

Election or Selection?

A discussion paper by Jonathan Wills

Shetland Charitable Trust is taking another look at how its members are chosen, four years after a reorganisation that left the seven elected councillors on the trust in a minority; the other eight are selected after being interviewed by a small committee with an independent chair. A decision on the new arrangements is expected in May.

Councillor Jonathan Wills is the trust's vice-chair and he argues that there should in future be a majority of eight directly-elected trustees, with seven selected members and no councillors at all – in order to restore democratic control to the trust, while avoiding the problems that can arise when councillors are trustees.

A Proposal for a Shetland Charitable Trust of 15 trustees, with eight nominated by public election and seven by appointment.

This is my proposal to my fellow trustees, revised and edited after listening to colleagues' comments on and criticisms of my first draft:

There would be eight trusteeships to be filled by candidates nominated in public elections and seven appointed trustees, selected by the mechanism currently used.

The method of choosing the eight independent, elected trustees would be as follows:

1. Candidates for trusteeships would require to be nominated by at least five registered electors in the Shetland area;
2. The trust should publish a list of the personal qualities and abilities considered desirable in candidates for trusteeships, and supply the candidates with a clear description of trustees' duties and responsibilities, as well as a general account of what the trust is and does;
3. There would be a postal ballot of all registered Shetland electors, conducted by Electoral Reform Services Ltd or a similarly qualified organisation;
4. Those electors who have chosen not to be on the published register would be alerted by a public notice that they could register with the trust to vote in the election;
5. No canvassing or advertising would be permitted;
6. Candidates would each be allocated space in the official election circular, sent out with the ballot paper, for a photograph and 400 words describing the skills, experience and ideas they would bring to the trust;
7. The method of voting would be for the elector to endorse up to eight candidates by marking a cross against the candidates' names (or by another voting arrangement to be decided by the present trustees, in consultation with OSCR);
8. Upon publication of the results of the ballot, the trust would write to the eight candidates with the largest number of votes and invite them to become trustees for a four-year term;
9. If any candidate were nominated unopposed, he or she would be subject to the same vetting process as the appointed trustees before being invited to join the trust.
10. The new system would be phased in and elections then held at two yearly intervals, to allow for a regular turnover of trust membership but also to ensure some continuity of knowledge and experience.

11. In the event of there being insufficient candidates to fill any or all of the vacancies for elected nominees, the trust would use its existing powers to select new trustees *pro tem*, in addition to the seven appointed trustees.

A Unique Trust with a Public Character

In proposing that the Shetland Charitable Trust (SCT) reverts to having a majority of elected trustees, I intend no criticism of the current appointed members. They make a valuable contribution to trust business (particularly those who insist on asking awkward questions) and I have no wish to dispense with their services; on the contrary. But, for reasons of public policy, grounded in the history of the trust and the origins of its “oil money”, I do contend that there should always be a majority of elected people on our board or, at the very least, the opportunity for the public to choose that majority.

The trust is indeed “unique”, as the recent review of our governance points out, in that its assets, although legally the collective possession of the trustees, are to be employed solely for the benefit of the public, specified in the trust deed as “the inhabitants of the Shetland Islands”.

The origins of the trust funds are the key to understanding this intrinsic public character and thus the desirability of some public accountability: SCT began with a gift of public money; it meets in public; its minutes and accounts are public; and it is probably the most transparent and best run trust of its kind in Britain.

The original source of trust revenue was in the form of annual, *ex gratia* payments from BP and partners to the council, made under a commercial agreement. In 1976 the council created a charitable trust (with the council as sole trustee) and in 1978 activated it, transferring these annual “disturbance” payments to the trust. The reason for this was to minimise liability for tax and to keep the money separate from local and national government accounts. That separation of trust money from other public money is crucial.

Not a Bad Record for a Bunch of Unsifted Amateurs?

Between 1979 and 2000 a total of about £81 million of this oil money was transferred from the council to the trust. The trustees invested it to produce annual revenue and, despite successive global financial crises, its value still stands at over £200 million, even after giving away more than £287m to support charitable activities solely for the benefit of “the inhabitants of the Shetland Islands”. This is not bad going for a trust which, between 1978 and 2012, was stewarded by a majority of elected trustees – councillors - who had not been screened to see if they possessed the (unspecified) “skill set” now said to be essential.

Although the council-controlled trust was undoubtedly too generous in its disbursements, and thus added to the problems caused by a declining stock market, it is important to note that, despite criticisms of the trust by various interested parties over the past 38 years, there has never been an instance of proven misconduct by an elected (or any other) trustee.

After changes in trust law and increasing concerns about councillors’ perceived conflicts of interest when acting as trustees (and vice-versa), in 2012 membership of the trust was reduced from 24 to 15 trustees, of whom seven were to be serving councillors and the other eight to be selected after advertisement, application and appraisal. We agreed that this

unprecedented shift to a majority of unelected trustees would be reviewed after three years, which is why we are discussing our future governance now.

