

Proposals for the Future Governance Arrangements for the Shetland Charitable Trust

Executive Summary

The following provides a summary of proposals to change the governance of the Shetland Charitable Trust prepared by the Governance Review group.

The following Trustees are members of the group:

Bill Manson (Chair of the Group)
Jim Henry
Frank Robertson
Florence Grains
Josie Simpson
John Scott
Valerie Nicolson
Allan Wishart (Resigned on 5 August 2009)

Why Change?

There has been a change in the law. Charities now have to comply with new rules, set out in the Charities and Trustees Investment (Scotland) Act 2005. A new body called the Office of the Scottish Charities Regulator (OSCR) looks at the way charities in Scotland operate.

OSCR has asked the trust to change the way it is governed.

It is important for Shetland Charitable Trust to remain a charity, as it saves paying tax on some of its activities (around £3 million per year) Its Trust Deed ensures that its money can only be used for the benefit of the people of Shetland.

What would happen to the money if SCT lost its charitable status?

Legally the new rules mean that the money would have to be paid over to another charity, under the guidance of OSCR.

Proposed Change to the Governance of Shetland Charitable Trust

- **Number of Trustees**
It is proposed that 15 would be an appropriate number of trustees to govern the work of the Trust.

- **Composition of Board of Trustees**

It is proposed that there should be 8 councillor trustees and 7 non-councillor trustees.

- **Method of Selection**

The Shetland Islands Council would nominate 8 councillor trustees.

The 7 Non-Councillor Trustees would be recruited from members of the community.

The public of Shetland would have already have elected the majority of trustees, and the remainder would be selected through a recruitment process, designed to ensure that the trustee body had the appropriate skills, knowledge and experience to govern the Trust on behalf of the Shetland community.

- **Duration of Appointment and Continuity**

In line with Nolan principles, it is proposed that Trustees are appointed for 2 times 4-year terms. Appointments will be staggered to ensure continuity and succession planning.

- **Implementation**

If the proposals are accepted, an implementation plan will be developed to ensure an appropriate transition from the current governance arrangements to the new arrangements.

Next Steps and Time-scale

The public are being asked to comment on the proposals.

The governance review group will consider these comments.

A final set of proposals, as agreed by the governance review group, will be presented at a meeting of the SCT for decision.

Your views:

Write to

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Arrange a meeting with Ann Black by telephoning 01595 744994.

Public Comments must be received by Friday 18th December 2009

Public Comment

To: Individuals, Organisations and the Community of Shetland for Comment

From: General Manager

Date: 13 November 2009

Proposals for the Future Governance Arrangements for the Shetland Charitable Trust (SCT)

1 Introduction

- 1.1 This document outlines the background as to why the SCT needs to change its current governance arrangements.
- 1.2 Members of the public, groups and organisations are asked to provide comments on a proposed model that would be suitable for Shetland, should it be required.
- 1.3 Specifically, this document presents some proposals for comment with regard to the number of trustees, the balance between council nominated and non-council trustees and the nature, selection and duration of appointments to the Trust. Due consideration would need to be given to a transition phase, if change was agreed upon.
- 1.4 These proposals have been prepared within a set of clearly defined parameters. The proposals must comply with the Charities and Trustee Investment (Scotland) Act 2005 and meet the requirements of the independent charities regulator, Office of the Scottish Charity Regulator (OSCR). It must also provide a "workable" solution that safeguards community funds on behalf of the people of Shetland.

2 History and Background

- 2.1 The current model of constitution of the Trust was agreed in March 1990. At that time, it was decided that Shetland Islands Council (SIC) should resign as sole trustee of the (then named) Shetland Islands Council Charitable Trust. In particular, this change was to ensure that the Trust was not constrained by Section 94 of the Local

Government (Scotland) Act 1973, which, at that time, placed certain restrictions on the level of capital expenditure, which could be incurred. Instead, councillors were appointed as individual trustees *ex officio*, and were joined by 2 other *ex officio* appointments, the Lord Lieutenant of Shetland and the Head Teacher of the Anderson High School, making a total at that time of 27 trustees. The introduction of the 2 non-councillor trustees freed the Trust from any such restrictions. The number of councillors has changed over the years, at one time increasing to 26, but has since been reduced to 22, giving a total number of 24 trustees. SCT currently has 23 Trustees, as one of the councillor trustees recently resigned.

