They have consulted about a reformed governance structure and in May 2011 accepted that changes are required to the governance structure. Notwithstanding this, 11 of the current trustees passed a motion on 21 September 2011 to hold a referendum on the issue. There has

therefore been no real progress in addressing the systemic conflict issue in the period since Senior Counsel's advice was obtained in March 2011.

General Manager: Ann Black
Financial Controller: Jeff Goddard

Mr David Robb
Chief Executive
Office of the Scottish Charity Regulator
2nd Floor
Quadrant House
9 Riverside Drive
DUNDEE DD1 4NY

22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Telephone: 01595 744994
Fax: 01595 744999
mail@shetlandcharitabletrust.co.uk
www.shetlandcharitabletrust.co.uk

If calling please ask for:
Bill Manson
Direct Dial: 01595 744994

Our Ref: WHM/em/TA38
Your Ref:

Date: 07 December 2011

Dear Mr Robb

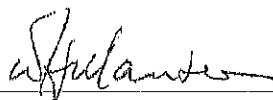
Shetland Charitable Trust (Charity Number SC027025)

I refer to your letter to the Trustees care of myself of 24th November 2011.

Following a meeting of the Trust held today, 7th December, I provide on behalf of the Charity Trustees an undertaking as follows, and using the numbering in your letter of 24th November:-

- 1 A copy of your letter was sent by SCT to all SCT Trustees, and they have each acknowledged receipt to the General Manager of SCT.
- 2 The Charity Trustees will take no further action to implement the terms of the motion passed at their meeting on 21st September 2011 in relation to a referendum in the terms noted in the Minutes.
- 3 The Charity Trustees agree to provide a timetable for OSCR's approval setting out the steps that will be taken to implement the required changes to the charity's constitution within 28 days of the date of your letter.
- 4 The Charity Trustees will ensure that all necessary action is taken to ensure that the approved timetable is implemented.

Yours faithfully



Bill Manson
Chairman



Shetland Charitable Trust

Registered Charity No: SC027025

MINUTE

Shetland Charitable Trust
Council Chamber, Town Hall, Lerwick
Thursday 15 December 2011 at 10.00am

Present:

W H Manson	L Angus
L F Balsley	J Budge
A J Cluness	A T J Cooper
A T Doull	A G L Duncan
E L Fullerton	F B Grains
R S Henderson	J H Henry
R C Nickerson	V Nicolson
F A Robertson	G Robinson
J W G Wills	

Apologies:

A J Hughson	R Hunter
C H J Miller	J G Simpson
C L Smith	

In Attendance (Officers):

A Black, General Manager - SCT
J Goddard, Financial Controller – SCT
M Anderson, Principal Officer - SCT
L Geddes, Committee Officer - SIC

Also:

S Mackintosh, Turcan Connell

Chairman:

W H Manson, Chairman of the Trust, presided.

Circular:

The circular calling the meeting was held as read.

Declarations of Interest:

There were no declarations of interest.

The Chair advised that he had earlier circulated a message regarding a number of Trustees who were unable to attend today's meeting, but had requested that they be allowed to attend and vote remotely by telephone or video conferencing. As he believed it was in the best interests of the Trust to allow as many Trustees as possible to participate in today's meeting, he had asked Legal Advisors to consider this matter. The Legal Advisors had advised that this would require an

amendment to the Administrative Regulations stating that presence at the meeting for the dispatch of business may be either in person or by means of telephone or videophone. Any amendment to the Administrative Regulations would require the support of three-quarters of the Trustees present and voting at the meeting, and would be a permanent change whereby this facility would be made available to all Trustees at future meetings where technically possible.

Ms L F Baisley moved that the Trust agree to this amendment to the Administrative Regulations, and Mrs E L Fullerton seconded.

Mr G Robinson moved, as an amendment, that the Trust do not agree to such an amendment, and Dr J W G Wills seconded.

Trustees speaking in support of the motion referred to the excellent conferencing facilities used by many organisations that were available throughout Shetland, and highlighted how weather conditions sometimes caused travel disruptions that meant that Trustees in outlying areas were unable to get to meetings.

Trustees speaking in support of the amendment said that this matter had been brought to the attention of Trustees at short notice, and they did not feel that the implications of such a decision had been fully thought out. Concern was expressed that Trustees could choose to stay at home instead of attending meetings in person. It was felt that Trustees should make every effort to attend meetings, particularly as conferencing facilities were not always reliable. It was requested that a report on the implications of allowing participation at meetings in this way should instead be presented to Trustees as soon as possible, in order that all the implications could be considered.

Mr S Macintosh advised that if a new constitution for a charity were being created now, consideration would be given to inclusion of a regulation of this kind to allow this type of participation at meetings. If Trustees wished to allow those unable to be present today to actually participate in the meeting, this would be the method of achieving this participation.

Mr A G L Duncan requested a roll-call vote, and a show of hands indicated that the majority of Trustees were in support of this.

After summing up, voting took place by roll call and the result was as follows:

Motion (Mrs L F Baisley)	Amendment (Mr G Robinson)
Ms L F Baisley	Mr J Budge
Mrs E L Fullerton	Mr A J Cluness
Mr J H Henry	Mr A T J Cooper
Mr W H Manson	Mr A T Doull
Ms V Nicolson	Mr A G L Duncan
Mr F A Robertson	Mrs F B Grains
	Mr R S Henderson
	Mr R C Nickerson
	Mr G Robinson
	Dr J W G Wills
	Mr L Angus
6	11

Minutes:

Except as undernoted, the minutes of the meeting held on 10 November and the special meeting held on 7 December 2011 were confirmed on the motion of Mr W H Manson, seconded by Mr A T J Cooper.

7 December 2011: Future Governance Arrangements of Shetland Charitable Trust – Letter from Office of the Scottish Charity Regulator (OSCR)

Mr R C Nickerson pointed out that he had advised Mr S Mackintosh that the Trust had operated for many years with 28 Trustees.

78/11 Future Governance Arrangements of Shetland Charitable Trust

The Trust considered a report by the General Manager.

The Chair pointed out that an amended proposal by Dr J W G Wills had been circulated to Trustees, and that both his proposal and the proposal contained in the report met the requirements of OSCR.

Mr S Mackintosh reminded Trustees of the requirements set out by OSCR in their letter dated 24 November 2011, and went on to say that OSCR had emphasised the importance of getting the necessary mix of skilled and experienced Trustees in order to manage the Trust and meet the needs of the beneficiary population. OSCR had referred to the care and diligence necessary in order for the Trust to discharge its duties, and the importance of having the right mix of skills and experience. This formed a large part of OSCR's considerations so would have to be borne in mind. He went on to say that he felt that any decision to use an elections process would be seen by OSCR as an improvement on the current position, but there was a need for Trustees to consider if this would result in the best trustee body for the purposes of managing the Trust in future. He felt that a proper arms-length process for selection of Trustees would be more likely to result in the best trustee body.

In response to questions from Trustees, Mr S Mackintosh advised that Trustees had always had the power to bring in additional Trustees, but that there would be a limit on the absolute number of Trustees. Whilst he appreciated that there had been 28 Trustees in the past, it could get to a point where it would prove to be unmanageable. Modern practices placed more emphasis on the contributions of individual trustees. The appointment of an additional six trustees to the existing Trust would rely on Councillor Trustees making appointments, and there would be a question as to where their interests and duties lie. Whilst a suggested arrangement of appointing an additional six Trustees would deal with quorum issues, other issues would arise from this arrangement and it would be a way forward which OSCR would not be comfortable with. He went on to confirm that Trustees currently had the power to assume new Trustees and anyone else could be added to the number. The proposal put forward by the Review Group intended to build into the constitution a requirement that there were a majority of Trustees who were not Councillors. The proposed selection method to achieve this was by an arms-length process that would avoid the issue of 'cronyism', and ensure that applications were invited to match the particular skills required. The proposed selection panel included an independent Chair

and two Trustees, one of whom would be a non-Councillor Trustee. This would move the selection process away from the existing body, as there could otherwise be a problem with the perception of independence. He confirmed that the current body of Trustees would be responsible for making the transition to any new system, and this would mean a majority of Councillor Trustees as things stand. However non-Councillor Trustees would be involved in the process in the future. He confirmed that if there was a direct election, Trustees would be elected directly to the Trust and existing Trustees would have no further say in the appointment. He also confirmed that there was no legal barrier to having a majority of directly elected Trustees.

In response to a query, the General Manager explained that the external firm would be involved up to and including the shortlisting stage. Thereafter the independent selection panel would conduct interviews and provide a recommended list of candidates to the Trustees for final approval. It was proposed that an independent Chair would be recruited from outwith Shetland to run the process, and that the remainder of the Panel would consist of at least one independent Trustee. However Trustees may wish to amend this. In response to a comment that there was an omission in the findings of the Review Group because they did not indicate the criteria for suitably qualified and able Trustees, the General Manager advised that a draft job description had been prepared and had previously been presented to Trustees.

A Trustee questioned if the Trust had adequate powers to censure or remove 'delinquent' Trustees - whether elected or selected - and if it would be necessary for a new constitution to include stronger powers.

Mr S Mackintosh said that he would require to check the Trust Deed, but he understood that the Trust did not have such powers. This should be one of the changes that should be added, as Section 66 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2006 Act) placed a duty on Trustees to take steps available to them to remove those in persistent breaches of duty.

A Trustee referred to the statement on page six of the appendix that election processes could produce "random" results and said that he did not concur with this statement. It was questioned if increased powers of removal would be an adequate safeguard in relation to the perceived risk of 'randomness'.

The General Manager explained that this was not intended to be a criticism of election processes, but there was a risk with a full election process that there could be a loss of continuity and experience. Mr S Mackintosh added that powers of removal related to trustees not meeting the required standard, whereas the 'randomness' issue related to ensuring that there was the right mix of skills on a board.

It was questioned why Trustees with professional experience were required, when the Trust already hired experts with expertise in various fields. Mr S Mackintosh explained that skills and experience were not intended to be a substitute for professional advice. However it was

helpful to have trustees with skills, experience and knowledge so that they could question and debate with professional advisors.

In response to a query regarding comparative costings of election processes and selection processes, the General Manager confirmed that the costs of an election were estimated at between £10,000 and £15,000. However there were no costings currently available regarding a selection process.

The question was asked if any consultation or dialogue had taken place with Shetland Islands Council regarding whether it would be willing to appoint Councillors to the new Trust, and the General Manager confirmed that such discussions had not taken place.

In referring to the recommendations in the report, Mr W H Manson explained that paragraph 5.1 related to the proposed components of a new constitution, and that paragraph 5.2 dealt with how these would be implemented. Mr W H Manson went on to move that recommendations 5.1.1(a)-(i) in the report be approved, and Mr F A Robertson seconded.

Dr J W G Wills moved, as an amendment, that the Trust agree recommendations 5.2.1, 5.2.2, and 5.2.4 in the report, and that the Trust resolve to:

1. Change the composition of the Trust so that there shall be:
 - a) eight Trustees directly elected by the registered voters of the Scottish Parliamentary Constituency of the Shetland Islands;
 - b) seven Trustees nominated by Shetland Islands Council;
 - c) and up to five Trustees co-opted by the above fifteen Trustees from time to time, to supply such additional skills, knowledge and experience as the Trust may require.
2. The terms of office of all Trustees shall not be more than five years between elections, nominations or co-options, with the exception mentioned in paragraph 4c below.
3. A Trustee shall not serve more than two consecutive terms of office but shall be eligible to serve again after a break of two years.
4. In order to ensure continuity of membership, the election of Trustees shall be staggered so that elected Trustees are voted on to the Trust as near as possible to the mid term of Shetland Islands Council's nominees. Therefore, the terms of office shall normally be as follows:
 - a) For Councillor Trustees, their term of office from one Council election to the next;
 - b) For directly elected Trustees, from mid-point to mid-point of the Councillor Trustee's term;

- c) For the first direct elections only, the elected Trustees shall serve two and a half years only. Thereafter, directly elected Trustees shall serve for five years.
- 5. The Chair of the Trust shall be one of the eight directly elected Trustees, and shall have a casting vote.
- 6. In notices of elections and on the ballot paper for the eight directly elected Trustees, the Trust shall print a description of the qualities, skills and experience considered desirable in a Trustee.
- 7. The quorum shall be six, including a minimum of three directly elected Trustees.
- 8. There shall be an annual general meeting, open to the public.
- 9. It shall be a requirement for Trustees to attend at least half of the Trust meetings.

Mr G Robinson seconded.

Mrs E L Fullerton and Mr R C Nickerson gave notice of further amendments.

Trustees speaking in support of the motion referred to the work that had been undertaken by the Governance Review Group, who had considered many options and sought advice on these options, as the legal advice received was that the status quo was no longer an option. It was pointed out that whilst smaller trusts usually had eight to ten trustees, they tended to administer smaller sums of money. It had been felt appropriate that for a trust with wider ranging powers that 15 trustees would be an appropriate number. The Trust had had the benefit of advice from both Roy Martin QC and its solicitors, and it was clear that OSCR would turn down an option with a majority of Councillor Trustees. The reasoning behind having appointed Trustees was that it would avoid a random result and ensure that the Trust had the appropriate mix of skills and experience required. It was felt that the proposals would be the best way of managing the funds for which the Trust was responsible, whilst satisfying the terms of the 2006 Act. It was clear, and had been confirmed by OSCR, that a level of expertise was required to manage funds of this size and that the appointments process would be transparent and arms length. The proposals would also ensure a level of continuity, and it was pointed out by a Trustee that elections could often be exclusive in terms of the small number of people who stand, the range of backgrounds that they come from, or the people actually voting. This could be illustrated by the low level of response to the consultations that the Trust had already carried out, and it was felt that selection would help ensure that the balance of skills required was achieved.

Trustees speaking in support of the amendment emphasised the importance of maintaining local democratic control and commented that the Trust had always had local public accountability. It was felt that the proposals in the report suggested that the public could not be trusted to

elect suitable people, so it could therefore also be challenged if Councillor Trustees were acceptable as they were elected by the public. It was pointed out that the amendment was a compromise between two extreme views, and that the non-Councillor Trustees should be directly elected with up to five additional Trustees being co-opted if required. It was proposed that the Chair of the Trust should always be a non-Councillor Trustee, and should have a casting vote. The perception of randomness or unsuitability of Trustees could be addressed by publishing a list of qualities considered desirable of a Trustee, and there would be sanctions to deal with Trustees who continually did not meet what was required of them. It was not necessary for the public to elect people with professional abilities as the Trust could hire advisors. It was felt that the proposals in the amendment would satisfy OSCR, and demonstrate to the people of Shetland that their Trust was under their democratic control. Otherwise, if the motion were approved, control of the Trust would be out of the hands of people's representatives.

Both the motion and amendment agreed that there should be an annual general meeting, open to the public, that Trustees should be expected to attend 50% of meetings, that the terms of office should be staggered to allow continuity and that the quorum should be six to include a minimum of three either directly elected or appointed Trustees. It was suggested that this requirement should be for attending in person, but that there should be allowance made in the new Administrative Regulations regarding the use of telephone or video conferencing, so that people who were unable to attend in person had a means of participating.

(Mr A G L Duncan left the meeting during the following discussion)

Other Trustees commented that whilst they accepted advice that changes had to be made to the status quo, they had difficulty with both proposals. Concern was expressed that any new composition of the Trust could result in a shift in the policy of the carefully structured support for the arts and leisure in Shetland, and could see the financial packages for supporting care in the community dismantled, and this would have a massive impact on the community. The significant advice that the Trust received from Council officers to help it operate was referred to, and it was questioned if this would continue should changes be made to the constitution. Comparisons were made with the Financial Services Regulator and its dealings regarding the Royal Bank of Scotland, where it had decided that nothing could be done regarding the loss of taxpayers' money, and it was suggested that it was a disproportionate response for the Trust to be threatened with court action due to the period of time its Trustees had taken to make a final decision on its future. A Trustee pointed out that the costs involved in holding a referendum to ascertain the views of the Shetland public would not have been excessive, and went on to highlight how the operation of the Trust, and the enormous benefits it had provided to the community of Shetland since the 1970s, could be destroyed by any decision to amend the constitution today. Some Trustees commented that they had difficulty accepting the conflict of interests issue that was behind the changes to the composition of the Trust, pointing out that the few complaints that had been made against Trustees had not been upheld.

