

The Macfarlane Trust

Report to: Macfarlane Board of Trustees

Date of meeting: 1ST November 2018

Report from: Interim Chief Executive

Subject: Potential Transfer of Funds and Assets to Terence Higgins Trust

Background

1. At the July Board meeting Trustees reviewed a paper by the CEO and had a preliminary discussion regarding the use of outstanding reserves and the assignment of outstanding beneficiary loans.
2. My understanding is that Trustees have considered a range of options:
 - a. *Distribution to beneficiaries:* Directly disbursing the residual funds prior to closure (assumed end February 2019) through a further beneficiary grants programme by MFT was not considered viable due to a combination of factors: the significant grants scheme run in 2013; the reduced number of applications to the most recent grants scheme initiated in January 2018 (70 applications were received and £436k of grants were made to 65 beneficiaries); the time and resource requirements to operate a further grants scheme the reserve grants scheme initiated in January 2018 is only just completing in October 2018 and the charity has since reduced to only one employee to administer any such scheme);
 - b. *Distribution to beneficiaries using a third party:* Distributing the residual funds indirectly through a grants programme administered via another organisation was also not considered viable for the same reasons noted above, and because there was no organisation known to trustees with both the scope of individual grant making experience and expertise *and* detailed knowledge of MFT's beneficiary group able to administer such a scheme;
 - c. Refocusing the Charity's work: The option of MFT remaining open post February 2019 and spending down its funds was also ruled out on the basis that its core activities had been transferred to other agencies and there was a risk of duplication of activities, and the cost of maintaining the organisation would be disproportionate to the funds available for disbursement;

- d. **Merger:** This was not explicitly explored as an option for a combination of reasons outlined in a), b) and c) above, and a decision had already been made and communicated to the Department of Health that the charity would be closing.
 - e. **Dissolution and transfer of funds to a third party organisation:** Trustees had a preliminary discussion regarding the options for distributing the residual funds through collaboration with a third party organization/s. It was noted that there was no organisation whose role and remit exactly matched those of MFT. Whilst a range of possible organisations was considered, discussion focused on the Terence Higgins Trust in view of its focus on people living with HIV, its national role, and its remit in offering a range of support services for this beneficiary group. At this stage, it was thought that it may be difficult to restrict THT's disbursement of funds to former MFT beneficiaries, but that it would be possible to determine their use more broadly. (The board had also previously agreed that the small number of outstanding beneficiary loans might also be passed to the organisation to whom the residual funds were transferred.)
3. On this basis the Board approved an initial exploratory discussion with the Terence Higgins Trust CEO.

Initial Discussions with Terence Higgins Trust (THT)

4. Jan Barlow met with Ian Green, THT CEO in early October 2018 and he expressed interest in exploring the possible transfer of residual MFT funds in confidence with his Trustees and senior management team.
5. At this stage the discussion was based on the following assumptions:
 - a. that any transfer of funds would be *on dissolution i.e. post a formal board decision to wind up the charity*;
 - b. that funds could be transferred to a charity/ies with the same or similar objects *without a restriction to MFT's objects subject to the Secretary of State approval*;
 - c. *that it would not be feasible/easy to transfer beneficiary information to THT and therefore to limit expenditure to MFT beneficiaries.*
6. This paper:
 - provides further legal advice in relation to any transfer of funds and assets to another organization, and related data protection issues;
 - updates Trustees on discussions with THT, and provides further information about the charity and its proposals for expenditure of residual funds and assets from MFT.

Further Legal Advice

7. I have sought further advice from Russell Cooke regarding disposal of residual funds (see Enclosure Ji).
8. James Sinclair Taylor has highlighted the distinction between:
 - a. a transfer of funds to another organisation/s *prior to closure which can be decided by Trustees alone subject to being in line with the objects in the Trust's Deed and Scheme amendments* i.e. for the beneficiaries and purposes as defined in the Scheme, and;
 - b. a transfer of funds to another organisation/s with the same or similar objects *following a formal decision by Trustees to wind up the Charity subject to this being approved by the Secretary of State*. He notes that the Secretary of State is unlikely to approve these funds being transferred unless they remain restricted to MFT's original objects i.e. the purpose for which it was established, and that the Charity Commission would also expect the transfer of residual funds to align as closely as possible with these original objects.
9. In summary, it is advisable for MFT to find a charity with similar objects *that is willing to apply the funds entirely within the MFT's objects*, and that if this is not feasible for the THT, there may be possible alternative organisations we can find with support from Russell Cooke.
10. I also sought further legal advice on the potential transfer of beneficiary personal data to THT if required to enable them to identify MFT beneficiaries and ensure that residual MFT funds are used exclusively for their benefit (see Enclosure Jii).
11. The advice from Russell Cooke in this context is slightly different to that relating to the transfer of beneficiary data to NHS Scotland (and NHS BSA and other devolved administrations). On that occasion, our lawyers took a very cautious approach taking into account the NHS Scotland request for full transfer of beneficiary data, and staff/trustees' concerns re potential beneficiary objections to their data being shared with these agencies, and advised the Trust accordingly to seek explicit consent from beneficiaries for this transfer. In the event, beneficiary consent was sought for only a very limited set of data necessary to effect the transfer of operations i.e. administration of individual grants.
12. The more recent advice sought from Carla Whelan in relation to sharing of beneficiary personal data in relation to any transfer of funds and assets is in a different context and draws a clear distinction between the handling of beneficiary data in relation to the assignment of loans and the transfer of funds:
 - assignment of loans: *the transfer of beneficiary personal data is necessary to support MFT's assignment of outstanding loans and is covered under merger/takeover*

