

365.08 (349.08)

THE MACFARLANE TRUST
TRUSTEE INFORMATION

1 Introduction

- 1.1 A revised edition of the Statement of Recommended Practice, Accounting and Reporting by Charities was published in 2005 ("SORP 2005"). SORP 2005, which applies to accounting years commencing on or after 1st April 2005, introduces a new requirement in relation to the Trustees' Annual Report. It is now necessary to disclose the policies and procedures adopted by a charity for the induction and training of its trustees. If no such policies or procedures have been adopted then it will be necessary to state this in the Report.

The Charity Commission recommends that all new trustees should be provided with sufficient induction material to allow them to understand their charitable purposes, financial position and current issues¹. The induction material should include the charity's governing document, recent accounts (with explanatory material where necessary) and minutes of recent meetings of the trustees.

The purpose of this guidance is to provide an introduction to The Macfarlane Trust ("the Trust") and to explain the role and functions, and the powers and duties of the trustees for the benefit of new trustees and to serve as an aide memoire for the benefit of existing trustees. The Trustee Information Pack includes all the induction material recommended by the Charity Commission.

1.2 Trustees

Throughout this guidance, reference is made to the 'Trustees'. The Trustees are appointed under the terms of the Trust's governing document. The Trustees are 'charity trustees' for the purposes of the Charities Act 1993. 'Charity trustees' are the persons having the general control and management of the administration of a charity. As a result, the Trustees are regulated by the Charities Act 1993 and need to comply with its provisions. While the Trust itself is an unincorporated charity, the Trustees are now a body corporate - see sections 2.7 and 5.1. below.

1.3 Introduction to the Charity

The Trust was established by a Trust Deed dated the 10 March 1988 which has been amended by a number of deeds of variation and amendment. A deed

consolidating all of these amendments ("the Consolidated Trust Deed") can be found in section 4 of this Trustee Information Pack.

The Consolidated Trust Deed sets out the objects of the Trust and provides the Trustees with a number of powers which they may exercise in furtherance of those objects. The Consolidated Trust Deed also provides for the appointment and retirement of the trustees and in addition, it contains provisions relating to the administration of the Trust.

The Consolidated Trust Deed is the primary source of the Trustees' powers. However, some powers are also conferred, and a number of duties imposed, by general law.

This guidance will look at the powers and other provisions contained in the Consolidated Trust Deed, and will then consider the general law powers and duties of the Trustees. Finally, the guidance will address issues concerning governance and best practice.

2 The Consolidated Trust Deed

2.1 The Trust is governed by a Trust Deed dated the 10th of March 1988 as varied by:-

- First Deed of Variation dated 20th March 1989
- Second Deed of Variation dated 23rd November 1996
- Deed of Confirmation and Variation dated 23rd November 1998
- Third Deed of Variation dated 9th November 1999
- Fourth Deed of Variation dated 24th May 2000
- Deed of Amendment dated 24th January 2005
- Deed of Amendment dated 3rd June 2005
- Deed of Amendment dated 18th July 2005
- Deed of Amendment dated 31st January 2006
- Deed of Amendment dated 8th May 2006

¹ The Trust holds Trustee Development Days and all Trustees are briefed and provided with induction

- Deed of Amendment dated 4th November 2006

2.2 The Purposes ("the Objects") of the Trust

The Objects of the Trust are set out in clause 4 of the Consolidated Trust Deed and are as follows:-

"To relieve those persons suffering from haemophilia who as a result of receiving infected blood products in the United Kingdom are suffering from Acquired Immune Deficiency Syndrome or are infected with human immunodeficiency virus and who are in need of assistance or the needy spouses, parents, children and other dependants of such persons and the needy spouses, parents, children or other dependants of such persons who have died".

The beneficiaries of the charity are therefore:-

- Persons suffering from haemophilia
- Who as a result of receiving infected blood products
- Are suffering from AIDS or are infected with HIV **and**
- Who are in need

or

- The needy spouses, parents, children or other dependants of such persons (or deceased persons)

"Need" refers to financial need. Financial need is not an absolute term and the Trustees have a discretion as to how to assess whether a person is in need. However there must be some form of objective assessment.