- 2.2 Other changes have been introduced to increase the separation between the Trust and SIC, including a change of name from Shetland Islands Council Charitable Trust to Shetland Charitable Trust (SCT), and these are listed in paragraph 4.5.

3 Why Change?

Financial Circumstances

- 3.1 The environment and circumstances in which the Trust operates has changed significantly in recent times. For example, the annual income from the disturbance payments provided to SCT by the oil industry ceased in 2000. This has meant that SCT must rely solely on the income it generates from investments. Although fortunate to hold significant resources, SCT must ensure investments are properly and appropriately managed, especially in the current economic environment. In addition, trustees must make sure charitable disbursements are in line with income. This can cause and has caused tensions, given that the community has become accustomed to a level of service well beyond that provided by local authorities in other areas. Trustees are currently looking at options to reduce expenditure, as well as mechanisms to increase income generation.

Legislative and Regulatory Environment

- 3.2 The legislative and regulatory environment in which SCT operates has also changed extensively. The Charities and Trustee Investment (Scotland) Act 2005, which introduced the Office of the Scottish Charity Regulator (OSCR), has brought an additional level of regulation and scrutiny.

Skills, Experience and Attributes of Board of Trustees

- 3.3 Trustees going forward are, therefore, faced with the challenge of ensuring the long-term sustainability of the SCT within the backdrop of a difficult financial climate, rising demand on resources and an increasingly heavily regulated operating environment. They have significant investment decisions ahead, including whether to invest further in Viking Energy Ltd, if planning consent is obtained. It is

essential that the board of trustees have the correct skills, experience and attributes to make these difficult decisions on behalf of its beneficiary group, the people of Shetland.

- 3.4 OSCR's report on its Rolling Review programme Phase 1a states "...an up to date constitution is an essential precondition of good and effective governance of a charity. We therefore continue to recommend that charity trustees should review their constitutions to ensure that these are up to date with legislative requirements and fit for purpose given the current activities of the charity."

4 Current Governance Arrangements

- 4.1 It can be argued that the make-up of the trustee body delivers accountability to the community. The beneficiaries of SCT are the inhabitants of Shetland, and the current arrangements ensure that there is wide representation of trustees from all areas of Shetland and that all beneficiaries have access to someone they know in their area. This helps with direct accountability between the beneficiaries and the trustees who look after the assets of the Trust on their behalf. The trustees act for all beneficiaries, not only the constituents who elected them as councillors. Unless where confidential business is being discussed, Trust meetings are open to the press and to the public.
- 4.2 This process is open and transparent and available to the local community. The democratic process means that this public accountability is tested regularly through the election process. Furthermore trustees, have access to a wide range of knowledge and information, affecting all aspects of life in Shetland, which is beneficial to the Trust in carrying out its business.
- 4.3 Furthermore, the purpose of SCT is naturally complementary to that of SIC so it makes sense to be strategically linked to ensure common goals and purpose. Both have in common the interest of the Shetland community, which is served through the current governance arrangements.

Operational Independence

- 4.4 OSCR expects all charities to be able to demonstrate openness, transparency and full public accountability in their operation. They feel that given the current structure and arrangements of SCT, that it is difficult to evidence SCT trustees' independence and compliance with section 66 of the 2005 Act. While OSCR does have the power to seek a change to be made to the constitution of the charity, they are reluctant to dictate what that change will be and feel it is important for the charity to provide better and more obvious evidence of independence from the SIC.