In response to a query, the Chair confirmed that the Chief Executive of OSCR had been invited to visit Shetland to meet with Trustees, and he had agreed to come in January provided a suitable date could be found.

It was pointed out by a Trustee that there would be a requirement that people selected for the Trust would then be approved by the Trust. It was also pointed out that there were no guarantees of continuity, as the Trust would lose a number of senior Councillors who were retiring at the end of this term. There was also no guarantee that existing Councillors who may be re-elected would be appointed to the Trust.

Trustees expressed concern that both the motion and amendment would prevent a Councillor Trustee from holding the post of Chair or Chair and Vice Chair, and it was suggested that it should be left to any new Trust to choose its Chair.

The General Manager advised that OSCR had indicated a preference for an independent Chair, but it would be up to Trustees to put this proposal forward.

After hearing the concerns expressed, and that it was not a legal requirement to appoint a non-Councillor Trustee as Chair, the movers of the motion and the amendment, with the consent of their seconders, agreed to amend their motions and amendment, as below:

- Dr J W G Wills advised that he would remove paragraph five of his amendment.
- Mr W H Manson advised that paragraph 5.1.1(e) of his motion would be amended to read "the Chair and Vice Chair should be elected by the Trustees for one term, and may stand for a second term".

Mr A T J Cooper and Mr G Robinson gave notice of further amendment.

After summing up, Trustees confirmed their earlier decision to vote by roll call for the remainder of the meeting. Voting accordingly took place by roll call and the result was as follows:

Motion (Mr W H Manson)	Amendment (Dr J W G Wills)	Abstention
Mr W H Manson	Mr G Robinson	Mr A J Cluness
Mr R C Nickerson	Dr J W G Wills	
Ms V Nicolson	Mr L Angus	
Mr F A Robertson	Mr A T Doull	
Ms L F Baisley	Mrs F B Grains	
Mr J Budge	Mr R S Henderson	
Mr A T J Cooper		
Mrs E L Fullerton		
Mr J H Henry		
9	6	1

Speaking in support of her amendment, Mrs E L Fullerton pointed out that it was an attempt to reach a compromise between the motion and the earlier amendment, so that there could be both elected and selected representatives on the Trust.

Mrs E L Fullerton accordingly moved, as an amendment, that the Trust agree that:

- Four Trustees are directly elected by the registered voters of the Scottish Parliamentary Constituency of the Shetland Islands
- Four Trustees are selected following recommendation of a selection panel for final approval by the Trustees
- Shetland Islands Council nominates seven trustees from their membership
- The selection panel consists of an independent chair and the two non-Councillor Trustees, if they are willing to carry out this task
- The terms of office of all Trustees shall not be more than five years between elections, nominations or co-options, with the exception that for the first direct elections only, the elected Trustees shall serve two and a half years only. Thereafter directly elected Trustees shall serve for five years
- The term of office of a Trustee should normally be from one Council election to the next for Councillor Trustees and, for the other Trustees, from mid-point to mid-point of the Councillor Trustee's term – for the first appointments, half should serve for 2½ years and have for 6½ years, both of which will count as one term. This will establish rotation and provide for some continuity so that at no point could the entire body of Trustees need to be replaced
- No Trustee should hold office for more than two terms without a break of at least two years
- A Trustee shall not serve more than two consecutive terms of office but shall be eligible to serve again after a break of two years
- In notices of elections and on the ballot paper for the four directly elected Trustees, the Trust shall print a description of the qualities, skills and experience considered desirable in a Trustee
- The quorum shall be six, with a minimum of three directly elected Trustees
- There should be an Annual General Meeting, published as such and open to the public
- There should be a requirement for Trustees to attend a minimum of 50% of meetings

- The selection of Trustees is carried out by a selection panel consisting of an independent chair with a proven track record in a relevant field, and the two non-Councillor Trustees
- The General Manager is authorised to engage a specialist firm to manage the selection process up to final interview stage
- The General Manager is authorised to approach a suitably qualified professional from outwith Shetland with a proven track record in a relevant field to chair the selection panel
- New Trustees should be in place as soon as possible
- The Chairman is authorised to agree such minor changes to the timetable with OSCR on behalf of Trustees subject to reporting thereon to the Trustees at the earliest practicable opportunity
- The Trust delegates to the General manager and Legal Adviser the compilation of a detailed draft amended to the Trust Deed, appropriately phrased so as to give precise, legally binding effect to the above proposals

Dr J W G Wills seconded.

The Chairman advised that the Trust would only have access to the edited electoral roll of the Shetland Islands Constituency in the event of elections taking place, and this meant that around 20% of the electorate would not be included. Therefore the Trust would have to advertise for those included on the edited electoral roll only to come forward to participate in an election.

After summing up, voting took place by roll call and the result was as follows:

Motion (Mr W H Manson)	Amendment (Mrs E L Fullerton)	Abstention
Mr W H Manson	Mr G Robinson	Mr L Angus
Mr R C Nickerson	Dr J W G Wills	Mr A J Cluness
Ms V Nicolson	Mr J Budge	
Mr F A Robertson	Mr A T Doull	
Ms L F Baisley	Mrs E L Fullerton	
Mr A T J Cooper	Mrs F B Grains	
Mr J H Henry	Mr R S Henderson	
7	7	2

The Chairman used his casting vote in favour of the motion.

Mr R C Nickerson pointed out that there was already a method in place to represent the community through elected Trustees, and that the law did not prevent a linked body from providing some or all trustees. He did not agree with OSCR's assessment that there was an inherent risk of conflict of interests, and pointed out that there were policies in place to deal with this although it had not happened on a regular basis. He

went on to say that it had not been demonstrated that 28-30 trustees was an unmanageable number. His proposal could address issues quite quickly without the need for elections or procedural consultations, and key agencies in Shetland could be asked to put forward nominations for additional Trustees. This would be a way of engaging with the main service providers and charities in the islands.

Mr R C Nickerson accordingly moved, as an amendment, that Trustees agree that:

- The number of Trustees should be as per the existing composition of 22 Trustees ex officio from Shetland Islands Council and the two independent Trustees, plus a further six Trustees.
 - The appointed Trustees should be selected, following recommendation of a selection panel for final approval by the Trustees
 - The quorum should be six, with a minimum of three appointed Trustees
 - The Chair and Vice Chair should be appointed trustees elected by the Trustees for one term, and may stand for a second term
 - The term of office of a Trustee should normally be for Councillor Trustees, the term of office from one Council election to the next and for appointed Trustees, from mid-point to mid-point of the Councillor Trustees' term – for the first appointments have should serve for 2½ years and half for 6½ years, both of which will count as one term. This will establish rotation and provide for some continuity so that at no point could the entire body of Trustees need to be replaced
 - No Trustee and no appointed Trustee should hold office for more than two terms without a break of at least two years
 - There should be an Annual General Meeting, published as such and open to the public
 - There should be a requirement for Trustees to attend a minimum of 50% of meetings
 - The General Manager should be authorised, in consultation with the Trust's Legal Advisers, the Chair and Vice Chair of the Trust, to submit to OSCR in advance of 22 December 2011 a timetable reflecting the changes decided by the Trustees and, if necessary, agree its terms with OSCR
 - The Trust's legal advisers be instructed to prepare the necessary procedure in consultation with the General Manager and advise OSCR of the decision
-
- The selection referred to above be carried out by a selection panel consisting of an independent chair with a proven track record in a

relevant field, and two trustees selected by the Trustees. At least one of the Trustees should be a non-Councillor Trustee

- The General Manager be authorised to engage a specialist firm to manage the selection process up to final interview stage
- The General Manager be authorised to approach a suitably qualified professional from outwith Shetland with a proven track record in a relevant field, to chair the selection panel
- New Trustees should be in post as soon as possible
- The Chairman should be authorised to agree such minor changes to the timetable with OSCR on behalf of the Trustees subject to reporting thereon to the Trustees at the earliest practicable opportunity

Dr J W G Wills seconded.

Mr S Mackintosh advised that OSCR required the Trust to make changes to its constitution. If all that was being proposed was for the Trust to co-opt a further six Trustees, it would not be a change to the constitution unless it was planned to build this into the constitution.

Mr R C Nickerson advised that he was willing to change his motion, with the consent of his seconder, so that it would constitute a change to the Trust's constitution.

After summing up, voting took place by roll call and the result was as follows:

Motion (Mr W H Manson)	Amendment (Mr R C Nickerson)	Abstention
Mr W H Manson	Mr R C Nickerson	Mr G Robinson
Ms V Nicolson	Dr J W G Wills	Mr A J Cluness
Mr F A Robertson	Mr L Angus	
Ms L F Baisley	Mr A T Doull	
Mr J Budge	Mrs F B Grains	
Mr A T J Cooper	Mr R S Henderson	
Mrs E L Fullerton		
Mr J H Henry		
8	6	2

Mr A T J Cooper said that he believed that the Trust had served the community well, and that Trustees had always acted in the best interests of the Trust. Whilst he accepted that Trustees had to make a decision on the matter, he did have concerns that the motion would pass control of the Trust from the people's representatives. He felt that there was a need to consider whether the Council actually needed seven representatives on the Trust, citing Lerwick Port Authority as a successful body that ran with three Council representatives on its Board. Whilst he was willing to trial the new constitution throughout the cycle of the new Council that would be elected in 2012, he felt that there should

be a review of the constitution before the end of the period of office of that Council.

He accordingly moved, as an amendment, that the recommendations 5.1.1(a) to (i) in the report be approved, but with the inclusion of an additional recommendation at 5.1.1(j) that there shall be a review of the composition of the Trustee body prior to the 2017 Council elections.

Mr G Robinson seconded.

(Dr J W G Wills and Mr G Robinson left the meeting during the following discussion)

In response to concerns regarding whether it would be in order for the existing Trust body to place a condition such as this on a new body which should have a right to determine its own future, Mr S Mackintosh advised that such a requirement for a review could be written into a revised Trust Deed. If it were left as an item in the minutes of the meeting, it would not be a requirement to do so.

After some further discussion, and with the consent of his seconder, Mr W H Manson agreed to incorporate this requirement for a review to be written into a revised Trust Deed into his motion.

Mr W H Manson's motion that the recommendations in the report be approved, as amended at paragraph 5.1.1(e) and with the inclusion of 5.1.1(j) as above, was declared the finding of the meeting.

The meeting concluded at 12.25pm.

CHAIRMAN



General Manager: Ann Black
Financial Controller: Jeff Goddard

David Robb Esq
Chief Executive
The Office of the Scottish Charity Regulator
2nd Floor
Quadrant House
9 Riverside Drive
Dundee
DD1 4NY

22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Telephone: 01595 744994
Fax: 01595 744999
mail@shetlandcharitabletrust.co.uk
www.shetlandcharitabletrust.co.uk

If calling please ask for:
Dr Ann Black
Direct Dial: 01595 744990

Our Ref: SM/TA38
Your Ref:

Date: 20 December 2011

Dear Mr Robb

Shetland Charitable Trust (Charity Number SC027025)

I refer to your letter of 24th November 2011 and to my response of 8th December giving the initial undertaking required by you.

With reference to action 3 required in your letter, I can now advise you that at a meeting of the Shetland Charitable Trust held on Thursday 15th December 2011, the Trust approved recommendations 5.1 and 5.2 contained within the paper "Future Governance Arrangements of Shetland Charitable Trust" of which you already have a copy with the Agenda for that meeting.

This approval of the recommendations is subject to two amendments:-

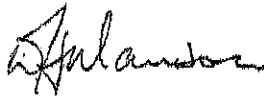
- 1 Paragraph 5.1.1(e) was not approved, the Trustees taking the view that the appointment of Chair and Vice Chair should be one for the Trustees from time to time with a view to selecting the best qualified person for these posts; and
- 2 Paragraph 5.1.1(i) was amended by making this a requirement to attend a minimum of 50% of meetings in person at the place where the meeting is being held. By way of explanation, this amendment was made in the light of a likely move to allow video conferencing or telephone attendance at meetings in future.

The terms of those two decisions by the Trustees set out the steps that will be taken to implement the required changes to the charity's constitution.

As requested by you, the steps necessary to implement these changes are set out in the attached timetable.

Elements of that timetable are necessarily provisional because of the requirements of law and regulations as to the timescale for consideration of reorganisation schemes, and decision making, by OSCR. If you are able to give any indication of more precise timescales then the Trust will be able to introduce firmer dates into the timetable.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'B. Manson', written in a cursive style.

Bill Manson
Chairman

Enc.

Timeline for Governance Changes

Event	Projected Delivery date	Action by	Date Delivered
Changes approved by Trustees	15 December 2011	Trustees	
Lodge timetable with OSCR	22 December 2011	Chair/General Manager	
Timetable approved	13 January 2012	OSCR/Chair/General Manager	
Draft application for re-organisation scheme and draft newspaper notice	13 January 2012	Turcan Connell	
Finalise and lodge application including newspaper notice with OSCR	27 January 2012	General Manager / Turcan Connell	
Acknowledgement of Application	10 February 2012	OSCR	
Draft notice for OSCR website	Unknown 24 February 2012	OSCR	
Publish notice on OSCR website	2 March 2012	OSCR	
Publish notice in newspaper and on SCT's website	16 March 2012 ⁱ	GM	
End of Period of Notice (at least 28 days at most 42 days);	13 April 2012 ⁱⁱ		
End of period of objection (14 days)	27 April 2012		
Invite new Council/for trustees to accept office under the existing Trust Deed, with existing two ex officio Trustees	May 2012	General Manager	
Decision (up to 6 months thereafter)	27th October, 2012 ⁱⁱⁱ	OSCR	
Copy of decision to SCT	1 November 2012	OSCR	
Adopt revised Trust Deed / Deed of Conveyance	15 November 2012	Trustees	

Selection Process to run concurrently with OSCR process			
Provisionally engage a suitable specialist firm to administer the initial phase of the selection process to start work immediately after OSCR decision <ul style="list-style-type: none"> • Draw up requirements • Advertise for expressions of interest • Evaluate responses • 	2nd March – 3rd May 2012	General Manager	
Appoint firm In consultation with firm above: <ul style="list-style-type: none"> • Compile person specification and role description, based on the Trust's Objects and key objectives • 	30th July 2012	General Manager / Consultants	
Appoint Selection committee <ul style="list-style-type: none"> • Approach suitable candidate for chair • Agree two trustees to sit on the panel 	30th August 2012 (dependent on timing of receipt of OSCR's approval of Reorganisation Scheme)	General Manager / Consultant	
<ul style="list-style-type: none"> • Advertise for suitable candidates, as widely as possible in the local media • Shortlist applicants Conduct interviews	1 November 2012 (dependent on timing of receipt of OSCR's approval of Reorganisation Scheme)	Selection Committee	
Present list of candidates to Trustees for approval	13th December 2012	General Manager	

Note – some of these actions can run concurrently

ⁱ Newspaper notice must be published within the first 14 days of the publication period.

ⁱⁱ This date assumes that OSCR will require the maximum period of 42 days.

ⁱⁱⁱ OSCR to confirm likely timetable. OSCR must make a decision within 6 months of the latest date for receipt of objections and must consider all notices of objections.

RECEIVED

12 JAN 2012

The Trustees of Shetland Charitable Trust
c/o Mr Bill Manson
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Our ref: MI/INQ/08-1383

11 January 2012

Dear Charity Trustees

Shetland Charitable Trust – SC027025

Thank you for your letter of 20 December 2011 providing further details of the proposed changes to the governance arrangements of the Trust.

We are satisfied that both the actions to be taken and the timeline involved meet the undertakings set out in my letter of 24 November 2011, and look forward to engaging with the Trust in support of this process.