The Charities Act 2006 (the "Charities Act") received Royal Assent on 8 November 2006 and will be implemented gradually over a two or three year period. The Charities Act has codified charitable purposes and there will be 13 heads of charity. The additional charitable heads do not, in the main, change the existing law. All charities will need to demonstrate that their purposes are for the public benefit and the Charity Commission is currently consulting on the meaning and scope of public benefit. In its consultation paper the Charity Commission submits that there are

material on their appointment.

two principles which should determine whether an organisation provides public benefit, being (1) there must be an identifiable benefit or benefits; and (2) benefit must be to the public or a section of the public. The second principle includes a requirement to consider whether people in poverty will be excluded from the opportunity to benefit. We can advise further on this, if required, once the Charity Commission's consultation process has been completed.

2.3 **"Object Powers"**

In furtherance of the objects, the Trustees have a number of powers ("Object Powers"). The Trustees may provide financial aid, holidays, food, clothing and other articles or assistance in kind or of shelter, hospice, housing or other accommodation (whether temporary or permanent). They may promote the education of and provide scholarships and apprenticeships for children and young people who are in need. In addition they may raise funds and do all such "other lawful things" which further the attainment of the objects. It is important to note that these powers can only be exercised in furtherance of the objects as set out in the Consolidated Trust Deed. However, the Trustees could if they so wished, further the objects in a way not specified in the "Object Powers".

2.4 **"Administrative Powers"**

The Deed then goes on to confer a number of "Administrative Powers". These are contained in clause 6 of the Consolidated Trust Deed.

Clause 6(i) provides that the Trustees may apply the income **or** the capital of the Trust in furtherance of the objects. In other words, both the capital and income of the Trust can be spent in furthering its purposes; there is no restriction on the expenditure of capital.

Clause 6(ii) provides that the Trustees may open bank accounts. The Trustees have a wide discretion as to how to operate these accounts – but see section 6.2 below dealing with good governance requirements.

Clauses 6(iii) and 6(iv) deal with the Trustees' power of investment. The Trustees may invest the property of the Trust as if they were absolute owners beneficially entitled. The Trustees have therefore wide powers of investment but see sections 3.2 and 3.3 below regarding the Trustees duties' when exercising these powers.

The Trustees are also empowered to borrow funds, including for the purpose of making investments.

Clauses 6(v) to (vii) allow the Trustees to appoint a custodian trustee, nominees and investment advisers. See section 3.5 below which deals with the exercise of these powers. The Trustees also have powers to employ a secretary and other staff and to make pension and other payments to employees and former employees.

The Trustees have power to make regulations relating to their meetings and proceedings.²

Clause 6(xiv) allows the Trustees to pay (out of income) the premiums for Trustee indemnity insurance.

Clause 6(xv) permits the Trustees to delegate any of their functions to any person or persons (including one or more Trustees) subject to certain provisos.

Clause 7(i) permits the Trustees to pass written resolutions; this is useful in allowing decisions of the Trustee body to be made where meetings of the Trustees cannot be easily convened. Clause 7(ii) permits meetings to be held by means of telephone conference calls.

2.5 **Exercising Powers**

The important thing for the Trustees to remember is that the exercise of a power is optional. A power should only be exercised if the Trustees are satisfied that the exercise of the power will further the best interests of the Trust.

2.6 **Trusteeship Provisions**

Clause 8 permits the payment of "professional charges" to a Trustee who is a solicitor or other professional for work done on behalf of the charity. However, see clause 11 of the Consolidated Trust Deed and section 4.6 below as to the remuneration of Trustees generally.

Clause 9(a) requires that the Trustees meet not less than once a year while clause 9(b) provides that unless otherwise provided, matters shall be decided on by a

² No regulations have been made but established practices have evolved. For example

- Dates of Board meetings are fixed for the following year at the last meeting in the financial year cycle.
- 4 meetings are held each year and the quorum is set at 4.
- The Board elects a Chairman
- Two sub-committees (the NSCC and the EAC) exist. The members of these sub-committees are appointed by and from the Trustees.

majority of the Trustees present and voting and in the case of equality of votes, the Chairman of the meeting shall have a casting vote.

Clause 10 provides for the constitution of the Trustee body.

- Four Trustees are appointed by the Secretary of State for Health (one of whom shall be a Haemophilia Reference Centre Director and one a Haemophilia Centre Social Worker);
- Four are appointed by the Executive Committee of the Haemophilia Society (two of whom being persons suffering from haemophilia who as a result of receiving infected blood products in the UK are suffering from AIDS or are infected with HIV ("User Trustees")); and
- Up to four Trustees (two of whom may be "User Trustees") may be appointed by the Trustees for the time being.³

Trustees serve for a maximum term of four years but they are eligible for reappointment.⁴

Trustees may resign (in writing).