provisions in GDPR. Data subjects do not have a right to object but would need to be informed individually of such assignment;

- transfer of residual funds: the transfer of beneficiary data in relation to transfer of funds is more complex:
 - It firstly depends on what *information is necessary to enable THT (or any another organization to whom funds are transferred) to comply with the restrictions in a grant from MFT* i.e. that can only be spent in line with MFT purposes and on MFT's beneficiaries. This is for THT to determine as they are responsible for complying with any grant restrictions. Unless there are justifiable reasons why THT have to have the data to manage the grant there is no need to pass beneficiary personal data at all i.e. THT could establish services to support MFT beneficiaries on an open access basis e.g. via their website, and MFT beneficiaries could self-identify where necessary to access individual services e.g. by self-declaration or on production of documentary evidence that they were indeed MFT beneficiaries.
 - If there is a need for THT to have some beneficiary personal data, then MFT could pass beneficiary data *sufficient to support the transfer of operations* without beneficiary consent under merger and takeover provisions in GDPR subject to the purposes for which THT would use this data being the same as the purposes for which beneficiaries originally registered with MFT. NB It could be argued that this is not the case as THT would not be likely to be administering individual grants.

More recent meetings and discussion with THT CEO

13. I met with Ian soon after my appointment on 11th October and have now had several conversations and exchanges of information taking into account the more recent legal advice. The tone and tenor of these conversations has been extremely positive and we have been able to make significant progress.

14. I am now in a position to confirm that:

- There is a clear synergy between MFT's objects and THT's mission and strategy; THT's beneficiary group is described in terms that include all of Macfarlane's beneficiaries i.e. they support people 'living with HIV' and people 'affected by HIV', and THT's strategy is focused on: ending the transmission of HIV in the UK; empowering and supporting people living with HIV to lead healthy lives; amplifying the voices of those affected by HIV across public and political arenas to eradicate stigma and discrimination; and enabling all people to enjoy good sexual health.

- There is real enthusiasm in THT to develop its support services for people with haemophilia living with HIV and their partners/spouses and families through infection from contaminated blood products.
- THT fully accepts the restrictions that will be placed on any funds to be transferred from MFT and has confirmed that it will not need access to MFT beneficiary data to comply with these restrictions.

Following a discussion specifically on this point THT have agreed that they do not need access to beneficiary data to be able to comply with the restrictions on the grant. They have considerable experience of this situation with other transfers and mergers and are very aware of the sensitivities around sharing beneficiaries' personal data in this context and have a policy of never requiring disclosure of sensitive health and other data to ensure access to services. They have given a lot of thought to how they will engage with and consult with Macfarlane beneficiaries, including reaching out to those who have not registered with Macfarlane at the point of transfer of operations, and have had early discussions with their lawyers about how they will provide assurance on accounting for expenditure against MFT funds.

- THT has been proactive in developing very positive proposals for development of their already extensive support services to support people living with HIV through contaminated blood (see Enclosure Jiii). These proposals include:
 - Appointment of an Engagement and Consultation Officer specifically for our beneficiaries to better understand their needs;
 - Provision of support services which will specifically target MFT beneficiaries e.g. a counselling service for MFT beneficiaries impacted by the Public Inquiry;
 - Further development of existing services to ensure that they are both accessible and relevant to our beneficiaries e.g. online support services or peer support groups.
- THT is also willing to take over management of the outstanding beneficiary loans subject to a due diligence on the loan book. We have already shared anonymised summary data to enable an early appraisal to take place, with a view to sharing more detail if and when we reach the point of both organisations formally agreeing in principle to the transfer.
- Finally, THT's management and governance appear robust and proactive, and THT is in a good financial position having undertaken a significant transformation programme following a significant reduction in contract income and voluntary income and has had an extremely successful year in terms of increasing its reach and impact

and being recognised for the quality of its work (See Enclosure Jiv THT Annual Report and Accounts 2017-18).

Decision Required by MFT Trustees

15. Trustees are asked to review progress with THT and to approve further work to finalise a Gift of Deed with appropriate legal advice to enable the transfer of funds and assignment of loans as set out in this paper.