We note that the Trust intends to effect the governance changes via the charity reorganisation route. We recognise that the Trust is not obliged to use this mechanism but wishes to do so to maximise transparency and minimise future criticism, and we commend the Trust for this course of action which, in the circumstances, is entirely appropriate. In the interests of transparency, if there is anything we can assist with to help explain key aspects the reorganisation processes to your beneficiaries, please let us know.

In the timetable you have provided, we note that the time periods allotted for OSCR to perform its role in the reorganisation process are based on the maximum timescales provided in the legislation. For planning purposes this is a prudent assumption. Our experience with this type of application, however, suggests there is probably scope to shorten these in a number of respects. We would be happy to discuss this or any other aspect of the application process, and we would encourage you and/or your legal advisers to make contact with the case officer who will be dealing with the Trust's application:

(Kenny Mathers; email kenny.mathers@oscr.org.uk).



INVESTOR IN PEOPLE

In line with your timetable, we now look forward to receiving the Trust's application for charity reorganisation later this month which will then be considered in line with the statutory process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Robb', with a stylized flourish at the end.

David Robb
Chief Executive



Application for Approval of a Charity Reorganisation Scheme

PLEASE USE BLACK PEN. Write only in the empty white boxes.

1. Charity Legal Name (as entered in the Scottish Charity Register)

Shetland Charitable Trust

Name known as

Scottish Charity Number SC027025

If also registered outwith Scotland please insert the charity's registration details below.

Registration Number

-

Country of registration

-

2. Applicant's Contact Details (as in the Scottish Charity Register)

Please record the details of the individual that is seeking reorganisation on behalf of the charity. This need not be the charity's principal contact

Title	Forename	Surname	Suffix
Mr	Simon	Mackintosh	

Preferred Salutation	Simon	Designation	
----------------------	-------	-------------	--

Address Line 1	Messrs Turcan Connell
Address Line 2	Princes Exchange
Address Line 3	1 Earl Grey Street
Address Line 4	Edinburgh
Address Line 5	

Telephone	0131 228 8111	Postcode	EH3 9EE
		Fax	0131 228 8118

E-Mail	simon.mackintosh@turcanconnell.com
--------	------------------------------------

3. Authority of the Applicant

If this application is not being made by a formally recognised charity trustee, please provide details below. Please refer to section 3 of the Charity Reorganisation Guidance, for further information.

The applicant is the solicitor authorised to act on behalf of the Charity in this matter.

4. Principal Contact Details (if relevant)

Please indicate if the individual named at (2) is to become the Principal Contact for the charity. If so, please state when this change took effect in order for us to update the Scottish Charity Register accordingly.

No.

5. Nature of Proposed Reorganisation Scheme

Please provide details of the change(s) which you wish to make to the charity.

The Charity wishes to make changes to its governance arrangements including (but not restricted to):-

the residency of Trustees, number of Trustees; make up of the body of Trustees; maximum length of service of Trustees before a break is required; selection of Appointed Trustees; quorum provisions; provisions regarding a Chair and Vice Chair; attendance by Trustees at Trustee Meetings and the requirement to hold an Annual General Meeting.

6. Rationale for Proposed Reorganisation Scheme

Please explain why you wish to make this change(s) to the charity.

The Charity's existing Constitution has not been amended since it was executed in September 1997, prior to the enactment of the Charities and Trustee Investment (Scotland) Act 2005.

The Trustees wish to make the changes to the Charity in order to deal with issues surrounding the management of conflicts of interests in transactions between the Charity and Shetlands Islands Council, independence of action and generally to update the governance provisions and bring them more in line with current good practice to ensure that the Charity is "fit for purpose".

It is a concern that some of the beneficiary group may have lost confidence in some of the actions of the Trustees.

The Trustees have agreed to submit this application in accordance with a series of actions, and a timetable, agreed with OSCR.

7. Reorganisation Condition(s)

Based on the proposed change(s), which of the reorganisation condition(s) does the charity fulfil? Please refer to section 4 of the Charity Reorganisation Guidance for further information.

That a provision of the Charity's Constitution (other than a provision setting out the Charity's purposes) is no longer desirable.

8. Outcome of Proposed Reorganisation Scheme

How will the proposed change(s) result in the specified outcome(s)? Please refer to section 5 of the Charity Reorganisation Guidance for further information.

The changes proposed will mean that where a conflict of interest exists for Councillor Trustees, there will be a sufficient number of Trustees, referred to as Appointed Trustees, to manage such conflicts and to continue the business of the Trust.

The introduction of Appointed Trustees will help to ensure independence of the Charity from the Council.

The introduction of Appointed Trustees is intended to ensure that the body of Trustees can more readily meet the skills requirements for the governance of the Charity by allowing appointments to be made to fill any identified skills gaps.

The additional governance arrangements are in line with modern thinking and practice and as such will lead to greater transparency.

Finally, and cumulatively, the proposed changes are intended to result in an increase in confidence in the Charity and its operations amongst the beneficiary group, and to resolve concerns about governance expressed by OSCR.

9. Annual Income

Please state the annual income of the charity in the last financial year. A copy of the most recent set of accounts should also be provided.

£10,656,000

If the annual income of the charity was over £250,000 a notice will need to be published in a newspaper. Please see section 6 of the Charity Reorganisation Guidance for further information. A draft copy of the charity's advert should be provided with this Application Form.

10. Statement of assets and liabilities

Please supply details of the assets and liabilities currently held by the charity, and details of the assets which are expected to remain after satisfaction of any liabilities.

This section need only be completed if the proposed reorganisation scheme involves the transfer of the property of the charity to another charity or if you are unable to supply a copy of the charity's most recent statement of account.

N/A

Data Protection Statement

OSCR is a Non-Ministerial Department of the Scottish Administration. Our data processing activities have been notified to the UK Information Commissioner, and appear on the Public Register with the registration number Z9409201.

Information on this form is processed for the following purposes:

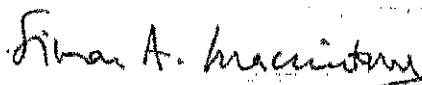
- To regulate charities in Scotland
- To inform investigations into allegations of misconduct, mismanagement or misrepresentation
- To develop a regime of proactive monitoring
- To encourage and facilitate compliance and best practice within charities
- To inform research into the charity sector in Scotland

The information on this form may be shared with Her Majesty's Revenue and Customs and other regulatory bodies.

Certification

I certify that the information given in the attached form is correct to the best of our knowledge.

Signed on behalf of the charity



Print name

Simon Aeneas Mackintosh

Designation

Solicitor and Agent acting for the Charity

Date

2 7 0 1 2 0 1 2

Documentation Checklist

- | | |
|---|---|
| Have you completed all the sections of the Application Form? | X |
| Have you included a copy of the charity's current constitution? | X |
| Have you included a draft of the proposed new constitution? | X |
| Have you included a copy of the most recent statement of account? | X |
| If applicable, have you included a copy of the draft advert? | X |
| Have you signed and dated the Form? | X |

Please return the completed form and documentation to:

OSCR
2nd Floor
Quadrant House
9 Riverside Drive
Dundee
DD1 4NY

KJP 30/08/2012

Deed of Trust

by

Malcolm John Bell and others
as Trustees of Shetland Charitable Trust
(Scottish Registered Charity SC027025)

2012

TURCAN CONNELL

LEGAL • WEALTH MANAGEMENT • TAX

PRINCES EXCHANGE, 1 EARL GREY STREET, EDINBURGH, EH3 9EE

Telephone 0131 228 8111 Fax 0131 228 8118

DX 723300 Edinburgh 43 LP 1 Edinburgh 14

E-mail enquiries@turcanconnell.com www.turcanconnell.com

KJP 30/08/2012

Deed of Trust

by

Malcolm John Bell and Others
as Trustees of Shetland Charitable
Trust
(Scottish Registered Charity SC027025)

2012

TURCAN CONNELL
LEGAL • WEALTH MANAGEMENT • TAX

PRINCES EXCHANGE, 1 EARL GREY STREET, EDINBURGH, EH3 9EE
Telephone 0131 228 8111 Fax 0131 228 8118
DX 723300 Edinburgh 43 LP 1 Edinburgh 14
E-mail enquiries@turcanconnell.com www.turcanconnell.com

KJP 30/08/2012

WE, MALCOLM JOHN BELL, residing at Edgcott, 34 St Olaf Street, Lerwick ZE1 0BX, MARK ROBERT BURGESS, residing at Mayburn Cottage, Ladysmith Road, Scalloway ZE1 0XD, PETER JAMES CAMPBELL, residing at 8 Sandyloch Drive, Lerwick ZE1 0SR, GARY KENNETH CLEAVER, residing at 1 Hillsgarth, Baltasound, Unst, ZE2 9DY, ALASTAIR THOMAS JAMES COOPER, residing at Linga, Mossbank ZE2 9RB, STEVEN WILLIAM COUTTS, residing at Glenlea, Weisdale ZE2 9LQ, ALLISON GEORGE LESLIE DUNCAN, residing at 1 Hillock, Dunrossness ZE2 9JR, ROBERT SIMPSON HENDERSON, residing at Maraberg, Cullivoe, Yell ZE2 9DD, ANDREA ISOBEL MANSON, residing at Greystones, Brae, ZE2 9QJ, WILLIAM ANDREW RATTER, residing at Gaets A Voe, Ollaberry, ZE2 9RX, FRANK ANDREW ROBERTSON, residing at Columbus, Selivoe, Bridge of Walls ZE2 9NR, GARY ROBINSON, residing at 17 Burnside, Lerwick ZE1 0QH, DAVID ALEXANDER SANDISON, residing at Bonhoga, 7 Castle Street, Scalloway, ZE1 0TP, MALCOLM GEORGE SMITH, residing at Breasclete, Sandwick, ZE2 9HH, THEODORE GEORGE CAMERON SMITH, residing at Stenaquoy, Wormadale, Whitenesss, ZE2 9LJ, MICHAEL WILLIAM STOUT, residing at Kirkabister, Bressay, ZE2 9ER, AMANDA JOAN WESTLAKE, residing at Maya Datcha, 41 Burgh Road, Lerwick, ZE1 0LA, JONATHAN WITNEY GARRIOCK WILLS, residing at Sundside, Bressay, ZE2 9ER, ALLAN SINCLAIR WISHART, residing at Seafield Lodge, Lower Sound, Lerwick ZE1 0RN and VAILA WISHART, Eden Cottage, Setter, Burra, ZE2 9LB, (the addresses of the foregoing parties all being in Shetland), being respectively some of the members of the Shetland Islands Council, incorporated under the Local Government etc (Scotland) Act 1994, for the electoral divisions of variously Lerwick South, Lerwick North, Shetland South, Shetland North, Shetland Central, Shetland West and North Isles and VALERIE MARGARET LILLIAS NICOLSON, residing at Midgarth, Twageos Road, Lerwick, ZE1 0BB and ROBERT WALTER HUNTER, residing at Millburn, Bridge End, Burra, ZE2 9LD both Shetland, being respectively Head Teacher of the

Anderson High School, Lerwick and Lord Lieutenant of Shetland, and as such members of Shetland Islands Council, such Head Teacher and such Lord Lieutenant, the present Trustees accepting and acting under Deed of Trust by Shetland Islands Council dated Tenth and registered in the Books of Council and Session on Twenty fourth, both days of September Nineteen hundred and ninety seven (hereinafter referred to as the "1997 Deed of Trust" and the Trust constituted by the 1997 Deed of Trust then being known as the Shetland Islands Council Charitable Trust, now being known as the Shetland Charitable Trust (Scottish Registered Charity SC027025) being hereinafter referred to as "the Trust") HEREBY DECLARE that in implementation of a Scheme under Section 39 of the Charities and Trustee Investment (Scotland) Act 2005 as approved by the Office of the Scottish Charity Regulator on 3rd July 2012 the assets of the Trust comprising (i) all and any property heritable or moveable real or personal made over to us, as Trustees foresaid for the purposes of the Trust created by the 1997 Deed of Trust (ii) any other property of any description which may be made over to the Trustees as aftermentioned for the purposes of the Trust and (iii) the investments and property representing the property within (i) and (ii) from time to time (all hereinafter referred to as "the Trust Fund") are held on and from the Effective Date as defined in the Schedule of Governance Arrangements annexed and executed as relative hereto (hereinafter referred to as the "Schedule of Governance Arrangements") by the Trustees as defined in the Schedule of Governance Arrangements in trust in accordance with the terms and provisions of this Deed of Trust, the Schedule of Powers annexed and executed as relative hereto and the Schedule of Governance Arrangements (hereinafter referred to as the "2012 Deed of Trust") for the purposes hereinafter written namely:-

Payment of Expenses

(FIRST) The Trustees shall pay all expenses which may be incurred by them or under their authority in connection with the trust hereby created as the same shall be instructed by an

account under their hands or by the discharged accounts hereof paid by their order without any other voucher.

Objects of Trust

(SECOND) The Trustees shall hold the Trust Fund at their sole discretion to make grants or loans with or without interest out of the income or capital of the Trust Fund for any purposes which in the opinion of the Trustees are solely in the interests of the area administered by the local or other governmental authority for the time being of the Shetland Islands or of the inhabitants of the said area (hereinafter referred to as "the community") and provided that any such grant or loan is for charitable purposes: Declaring that without prejudice to the generality of the foregoing such grants or loans may be made towards all or any of the following purposes:-

- (a) In carrying out developments on or in connection with the said area calculated to promote the welfare of the community;
- (b) In encouraging and assisting the holding of meetings of members of the community for purposes of recreation, instruction or education;
- (c) In improving, maintaining and encouraging the improvement and maintenance of means of communication in the said area, and in particular by (i) building or improving or maintaining ports, harbours, piers, roads, bridges or aerodromes; (ii) hiring or chartering or purchasing and operating any boat, ship, vessel, aeroplane or any kind of land, sea or air vehicle; (iii) laying or maintaining telephone and telegraph wires or cables, whether on land or under the sea; and (iv) installing and operating stations for wireless and television;
- (d) In promoting directly or indirectly the development of any industry or industries among the community for its benefit in any manner in which the Trustees consider desirable;
- (e) In promoting directly or indirectly the development of agriculture among the community for its benefit;
- (f) In encouraging the education of the community by such means as the Trustees may consider desirable;

- (g) In improving the medical service to the community by such means as the Trustees may consider desirable;
- (h) In the preservation and improvement of the said area in the manner which in the opinion of the Trustees is most conducive to promoting the said area for the benefit of the community and of the Nation;
- (i) In the founding, endowing and equipping of schools, colleges, institutions, laboratories, experimental stations, libraries, sports centres, welfare centres or technical education centres for the community;
- (j) In encouraging the study and practice of any useful branch of human knowledge by the provision of buildings, equipment or otherwise as the Trustees may consider desirable;
- (k) In the doing of all such other things as are incidental to any of the foregoing purposes:
Declaring further that no act of the Trustees shall be deemed to be ultra vires by reason only that individuals or bodies who do not form part of the community may or will benefit indirectly by such act.

Surplus Income

(THIRD) Any income of the Trust Fund not expended in any year may at the discretion of the Trustees be accumulated as the Trustees may determine but with power to resort thereto in future years.

Supplementary Deed

(FOURTH) The Trustees may from time to time by Deed or Deeds revocable or irrevocable supplement or alter or amend the provisions of the 2012 Deed of Trust to the extent (and to such extent only) as may in the opinion of the Trustees be requisite for the purpose of conferring on the Trustees such further or other powers as may be necessary for the better administration and more effectual execution of the charitable trust hereby created PROVIDED always that ~~nothing in this Clause shall authorise or be deemed to authorise any departure from or~~ modification of the objects declared in Clause (SECOND) hereof or the application of any part

of the Trust Fund or the income thereof for any purpose which is not a purpose charitable in law.

Trustees' Powers

The Trustees shall have the fullest powers of administration and management of the Trust Fund as if they were absolute owners thereof and beneficially entitled thereto, and in particular and without prejudice to these general powers the Trustees shall have the powers specified in the Schedule of Powers annexed and executed as relative hereto, such powers to be exercised or not exercised as the Trustees may decide in their sole and absolute discretion at any time and from time to time provided always that no power vested in the Trustees hereunder shall be exercised in such manner that the Trust Fund or the income thereof or any part thereof shall be held, paid or applied other than for purposes charitable in law.