A Trustee automatically ceases to be a Trustee if a bankruptcy order is made against him.

The Charities Act 1993 provides that certain people are disqualified from becoming charity trustees, for example, undischarged bankrupts, persons with unspent criminal convictions (for any offence involving dishonesty or deception) and anyone who has previously been removed from trusteeship of a charity by the Court or the Charity Commission. As a matter of good practice, trustees should complete a Declaration of Eligibility form on becoming a trustee and then on an annual basis confirming that they are (or continue to be) eligible to be a Trustee. A copy of the Declaration of Eligibility is contained at section 14 of the Trustee Information Pack.

Clause 11 provides that trustees shall not receive any benefit from the Trust except if permitted in writing by the Charity Commission or in accordance with clause

³ The number of User Trustees who may be appointed by the Trustees was increased from 1 to 2 by a Deed of Amendment dated 4th November 2006.

⁴ Trustees appointed by the Board of Trustees serve for a term of four years. However, the term of office of trustees appointed by the Department of Health and the Haemophilia Society may be shorter, depending on the appointment policies of those two bodies.

6(xiv) or clause 8 of the Consolidated Trust Deed. However clause 11 also provides that this general rule does not prevent a trustee from receiving a benefit from the Trust in his or her capacity as a beneficiary of the Trust provided that the Trustees comply with the provisions set out in sub-clauses (b) to (d) of clause 11.⁵

Clause 12 provides the Trustees with an indemnity in respect of any losses to the Trust arising as a result of improper investments or by reason of any mistakes or omissions made by the Trustees in good faith.

Clause 13 contains a power of amendment, but amendments which would change the objects of the Trust or which would cause the Trust to cease to be a charity cannot be made. Amendments which would confer benefits on the Trustees cannot be made without the prior consent of the Charity Commission. A copy of any amendments must be filed with the Charity Commission.

Finally, under clause 14, the Trust can be dissolved by a resolution passed by two thirds of the Trustees present and voting. The application of the remaining property of the Trust under this clause requires the prior consent of the Secretary of State for Health.

2.7 Incorporation of the Trustee Body

On 8 January 2008 the Charity Commission granted a certificate of incorporation of the Trustees as a body corporate with the name of "The Incorporated Trustees of The Macfarlane Trust". With effect from 8 January 2008 the Trustees are, therefore, a body corporate and will enter into contracts in the name of the incorporated body, rather than in the names of the individual Trustees. The individual Trustees will remain liable under contracts entered into before the grant of the certificate (unless those are novated - see section 5.1 below) although they will be entitled to a full indemnity from the Trust for expenses properly incurred. Documents may be executed by the incorporated body either (i) by being signed by a majority of the Trustees of the Trust and expressed as being executed by the incorporated body; or (2) in accordance with an authority (in the form of a resolution) of the Trustees conferred by the Trustees on two or more of their number to execute documents in the name of the incorporated body.

⁵ Clause 11 was included in the Trust Deed by the Deed of Amendment dated 8th May 2006. The Trustees were authorised to make the amendment by the Charity Commission pursuant to an Order made under section 26 of the Charities Act 1993 dated 20 April 2006.

The fact that the certificate has been granted will not have any effect on the status of the Trust as an unincorporated charity (see section 1.3 above) or on the composition of the trustee body, the duties of individual trustees or the retirement and appointment of trustees - it is simply an easier way for the Trustees to contract and will avoid the need to assign and novate contracts on a change in the composition of the Trustee body, as would be the case if the Trustee body consisted of individuals.

3 General Law Powers and Duties

Most of the Trustees' powers are contained in the Consolidated Trust Deed. However some powers are conferred by general law. In particular, powers are conferred by the Trustee Act 2000.

3.1 The Trustee Act 2000 contains a series of default provisions that apply to all trusts whenever created which are in addition to any powers conferred in their governing documents but subject to any restrictions or exclusions they might contain. The Trustee Act is divided into 6 parts. Parts 1 to 4 are relevant to the Trust.

- Part 1 introduces a new statutory duty of care
- Part 2 confers a new general power of investment
- Part 3 authorises Trustees to acquire land for any purpose
- Part 4 deals with delegation by the Trustees to agents, nominees and custodians.

