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25 January 2010

Dear Dr Black

Please find attached the response from Sustainable Shetland as a contribution to your consultation request regarding reform of Shetland Charitable Trust governance. Our response is a revised version to the summary you received from Sustainable Shetland on 7/1/10

We believe this consultation process to reform the Charitable Trust is an opportunity to allow the Trust to effectively serve the people of Shetland for the next 20 – 30 years.

We believe this is a golden opportunity to improve the work of the Trust and should not be squandered. We see this reform process as improving an existing institution rather than simply a quick fix to an immediate problem.

We fear that if reform is not carried out properly, and in good faith, the current problems of conflict of interest and governance will remain.

We support the principle that the people of Shetland, and those who serve them, should put our own Trust in order, democratically and efficiently.

We acknowledge that the law, and in particular Charity and Trust law is there to protect the beneficiaries of trusts and the public at large, and that adherence to the letter and spirit of the law is in the best interests of the Shetland Charitable Trust and those it serves.

As you are aware we had asked for an extension to 12 February 2010 to enable us to involve our membership as fully as possible in our contribution towards your consultation process. Whilst we are dissatisfied with your refusal to properly consider our request, we do appreciate this later informal submission date.

The vast majority of our 660 members are resident in Shetland. We as individual members are all trust beneficiaries. We all have a considerable stake in the reform of the trust being carried out safely and effectively for the current and future benefit of all trust beneficiaries.

We feel election of trustees is essential to a successful outcome of this process.

We welcome inclusion in this current consultation, and hope this is the beginning of a process rather than a one off event.

Our committee would welcome further participation in this review and reform process.

We also wish to present our case directly to the review group or full trustee board, before any final decision is reached by them.

Yours sincerely

Billy Fox, Chairman  
Sustainable Shetland

## 1. Summary

- We agree that reform of the Charitable Trust is necessary and desirable.
- We agree that the trust retaining charitable status is in the best interests of the Trust and its beneficiaries.
- With regard governance, we agree that maintaining the status quo is not an option.
- A 15 member Charitable Trust would be acceptable.
- **An 8-7 split between councillors and council appointed trustees is not acceptable.**
- **Maintaining a majority of councillors is not acceptable.** We note the original McFadden committee report, which informed the Act, recommended that no more than a third of councillors serve on a Trust.
- Council appointed trustees is not democratic and is not acceptable.
- We feel that council appointed trustees may not be sufficient to prove independence, and may prove the reverse, that council control remains.
- We believe a potential risk exists that the continuation of any number of councillor trustees with voting rights may compromise the charitable status of the Trust or its future integrity or viability.
- **We believe that all Trustees should be directly elected to the Charitable Trust**
- **We believe that other options for governance reform should be considered and consulted upon.**
- Future consultation should include direct community engagement such as public meetings, events, workshops and surgeries
- The current report proposals leave the risk of a future SIC with a slim political party majority would ensure “their” members and supporters gained control of Shetland Charitable Trust through SIC councillors and appointed trustees. Such control may be manifestly disproportionate to their initial council majority.
- Structure of councillor plus councillor nominee could magnify any council imbalance rather than create a more representative charitable trust.
- The current proposals may be viewed as “too little too late” and invite further scrutiny or action from regulators or aggrieved trust beneficiaries.
- Holyrood and Westminster may take a continuing councillor majority on SCT into account when deciding on local authority funding.
- We agree that a maximum of two consecutive terms for trustees is acceptable.
- We accept either a four or five year term for Trustees, but that all trustees should serve the same length of term.
- We would like the trust to consider phased elections to maintain trustee continuity, where at any time the trust would comprise a mix between recent and more experienced trustees, as proposed between appointed and councillor trustees.
- We would like the Trust to consider mechanisms for the recall of individual Trustees by beneficiaries of the Trust by democratic means.
- We believe that the chair of the Charitable Trust should be independent of Shetland Islands Council.
- We support the principle that Trustees reflect the geographical, gender, racial, age and income diversity which exists within Shetland.
- To this end we would like the Trust to investigate mechanisms to enable this to happen, including consideration of training, support, expenses or remuneration within strictly controlled parameters.
- We would like the trust to *consider* mechanisms to include non-voting, co-opted individuals with specific areas of expertise.
- Any change to the Trust deed should be referred back to the beneficiaries of the trust for consultation, and ratified by registered voters.