Apportionments

All interest, dividends, rents and other periodical payments of income received by the Trustees after the date of these presents shall be regarded as wholly income of the Trust Fund and that without reference to the periods in respect of which the same are earned or paid and that notwithstanding the provisions of any Statutes dealing with apportionments and similarly on the sale or realisation of any part of the Trust Fund by the Trustees or on the purchase or acquisition by them of any other property heritable or moveable, real or personal, the whole of the proceeds of sale or realisation shall be treated as capital and all the interest, dividends, rents and others received subsequent to such purchase or acquisition shall be treated as income, there being no apportionment of such proceeds or interest, dividends, rents and others as between capital and income.

Persons transacting with Trustees

Purchasers, tenants, debtors and others transacting with the Trustees shall be nowise concerned with the application of the sums to be paid by them to the Trustees or with any of the conditions and provisions contained in these presents nor shall they be entitled to notice or to enquire

whether these sums be applied or not towards the uses and purposes of the trust but they shall be sufficiently exonerated and discharged by the conveyances, discharges or other writings to be granted by the Trustees or by any factor, attorney, solicitor, accountant, stockbroker or agent duly authorised by them.

Finality of discretionary powers

Whenever it shall be necessary in connection with the affairs of the trust hereby created for the Trustees to exercise any discretionary power whatever decision or resolution they may act upon shall be final and binding on all parties interested either directly or indirectly and the actings of the Trustees shall not be liable to be called in question upon any ground whatever except fraud.

Trustees' Immunity

The Trustees shall not be in any way liable for any loss suffered as a result of the exercise of any of the powers given to them by these presents or for any fall in value of or for the validity and sufficiency of investments, securities and others held by them or on their account whether made or retained by the Trustees or for omissions or for neglect in their management or for one another or for factors, attorneys, solicitors, accountants, stockbrokers, agents or others appointed or employed by them except that they were habit and repute responsible at the time of their appointment or employment but each for his or her own actual personal intrusions only.

Irrevocability

And we declare these presents to be irrevocable: IN WITNESS WHEREOF

This is the SCHEDULE OF POWERS
referred to in the 2012 DEED of TRUST
dated _____

To hold original assets or to sell

1. To hold any assets heritable or moveable, real or personal, which are transferred by the 2012 Deed of Trust or which may subsequently be made over to the Trustees or to sell the same and reinvest the proceeds.

To invest

2. To invest the Trust Fund in the purchase or on the security of such heritable or real property including rights under Leases, corporeal or incorporeal moveables, investments, stocks, shares (including ordinary stocks and shares and including partly-paid shares), deposits and securities, real or personal (including bonds or securities payable to bearer) whether within the United Kingdom or abroad as the Trustees shall in their sole discretion think fit, it being our intention that the Trustees shall not be restricted to the class of investments authorised by law to Trustees but shall have as full and ample powers of investment as if they themselves were absolute owners of the Trust Fund and beneficially entitled thereto.

To enter into Conservation Agreements

3. To enter into Conservation Agreements for the better preservation of the Trust Fund or any part thereof.

To create Advisory Councils or Committees

4. To create, should the Trustees so desire, an Advisory Council or Councils or Committee or Committees to act along with them and/or advise them on any or all of the objects of the Trust provided always that the creation, constitution, membership and continuance

of any such Advisory Council or Committee or the individual membership thereof shall be entirely at the discretion of the Trustees.

To use nominees

5. To have registered in the names of a nominee all or any part of parts of the Trust Fund and to pay reasonable fees to such nominee.

To distinguish between capital and income

6. To decide what money represents capital and what represents income of the Trust Fund and the proportion in which the expenses of the Trust are to be charged against capital and income respectively, notwithstanding any rule of law or practice to the contrary, and all similar questions which may arise in relation to the trust.

To repair and improve

7. To expend both capital and income of the Trust Fund as shall appear to the Trustees necessary or desirable to be expended from time to time in insuring, putting and keeping in good repair and replacing any heritable or real property (including without prejudice to the generality buildings, fences, drains, ditches, roads, plantations and others) corporal moveables and other effects forming part of the Trust Fund and in erecting any additional buildings or making any additional fences, drains, ditches, roads or plantations or executing any other works of any kind on such heritable or real property which they may consider necessary or desirable and in keeping up the offices, gardens and other grounds of and the game and fishings on any such heritable or real property.

To cut woods and to plant

8. To thin or cut down woods or plantations forming part of the Trust Fund and to sell or dispose thereof as the Trustees shall judge necessary or desirable and to plant timber.

To pay taxes, etc

9. To expend both capital and income of the Trust Fund -

- (a) for payment of all duties, rates, taxes, parochial burdens and other charges affecting or payable out of any property forming part of the Trust Fund, and
- (b) for any purposes which the Trustees shall judge to be necessary or desirable for the administration, management, cultivation, letting, working, maintenance or improving of the Trust Fund or of any part thereof.

To deal with minerals

- 10. To deal with minerals and mineral substances forming part of the Trust Fund either by themselves or in association with another or others and that in such way or ways as the Trustees may think fit provided always that this power is exercised in furtherance only of the terms and purposes of this Trust and that no part of the income or capital of the Trust Fund shall be applied otherwise than for purposes charitable in law.

To grant allowances to tenants

- 11. To grant to tenants such allowances as the Trustees shall think fit in respect of expenditure made or undertaken by such tenants for improvements or repairs on their houses, farms, farm buildings or other possessions or on any other account which the Trustees may think proper.

To carry on businesses

- 12. To begin or carry on or join or concur in the beginning or carrying on of any business or businesses where such business or businesses would be in furtherance of the terms and purposes of this Trust provided always that no part of the capital or income of the Trust Fund shall be applied in the exercise of this power otherwise than for purposes charitable in law.

To promote companies

- 13. To promote or concur in the incorporation, flotation or reconstruction or amalgamation of any company where such company would be in furtherance of the terms and purposes

of this Trust provided always that no part of the capital or income of the Trust Fund shall be applied in exercise of this power otherwise than for purposes charitable in law.

To grant proxies

14. To grant proxies in favour of one or more of the Trustees or any other person or persons to attend, act and vote for the Trustees at all meetings of any company, corporation, trust or undertaking or in any bankruptcy proceedings in which the Trustees may be interested as shareholders, stockholders, debenture holders, creditors or otherwise or at any class meeting of shareholders, stockholders, debenture holders or creditors of such company, corporation, trust, undertaking or bankruptcy.

To settle claims

15. To settle all disputed claims competent to or against the Trust Fund.

To borrow money

16. To borrow money either on the security of the Trust Fund or without security and pay or apply the monies so raised in any manner in which money forming part of the capital of the Trust Fund may be paid or applied.

To appoint agents, etc

17. To appoint one or more of the Trustees or any other person or persons to be factors, solicitors, accountants, stockbrokers or agents for executing and carrying into effect the powers and purposes of the Trust or any of them with or without cautioners for their intromissions and to allow to such factors, attorneys, solicitors, accountants, stockbrokers or agents for their trouble their usual professional charges or if they are not members of a profession such fees as are proper and reasonable as also to employ such specialist and clerical assistance as may be required for the proper and efficient administration and management of the Trust Fund.

To pay expenses

18. To reimburse the Trustees out of the Trust Fund for all expenses reasonably incurred by them in connection with the administration of the Trust without in any way prejudicing their rights, privileges and immunities as gratuitous trustees including the right to resign.

To Delegate

19. To delegate in any way and to any extent to any person or persons, committee or committees, company or authority whatsoever the exercise of any of the powers conferred on the Trustees herein or by law.

To exercise powers conferred on Trustees by Statute

20. In so far as more ample powers are not given by these presents the Trustees shall have the powers conferred on trustees by the Trusts (Scotland) Acts 1921 and 1961 and by any Acts amending the same relating to trustees in Scotland (which powers shall not be held to be at variance with the terms and purposes of this Trust).
21. To renounce irrevocably in whole or in part at any time and from time to time any power given to the Trustees by this Schedule.

This is the SCHEDULE OF
GOVERNANCE ARRANGEMENTS
referred to in the 2012 DEED of TRUST
dated

1 Definitions:-

In this Schedule of Governance Arrangements:-

“Appointed Trustee” means a trustee appointed or re-appointed by the Trustees under Paragraph 4 and shall include the First Appointed Trustees unless the context requires otherwise;

“Appropriate Officer” means the Chief Executive of Shetland Islands Council, or other officer designated by Shetland Islands Council for the purposes of this Schedule;

“Councillor” means an elected member of Shetland Islands Council;

“Councillor Trustee” means a Councillor appointed or re-appointed under Paragraph 5 and shall include the First Councillor Trustees unless the context requires otherwise;

“Existing Trustees” means the granters of the 2012 Deed of Trust and their successors;

“Effective Date” means such date as shall be determined by the Existing Trustees and shall be not later than 31st March 2013 and in the event of no determination by the Existing Trustees, 31st March 2013;

“First Appointed Trustee” and “First Councillor Trustee” means a trustee appointed as such under Paragraph 9;

“Local Government Election” means an ordinary election of councillors to Shetland Islands Council;

“Schedule” means this Schedule of Governance Arrangements;

“Selection Panel” means such persons appointed by the Trustees under Paragraph 7;

“Shetland Islands Council” means Shetland Islands Council constituted in terms of the Local Government etc (Scotland) Act 1994 and its statutory successors from time to time as such local or other governmental authority representative of the Shetland Islands or the inhabitants of the area;

“Term” means for Appointed Trustees the term of office from the date of appointment until retiral as specified in Paragraph 4(c) and for Councillor Trustees the term of office from the date of appointment until retiral as specified in Paragraph 5(b);

"Trustees" includes Appointed Trustees, First Appointed Trustees, Councillor Trustees and First Councillor Trustees and references to Trustees shall include the Existing Trustees and the Remaining *ex officio* Trustees as defined in sub-paragraph 9(c)(i) unless the context requires otherwise;

2 Trustees

Trustees shall be principally resident in the Shetland Islands and in the event that any Trustee ceases to be so resident such Trustee shall be deemed to have demitted office as a Trustee on the date he ceases to be so resident.

3 Number and Body of Trustees

Subject to the provisions of Paragraph 9 relating to the transition to the new governance arrangements:-

- (a) The Trustees shall normally be fifteen in number and any vacancy shall be promptly filled.
- (b) The body of Trustees shall be made up of seven Councillor Trustees and eight Appointed Trustees.
- (c) Notwithstanding any vacancy in the number of Trustees at all times there shall be deemed to be a full complement of Trustees.
- (d) No Trustee may serve for more than two consecutive Terms and once a Trustee has demitted office there must then be a break of at least two years before any subsequent Term. Any Trustee re-appointed following a break of two years will be deemed not to have served any prior term for the purposes of this Schedule.

4 Appointed Trustees

- (a) The Trustees shall, on the recommendation of the Selection Panel, appoint Appointed Trustees.
- (b) Subject to sub-paragraph (c) below, Appointed Trustees shall serve a Term and shall be eligible for re-appointment for one further Term thereafter.
- (c)
 - (i) One half of the First Appointed Trustees appointed under Paragraph 9(a)(i) shall retire on 30th November, 2014 and the remaining one half shall retire on 31st May 2019.
 - (ii) Appointed Trustees appointed on the retiral of the First Appointed Trustees due to retire on 30th November 2014 shall retire on 31st May 2019.
 - (iii) Appointed Trustees appointed as and from 31st May, 2019 shall retire on the 31st May occurring every fourth year after 31st May, 2019.
- (d) In the event (i) that all vacancies have not been filled, or (ii) of any vacancy occurring by the death, resignation or otherwise of any Appointed Trustee before

the completion of his Term, on the recommendation of the Selection Panel, the Trustees may appoint any person to fill the vacancy and such Appointed Trustee shall retire when the Term of the vacancy being filled would in ordinary course have expired and shall be deemed to have served one Term on such retirement.

- (e) No Councillor may be an Appointed Trustee and in the event that any Appointed Trustee, during his Term is elected as a Councillor, he will demit office as an Appointed Trustee.

5 Councillor Trustees

- (a) Shetland Islands Council may by notice in writing, signed on its behalf by an Appropriate Officer and given to the Trust appoint a Councillor Trustee or Councillor Trustees.
- (b) Councillor Trustees shall retire one calendar month after the date of the Local Government Election next following the date on which they took up office as a Councillor Trustee.
- (c) In the event that a Councillor Trustee, other than a Councillor Trustee retiring as a Councillor on the day on which the poll is held at the Local Government Election next following the day on which he was elected, ceases to be a Councillor whether by death, resignation as a Councillor or otherwise he shall be deemed to have demitted office as a Trustee on such date as he demits office as Councillor.
- (d) In the event (i) that all vacancies have not been filled following either the Effective Date or a Local Government Election, or (ii) of any vacancy occurring in the number of Councillor Trustees whether by death, resignation as a Trustee, demitting office in terms of sub-paragraph (c) above or otherwise of such Councillor Trustee before the completion of his Term, Shetland Islands Council may appoint a Councillor to fill such vacancy and such Councillor Trustee shall retire one calendar month after the date of the Local Government Election next following the date on which he took up office as a Councillor Trustee and shall be deemed to have served one Term on such retirement.

6 Quorum, Chair and Trustees' Meetings

- (a) No business shall be transacted at a meeting of the Trustees unless a quorum is present and any and all such business shall be decided by a majority of the Trustees present and voting thereon. In the event of an equality of votes, the Chair of the Trust, or in his absence the Vice-Chair, or in the absence of both, the person presiding at the meeting shall have the second or casting vote.
- (b) The quorum for a meeting of the Trustees shall be six of whom at least three must be Appointed Trustees.
- (c) There shall be a Chair and Vice Chair of the Trust. The Chair and Vice Chair shall be elected by the Trustees for the remainder of their current Term and shall be eligible for re-election for a further Term thereafter.

- (d) Trustees shall be required to attend in person at least one-half of Trustee meetings in each financial year of the Trust and if they do not such failure to attend may be treated as grounds on which the remaining Trustees may remove such Trustee by a resolution passed by a 75% majority of those attending and voting thereon.

7 Selection Panel

- (a) The Trustees shall establish a Selection Panel to guide the Trustees in relation to the selection of appropriate individuals for appointment as Appointed Trustees.
- (b)
 - (i) The Selection Panel established in relation to the selection of individuals for appointment as the First Appointed Trustees shall comprise an independent Chair appointed by the Trustees but who shall not be a Trustee of the Trust and two existing Trustees at least one of whom must not be a Councillor.
 - (ii) Thereafter, the Selection Panel so established shall comprise an independent Chair appointed by the Trustees but who shall not be a Trustee of the Trust and two Trustees at least one of whom must be an Appointed Trustee.

8 Annual General Meetings

- (a) An Annual General Meeting shall be held in public once in every financial year at such time (within a period of not more than 15 months after the holding of the last Annual General Meeting) and place as may be determined by the Trustees.
- (b) The Chair, or in his absence for any reason the Vice-Chair, or in the absence of both for any reason a Trustee present and chosen by the other Trustees present shall preside as Chair of the Annual General Meeting.
- (c) At least 21 clear days' notice must be given of the Annual General Meeting, such notice being published on the Trust's website and in a local newspaper specifying the time and place of the meeting.
- (d) The purpose of the Annual General Meeting will be to present the Annual Report of the Trustees and such other business as the Trustees may decide.