4.5 Trustees should be mindful that the following changes have taken place since 2002 in an attempt to ensure effective operational independence of SCT:

- The Trust was renamed from Shetland Islands Council Charitable Trust to Shetland Charitable Trust;
- Trustees adopted a corporate plan for the Trust;
- Trustees appointed management and staff of its own who operate from separate office premises;
- The Trust ceased to seek recommendations from SIC (on charitable disbursement applications), rather assistance from Council services is bought in as required;
- From 1st January 2009 no council officials are employed by the Trust;
- A communications strategy has been developed to address issues of public perception in relation to the independence of the Trust;
- Trustee meetings no longer take place in the council chamber.

Conflict of Interests

4.6 The SCT lawyers, are of the view that given the very obvious and occasionally significant conflicts of interest which have arisen and will continue to arise between SCT and SIC, the status quo may cause OSCR difficulties when reviewing the on-going charitable status of SCT and whether the actions of the trustees are in accordance with their duties under the 2005 Act. Discussions with OSCR confirm this view.

4.7 The Trust has a Conflict of Interest policy that informs trustees of their roles and responsibilities in the event of any potential conflicts arising.

4.8 It is accepted that the retention of charitable status and the avoidance of any findings of trustee misconduct are paramount and therefore the issue must be addressed.

Skills, Experience and Attributes of Board of Trustees

4.9 Currently there is a wide range of skills and knowledge amongst trustees. Consideration may be required as to whether, given the complexities that the SCT faces in the forthcoming years (especially the scale and complexities of future investment and difficult expenditure decisions), the current election process can guarantee that the board of trustees has the necessary attributes to deliver what is required. Can or does it have sufficient procedures to ensure structured and appropriate succession planning? Furthermore, do all of the current 23 trustees understand their role and take full responsibility for their actions as trustees of SCT?

5 Opportunities Associated with Change

- 5.1 Any concerns OSCR has about governance of SCT should be addressed as part of this process, and therefore any threat to SCT charitable status or of trustee misconduct findings should be removed. SCT, through its charitable status, enjoys certain Westminster and Holyrood tax reliefs. The loss of charitable status would therefore have a direct financial dis-benefit to the local community, which would result in a reduction in the services that the Trust is currently able to support. The tax savings due to charitable status is estimated to be at least £3 million pa. Over the lifetime of the Trust it could be argued that that charitable status has been worth more than £100 million to this community.¹
- 5.2 The Trust was, and still is seen as the most effective vehicle for ensuring funds are retained and managed locally. Under charity law, the funds can only be used to benefit the inhabitants of Shetland for charitable purposes. This provides valuable protection from potential central government interference or intervention. Furthermore trustees should also be mindful that according to the Charities and Trustee Investment (Scotland) Act 2005, if a charity is “wound-up” for any reason, the assets have to be used in accordance with its purposes, which must be charitable.
- 5.3 If undertaken correctly, a selection process could ensure that the board of trustees always has the necessary skills, knowledge and attributes required to govern the community funds on behalf of Shetland. Councillor trustees will be nominated rather than appointed.

6 Risks Associated with Change

- 6.1 Concerns have been expressed that any change to the current governance arrangements would reduce the direct public accountability, which is currently in place. Any selection, election or nomination/appointment process could be seen as less open and transparent than the current system.
- 6.2 There is a concern that reducing or changing the make-up of the Trust board means that control of the community funds becomes dominated by interest groups, and does not serve the best interests of the whole of Shetland.
- 6.3 There is an assumption that by introducing more non-councillor trustees that this will somehow “solve” the problems of the Trust. Discussions in the review group, including lessons learnt from the Shetland Development Trust, have highlighted that this is not

¹ These calculations were undertaken by Jeff Goddard, Financial Controller and are based on a company paying tax on its investment returns, of c.£11 million (on average) @ 28% (current rate of corporation tax) which gives £3 million per annum. It should be noted that a non-charitable Trust pays tax at 40%, which would give a much higher sum.

necessarily the case. In fact a change of governance arrangements may “solve” certain problems, but may equally create others. Furthermore, given the size of the Shetland community, conflict of interest will arise regardless of the make-up of any board.