## 2. Current operation and governance

- 2.1. Your report section 1.1 the proposals states one of the aspects of the consultation relates to “the balance between council nominated and non-council trustees”.
- 2.2. We feel that such a statement within the terms of reference pre-supposes that there must be councillor trustees.
- 2.3. There is a concern that the report seeks to answer the self-set question, “How can councillors continue to exert control and influence over the Shetland Charitable Trust and the funds it controls”.
- 2.4. Paradoxically, the demand for reform made by OSCR, have been prompted by the very situation of council control and influence this consultation hopes to address.
- 2.5. Section 3.1 makes an interesting point with regard to trustees spending decisions “This can cause and has caused tensions, given the level of service well beyond that provided by local authorities in other areas.”
- 2.6. This point highlights the fundamental conflict of roles and responsibilities. With all councillors automatically becoming trustees on election, residents in Shetland find it difficult if not impossible to separate the financial and policy decisions of the council from those of the trust, since these decisions are made by the same people.
- 2.7. Some councillor trustees often share in this confusion by mistakenly referring to fellow Trustees as councillors and addressing questions to “this council” rather than “this trust”. Since all but the last two Charitable Trust meetings were held in the council debating chamber, this confusion was understandable.
- 2.8. Some small examples of the perception that they are one and the same organisation include:
  - Shetland Islands Council annual accounts receive a qualified statement under group reporting standards (FRS2 regulations). The reason for this is that they do not include the accounts of Shetland Charitable Trust, an entity under the control or overwhelming influence of Shetland Islands Council. The statutory government regulatory body, Audit Scotland, take a similar, well publicised view.
  - A telephone call to the main SIC telephone number can be seamlessly transferred to the Charitable Trust.
  - The domain name used by the Charitable Trust [www.shetlandcharitabletrust.co.uk](http://www.shetlandcharitabletrust.co.uk) is registered, and therefore owned, by Shetland Islands Council.
  - Most or all staff are currently part of the local authority pension scheme.
  - Most Shetland Charitable Trust IT equipment and infrastructure is owned by Shetland Islands Council.
  - A review of the election literature for candidates standing at the last council election shows that many make no specific mention of the Charitable Trust, even amongst successfully elected candidates. Some use the blanket description of “oil funds” to cover council and trust funds.
  - In March 2008 Shetland Islands Council commissioned a report into the governance of Shetland Charitable Trust and the then Shetland Development Trust. (Shetland’s oil monies and their governance, Dundas and Wilson, March 2008). The report allegedly cost around £100,000.
- 2.9. In this last example, it is unusual for a supposed unconnected organisation to consider how another nominally independent organisation should be run, and to take a vote on what should happen to them. The council meeting voted to wind up Shetland Development Trust within 2 weeks of the report, and to fight to maintain the status quo, i.e. council domination, of Shetland Charitable Trust.
- 2.10. Sustainable Shetland welcomes recent attempts to hold Charitable Trust meetings outwith the council debating chamber.