9 Transition etc

- (a) In advance of the Effective Date:-
 - (i) The Existing Trustees shall appoint the First Appointed Trustees; and
 - (ii) Shetland Islands Council shall appoint the First Councillor Trustees.
- (b) Subject to sub-paragraphs (c) and (d) below, as at the Effective Date:-
 - (i) All Existing Trustees shall demit office;

- (ii) The First Appointed Trustees shall take up office;
 - (iii) The First Councillor Trustees shall take up office; and
 - (iv) All *ex officio* appointments shall cease to operate.
- (c) If, as at the Effective Date, the number of First Appointed Trustees appointed under sub-paragraph (a)(i) above is less than eight then, as and from the Effective Date:-
- (i) the *ex officio* appointments of the Head Teacher of the Anderson High School, Lerwick and the Lord Lieutenant of Shetland ("the Remaining *ex officio* Trustees") shall continue and shall be treated as Trustees of the Trust for all purposes other than for calculating the total number of First Appointed Trustees;
 - (ii) the power to appoint First Appointed Trustees conferred on the Existing Trustees in terms of sub-paragraph (a)(i) above shall rest with the Remaining *ex officio* Trustees and First Appointed Trustees, if any, appointed by the Existing Trustees under sub-paragraph (a)(i) above;
 - (iii) on the date the eighth First Appointed Trustee takes up office, the Remaining *ex officio* Trustees shall demit office and the *ex officio* appointments of the Remaining *ex officio* Trustees shall cease to operate; and
 - (iv) until such time as the Remaining *ex officio* Trustees demit office they shall, other than for calculating the number of First Appointed Trustees, be treated as Appointed Trustees for all purposes and further, until such time as the Remaining *ex officio* Trustees demit office, the number of Trustees referred to in paragraph 3 of this Schedule may be temporarily increased to sixteen to allow the operation of the provisions of this Schedule.
- (d) If, as at the Effective Date, the number of First Councillor Trustees appointed under sub-paragraph (a)(ii) above is less than seven then, as and from the Effective Date, such First Councillor Trustees appointed in terms of sub-paragraph (a)(ii) above shall take up office.
- (e) Subject to the terms of this Schedule, Existing Trustees are eligible for appointment as Trustees and such Trustees will be deemed not to have served any prior Term for the purposes of this Schedule.

Dr Ann Black
Shetland Charitable Trust
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Your ref:
Our ref: RS/C&N/12-0281

03 July 2012

Dear Dr Black

Notice of approval of charity reorganisation scheme for Shetland Charitable Trust (SC027025)

I refer to the application submitted by Shetland Charitable Trust (**the Trust**) for approval of a charity reorganisation scheme.

The Office of the Scottish Charity Regulator (**OSCR**) approves the proposed scheme under section 39(1) of the Charities and Trustee Investment (Scotland) Act 2005 (**the 2005 Act**).

1. The proposed scheme

You propose to amend the Trust's constitution and introduce a Schedule of Governance Arrangements (**the Schedule**).

The Schedule proposes a new body of 15 trustees, each of whom must be principally resident in the Shetland Islands. The trustee body will be made up of 8 Appointed Trustees, recommended by a selection panel and appointed by the trustees, and 7 Councillor Trustees who are elected members of, and appointed by, Shetland Islands Council. The workings of the selection panel will be dealt with in new Administrative Regulations.

The Schedule makes further provisions relating to the administration of the Trust and sets out a process to deal with the transition from the existing body of trustees to the new body of trustees.

2. Objections received

OSCR received 68 objections to the proposed reorganisation scheme. The following were common concerns.

Selection or Election of Trustees

Objectors expressed concern about the proposal to "select" 8 Independent trustees. Currently, all charity trustees are appointed by virtue of another office held by them; 22 out of the 24 charity trustees are elected local councillors.

Objectors expressed the view that the trust belongs to the people of Shetland and it is their right to elect or select the charity trustees. A common factor in the objections was the strongly expressed view that the Trust should be democratically accountable. Objectors suggested that:

- the current system of *ex officio* trustees should be retained; or
- independent trustees should be elected by the people of Shetland rather than recommended by a selection panel; or
- there should be some other combination of *ex-officio* and Independent trustees.

The most common suggestion was that the majority of trustees should be directly elected.

Selection Panel

The reorganisation scheme proposes that a selection panel be established in relation to the selection of appropriate individuals for appointment as Appointed Trustees.

Objectors expressed concern about the role of the selection panel, asserting that trustees should be directly elected by, and be democratically accountable to, the people of Shetland.

Objectors considered there was a lack of detail in the proposed scheme about the make-up of the selection panel; some expressed this as a lack of transparency.

Objectors expressed concern that former councillors (*ex officio* Trustees) who had not been re-elected might be appointed to the selection panel, or might be recommended by the panel as trustees. Those objectors suggested that this would allow existing and former trustees to continue to administer the Trust through a back door.

The proposed scheme does not specify whether the chair should be an Independent or councillor trustee. Objectors asserted that the constitution should prohibit the appointment of a councillor trustee as chair.

Quorum for Trustee meetings

Objectors raised concerns about the proposed quorum for trustee meetings.

The quorum required for a meeting of trustees will be 6, at least 3 of whom must be Appointed Trustees. A chair and vice chair will be elected by the trustees. In the event of an equality of votes at any meeting, the chair (or any person chairing the meeting in his absence) will have a casting vote.

The greatest concern was that decisions (relating in particular to major financial investments) which might have long term effects on the community could potentially be passed by only 3 trustees. Objectors considered a quorum of 6 was too low and could lead to an unfair and unbalanced vote.

Selection of Councillor Trustees

The proposed constitution states that Shetland Islands Council may, by notice in writing to the Trust, appoint a Councillor Trustee or Councillor Trustees.

Objectors stated it was not clear how the Council would choose Councillor Trustees from its body of councillors, and that a transparent process should be set out.

3. Our Assessment

Section 39(1) of the 2005 Act provides that OSCR may approve a reorganisation scheme of this type if it considers that any of the reorganisation conditions is satisfied and implementation of the scheme *will enable the charity to be administered more effectively*.

These are the factors we had in mind when considering your application and the notices of objection received.

4. Reorganisation conditions

Your application suggests that the condition set out in section 42(2)(c) of the 2005 Act is satisfied, namely "that a provision of the charity's constitution (other than a provision setting out the charity's purposes) can no longer be given effect to or is otherwise no longer desirable".

You submit that this condition is met because the current provision for appointment of *ex officio* trustees has resulted in conflicts of interest between the duties these individuals owe as councillors and those they owe as charity trustees. This raised serious questions about the Trust's governance.

The following are examples of contractual relationships between the Council and the Trust where clear potential for conflict exists:

- The Trust leases property to the Council including an airport, an engineering base and two colleges;
- The Trust provides buildings under a partnership agreement with the Council for the delivery of care in rural areas;
- The Trust leases Sullom Voe Oil Terminal to the Council;
- The Council sold an interest in Viking Energy Limited to the Trust.

- The Trust and the Council have entered into service level agreements.

The Trust has a conflict of interest policy but it is not clear that it has been invoked in all relevant circumstances.

Ambiguity concerning who is in control of the Trust leads to problems in the preparation of its accounts. Audit Scotland has qualified the accounts of Shetland Islands Council since 2006/7 because it considers the Council has an ability to control the Trust and it should consolidate the Trust's accounts with its own.

OSCR considers that provisions of the Trust's current constitution have created irreconcilable conflicts of interest and resulted in public mistrust of decisions taken on behalf of the Trust. Consequently, OSCR is satisfied that the reorganisation condition set out in section 42(2)(c) of the 2005 Act is met.

5. Reorganisation outcomes

Section 39(1)(b) of the 2005 Act specifies required outcomes of charity reorganisation schemes. Before consenting to a section 42(2)(c) scheme such as this, OSCR must be satisfied that the scheme will "enable the charity to be administered more effectively".

We have considered the proposed changes in light of section 66 of the 2005 Act (general duties of charity trustees) and our published guidance, titled "Who's in Charge: Control and Independence in Scottish Charities".

We are satisfied that provisions in the proposed constitution will enable the charity to be administered more effectively. However, given the number of objections received, we take this opportunity to comment on specific issues.

Selection or election of trustees

Objectors suggested that non-councillor trustees should be directly elected by the people of Shetland. We consider that the methods of appointment put forward by the applicant and the objectors all have distinct advantages and disadvantages.

OSCR's role in charity reorganisations is to give or withhold its approval for a proposal put forward by a charity. In general, we would not consider it appropriate to refuse an application for approval of a reorganisation scheme because it is suggested that there might be a better alternative to that proposed by the charity. Instead, we must focus on whether the change proposed by the charity will enable it to be administered more effectively. In light of the difficulties identified in connection with the current method of appointment of trustees, we consider the change proposed in this scheme will have that effect.

Independence of Trustees

The proposed changes will result in a majority of trustees being independent of Shetland Islands Council. Those trustees will be selected for their suitability and the skills they might bring to the Trust. This is clearly an improvement on the current process, where trustees are appointed by virtue of another position held by them.

Independence of the Chair

The proposed constitution does not specify that the chair must be independent. We believe that, where numbers of independent charity trustees and potentially conflicted charity trustees are balanced, it is good practice that the chair be one of the independent charity trustees. However, in this instance there will be eight independent trustees and seven potentially conflicted trustees and therefore the independent trustees are in the majority. Therefore, whether the chair is independent or not is not a significant issue.

Selection Panel

A selection panel is a common method used by charities to identify potential trustees. According to the Schedule, the selection panel will consist of two trustees and another person appointed by the trustees. We consider it might have been better for a majority of independent persons to form the selection panel, rather than trustees. However, the proposed arrangement is clearly an improvement on the current position which will enable the charity to be administered more effectively.

You have confirmed that detailed regulations about the workings of the selection panel will be drawn up if the reorganisation scheme is implemented.

Appointment of former Councillors

We have no objection to the re-appointment of former Councillors as trustees following implementation of the reorganisation scheme. By definition, former Councillors have ceased to be Councillors and that there can be no conflict of duty on account of any duty owed to Shetland Islands Council.

We expect there is not an unlimited supply within any community of individuals with the necessary skills and willingness to devote their time to the running of a large charity. We would have greater concerns about a constitution seeking to impose a blanket restriction on the appointment of former Councillors as Trustees.

Quorum for Trustee meetings

The 2005 Act does not specify a minimum number of trustees required to form a quorum at Trustee meetings. However, we considered the view of objectors that the number proposed is not sufficient.

OSCR has an overview of the constitutions of the 23,500 charities on our Register, and we have taken a particular interest in issues of quorum where

conflict of interest may be an issue. While on the one hand there are risks from having a quorum requirement which is too small, if on the other hand the number of trustees required to form a quorum is set too high, it may become difficult to hold valid meetings and administer a charity effectively. On the basis of our experience a quorum of 6 is not untypical of a charity with 15 trustees and it might be counter-productive to insist on a higher number. Such a quorum is in line with the views on best practice set out by other regulators, such as the Charity Commission for England and Wales.

Selection of Councillor Trustees

We do not consider it appropriate for the Trust's constitution to set out detail about how the Council should select Councillor Trustees, as some objectors suggested. The Trust has no power to bind the Council in this regard.

6. Decision and consequences

OSCR has approved the proposal outlined in your application. Should you wish to make any alteration to this proposal, you must make a new application for approval to reorganise the charity.

Notification of changes

Please note that OSCR's approval does not in itself make the change: it provides the charity with the necessary power to make the change. After making the changes described in the scheme, the charity must notify us.

Next steps

1. We would strongly recommend that the charity gives effect to the charity reorganisation scheme as soon as possible. This is important since the scheme outlines conditions which are satisfied and outcomes which are envisaged currently, and this may change.
2. You must notify OSCR within three months of the date on which the charity reorganisation took effect, and provide us with a signed copy of the charity's new constitution or signed deed of amendment/variation.
3. When notifying us that the change has taken effect, you must also submit documentation showing that the change has been made in accordance with the decision-making processes laid down in the charity's constitution (or those agreed to for the purpose of reorganising the charity), for example a **signed minute** of the AGM or the meeting at which the proposed change was formally agreed by the charity trustees.
4. The change to your constitution must be **as set out in your proposal** contained in the draft constitutional documents enclosed with your application dated 27 January 2012, subsequently amended by e-mail of 14 February 2012.

A 'Notification of Changes Made' form is available to facilitate this notification process. You can download it from the OSCR website, at:

<http://www.oscr.org.uk/managing-your-charity/making-changes-to-your-charity/>

I look forward to hearing from you once the charity trustees have put the proposed reorganisation into effect. If you require any further help, please contact me.

Yours sincerely

Kenny Mathers
Charities Services Senior Case Officer
Tel: 01382 346895
kenny.mathers@oscr.org.uk

Drew Ratter
Chair, Shetland Charitable Trust
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

By e-mail

Our ref: RS/C&N/12-0281

6 June 2012

Dear Mr Ratter

SHETLAND CHARITABLE TRUST (SC027025): APPLICATION FOR CHARITY REORGANISATION

Thank you for your letter earlier today. We have arrangements for a meeting in hand, I think, and I look forward to that.

I note that you suggest that there is a proposal to amend the SCT scheme of reorganisation submitted to us in January. Please note that it is not possible for SCT to amend the scheme which has been submitted to OSCR: this scheme has been published in its current form, we have received objections and SCT's responses, and we are considering our decision at the moment. Our consideration is very close to being concluded – in the normal course of events we would have been proceeding to make and publish our decision very soon. In these circumstances, we cannot consider any amendment to the scheme as published since this would call into question, with objectors and the wider public, the procedural fairness of our process.

It is open to SCT to withdraw the current reorganisation application altogether, and to submit a new application. You should note however that this would involve starting the process again from the beginning, including the process of publication and objection. I would draw your attention - and that of the other trustees - to what we said in our letter to trustees of 23 May: any decision to withdraw the current reorganisation application and thereby to delay yet again SCT's resolution of the issues with its governance would be subject to our close scrutiny.



INVESTOR IN PEOPLE

I should therefore be grateful if you could confirm at the earliest opportunity whether you wish us to pause the normal process, and if so, set out, for our consideration, proposals for an alternative course of action and timetable which gives a real prospect of setting the Trust's governance on a sustainable basis for the future.

I would of course be happy to discuss any of this with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Robb', with a stylized flourish at the end.

David Robb
Chief Executive

The Trustees of Shetland Charitable Trust
c/o Mr Drew Ratter, Chairman
Shetland Charitable Trust
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Our ref: MI/INQ/08-1383

13 August 2012

Dear Charity Trustees

Shetland Charitable Trust – SC027025

I am writing to you five weeks on from OSCR's approval of the Trust's application for charity reorganisation on 3 July 2012. I am keen to establish what progress has been made with the reorganisation.

Our sustained engagement with the Trust over the last four years has been with a view to putting your governance on a positive and sustainable basis and to removing any concerns about the governance of the Trust – that is our duty as the Regulator. Over the last ten months in particular, there have been a number of significant developments. When I wrote to trustees on 24 November 2011, reflecting on the history of our ongoing inquiry, explaining our view on the actions of the trustees and outlining the potential use of OSCR's disciplinary powers, it was with the intention of protecting the charity, its reputation and its beneficiaries from significant damage and to safeguard the charity's assets by requiring decisive action to be taken by trustees, in accordance with their duties under charity law.

On 7 December 2011, OSCR was supplied with undertakings from the then Chair, Bill Manson, to make the required changes to the charity's constitution and that the charity trustees would ensure that all necessary action was taken to ensure that the approved timetable was implemented. The detailed undertakings and timetable subsequently provided on 20 December 2011 were accepted by OSCR on 11 January 2012.



INVESTOR IN PEOPLE

At that point, we were encouraged to see the commitment of trustees, finally, to make the necessary governance changes; this was confirmed later in January 2012 when we received an application for charity reorganisation from the Trust. As you are aware, this scheme was not imposed on the Trust – it was the outcome of a lengthy review of governance conducted by the Trust and whose recommendations first emerged in 2010 and have been the subject of much discussion since then.

It has now been more than five weeks since we gave our approval of the reorganisation scheme and it would be helpful if you would now provide a progress report to allow us to understand where the Trust is in the context of the implementation timetable. I acknowledge of course that the composition of the trustee body has changed since those undertakings were provided, and there is therefore, to some degree, a period of transition but that does not alter the formal position, or our expectations of the Trust. Within the timetable supplied to OSCR on 20 December 2011, it is stated that the adoption of the revised Deed of Trust was intended to occur two weeks following the communication of our decision. We are aware that at your recent workshop session, there has been further discussion about the approved scheme and whether it is the most desirable way to proceed. I note with considerable disappointment that the current situation would appear to indicate that at least some of the charity trustees are unwilling to proceed in the manner previously indicated to and agreed with OSCR.