- 6.4 There is a need for public understanding of the reasons for, and implications of change.
- 6.5 The ability to attract sufficient numbers of appropriately skilled individuals to serve as trustees may be an issue given the size of the population.

7 Options for Change

- 7.1 Assuming that change is required, the various aspects of change are considered below. It should be noted that there is no specific statutory guidance in Scotland for charitable Trusts with regard to determining their constitution. OSCR’s guidance for charity trustees “Acting with care and diligence” states that it is good practice, in line with trustees’ duties to act with care and diligence, to consider any constitutional change that may be appropriate.

Number of Trustees

- 7.2 As mentioned, at present, there are 23 trustees, 21 of whom are appointed as councillors of SIC. The quorum for a trustee meeting is 12 trustees present. In general, the size and structure of a board of trustees should depend on the nature of the work that they are expected to perform. The SCT is, and is likely to continue to be in the foreseeable future, a funding organisation. Its main functions will be investing money to secure a good rate of return on the capital of the Trust and then paying out the income earned for projects and services to specialist organisations in line with the corporate plan. A corporate plan is in place and an investment strategy approved.
- 7.3 The focus of the trustees’ work is of a strategic nature – how does the Trust want to invest its money and what does it want to spend it on?
- 7.4 From experience with other board structures, an effective working number of participants would be in the range of 8 to 15 trustees. Consideration should therefore be given to reduce the overall number of trustees. It is felt that given the breadth of activity considered by the Shetland Charitable Trust, it would warrant a higher number of trustees than 8 in this first stage.
- 7.5 The working group wished a board of 15 trustees be considered (the quorum proposed is six trustees, though this may require further consideration). It was felt that this would provide sufficient number for a broad range of views and skills and knowledge to debate and discuss the issues, facing the Trust over the next few years.

Composition of Board of Trustees

- 7.6 The next issue, which needs to be considered, is the composition of the Board – what skills are required of trustees and what is an appropriate balance between council and non-council trustees. The existing “job description” for trustees is set out in Appendix 1. Trustees have a range of strategic, financial and legal responsibilities and a general duty of care to act in the best interests of current and future beneficiaries (in this case, the inhabitants of Shetland).
- 7.7 The Smith and Higgs reports have recognised that the ideal board of trustees would comprise trustees representative of the skills required at executive level, with a balance of ages, gender and ethnicity of the islands. The skills required for the Shetland Charitable Trust would be in line with the Trust’s objectives.²
- 7.8 As already mentioned, the Shetland Charitable Trust is predominantly a funding organisation and more focused on strategic, rather than operational, decisions. However, in future it is envisaged that trustees will need to be more involved in the business of the Trust. They will receive reports of a more detailed and technical nature and be expected to gain a considerable degree of expertise in Trust, charity and investment matters. It goes without saying that the Trust is entering one of its most challenging periods as it works through the financial difficulties it faces. It must also make significant investment decisions on potential income generation opportunities such as Viking Energy Ltd. The Trust has in place a range of professional advisers to ensure that all the financial and legal regulations are complied with, so “professional” financial and legal skills are not necessarily essential. A general understanding of financial and investment matters would be highly desirable allowing trustees to support and challenge staff in these areas.
- 7.9 Finally, the following general skills and abilities would be beneficial. Firstly, a willingness to engage actively in the work of the Trust and be a champion for the objectives it is trying to achieve. Secondly, a challenging yet supportive stance so that trustees can challenge any proposals from paid staff of the Trust from an informed position yet at the same time support the overall strategies and policies of the Trust.
- 7.10 Taking all these issues together, an amended draft role description, which explains the balance of skills, knowledge and expertise expected of trustees, has been set out in Appendix 2.

² Smith, R “Audit Committees Combined Code Guidance,” January 2003 and Higgs, D., “Review of the Role and Effectiveness of Non Executive Directors,” January 2003.