- 2.11. An independent general manager has also greatly assisted moves towards more independence. We also find that public communication through online and print media has also improved greatly over the last year. In particular the Charitable Trust web site has been a welcome contribution to openness.
- 2.12. Whilst Sustainable Shetland welcomes serious attempts to increase the independence of Shetland Charitable Trust, from time to time the trusts own conduct; the action of Shetland Island Council and that of individual councillors occasionally continues to undermine that attempt at independence.
- 2.13. As recent as December 2009 the council convenor, and Charitable Trust trustee, in opposing the need for Charitable trust reform said "I am prepared to go to the Court of Session and the House of Lords, saying we have a unique situation here and we want to keep it the way it is". In the unlikely event the convenor paid for this legal action himself, the threatened legal action would presumably be paid for by Shetland Charitable Trust or Shetland Islands Council, as in the case of the Dundas and Wilson report.
- 2.14. We consider such a threat to be inappropriate use of public or charitable funds.
- 2.15. It is by no means proven that the majority of people in Shetland understand that by electing a local councillor that they are automatically selecting a Charitable Trust trustee.
- 2.16. It is of concern to Sustainable Shetland that the financial and governance needs of Viking Energy Ltd are cited several times in the report as a criterion for trustee skills, experience and attributes.
- 2.17. It is difficult to avoid the conclusion that the dual drivers of the reform proposals are the instruction from OSCR to reform governance of the Trust, and the needs of Viking Energy Ltd to obtain support and investment from Shetland Charitable Trust.
- 2.18. In the past year Councillor Trustee conflicts of interests have made reaching simple decisions on Viking Energy capitalisation very problematic, including at least one meeting made inquorate as a result of declarations of interest.
- 2.19. The fact that the initial review group of 8 contained two of the three directors of Viking Energy does little to inspire confidence in the impartiality of the report.
- 2.20. That one of these Viking Energy directors, and review group member, had to resign part way through the review process to take up a paid post in Viking Energy led to much community comment over the ethics of swapping positions for financial reward.
- 2.21. In 4.1 the report argues that the current make-up of the trustee body delivers accountability to the community. We dispute the factual accuracy of this claim.
- 2.22. No acknowledgement is made of the considerable disquiet which has existed within the public domain that this make up does not deliver accountability or transparency.
- 2.23. No evidence is presented that people in Shetland are satisfied with the current make-up of trustees or general trust governance.
- 2.24. In contrast, opinion polls and letters to the media have suggested a majority (61%) of people in Shetland are unhappy with current governance of the trust, whilst just 25% say they are satisfied.
- 2.25. At the last council elections some evidence exists that less than a third of voters were aware that councillors automatically became trustees on election.
- 2.26. It is our understanding that people vote for councillors at election time, not Charitable Trust trustees.
- 2.27. At least one current serving councillor trustee was unaware that they automatically became a Charitable Trust trustee on successful election. If candidates are in this situation, it is little wonder the wider population is in similar confusion over who runs the Charitable Trust and how they got there.
- 2.28. Rather than ignore uncomfortable truths, it would be more fitting to acknowledge that the current governance of the Trust does not receive universal support and that considerable

dissatisfaction exists within the community over trust accountability, transparency and governance.

- 2.29. On the fundamental issue of Trust accountability and transparency, we find the report selective and partial in the evidence it presents to show current trust independence.
- 2.30. We are so far disappointed that the consultation period was not extended to allow fuller consultation.
- 2.31. We believe that future consultation should include direct community engagement such as public meetings, events, workshops and surgeries. We are so far disappointed that such events have not taken place for this consultation.
- 2.32. We believe that any trustee decision to change the Trust deed of Shetland Charitable Trust should be referred back to the beneficiaries of the trust for consultation, and ultimately democratically ratified by registered voters in Shetland.

### **3. Opportunities**

- 3.1. We feel there are many opportunities presented by reform of the Trust.
- 3.2. We believe that all of the Trustees being directly elected would deliver the most accountability, and remove any question of council control.
- 3.3. Trustees would be able to properly commit energy and enthusiasm to the trust rather than split time and energy between council and trust.
- 3.4. Greater potential for diversity of background from trustees.
- 3.5. Direct election to the Trust may encourage better understanding and more participation and in the work of the trust.
- 3.6. Less conflict of interest with trustees no longer having dual public responsibilities as councillors and trustees.
- 3.7. Elected Trustees would be directly accountable for their performance as Trustees.
- 3.8. Elected trustees have a democratic mandate to serve, create policy and reach decisions.

### **4. Risks associated with change**

- 4.1. This section appears to highlight the fears of councillor trustees, not of the beneficiaries of the trust.
- 4.2. As an exercise in self referential evaluation it is admirable, but ultimately so narrow as to be pointless.
- 4.3. However there are indeed risks associated with change. These include:
- 4.4. Keeping “just within the law” is not in the spirit of good governance, and could waste Trust time and resources should Charity law change in the future, or in the present, by defending the indefensible.
- 4.5. The current proposals may be viewed as “too little too late” and invite further scrutiny or action from regulators or aggrieved trust beneficiaries.
- 4.6. A continuing councillor majority on Shetland Charitable Trust may be taken into account by Holyrood and Westminster when deciding on future local authority funding and resource needs.
- 4.7. The report appears to have considered that the current non-party political composition of the council will continue indefinitely. In our opinion, this is a mistaken assumption.
- 4.8. The report proposals ignore the risk of a future SIC controlled by a slim party political or organised block majority. Such a majority may ensure “their” members and supporters gained control of Shetland Charitable Trust through SIC councillors and appointed trustees. Such control may be manifestly disproportionate to their initial council majority or electoral mandate.

- 4.9. We consider the best way to manage these risks is for the activities, spending, investing and general governance to be as accountable, transparent and accountable to the residents of Shetland as possible.
- 4.10. We believe that the attempt to create a councillor majority is in itself an unnecessary and avoidable risk, and should be avoided at all costs.