Accordingly, for the avoidance of doubt, let me be clear that it is the Regulator's expectation that as charity trustees you will, as a priority, seriously consider your legal duties under charity law and act in line with the undertakings previously given by the Trust to the Regulator. As charity trustees, you are all collectively responsible for any decisions or courses of action taken by the Trust whether or not you personally agree with them. Where any charity trustee feels that a decision has been made or action taken that is not in the best interests of the charity, they should consider their position.

My letter of 6 June 2012 (which I hope has been made available to all trustees) made clear that an amendment to the reorganisation scheme is not possible: any changes would require a new application and would take us back to the start of the process initiated in January this year. It would be for the Trust to demonstrate how, in these circumstances, such a deviation from the agreed course of action was in the best interests of the charity, and it would be for the Regulator to consider whether any further intervention was warranted to protect the charity, its reputation and its beneficiaries.

For the sake of clarity, I should say that if the Trust decides to seek approval for an alternative scheme, this would not be regarded by the Regulator as a minor matter: it would set back by at least six months the progress made and would result in the systemic risks in your current governance model remaining unresolved during this

period. It would be open to OSCR at that point to consider whether the actions of the charity trustees amounted to misconduct in terms of charity law and if so, to examine the options available in response.

Section 31 (4) of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) provides the power for OSCR to suspend any person concerned in the management or control of the charity who appears to have been responsible for, privy to, contributed to or facilitated misconduct. In the particular situation faced by SCT, this would apply regardless of whether or not they were party to the undertakings given to OSCR in December 2011.

Subsequent to taking any action considered appropriate under section 31 of the 2005 Act, OSCR would also have the option of petitioning the Court of Session under section 34 for more permanent action to be taken.

OSCR would prefer not to take formal measures to ensure the prompt implementation of the reorganisation scheme. Nevertheless, should there be any delay implementing the approved reorganisation scheme, OSCR will proceed to examine the options available.

I should be happy to discuss any of this with you if you would find that helpful – I am mindful however of the need for expedited action. I look forward to receiving your early assurance that the approved scheme will be implemented in accordance with the undertakings the Trust has given.

Yours sincerely,



David Robb
Chief Executive



INVESTOR IN PEOPLE

The Trustees of Shetland Charitable Trust
c/o Mr Drew Ratter, Chairman
Shetland Charitable Trust
22-24 North Road
Lerwick
Shetland
ZE1 0NQ

Our ref: MI/INQ/08-1383

24 August 2012

Dear Charity Trustees

Shetland Charitable Trust – SC027025

I write further to my letter of 13 August and subsequent to a constructive meeting on 22 August between OSCR and the Trust's Chair, Chief Executive and legal advisors.

We were pleased that Mr Ratter found our letter of 13 August clear and we confirmed our expectations of the Trust in moving forward with the approved scheme of reorganisation and acting in line with the undertakings previously given to OSCR. We reinforced our concerns that a failure to make rapid progress towards a sustainable governance model would erode confidence in the Trust's ability to conduct its affairs in a responsible manner and I was particularly concerned to hear that action by the Trust to seek approval for an alternative scheme could add a further delay of up to a year. The approved reorganisation scheme is the product of careful and lengthy consideration; it is difficult to see how abandoning the work and progress to date could be justified.

We expect, as part of acting in the interests of a charity, that charity trustees accept and exercise collective responsibility to abide by decisions corporately taken and undertakings corporately given. This responsibility extends to decisions taken by earlier groups of trustees and applies despite any views which trustees may have expressed publicly previously to becoming trustees, or in relation to other offices they may hold.

You have been sent copies of Dr Wills' letter to me of 16 August outlining his proposed governance model for the Trust: a model which appears to be significantly different from that previously put forward by Dr Wills in May 2012. In all the circumstances, it is questionable that adding further uncertainty and delay by flouting the conclusions reached by the Trust's own Governance Review Group is in the best interests of the charity. It is regrettable that Dr Wills was unavailable for Wednesday's meeting – your Chief Executive was not able to provide any further detail of the new proposal and I therefore do not wish to comment on it in any detail.

I consider it essential, however, that you have accurate and comprehensive information in preparation for your forthcoming meeting on 13 September and in the annex to this letter I have provided a commentary on Dr Wills' letter to clarify any misapprehensions that trustees may currently have.

Your Chair will, I hope, relay to you the Regulator's expectation that, at your meeting of 13 September, positive, urgent steps will be taken to implement the approved scheme in order to allow the Trust to demonstrate compliant, sustainable governance and take a firm step towards the relaxation of OSCR's proactive monitoring of the Trust.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Robb', with a stylized flourish at the end.

David Robb
Chief Executive

Commentary on issues raised in Dr Wills' letter of 16 August to OSCR

OSCR's position on election v selection:

As Laura Anderson stated in her letter of 23 May to trustees, OSCR has no comment on the merits of selection versus election. The principal necessity is to reduce to a minority the number of trustees holding that position on an ex-officio basis from any other organisation. We have consistently advised that the Trust needs to ensure that whatever the future governance model, the trustee body needs to have an appropriate composition of skills and attributes to manage and control a charity of the size and scale of SCT.

Accounts consolidation:

Dr Wills correctly records our continuing opposition to the consolidation of the Trust's accounts with those of SIC, and we know of no accounting requirement or convention that limits to three the number of councillors who could be trustees.

Quorum:

We have no reservations about the proposed quorum: we could not have approved the reorganisation scheme unless the proposed quorum and the scheme as a whole would allow SCT to be administered more effectively. Our decision letter sets out fully our reasoning on this.

Misconduct, defamation and legal expenses:

The 2005 Act provides a range of remedies for the Regulator to deploy where it perceives there to be a significant risk to a charity's assets or its reputation and where intervention is merited. Your legal advisors will be able to confirm the statutory position. Trustees should consider only the interests of the Trust in making their decisions. We do not mention suspension or removal action lightly. Neither do we mention it as a personal threat to trustees. Recovery of costs is, however, an option open to us, in extreme circumstances.

REPORT

To: Shetland Charitable Trust

13 September 2012

From: Financial Controller

Report Number CT1209035

**General Administration
Charitable Trust Nominee Directors**

1. Introduction

- 1.1 This report is presented to seek trustee approval for a change to how the boards of the Trust's subsidiary companies are structured, and also recommends a new method for appointing directors to the companies. The report also gives a brief outline of the activities of each of the companies.
- 1.2 All the companies concerned are directly owned 100% by the Trust, where investment has been made to secure objectives in the interest of Shetland and/or its inhabitants. A key part of the investment process is for trustees to appoint appropriate individuals as directors to these companies.
- 1.3 The Trust has an indirect relationship with Viking Energy Shetland LLP, the 'Shetland Partner' in the Viking Energy partnership. This report also informs trustees of proposals relating to the Viking Energy Shetland LLP board.

2. The Trust's Wholly Owned Subsidiary Companies

- 2.1 A brief outline of each directly owned company is given below.
- 2.2 Shetland Leasing and Property Developments Limited, SLAP
Core activities - purchasing, developing and letting property (SLAP owns more than 30 properties); sale and leaseback arrangements.
Authorised share capital - £50,000,000.
Issued share capital - £35,000,000.
- 2.3 Shetland Heat Energy and Power Limited, SHEAP
This company operates the Lerwick District Heating Scheme, using infrastructure leased from the Trust. (nbv £6,600,000)
Authorised share capital - £1,000,000.
Issued share capital - £1,000,000.

2.4 Viking Energy Limited, VEL

Viking Energy Limited is the vehicle by which the Trust has invested, with others, in the development of a proposed large windfarm in central Mainland. Viking Energy Limited will deal with the flow of money to and from the windfarm in a tax efficient manner.

Authorised share capital - £10,000,000

Issued share capital – £5,220,000, with investment of up to a further £4,500,000 million agreed to be made as required.

2.5 CT Shetland (TM) Limited

This is a dormant company whose purpose is to register and own certification trademarks, for example knitwear trademarks.

Authorised and issued share capital £500.

3. **Board Appointments**

3.1 The practice in the past of appointing only trustees as directors of the subsidiary companies has been shown to have a limitation, in that there can be a conflict of interest between being a trustee and a director of a subsidiary company. This has led in some cases to the Trust being left in a quorate, and unable to take key decisions.

3.2 The Trust will soon have a major change of membership of its trustee body, therefore it is seen to be an opportune time to consider a review of how it appoints directors to the boards of its subsidiary companies, for the reason set out in 3.1 above, as well as to ensure a more commercial stance, and to strengthen the skill set of the boards.

3.3 Consequently, a review was commissioned from the Institute of Directors (IoD) on the governance arrangements of the Trust's subsidiary companies, which has made recommendations regarding the number of directors, the skills required and the method of appointment. The report is attached as Appendix A, but the main findings are summarised below.

3.4 Summary of relevant IoD recommendations

1. In the case of SCT subsidiary company boards, all board members are currently non-executive. It is recommended that this continue to be the case.
2. That SHEAP and SLAP have 3 board members each.
3. In view of the role VEL will play henceforth that VEL has 1 board member.
4. That the following areas of board ability are sought:
 - SHEAP: Engineering – Commercial – Financial
 - SLAP: Property/Technical – Financial/Legal – Commercial
 - VEL: Financial

5. That appointment to boards of all three subsidiary companies is by selection against a set series of criteria.
 6. No councillor or independent trustee may apply to be a board member of any of the subsidiary companies of SCT.
 7. Posts for SHEAP, SLAP and VEL are advertised in the local press and that any person, excepting councillors, may apply to be considered for a post.
 8. The Chair of each subsidiary company be called to address the trustees (as the single shareholder) at least quarterly to advise the shareholder of progress within the company against the Key Performance Indicators identified in the business plan.
 9. Board members serve a 3 year term with the option to put themselves forward for two further terms of 3 years, and that a rolling board membership is introduced for SHEAP and SLAP with one board member being replaced each year.
 10. That all directors receive a properly conducted induction, are provided with professional development opportunities, are subjected to an annual review of performance and take part in an annual all board review of board performance.
 11. SCT should reserve the right to remove a director who fails to properly attend to the duties and responsibilities of a director.
 12. In the case of SHEAP, SLAP and VEL it is recommended that a small compensation is paid of £150 per day per board member.
 13. The trust gives clear outlines of business requirements to the newly elected boards, who can then create business plans for approval.
- 3.5 The Trust is required to appoint directors for each of the companies it owns. Trustees are asked to note that the dormant company CT Shetland (TM) Limited (CTTM) was not included in the IoD report, but since it is a dormant company, it is recommended that only one director need be appointed.
- 3.6 The typical time commitment varies considerably from company to company but can be summarised as follows:-

Company	Commitment
SLAP	Meetings every cycle, and additional meetings if required
SHEAP	Meetings every cycle
VEL	Two meetings per year
CTTM	One meeting per year

- 3.7 The present directors of the above companies are set out below.

Shetland Leasing and Property Developments Limited

James Henry – Chair

William Manson – Vice Chair

Adam Doull

Allison Duncan

Robert Henderson

Caroline Miller

Shetland Heat Energy and Power Limited

Gary Robinson – Chair

Richard Nickerson – Vice Chair

Allison Duncan

Robert Henderson

James Henry

Viking Energy Limited

William Manson – Chair

Alastair Cooper

Caroline Miller

CT Shetland (TM) Limited

William Manson - Chair

Florence Grains

James Henry

These directors have agreed to remain in place until new structures are implemented.

4. Viking Energy Shetland LLP

- 4.1 The main role of the Trust's 100% subsidiary Viking Energy Limited is now, and will continue to be, as a vehicle for the investment of Trust funds and the eventual return of profits to the Trust in a tax efficient manner.
- 4.2 Viking Energy Limited has a 90% interest in Viking Energy Shetland LLP, the 'Shetland Partner' in the Viking Energy partnership, the joint venture vehicle that plans to construct and operate the windfarm. In this role it will be Viking Energy Limited, along with the 10% partner, Viking Wind Limited, who will select the members of the partnership board of Viking Energy Shetland LLP. These will be important roles and were also covered in the IoD report. The Trustees are asked to note the recommendations within the IoD report, which will inform the selection process.

4.3 Summary of Relevant Recommendations

The IoD recommend that the appointment process and intended outcomes should be modelled on that recommended for the Trust's direct subsidiaries, with the following particular recommendations:

1. That VES LLP has a Board of 5 members (one of whom should be an executive director), probably reducing to 3 members once the construction project is complete and the windfarm has moved to a steady operational state.
2. The following areas of board ability are sought: Renewables - Electricity Markets - Project Management - Procurement - Construction Finance.
3. Posts for VES LLP are to be selected as soon as possible by the current VEL Board with recruitment consultants to be engaged in support.
4. In order to attract and retain the level of expertise required, consideration is given to paying a higher level of compensation. The current VEL Board will be guided by their contracted executive search organisation. Figures for the chair of the board to be compensated with £30K per annum and the other board members £20 - £25K per annum and their travel to Shetland to be paid are not unrealistic.

5. Financial and Other Implications

- 5.1 At present, directors of companies are paid out of pocket expenses and there is an allowance for directors' expenses within existing budgets. SLAP's articles of association do not allow directors to be remunerated. This will require amendment.
- 5.2 SLAP's Articles of association require that the Trust decides who should be chair and vice-chair of the Board. SHEAP and VEL are set up so that the chair and vice-chair are chosen by the board or each company. It is proposed that SLAP is brought in line with SHEAP and VEL.
- 5.3 Should you appoint remunerated directors, the costs would fall on the subsidiary companies.

6. Recommendations

- 6.1 Trustees are recommended:-

- (i) to agree to appoint directors, as shown in the table below, to the four companies in accordance with the recommendations of the IoD report, to serve for a three year term;

Company	No
Shetland Leasing and Property Developments Limited	3
Shetland Heat Energy and Power Limited	3
Viking Energy Limited	1
CT Shetland (TM) Limited	1

- (ii) to agree that SLAP's articles of association should be modified as proposed in section 5 above; and
- (iii) to note the proposals for recruitment to the partnership board of Viking Energy Shetland LLP as set out in Section 4 above.

Reference: JPG/EMA/C14

Report Number CT1209035

REPORT
ON A REVIEW OF
THE GOVERNANCE
OF
THE SHETLAND CHARITABLE TRUST
SUBSIDIARY COMPANIES
INSTITUTE OF DIRECTORS –
SCOTLAND

Nigel Scott
David Wilkinson
June 2012

Contents

1. INTRODUCTION	4
2. EXECUTIVE SUMMARY	6
3. METHODOLOGY.....	8
3.1 Stage 1: Project inception.....	8
3.2 Stage 2: Desk research	8
3.3 Stage 3: follow up Interviews, discussions and workshop	9
3.4 Stage 4: Prepare and deliver draft recommendations, proposals and template documents	9
3.5 Stage 5: Agree final recommendations, proposals and template documents	9
4. THE UK CORPORATE GOVERNANCE CODE.....	10
4.1 The origins of the Code	10
4.2 The purpose of the Code	10
5. FINDINGS AND RECOMMENDATIONS.....	12
5.1 Board Sizes	12
5.2 Board Skills	13
5.3 Selection or Election	14
5.4 Selection Panel & Recruitment.....	14
5.5 Chairs of Subsidiary Companies.....	15
5.6 Terms of Office	15
5.7 Induction, Professional Development and Review	16
5.8 Sanctions	17
5.9 Compensation.....	17
5.10 Other Issues.....	18
5.10.1 Subsidiary Business Plans	18
5.10.2 Trust Plan.....	18
5.10.3 Subsidiary company cost clarity.....	18
5.10.4 CEO and Financial Controller roles.....	18
5.10.5 Communication Clarity.....	18
6. Outstanding actions.....	18
6.1 Draw up a board job description	18
6.2 Recommend a plan of action	18

ANNEXES:

- A. Meeting Aide Memoire – 1-1 Interviews
- B. UK Corporate Governance Code
- C. Director's Attributes
- D. New Director's Checklist
- E. Competency based interview rating

1. INTRODUCTION

This report describes the methodology, findings and recommendations made by the Institute of Directors (IoD) in response to a tender from Shetland Charitable Trust (SCT) and Highlands and Islands Enterprise (HIE) seeking advice on how best to appoint Directors to SCT's subsidiary companies, and how best these boards should be structured.