The Intentions of the Founders and the Wishes of the People

It was the clear assumption and intention of the SIC, when establishing and activating the original Shetland Islands Council Charitable Trust (SICCT) in 1976-78, and of SICCT, when amending the trust deed in 1997 and transferring its powers and property to the new SCT in 2003, that majority control of the trust should always remain in the hands of elected representatives of “the inhabitants of the Shetland Islands”. The idea that control should pass to a majority of unelected trustees runs entirely counter to the original aims and purposes of those far-sighted and public-spirited Shetland citizens who created the trust. The late councillors A. I. Tulloch and Alex Morrison, for example, would turn in their graves if they knew it was now being suggested.

In addition to being against the clearly understood intention of the trust’s founders, the shift to an unelected majority was also contrary to the wishes of “the inhabitants of the Shetland Islands”, if we are to judge from their responses to the trust’s public consultation in 2011 and the results of the 2012 council election. In that poll the future of the trust was an issue. Not a single candidate (not even my old friend Drew Ratter) stood on a platform advocating a majority of unelected charitable trustees, whereas those candidates who had publicly declared themselves in favour of retaining a majority of elected trustees generally attracted strong support (for example: Malcolm Bell, Allison Duncan, Robert Henderson, Gary Robinson and myself, among others). At a well-attended annual meeting of the Association of Shetland Community Councils that same year there was unanimous opposition to majority selection.

There can be little doubt that “the inhabitants of the Shetland Islands” and their elected representatives wished the trust to remain under democratic control in 2012. When (if?) we consult the public on our new proposals, we shall see if that is still the case.

Why Have Any Councillors on the Trust?

Hardly anyone now argues that we should keep a majority of councillors on the trust. We mostly accept that the 2006 Scottish charity law makes that undesirable, and possibly improper. So I suggest we just stop the council appointing trustees. The trouble it causes is simply no longer worth the bother.

There is a suggestion that we reduce the number of councillor trustees to four. This looks like a sop to democracy. There’s a reluctant admission that there ought to be public accountability but some critics cannot bring themselves to accept the idea of directly-elected trustees, let alone a majority of them. The proposed rump of four continuing councillor trustees would probably not avoid the continuing problem of the council’s auditors ‘grouping’ the trust’s accounts with the council’s (on the mistaken assumption that the seven councillor trustees currently act as an organised group and exercise 47% of the voting rights on the trust). However, the legal advice we received in 2011/12 was that the number of councillor trustees would need to be reduced to three (20% of 15), not four (26.7%), to avoid grouping.

The council’s external auditor, Audit Scotland, still describes the trust as a subsidiary of the council. This statement was once true but has been false for several years now. In my opinion (not universally shared) it is potentially damaging to both organisations. But if councillors do

not and should not control the trust - not least because the council is a beneficiary - then why have any councillors on it at all?

If not Councillor Trustees, Who?

With no councillors on the trust, how could the resulting “democratic deficit” be redressed? The obvious answer is for the public to nominate trustee candidates by direct election. The democratic principle is central to the rules of good governance for companies, after all, where the shareholders have the right to approve the appointment of company directors. So why not for a unique trust like ours? Those who oppose it in this instance might care to explain why democratic sauce is good enough for the company goose but not for the trust gander.

By the way, I use the word “nominate” deliberately because, in the trustee elections that I propose, the public would be voting to elect *nominees* to the trust. Legally, it would still be open to the trust to reject an elected nominee (although there would have to be very good reasons to do so).

Some critics have objected that elections cannot be relied upon to produce suitable nominees for the trust and also that there are not enough appropriately qualified people in Shetland who would be willing to stand. The answer to that is fourfold:

1. the size of the voluntary sector in Shetland shows the range of talent, experience and commitment available;
2. if election is good enough to choose 22 councillors to act in the public interest, why should it be inadequate to choose eight trustees acting in the same interest?
3. if not enough candidates stood for election, the vacant trusteeships could be filled by selection until the next election date;
4. if candidates were unopposed, they could be vetted in the same way as appointed trustees before being invited to join the trust.

Critics of the democratic method for choosing trustees sometimes often suggest that voting might throw up “random” or “campaigning” candidates. The “random” classification is extremely revealing: what we’re being told is that although some of our fellow citizens might do well enough as councillors in charge of an annual budget of over £110m, they wouldn’t be good enough to be trustees in charge of spending less than a tenth of that sum.

As for “campaigning” candidates, well, the record of single-issue candidates for Shetland Islands Council is instructive: they almost never get elected but if they do they rarely serve more than one term. For example, all of the single-issue (i.e. anti-windfarm) candidates in the 2012 SIC election were defeated.

How to Choose Good Trustees and Get Rid of Dodgy Ones?

The concern about unsuitable trustees may be understandable but the trust already has more than adequate means of censuring, suspending or expelling trustees who neglect their duties, who act as promoters or agents for beneficiaries, who betray confidential information, who attempt to put undue pressure on staff, who bring the trust into disrepute or who are persistently absent.

When we advertise for appointed trustees at present, we ask them to write a letter of application in which they explain why they would be suitable; we ask them to fill in a form to see if they meet our criteria; and we then interview them to see if they understand the aims and objects of the trust, the duties and responsibilities of trustees, and the personal qualities and experience we seek in a trustee, as set out in the explanatory material sent to all applicants. That process is established, it works well and it should continue, in my opinion.