- 7.11 With a Board of 15 trustees, the working group propose that 8 trustees are elected Councillors and 7 are from the wider community.
- 7.12 Trustees will provide a balanced range of skills and knowledge to complement the overall objectives of the Trust.

Method of Selection

- 7.13 At the moment, the appointments to the Trust are made on the basis of individuals holding specific positions, that is, elected members of Shetland Islands Council, the Head Teacher of the Anderson High School and the Lord Lieutenant of Shetland. Under these new proposals, the Trust would need to change the method of selection to the Trust.
- 7.14 From SIC's point of view, it would be necessary to seek nominations for the councillor trustee posts, and these appointments should be linked to council elections and terms of office.
- 7.15 For the non-councillor trustees, the working group suggested an open selection process be held for trustees from residents of Shetland whose name is listed in Shetland's current Electoral Register. This would be based on the skills set identified as appropriate to the Trust.
- 7.16 Again, for reasons of continuity in the first instance, it would propose that the existing non-councillor trustees be retained for a period of 2 years and that new trustees be secured through open advertisement.
- 7.17 It is proposed that SCT trustees sit as the interview panel to select the remaining trustees, with appointments being made on merit. A range of advertising methods should be adopted to ensure as wide a range of candidates as possible. The working group favoured that a panel of 5 trustees plus an independent Chairperson be appointed to oversee proceedings.
- 7.18 A combination of election and selection was seen to provide the most appropriate method for the Trust going forward. The people of Shetland, through the existing election, would choose the majority of trustees. This would retain the level of public accountability, representation and breadth of knowledge of all aspects of life in Shetland, provided by councillor trustees at present. The remaining trustees would be selected on their skills and knowledge, in order to provide an effective board to govern and manage the community's funds.

Duration of Appointments and Continuity

- 7.19 The OSCR guidance mentioned above makes specific reference to trustees considering changes in selection or rotation of trustees as part of constitution reviews. The Nolan Committee recommended

for non-executive directors, that, “terms of office, which should be renewable, should not normally exceed 4 years, and reappointment for third or subsequent terms should be the exception rather than the rule”. If these principles were followed, the trustees’ maximum term of office would be limited to 2 4-year periods once the system is established (but Council appointed trustees’ term of office should mirror that of council elections). The normal period of appointments would be for 4 years and trustees would be required to seek re-selection if they wish to serve 2 terms. After a break of 4 years, individuals would be free to seek re-selection for another 8-year period. Consideration must be given to succession planning, and transitional arrangements to ensure continuity and the appropriate skills set of the Trustee body.

- 7.20 The review group considered whether, given the size of the Shetland community and the concern at attracting suitable candidates, the period of office should be extended to 3 times 4-year terms. They concluded that 2 terms of 4 years would be best. This would be adjusted to fit in with Council elections over the next few years.

Implementation

- 7.21 To effect these proposed changes will require legal advice to prepare a Supplementary Trust Deed, and will require notification of the changes to OSCR under section 17 of the Charities and Trustee Investment (Scotland) Act 2005. Time will be required to appoint the new trustees, bring the ex officio non-councillor appointments to an end, and amend the existing operational framework and procedures, including the Administrative Regulations, Powers of Attorney, and so on. A detailed implementation plan will be prepared for Trustees.

8

Conclusions

- 8.1 This report makes proposals to significantly change the shape of the Shetland Charitable Trust. The overall objective is to ensure that the Trust can continue to operate as a wholly autonomous organisation for the benefit of the inhabitants of Shetland and that it is not, nor seen to be, unduly influenced by the Council in its decision making or management.
- 8.2 A range of proposals has been set out with regard to the size, composition and methods of selection to the Board of trustees. Trustees will be invited to consider these proposals and indicate the likely timescale within which they would wish to see the changes adopted.
- 8.3 Comments are welcomed from members of the public, groups and organisations on the proposals set put in this paper, and any views they have on an appropriate governance model for Shetland.