These subsidiary companies are:

- Shetland Heat Energy and Power Limited (SHEAP), a wholly owned subsidiary
- Shetland Leasing and Property Developments Limited (SLAP), a wholly owned subsidiary
- Viking Energy Limited (VEL), which has recently become a wholly owned subsidiary

In addition, and not included in the original tender request, recommendation is made regarding the board structure for Viking Energy Shetland LLP (VES LLP), the 'Shetland Partner' in a joint venture partnership with Scottish and Southern Energy (SSE).

The aim of this piece of work was to consider the options for the optimum board structures, and how Directors are appointed to the Boards of these companies in the future.

In conducting this work the IoD has taken into consideration the fact that the Trustees are in the process of making changes to the governance of the charity in order to deal with issues surrounding the management of conflicts of interest, ensuring independence of action and generally to update the governance provisions and bring those more in line with current good practice to ensure that the Constitution models current best practice.

The Trust's proposal is a new body of 15 trustees, each of whom must be principally resident in the Shetland Islands. The trustee body will be made up of 8 Appointed Trustees, recommended by a Selection Panel and appointed by the Trustees, and 7 Councillor Trustees who are elected members of, and appointed by, Shetland Islands Council.

The recommendations made in this report are the same whether the trustee composition remains as is or the proposed new body, as presented for approval to the Office of the Scottish Charity Regulator (OSCR), is adopted.

In particular the IoD were asked to consider the following:

"Review the current Boards for Viking Energy Ltd., SHEAP and SLAP, and recommend an appropriate structure going forward in order to ensure a commercial stance. The key tasks will be to develop a Board recruitment plan as an ongoing, year-round function: prospecting,

contacting, recruiting, orienting, supporting, providing ongoing training, and evaluating board directors through the following tasks:

Examine and critically assess the current Board structure of the three businesses.

Scope out the optimum Board for all three companies including:

Board size: *The optimum number of directors to serve based on the board responsibilities.*

Compensation: *Consider the pros and cons of compensating Board members, and make recommendations on methods and if this is appropriate for each of the companies.*

Skills: *Determine any new skills, knowledge, personal contacts and other attributes future board directors will need to possess in order for the board to do its part in advancing the strategic plan. Develop a board matrix of required skills for the Board.*

*Link **recruitment** to the strategic plan for each business. Match board recruitment and development activities with the new governance requirements for the Shetland Charitable Trust, and for the strategic growth of the respective subsidiary companies.*

Focus the recruiting priorities. Identify the main skills and knowledge needed for the board. Also, how can you best recruit entrepreneurs and individuals with natural drive to a board?

*Develop a written **board director job description**. This should serve as a job description and clarify board responsibilities. The job description should set out the expectations that each company has of its directors.*

Recommend a plan *for SCT on developing the most suitable board structure for each company, how SCT should appoint directors, and generally on scouting board leadership talent for the future if appropriate."*

Because VES LLP is the 'Shetland Partner' in a joint venture which will shortly become the operating organisation overseeing considerable expenditure on a large joint wind farm project with SSE, whereas the existence of VEL is determined through tax efficiency requirements, it was considered appropriate that the board composition for the partnership should also be included in the review.

2. EXECUTIVE SUMMARY

Using the UK Corporate Governance Code 2010 as the benchmark for good practice in governance, this report identifies a number of issues and makes recommendations based on the code and other IoD good practice documents.

The recommendations laid out in this report are as follows:

1. In the case of SCT subsidiary boards, all board members are currently non-executive. It is recommended that this continue to be the case, with the exception of VES LLP which gets one executive director (to work with 4 non-executive directors).
2. That SHEAP and SLAP have 3 board members each.
3. In view of the role VEL will play henceforth that VEL has 1 board member.
4. That VES LLP has a board of 5 members, probably reducing to 3 members once the construction project is complete and the wind farm has moved to a steady operational state
5. That the following areas of board ability are sought:
 - SHEAP: Engineering – Commercial – Financial
 - SLAP: Property/Technical – Financial/Legal – Commercial
 - VEL: Financial
 - VES LLP: Renewables / Electricity markets / Project management / procurement / Construction finance
6. That appointment to boards of all four subsidiary companies is by selection against a set series of criteria.
7. No councillor or independent trustee may apply to be a board member of any of the subsidiary companies of SCT.
8. Posts for SHEAP, SLAP and VEL are advertised in the local press and that any person, excepting councillors, may apply to be considered for a post. Posts for VES LLP are to be selected as soon as possible by the current VEL Board and recruitment consultants to be engaged in support. It is noted that this company was acquired by SCT with a board of directors, and hence it is not for SCT to carry out the process, but is a matter for that board. It is our recommendation that it is commenced as soon as possible, given the stage the project finds itself at.

9. The Chair of each subsidiary company be called to address the trustees (as the single shareholder) at least quarterly to advise the shareholder of progress within the company against the Key Performance Indicators identified in the business plan.
10. Board members serve a 3 year term with the option to put themselves forward for two further terms of 3 years, and that a rolling board membership is introduced for SHEAP and SLAP with one board member being replaced each year.
11. In the short term it is recommended that the board of VES LLP is selected as soon as possible (by the current VEL Board) and remains in place until the project phase of development is completed.
12. That all directors receive a properly conducted induction, are provided with professional development opportunities, are subjected to an annual review of performance and take part in an annual all board review of board performance.
13. SCT should reserve the right to remove a director who fails to properly attend to the duties and responsibilities of a director.
14. In the case of SHEAP, SLAP and VEL it is recommended that a small compensation is paid of £150 per day per board member.
15. When and if non-executive board members are selected from off-island it is recommended that travel be paid in addition to day rate compensation.
16. In the case of VES LLP it is recommended that, in order to attract and retain the level of expertise required to deliver the successful joint venture project, the trust consider paying a higher level of compensation. Whilst it may be found that there are experts in the field who are willing to work for nothing, it may be necessary to provide significant contribution. The current VEL board will be guided by their contracted executive search organisation. Figures for the Chair of the board to be compensated with £30K per annum and the other board members £20 – 25K per annum and that travel to Shetland also be paid are not unrealistic.
17. The trust gives clear outlines of business requirements to the newly elected boards, who can then create business plans for approval.
18. A single document summarising the Trust development plan is created and used to drive the business of the trust forward.
19. Staff costs are allocated to the companies appropriately.
20. Consideration is given to making the posts of CEO and Financial Controller executive trustees.

Once acceptance of these recommendations is confirmed the IoD will be willing to assist in drawing up appropriate, specific director job descriptions and a plan for implementation.

3. METHODOLOGY

The methods used for this piece of work were as follows:

Stage 1: Project inception

Stage 2: Desk research

Stage 3: Follow up Interviews and discussions

Stage 4: Prepare and deliver draft recommendations, proposals and template documents

Stage 5: Agree final recommendations, proposals and template documents

3.1 Stage 1: Project inception

At the outset face to face meetings were held with the CEO of the trust, the Finance Manager and the HIE account manager. This clarified:

- The process of change that the Trust has embarked on, as outlined in the charity reorganisation information provided on the SCT website, and clarification of the precise nature of the proposed board activities in the three companies.
- The strategic plans, memoranda and articles of the three subsidiary companies (SHEAP, SLAP, VEL) and the specifics of the partnership arrangements in place for VES LLP
- Current approaches to Director/trustee selection, induction and ongoing development and compensation arrangements
- Current and historic challenges, regional difficulties, resource limitations, and specific issues to be aware of in drafting our recommendations, proposals and templates

3.2 Stage 2: Desk research

The provided documentation was reviewed and research conducted on IoD publications and other appropriate sources to:

- Review the strategic plans of SCT, the three subsidiaries and VES LLP
- Identify optimum board sizes and compositions for the subsidiary business requirements
- Review current compensation best practice for Board/Non-Executive Board members in mixed public / private sector organisations

- Collate and or create templates for the board recruitment planning, prioritising, prospecting, contacting, recruiting, orienting, supporting, providing ongoing training, evaluating board directors, job descriptors for board members, board skills matrices

3.3 Stage 3: follow up Interviews, discussions and workshop

Having collated the key background information it was identified that it would be helpful to interview OSCR and Turcan Connell, the Trust solicitors. Separate discussions were held with Laura Anderson, Head of Enquiry and Investigation at OSCR and with Kenneth Pinkerton, Trust lawyer at Turcan Connell. Both discussions assisted in understanding the trust from an external perspective and to further set the parameters of the response required.

A series of questions was framed to use as the basis of one to one discussions with senior staff and current directors of the subsidiary companies, the CEO, Finance Manager and newly elected chair of the Trust. Each interviewee was provided with a pre meeting aide memoire to assisting in thinking through the issues prior to their meeting (Sample at Annex A). A total of 14 people were interviewed.

After discussions with the Chair of the Trust and the CEO an open session was held for all those who had been interviewed for them to hear the initial findings and recommendations.

3.4 Stage 4: Prepare and deliver draft recommendations, proposals and template documents

The draft documents covering our recommendations, proposed actions and template documents were prepared and sent forward for consideration and comment to ensure they meet trust requirements, are framed in an appropriate context and take account of any political or commercial sensitivities not apparent from the process.

3.5 Stage 5: Agree final recommendations, proposals and template documents

4. THE UK CORPORATE GOVERNANCE CODE

The key reference document when considering the governance of limited companies is the UK Corporate Governance Code¹. The code is considered the “gold standard” for governance in all companies. Subsidiary companies of trusts are included in this group.

4.1 The origins of the Code

The origins of the current Code stem from the report of the Committee on the Financial Aspects of Corporate Governance (the Cadbury Report, 1992²) to which was attached a Code of Best Practice. This was further developed through a series of re-workings including those of the Greenbury Committee³, which made recommendations on executive pay and a Code of Best Practice.

It was then decided that previous governance recommendations should be reviewed and brought together in a single code. The work was carried out under the chairmanship of Sir Ronald Hampel and culminated in the Final Report: Committee on Corporate Governance with its Combined Code on Corporate Governance in 1998.

In 2002 Derek Higgs was asked to report on the role and effectiveness of non-executive directors. His report, published in January 2003, suggested amendments to the Combined Code. At the same time a committee under Sir Robert Smith reported on guidance for audit committees. The revised Combined Code which was issued in July 2003 by the Financial Reporting Council (FRC) took into account both reports. The 2003 Code has been updated at regular intervals since then, most recently in May 2010. This latest version has a new title, the UK Corporate Governance Code and applies to financial years beginning on or after 29 June 2010.

4.2 The purpose of the Code

All the UK reports and codes, including the 2010 Code have taken the ‘comply or explain’ approach. Although only quoted companies (those with a premium listing on the London Stock Exchange, whether they are incorporated in the UK or elsewhere) are obliged to report how they apply the Code principles and whether they comply with the Code provisions and, where they do not, explain their departures from them. The Code has had a noticeable wider impact on governance of organisations outside the commercial corporate sector where parallel codes of governance are emerging. For a quoted company reporting

¹ The UK Corporate Governance Code, 2010, *Financial Reporting Council*
<http://www.frc.org.uk/corporate/ukcgcode.cfm>

² The Cadbury Report. Report of the committee on the Financial Aspects of Corporate Governance 1992, *Gee and Co. Ltd.*

³ The Greenbury Report 1995, *CBI*.

on its application of the Code is one of its continuing obligations under the Listing Rules published by the UK Listing Authority (UKLA). If quoted companies ignore the Code, then there will be penalties under the Listing Rules.

The Code is divided into main principles, supporting principles and provisions. For both main principles and supporting principles a company has to state how it applies those principles. In relation to the Code provisions a company has to state whether they comply with the provisions or – where they do not – give an explanation. It is the Code provisions that contain the detail on matters such as separation of the role of chairman and chief executive, the ratio of non-executive directors and the composition of the main board committees.

The first principle of the Code states that: “Every company should be headed by an effective board”. The board’s effectiveness is widely regarded as a prerequisite for sustained corporate success. The quality and effectiveness of directors determines the quality and effectiveness of the board. Formal processes for appointment, induction and development should be adopted. Effectiveness of the board and its individual members has to be assessed. The Code states that no one individual should have unfettered powers of decision-making. It sets out how this can be avoided by splitting the roles of chairman and chief executive, and specifies what the role of the chairman should be. The Code offers valuable guidance on the ratio of non-executive to executive directors and definitions of independence.

A summary of the code is at Annex B.

5. FINDINGS AND RECOMMENDATIONS

5.1 Board Sizes

The size of a board should be determined by the activities and size of the company. It may vary from time to time depending on the requirements of the company and the shareholders. So, for example, should a particular issue arise that the board at the time does not have the particular skills to resolve, it may be prudent to secure a board member with relevant skills for a specific time period to address the issue.

It is also preferable to keep things as simple as possible by not having more board members than is absolutely necessary. All limited companies must have at least one director and a company secretary. There is no upper limit to the number of board members a company may have. Larger companies will also distinguish between executive and non-executive board members, but there is no difference in the legal responsibilities held by either form of director.

In the case of SCT subsidiary boards, all board members are currently non-executive. It is recommended that this continue to be the case, with the exception of VES LLP which gets one executive director.

Board members should have skills appropriate to the needs of the company. This is to ensure that they can take effective decisions, understand the business requirements, and act responsibly on behalf of the company and the shareholders.

It is understood that both SHEAP and SLAP are running in “steady state”, i.e. they are trading in the normal way with no current intent to set up large projects or otherwise change the ongoing balance of activity.

It is recommended that SHEAP and SLAP have 3 board members each.

In the case of VEL this company will shortly hand on the day to day operational management of the wind farm project to the joint venture vehicle. It is understood that VEL exists as a legal tax vehicle to increase the available return on future incomes from electricity generation to the trust. In this case there is no onerous activity being conducted by the company.

In view of the role VEL will play henceforth is recommended that VEL has 1 board member.

VES LLP is on the cusp of becoming the engine for developing the wind farm in partnership with SSE. There is a need to have a robust board with a range of skills and experience in renewables, electricity generation, projects and contractual work. Over this period it is recommended that a board of 5 directors is put in place. This situation is likely to be the case for the next 18 months.

It is recommended that VES LLP has a board of 5 members, probably reducing to 3 members once the construction project is complete and the wind farm has moved to a steady operational state.

5.2 Board Skills

There are six groups of personal attributes⁴ generally identified which relate to specific aspects of company direction. They are relevant to a director's role, whether as chairman, managing director executive or non-executive director. These groups are:

- Strategic Perception
- Decision-making
- Analysis and the use of information
- Communication
- Interaction with others
- Achievement of results

(The full list of Director's attributes can be found at Annex C)

Many of these attributes are components of leadership, by which is meant the ability to conduct the company's affairs and to govern, guide and motivate others. The board of directors leads the company and whether it does this well or badly depends in part upon the personal attributes of its members. And it is unlikely that any one individual will have the personal attributes listed, but each of those deemed necessary for a particular board should be possessed by at least one director. Ideally, there should be a good balance of individuals, whose strengths and weaknesses are complementary.

Ultimately directors need to know – or know how to find out – everything that is relevant to their responsibilities. Ignorance is no excuse and no longer absolves them of their responsibility.

The areas of knowledge it is recommended company directors are cognisant of are:

- The role of the company director and the board
- Strategic business direction
- Basic principles and practice of finance and accounting
- Effective marketing strategy
- Human resource direction
- Leadership and strategic change

In finding appropriate directors for the posts in the subsidiary companies these attributes and areas of knowledge must be sought.