## 5. Options for reform

- 5.1. In section 7.1. We agree with the assumption that need for change is required. Not only to satisfy OSCR overview and current charity legislation, but more importantly, to create a more democratic, transparent, accountable and above all else, effective organisation to serve the current and future residents of Shetland.
- 5.2. In section 7.5 we are persuaded that a Trust comprising 15 voting trustees could be an effective number. This being the case a quorum of 6 would seem appropriate.
- 5.3. We would be concerned if this quorum number was artificially adjusted down to enable all councillor trustees to declare an interest on specific matters but still allow the nominated trustees present to form a quorum to conduct a meeting.
- 5.4. Section 7.6 makes the assumption that there must be councillor trustees. In fact the phrase used is council trustees and non-council trustees. Referring to them as council rather councillors reinforces the current public perception that they are there as an extension of the activities of Shetland Islands Council.
- 5.5. We reject the assumption that there should always be SIC councillors serving as trustees. There may be a case for some, but the case made in the report is based on maintaining a majority of councillors for the sake of a majority.
- 5.6. It is inconceivable that other options for governance reform were not considered by the Governance Review Group. We would have expected obvious options for consideration to have included a fully directly elected trust. Majority elected plus minority appointed. Small number councillors plus majority appointed.
- 5.7. We are disappointed that the report does not disclose the nature or substance of these alternative options, nor any reason why they were not considered at all.
- 5.8. In their place we have a single option for consideration, a council dominated Charitable Trust with an 8 – 7 split between councillors and others. The others being “selected”.
- 5.9. In 7.17 the report is clear on who carries out the selection, this is the councillor trustees. The potential for SIC councillors to select the trustees that best match their own views is very high.
- 5.10. We feel it totally unacceptable that some or all of the 8 councillor trustees should be able to select the remaining 7 trustees.
- 5.11. This selection mechanism could give rise to a situation of even less nominal independence than was previously enjoyed.
- 5.12. We feel that this attempt to maintain council control is unacceptable, and is unlikely to satisfy the test of independence required by charity law, or of governance free from actual or potential conflicts of interest.
- 5.13. The original McFadden Commission, which informed the Scottish Charities Bill, said that no public sector body may appoint more than one third of the trustees of a charity.
- 5.14. Charities responding to the McFadden Commission supported this view as to “ensure that charities continue to add value; to maintain public confidence and to allow innovation.
- 5.15. We note that the Trusts own legal adviser sat on the committee which made this recommendation.
- 5.16. We also note that Shetland Charitable Trust allegedly lobbied for the removal of this conclusion, and that their paid legal advisor appeared to have been involved in this process.

- 5.17. As an alternative to the 8 councillor, 7 appointed structures proposed, we would like to see a fully elected 15 member Charitable Trust.
- 5.18. We would like this option, and any others considered by the review group, as well as public responses to the consultation, to be fully and openly discussed.
- 5.19. Section 7.18 refers to a mix of trustees by election and selection.
- 5.20. We feel this is disingenuous to suggest that any of these trustees are actually elected to the Trust. Each council ward elects three councillors (4 in case of Lerwick South). Only one of these councillors can become a trustee under the proposals.
- 5.21. It is just as likely that the councillor with the lowest mandate could be come a trustee as those with the largest share of the vote.
- 5.22. Again, we believe that direct elections of trustees to the Shetland Charitable trust is the fairest, most accountable and most transparent option available.
- 5.23. We acknowledge that whilst selection can help ensure appropriate skills, within a small community, it also carries a high risk of encouraging cronyism.
- 5.24. Even with the best of intentions, the temptation to select “weel kent faces” makes representation of a range or ages, genders and backgrounds less likely.

