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

Our Ref: EMA/TA1/1

Date: 30 November 2011

Dear Sir/Madam

You are invited to the following:

**Shetland Charitable Trust – Special Meeting
Council Chamber, Town Hall, Lerwick
Wednesday 7 December 2011 at 9 a.m.**

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

Yours faithfully

(signed) Dr Ann Black
General Manager

AGENDA

- (a) Hold circular calling the meeting as read.
- (b) Apologies for absence, if any.
- (c) Declarations of Interest.

For Decision

1. Future Governance Arrangements of the Shetland Charitable Trust - Letter from OSCR. Report enclosed.

For Information

2. Date and time of next meeting – 15 December 2011 at **12 noon** (please note the change of time)

REPORT

To: Shetland Charitable Trust

Date 7 December 2011

From: General Manager

Report: CT1112078

Future Governance Arrangements of Shetland Charitable Trust Letter from OSCR

1. Introduction

- 1.1 This report is presented to seek approval of the actions required by OSCR in their letter to Trustees dated 24 November 2011.

2. Background

- 2.1 At their meeting in February 2009, Trustees agreed to review the governance arrangements of the Trust in the light of the current regulatory and legislative framework.
- 2.2 At their meeting on 12 May 2011, after considering 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 Shetland Islands Council (Min Ref CT/27/11).
- 2.3 On 21 September 2011, Trustees considered a report which set out detailed proposals for the future governance of the Trust. However, at that meeting, Trustees approved a motion which proposed "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" (referred to above).

3. Present Position

- 3.1 Trustees have received a letter from OSCR, attached as Appendix 1 which sets out their position as regards the Trustees' decision to hold a referendum, and the action which needs to be taken. The immediate requirement is for Trustees to:-
 1. acknowledge receipt of the letter from OSCR dated 24 November 2011 within 14 days (ie before 8 December 2011);
 2. take no further action to implement the terms of the motion passed on 21 September 2011 (quoted in paragraph 2.3

above), 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. provide to OSCR within 28 days from the date of the letter (ie by 22 December 2011) 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. in the event that OSCR provides such approval and on receipt of this, ensure that all necessary action is taken to ensure that the approved timetable is implemented as outlined and in line with OSCR's expectations.

4. Financial Implications

4.1 There are no financial implications arising directly from this report.

5. Recommendations

- 5.1 Trustees are asked to note the requirements from OSCR, and to agree
 - a) to provide the information required by OSCR set out in paragraph 3.1, points 1 and 2, to meet the 14 day deadline, and
 - b) that a further response will be provided to OSCR before 22 December 2011.

Reference: EMA/TA38
Date: 29 November 2011

Report Number 1112078-f

APPENDIX 1

RECEIVED
28 NOV 2011

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



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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



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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



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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



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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.



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