It is specifically recommended that the following areas of ability are sought:

⁴ Standards for the Board – part 4. Knowledge and Skills, Institute of Directors

SHEAP	Engineering – Commercial – Financial
SLAP	Property/Technical – Financial/Legal – Commercial
VEL	Financial
VES LLP	Renewables / Electricity markets / Project management / procurement / Construction finance

5.3 Selection or Election

Whilst there is no specific guidance in the UK Code of Governance for directors to be elected or selected, an election process is less likely to successfully source the skills and abilities required for the Directors of a business. All of those interviewed indicated that they would prefer to see a selection process.

In view of the responsibility to the community placed upon the trust, and reported issues of conflict of interests in recent times, the evidence suggests that the election process used to date has reached a point where it no longer represents sound governance for the subsidiary companies.

It is recommended that appointment to boards of all four subsidiary companies is by selection against a set series of criteria.

Because of the recent issues regarding conflicts of interest for Trustees who are councillors, and also board members, there seems every reason to put some distance between councillors / trustees and the role of director in subsidiary companies.

It is recommended that no councillor or independent trustee may apply to be a board member of any of the subsidiary companies of SCT.

5.4 Selection Panel & Recruitment

For SHEAP, SLAP and VEL it is considered appropriate for a selection committee to be made up of The CEO, the Chair of the trust and an independent off-island selection professional (Off island to provide absolute objectivity and ensure correct application of the process). Applicants are to be interviewed and selected using agreed criteria from the board skills matrix, knowledge and skills outlined at 5.3 above.

It is recommended that the posts for SHEAP, SLAP and VEL are advertised in the local press and that any person, excepting councillors, may apply to be considered for a post.

For the VES LLP board it is considered necessary to engage the services of an international executive search organisation to find and assist in the recruitment and selection of appropriately skilled board members for the project development phase of the wind farm partnership with SSE.

It is recommended that Posts for VES LLP are to be selected as soon as possible by current VEL Board and recruitment consultants to be engaged in support.

5.5 Chairs of Subsidiary Companies

The chair of the board is elected by the board and has the same legal duties as other directors⁵. In recruiting board members the skills of a chair are included in the agreed criteria.

The fundamental role of the chair is to run board meetings and any special one-off meetings of directors effectively and efficiently. They must also conduct the Annual General Meeting and any other public meetings such as an Extraordinary General Meeting.

It is recommended that the Chair of each subsidiary company be called to address the trustees (as the single shareholder) at least quarterly to advise the shareholder of progress within the company against the Key Performance Indicators identified in the business plan.

5.6 Terms of Office

The UK Corporate Governance Code does not set any particular period for re-election.

B.7 Re-election

All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.

(See annex B)

In the case of SCT subsidiary companies it should be borne in mind that there is a finite pool of potential board members available from the Shetland Community. This necessitates an approach which is sustainable, ensures continuity of knowledge and company stability, yet does not create a long term burden for any board member.

It is recommended that board members serve a 3 year term with the option to put themselves forward for two further terms of 3 years. It is further recommended that a rolling board membership is introduced for SHEAP and SLAP with one board member being replaced each year.

In the short term it is recommended that the board of VES LLP is selected as soon as possible (by the current VEL Board) and remains in place until the project phase of development is completed.

It may be appropriate in this instance to select an executive board member to this board, thus ensuring continuity from the point at which the off-island expertise is no longer required.

It is suggested that consideration is given to adjusting the board composition of SHEAP, SLAP and VES LLP in three to five years so that one off-island non-executive director is selected to each board. This would provide an external, independent, objective voice with the intent to create even better governance overall.

⁵ Bain, Neville. *The Effective Director, building individual and board success*, Director Publications Ltd. 2008

5.7 Induction, Professional Development and Review

It is commonly recognised that the effective induction, development and regular review of staff in an organisation is of great benefit to the organisation and to the individual. This applies equally to directors of companies.

B.4 Development

All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge

UK Corporate Governance Code (see annex B) .

Induction should occur shortly after selection and acceptance of the post by the candidate. A new director needs to know:

- The financial situation of the company
- Contents of the memorandum and articles of association of the company
- The recent history
- The strategic plan
- Current issues
- The relationship and expectations of the shareholder(s)
- Staffing

An example of a new directors check list is at Annex D

Professional development covers a wide range of possibilities. Key is the understanding of the duties, responsibilities and liabilities of directors. The level of development activity should be in proportion to the amount of time a director is expected to devote to the duties of the board. In the case of the SCT subsidiaries it is suggested that a couple of one day workshops a year, which may also include a strategic planning activity, would be sufficient and appropriate.

Review is required at two levels – the performance of each individual board member and the performance of the board as a whole. Standard practice is for the Chair to review each of the board members and for selected board members to review the chair. In the case of the SCT subsidiary companies it would be appropriate for two board members to review the chair. An example of a typical competency based interview format is at Annex E.

Review of the performance of the board is conducted by the board as a group. This may also seek feedback from executive officials in the company and from shareholder(s).

It is recommended that all directors receive a properly conducted induction, are provided with professional development opportunities, are subjected to an annual review of performance and take part in an annual all board review of board performance.

5.8 Sanctions

In the unlikely event that a board member fails to perform satisfactorily i.e. demonstrates a lack of attention to the duties and responsibilities of a director, for whatever reason, the SCT should reserve the right to remove the director and select an alternative. This should be made clear in the contract drawn up with the director at the outset.

It is recommended that SCT should reserve the right to remove a director who fails to properly attend to the duties and responsibilities of a director.

5.9 Compensation

There is no definitive answer to the question of whether or not to provide payment to directors. The UK Corporate Governance Code states:

“Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose.”

In many Charities, trusts and their subsidiaries it is common to find trustees and directors are not given compensation, rather it is considered an honour to contribute. However, the larger the organisation, the more complex the business undertakings and the larger the amounts of money involved leads to a need to have some leverage, no matter how small, to “formalise” the relationship. In situations where non-executive directors with specific skills are required this may result in significant amounts of compensation being paid for expertise.

The amount of compensation need not be large. A number of public bodies have boards selected from open recruitment whose members are paid a rate per day in the region of £150 to £350, some have no remuneration such as the Chair of the National Library of Scotland.

In the case of SHEAP, SLAP and VEL it is recommended that a small compensation is paid of £150 per day per board member. It is estimated that these boards will not need a large number of days per year to function effectively.

When and if non-executive board members are selected from off-island it is recommended that travel be paid in addition to day rate compensation

In the case of VES LLP it is recommended that, in order to attract and retain the level of expertise required to deliver the successful joint venture project, the trust consider paying a higher level of compensation. Whilst it may be found that there are experts in the field who are willing to work for nothing, it may be necessary to provide significant contribution. SCT will be guided by their contracted executive search organisation. Figures for the Chair of the board to be compensated with £30K per annum and the other board members £20 – 25K per annum and that travel to Shetland also be paid are not unrealistic.

5.10 Other Issues

In conducting this work several other issues have been identified that it would be prudent to raise as part of this report.

5.10.1 Subsidiary Business Plans

There are no clearly defined business plans for any of the subsidiary companies. *It is recommended that the trust gives clear outlines of business requirements to the newly elected boards, who can then create business plans for approval.* These must be reviewed annually and progress against plan checked regularly. This is a board responsibility.

5.10.2 Trust Plan

It has become apparent that there is not a focussed trust development plan. If this does not exist *it is recommended that a single document summarising the Trust development plan is created and used to drive the business of the trust forward.*

5.10.3 Subsidiary company cost clarity

It is understood that staff who work for the different subsidiary companies are not charged to the companies, but are accounted for under the overheads of the trust. This fails to accurately identify the true costs of overheads to the companies and, in turn, gives a false position of their actual profitability. *It is recommended that staff costs are allocated to the companies appropriately.*

5.10.4 CEO and Financial Controller roles

Both the CEO and the Financial Controller positions have considerable responsibilities and liabilities, yet neither role is identified in the sense of executive board membership. *It is recommended that consideration is given to making the posts of CEO and Financial Controller executive trustees.*

5.10.5 Communication Clarity

During research for this report it became apparent that "Shetland Charitable Trust" is still being referred to as "Shetland Islands Council Charitable Trust" in a number of places. *It is recommended that council employees be reminded that the trust has a new name, is not a part of Shetland Islands Council any more, and must be referred to as Shetland Charitable Trust in all correspondence.*

6. Outstanding actions

There are two outstanding actions from the initial brief:

6.1 Draw up a board job description

6.2 Recommend a plan of action

These documents will be created, adjusted and confirmed with the CEO and Trust Chairman following agreement to implement the recommendations in the report.

Nigel Scott
Edinburgh
June 2012

ANNEX A: MEETING AIDE MEMOIRE – 1-1 INTERVIEWS

Name:-

- Role and responsibility (outside the Trust - may not be a trustee):-
- Role in the Trust/Company (including how you came to join):
- How do you see your role in the Trust/company:-
- Board Size for each company / your company:-
- Compensation for Board Members yes/no/options/expenses /expenses and attendance/ amount:-
- Board Members skills and Knowledge:-
- What would you expect to see in a board member's Job description (How detailed would you expect that to be):-
- Your view on non-executive directors from the Islands / From off island:-
- Your view on selection or election of board members:-
- How long should a board member serve/ how many times can a board member be re s/elected:-
- Your view on the chair of the board for each company – same person as Trust Chair/different for each board/Trustee or non-exec from on or off island
- Other comments (including- how you feel the current structure works)

ANNEX B: UK CORPORATE GOVERNANCE CODE

Main principles of the UK Corporate Governance Code

A. Leadership

A.1 The role of the board

Every company should be headed by an effective board which is collectively responsible for the long-term success of the company.

A.2 Division of responsibilities

There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of decision.

A.3 The chairman

The chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role.

A.4 Non-executive directors

As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy.

B. Effectiveness

B.1 The composition of the board

The board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively.

B.2 Appointments to the board

There should be a formal, rigorous and transparent procedure for the appointment of new directors to the board.

B.3 Commitment

All directors should be able to allocate sufficient time to the company to discharge their responsibilities effectively.

B.4 Development

All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.

B.5 Information and support

The board should be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties.

B.6 Evaluation

The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.

B.7 Re-election

All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.

C. Accountability

C.1 Financial and business reporting

The board should present a balanced and understandable assessment of the company's position and prospects.

C.2 Risk management and internal control

The board is responsible for determining the nature and extent of the significant risks it is willing to take in achieving its strategic objectives. The board should maintain sound risk management and internal control systems.

C.3 Audit committee and auditors

The board should establish formal and transparent arrangements for considering how they should apply the corporate reporting and risk management and internal control principles and for maintaining an appropriate relationship with the company's auditors.

D. Remuneration

D.1 The level and components of remuneration

Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance.

D.2 Procedure

There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No directors should be involved in deciding his or her own remuneration.

E. Relations with shareholders

E.1

Dialogue with shareholders

There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place.

E.2 Constructive use of the AGM

The board should use the AGM to communicate with investors and to encourage their participation.

©2010 Institute of Directors. All rights reserved

Strategic Perception

- Change orientation – Alert and responsive to the need for change. Encourages new initiatives and the implementation of new policies, structures and practices.
- Creativity – Generates and recognises imaginative solutions and innovations
- Foresight – Is able to imagine possible future states and characteristics of the company in a future environment.
- Organisational Awareness – Is aware of the company's strengths and weaknesses and if the likely impact of the board's decisions upon them.
- Perspective – Rises above the immediate problem or situation and sees the wider issues and implications. Is able to relate disparate facts and see all relevant relationships
- Strategic Awareness – Is aware of the various factors which determine the company's opportunities and threats (for example, shareholder, stakeholder, market, technological, environmental and regulatory factors).

Decision-Making

- Critical Faculty – Probes the facts, challenges assumptions, identifies the (dis)advantages of proposals, provides counter arguments, and ensures discussions are penetrating.
- Decisiveness – Shows a readiness to take decisions and take action. Is able to make up his/her mind
- Judgement – Makes sensible decisions or recommendations by weighing evidence, considers reasonable assumptions, the ethical dimension, and factual information.

Analysis of Information

- Consciousness of detail – insists that sufficiently detailed and reliable information is taken account of, and reported as necessary.
- Eclecticism – Systematically seeks all possible relevant information for a variety of sources.
- Numeracy – Assimilates numerical and statistical information accurately, understands its derivation and makes sensible, sound interpretations.
- Problem recognition – Identifies problems and identifies possible or actual causes.

Communication

- Listening skills – Listens dispassionately, intently and carefully so that key points are recalled and taken into account, questioning when necessary to ensure understanding
- Openness – Is frank and open when communicating. Willing to admit errors and shortcomings
- Verbal Fluency – Speaks clearly, audibly and has good diction. Concise, avoids jargon and tailors content to the audience's needs
- Presentation Skills – Conveys ideas, images and words in a way which shows empathy with the audience

- Written Communication Skills – written matter is readily intelligible: ideas, information and opinions are conveyed accurately, clearly and concisely
- Responsiveness – Is able to invite and accept feedback.

Interaction with others

- Confidence – Is aware of own strengths and weaknesses. Is assured when dealing with others, Able to take charge of a situation when appropriate
- Co-ordination skills – Adopts appropriate interpersonal styles and methods in guiding the board towards task accomplishment, fosters co-operation and effective teamwork
- Flexibility – Adopts a flexible (but not compliant) style when interaction with others, takes their views into account and changes position when appropriate.
- Presence – makes a strong positive impression on first meeting. Has authority and credibility, establishes rapport quickly
- Integrity – Is truthful and trustworthy and can be relied upon to keep his/her word. Does not have double standards and does not compromise on ethical and legal matters.
- Learning Ability – Seeks and acquires new knowledge and skills from multiple sources, including board experience
- Motivation – Inspires others to achieve goals by ensuring a clear understanding of what needs to be achieved and by showing commitment, enthusiasm, encouragement and support
- Persuasiveness – Persuades others to give their agreement and commitment: in face of conflict, uses personal influence to achieve consensus and/or agreement
- Sensitivity – Shows an understanding of the feelings and needs of others, and willingness to provide personal support or to take other actions as appropriate

Achievement of results

- Business Acumen – Has the ability to identify opportunities to increase the company's business advantage
- Delegation skills – Distinguishes between what should be done by others or by himself/herself, allocates decision-making or other tasks to appropriate colleagues and subordinates.
- Exemplar – Sets challenging but achievable goals and standards of performance for self and others.
- Drive – Shows energy, vitality and commitment
- Resilience – Maintains composure and effectiveness in the face of adversity, setbacks, opposition or unfairness
- Risk Acceptance – Is prepared to take action that involves calculated risk in order to achieve a desired benefit or advantage
- Tenacity – Stays with a position or plan of action until the desired objectives are achieved or require adaptation.

ANNEX D: NEW DIRECTOR'S CHECKLIST

- Am I clear about the legal requirements of the role of a director? In particular do I have a good knowledge of the duties and liabilities of directors?
- Have I read and understood the powers in the memorandum and articles of association?
- Am I clear about the company's strategy and how it will be delivered?
- Have I received and understood the vision, mission and values of the company?
- Have I reviewed the agenda and minutes over the past 12 months; Am I satisfied that the right items are discussed and covered at the board?
- Have I drawn up a schedule of visits or meetings, where needed, to improve my knowledge?
- Have I made the time to talk to key advisers and the key shareholder (s)?
- Is the information provided to directors concise and valuable; does it present a balanced view of the health and progress of the business against pre-determined goals?
- Are the minutes informative, listing areas for future action by individual, and issued quickly after each meeting?
- ARE the minutes of any sub committees to the board available to the directors?

From: Bain Neville, *The Effective Director, building individual and board success*, Director Publications Limited, 2008

ANNEX E: COMPETENCY BASED INTERVIEW RATING

Board Member			Date		
Reviewer					
Competence Criteria	Evidence				Rating
Organising / Planning					
Strategic Thinking					
Creativity					
Knowledge of markets					
Research methods					
Analytical orientation					
Oral communication skills					
Other information					
Scale: 5 well above, 4 a little above, 3 meets standard requirement, 2 a little below, 1 well below					