## **6. Duration and continuity**

- 6.1. Regarding section 7.19, whilst we note the Nolan Committee recommendation of a term of 4 years. The suggestion that this be followed by only appointed trustees but not council trustees seems contradictory. We fear the needs of council members are overriding the needs of the Trust.
- 6.2. We would find it reasonable and fair that all trustees could serve for the same length of term, be that 3, 4 or 5 year term.
- 6.3. We are comfortable of any length of term from 3 – 5 years, but may prefer 4 years as best fit.
- 6.4. We support the principle that a maximum of two terms should be the norm.
- 6.5. We note there is limited discussion of overlapping terms for continuity of governance. For example a staggered election of trustees every two or four years so that once established there wouldn't be a situation where all trustees were new to the position.
- 6.6. Such a system of overlapping terms would help ensure continuity and provide a mix of experience, enthusiasm and fresh thinking.
- 6.7. In section 7.20, we agree with the conclusion that 3 times four year terms would be excessive. We are concerned however to note that these terms could be adjusted to fit with council elections over the next few years. This could be read as the governance of the trust being adjusted to fit the needs of council members.
- 6.8. However, if the proposal was for elected trustees, this suggestion may have merit as a cost efficient measure and possibly helping encourage greater voter participation. It should be noted that the Scottish government decides on council election dates and periods, so the duration and continuity of the Trust would then have to fit in with national considerations.
- 6.9. We feel that there may be a case to consider for the Charitable Trust setting its own terms of office, duration and election dates, then sticking to it.

## **7. Alternative proposals for consideration**

- 7.1. In terms of getting to where we would like to see the Charitable Trust from where it is now, we would like to see a detailed timetable of how this is to progress.
- 7.2. We would accept a transitional Trust where some councillors remain as Trustees, but that elections for new independent Trustees be carried out during 2010 or early 2011.
- 7.3. Given that Shetland has 7 council wards representing approximate settlement patterns, it would make sense to use these areas to provide 7 trustee positions, giving a

geographical spread of trustees. The remaining 8 positions could be filled by Shetland wide candidates. Voting could be similar to that used by "list" candidates to Holyrood elections, with a system of single transferable vote being used.

- 7.4. Greater use of the skills, knowledge and expertise of individuals from the wider community should be considered. For example as co-opted, non-voting members of specific working groups or committees. All policy and strategic decisions would remain with elected trustees.
- 7.5. For continuity within a transition Charitable trust, we consider the following scenario workable:
- 7.6. During 2010 SCT consults on new Trust deed
- 7.7. 2010/2011, new Trust Deed ratified by the Shetland electorate.
- 7.8. Elections for 7 trustees held, representing 7 main areas in Shetland (mirroring council ward areas)
- 7.9. SIC council nominates 7 members as interim trustees for 2 years.
- 7.10. One ex-officio Trustee to remain during this transition phase, most probably the trustee with least connection to SIC
- 7.11. 2014, all council trustees and ex-officio trustees step down, elections held for remaining 8 trustee places.
- 7.12. An example of such a timetable may resemble the following based on a 4 year term.

<b>Year</b>	<b>Trustees</b>	<b>Elected</b>	<b>Ex-officio</b>	<b>SIC</b>
Current	23	0	2	21
2011	15	7	1	7
2013	15	15*	0	0

\* i.e. 7 elected Trustees from 2011 and 8 elected Trustees in 2013.

- 7.13. Once established this proposal would have elections every two years for half the Charitable Trust places.
- 7.14. We believe that a new trust deed should be proposed and accepted by the residents of Shetland before this reformed Charitable Trust is fully established.
- 7.15. Your report point 7.7 highlights the need for Trustees to come from a background represent of the broad spread of the Shetland population; particularly with regard to age, gender and ethnicity.
- 7.16. We welcome the recognition that a range of trustees reflective of community diversity would be desirable. We would also add relative wealth and income to this list of factors, as well as a reasonable geographical spread from different areas within Shetland.
- 7.17. Mechanisms should be investigated and evaluated to encourage prospective trustees from a wide variety of backgrounds with particular reference to age, gender, ethnicity, income and location.
- 7.18. Training, support, and resources should be considered within these mechanisms, as well as the impact on trustees of lost working time and additional expenses. Any consideration of expenses or remuneration should be within strictly defined limits and subject to full public disclosure.
- 7.19. Such efforts at inclusion helped widen access to council elections. In the last council election all seats were contested. We believe a similar positive effort at diversity and inclusion could be achieved for trustees.
- 7.20. We need individual trustees reflective of the wider community, and need to avoid the impression that serving as a trustee is mainly for people with lots of spare time or money.



## **8. Conclusion**

- 8.1. We feel election of trustees is essential to a successful outcome of this process.
- 8.2. We feel that reform of governance is necessary to improve accountability, transparency and democracy within the trust. This reform, carried out in a measured and conscientious manner can result in a more effective, responsive and sustainable Charitable Trust.
- 8.3. We wish to see this reform process as improving an existing institution rather than simply a quick fix for an immediate problem.
- 8.4. The vast majority of our 660 members are resident in Shetland. We as individual members are all trust beneficiaries. We all have a considerable stake in the reform