If we advertise elections to nominate candidates for trusteeships, a very similar process would take place, only it would be the public who assess the suitability of the candidates. The public may actually be better qualified to do this than we are. They will probably have more and perhaps better information (island life being what it is). And if any trustee is suitable in most respects but appears to lack certain skills, then training can be offered. The annual interview is another way of ensuring that trustees are and remain fit for purpose.

The “Undemocrats”, as we might call them, will argue, as they did in 2011-12, that the governance of the trust will become more “stable” if a majority of appointed trustees in turn selects unelected appointees to succeed them *ad infinitum*, which we might call an “appointocracy”. Well, there’s stability in any self-perpetuating, closed organisation, of course. What’s missing is popular consent.

Confusion over the Roles of Trustees, Officers and Advisers

Few would disagree that the trust needs to have “an appropriate composition of skills and attributes to manage and control a charity of the size and scale of SCT”. Curiously, no-one has actually said what those skills and attributes might be, or explained why elected trustees, as distinct from selected ones, would not possess them.

Those who insist on a mainly appointed trust seem to be confusing the roles of trustees with those of our staff and professional advisers. The daily management of the trust is performed, not by trustees, but by professional managers, advised by expert lawyers and fund managers, all working within policies set by the trustees. Also, the trust does not actually carry out any charitable activities itself but instead funds specialist groups and charities who do.

The trustees’ chair and vice-chair take an active and informed interest in the business of the trust and meet the managers and advisers regularly, but they do not “manage” the trust. This is quite clearly laid out in the Aims of the Trust, updated in 2014:

“The fundamental principle underpinning the operation of the trust is that trustees have responsibility for the strategic framework of the trust, as set out through various strategies, plans and policies approved by them, and that they ensure the staff implement these strategies, policies and plans effectively.”

It is therefore not essential to have cohorts of retired bank managers, accountants, actuaries, hedge fund speculators, lawyers, company directors and management consultants sitting on the (unpaid) board in order for it to function. It is not at all clear how the Undemocrats’ proposed changes to the composition of the trust would make its day to day administration more effective, unless they are hinting that professionally qualified trustees ought to become involved in micro-management of operational matters, which I assume they are not.

It is certainly very useful if we have some trustees with specialist skills and experience, and we do in fact have a remarkably wide range of skills and experience on the existing board¹, but that does not alter the principle that the majority, whether “random” or not, should always be elected.

What Trustees Actually Do

The tasks of trustees, as set out in the information given to all applicants for membership of the trust, include the following:

- “setting the strategic aims, objectives and direction of the charity and monitoring performance;
- setting policy and monitoring implementation;
- ensuring that the necessary financial and human resources are in place to meet the trust’s objectives
- safeguarding the financial solvency of the trust
- enabling risks to be assessed and managed
- ensuring compliance with the law
- being a responsible employer
- promoting the trust’s role in the community
- ensuring trustees work effectively together as a trust
- providing leadership, upholding values, and being committed to the business of the trust.”

It seems to me that the main qualities needed in trustees if they are to do this effectively are as follows:

- An understanding of what the trust is and does
- Honesty and public spirit
- Common sense and critical intelligence
- An ability to work with others
- A record of volunteering for the community’s benefit
- Detailed local knowledge
- And, as a bonus, skills and experience in a relevant profession

As I noted earlier, we have hundreds of such citizens who donate their time and skills to the very large number of voluntary organisations in Shetland. To suggest that we could not find eight people willing and able to stand as elected trustees is, to put it mildly, contemptuous of “the inhabitants of the Shetland Islands”.

What if No-one Stood as a Candidate?

¹ Between the current trustees, all local residents, we bring to the board our knowledge and experience of, among other things: public administration; local government; social work; medicine; scientific research; marine and fisheries policy; business management; journalism; broadcasting; public relations; English literature; text editing; charitable fund-raising; tourism; hotels and catering; property management; agriculture; road haulage; marine and electrical engineering; financial auditing; naval architecture; seafaring; the police; and the church. That is quite some collective “skill set”.

If the critics of democracy are right and not enough candidates would apply to become trustees, then the remedy is simple - the vacant seats could be filled by appointment, using the existing selection process, until the next election in four years' time. What's wrong with that? The public would still have a regular opportunity to choose the majority of trustees, even if they decided not to use it.

The suggestion that we should greatly increase the majority of unelected trustees (from 53.2% to 73.3%) and leave a rump of four councillors on the trust would not be a reform: it would be perceived by "the inhabitants of the Shetland Islands" as a reversion to the early 19th century, when Shetland's self-appointed, self-perpetuating Great and Good decided amongst themselves how best to distribute the contents of The Poor's Box, not trusting ignorant, feckless peasants to elect their own trustees. This, in my opinion, would have a severely adverse effect on the trust's reputation and also on its efficiency.

I look forward to our forthcoming discussions on the future of the trust and, in due course, to our consultations with the public whose interests we try to serve.

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