Appendices:

- 1: - Existing Job Description
- 2 : - Proposed New Job Description

References:

- 1 McFadden Commission – Scottish Charity Law Review Commission on Charity Regulation in Scotland and the Scottish Executive's Response to that Report, 2001
- 2 Smith, R, "Audit Committees Combined Code Guidance", January 2003
- 3 Higgs, D., "Review of the Role and Effectiveness of Non Executive Directors, January 2003
- 4 Nolan Committee - Standards in British public life Reports 1 and 2
- 5 OSCR –Guidance for charity trustees:"acting with care and diligence"

Existing Trustee Roles and Responsibilities

Trustees noted the following description of Roles and Responsibilities at their meeting on 16 April 2003 [which is now updated following the implementation of the 2005 Act]

Each trustee shall act honestly and in good faith and in the best interests of the Trust and the beneficiaries thereof.

Each trustee shall attend regularly the meetings of the Trust and any Committee of which the Trustee is a member.

A trustee's prime concern is the interest of the Charity. Trustees must act and take decisions in the best interest of the charity and present and future beneficiaries.

Except where any particular task is specifically delegated to one or more trustees or to others, the trustees acting together take decisions affecting the Trust. Even if a task is delegated the trustees retain ultimate responsibility for all decisions.

Trustees must take care to act in accordance with the Trust Deed.

Trustees are under a duty to ensure compliance with all relevant legislation and guidelines (such as the various charities acts and in relation to tax matters).

Trustees are responsible for setting the strategic aims, objectives and direction of the charity.

Trustees must protect the charity's assets and be accountable for the solvency and continuing effectiveness of the charity and the preservation of its endowments.

Trustees must exercise overall control over its financial affairs and ensure the completion of the relevant statutory reports, returns and accounts.

Trustees have a duty of care and [under the 2005 Act] must act with the care and diligence reasonably expected of a person who is managing the affairs of another person

Proposed Role Description for Recruitment Purposes

Shetland Charitable Trust was established in 1976 to receive the income, known as the Disturbance Receipts, which the Shetland community got from the oil industry to compensate the people of Shetland for building the oil terminal at Sullom Voe. The Trust has assets of about £200m and an annual budget of about £13m. The Trust is facing considerable financial pressures and is looking to reduce its spending commitments to an affordable level. The Trust mainly carries out its business by paying out grants to local charitable organisations, which are specialists in their own field.

Shetland Charitable Trust is an independent organisation, which is managed, on behalf of the people of Shetland, by trustees. Previously, all 22 Councillors were appointed to sit on the Trust, along with two others. However, a decision has been taken to change the membership of the Trust. The number of trustees has been reduced to 15, of which the Council will nominate 8 and 7 will be independently selected from the local community.

Trustees do not receive any remuneration. Expenses wholly and necessarily incurred while carrying out the business of the Trust can be claimed.

The role of Trustee of Shetland Charitable Trust is a challenging one. Trustees will be expected to have the following skills and knowledge:

- An interest in the business of the Trust and a willingness to actively engage in its work for the benefit of the inhabitants of Shetland
- Ability to communicate effectively about the work of the Trust
- A good understanding of public services and the role they play in the economy and their contribution towards a balance of services
- An interest in the sectors which the Trust is most actively involved in, namely: care and welfare; arts, sport, culture and recreation; and the environment, natural history and heritage.
- An interest in the work of the local voluntary sector
- A strategic thinker, with an ability to articulate a vision for Shetland
- A challenging mind, with an ability to challenge the way things are currently done
- An enterprising mind, with an ability to seek out new opportunities
- Effective at partnership working
- An understanding of the strategic, legal and financial responsibilities of being a Trustee
- A knowledge of financial and investment matters would be beneficial
- Free from significant conflicts of interest with the work of the Trust.

Potential candidates require to be resident in Shetland and listed in Shetland's Electoral Register.

The basic time commitment for this post is estimated to be about 2 days a month, plus appropriate reading time.