3.2 Part 1: Statutory Duty of Care

The Trustee Act 2000 (the Act) provides that whenever the duty applies to a trustee he must exercise such care and skill as is reasonable in all the circumstances, having regard in particular to:-

- (a) any special knowledge or experience that he has or holds himself out as having,
- (b) if he acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that business or profession.

The statutory duty is largely a codification of the position at common law but this new statutory duty only applies in certain circumstances. These include:-

- where a trustee exercises a power of investment
- where a trustee is carrying out his duties to consider the standard investment criteria and to take advice before exercising the general power of investment (see section 3.3 below)
- where the trustee exercises the power to acquire land
- where the trustee enters into arrangements with agents, nominees and custodians. The duty will apply when selecting the person who is to act and when determining their terms of appointment, and if an asset management function is being conferred, to the preparation of a policy statement
- where the trustee is reviewing the appointment of agents
- where the trustee exercises powers to compromise claims or to settle debts under Section 15 of the Trustee Act 1925 (eg, compromising a claim by a former employee for unfair dismissal).

It is important to note that the statutory duty applies not only to the exercise of the statutory powers conferred by the 2000 Act but also to any express powers contained in the Consolidated Trust Deed which have equivalent effects.

3.3 **Part 2: General Power of Investment**

A trustee may, subject to certain provisos, make any kind of investment that he could make if he were absolutely entitled to the assets of the Trust. This power expressly excludes investment in land but this is dealt with further in part 3 of the Act. The general power of investment is an addition to any powers given to the Trustees by the Consolidated Trust Deed but is subject to any restrictions that are imposed under the deed or by legislation. In fact, there are no restrictions because the Consolidated Trust Deed confers wide powers of investment on the Trustees and it is unlikely therefore that they would need to rely on the statutory powers. However, in exercising **any** power of investment (that is whether the power is conferred by the Trustee Act 2000 or under the Consolidated Trust Deed) the Trustees must have regard to the standard investment criteria when making and reviewing investments. **These criteria are mandatory.**

What are the Standard Investment Criteria?

The Trustees must have regard to:-

- (a) the suitability to the Trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind; and
- (b) the need for diversification of the investments of the Trust, insofar as is appropriate to the circumstances of the Trust.

Whether an investment is suitable will involve considering the size and risk of the investment to be made. Also, ethical or socially responsible investment decisions may be appropriate in the circumstances of the Trust.

In addition to having regard to the standard investment criteria, before exercising **any** investment power Trustees are required to obtain and consider proper advice about how, having regard to the standard investment criteria, the power of investment is to be exercised or, in the case of reviewing an investment, the investment should be varied. The advice required is that of a person who the Trustees reasonably believe to be qualified to give it by reason of his ability in and practical experience of financial and other matters relating to the proposed investment. However, Trustees are relieved of their duty to obtain proper advice if they reasonably conclude it is unnecessary or inappropriate to do so. Advice can be given by an employee in the course of his employment.

3.4 Part 3: Investment in Land

The general power of investment does not extend to investment in land. However Part 3 of the Act authorises Trustees to acquire freehold or leasehold land in the UK

- as an investment;
- for occupation by a beneficiary; or
- for any other reason (this last category includes the purchase of land to be used for the objects of the Trust).

The exercise of this power to acquire land will be subject to the statutory duty of care. Where land is being acquired for the purpose of an investment the duty to have regard to the standard investment criteria and take proper advice, will apply.

In addition to the power to acquire land, the Act gives Trustees who acquire land in pursuance of the powers conferred by the 2000 Act, powers of an absolute owner in relation to the land. This includes a power to charge the land or to dispose of it.

3.5 **Part 4: Delegation**

3.5.1 Generally, Trustees have a duty to act personally. While Trustees cannot delegate their duties they do have power to delegate certain powers and functions.

In the case of a charitable trust, the Trustee Act 2000 empowers the Trustees to delegate those functions which:-

- consist of carrying out a decision that the Trustees have taken
- relate to the investment of assets subject to the Trust
- relate to the raising of funds for the Trust otherwise than by means of profits of a trade which is an integral part of carrying out the Trust's charitable purposes (sometimes referred to as primary purpose trading)
- are prescribed by an order of the Secretary of the State

However again, the Consolidated Trust Deed provides wide powers of delegation in relation to the Trustee's functions, including delegation of investment matters.

The Act permits the Trustees to authorise any person (including a company) to exercise any of their delegable functions as their agent. This includes delegation to one or more of the Trustees or to a person who is also appointed to act as the Trustees' nominee or custodian.

Under the Act an agent may be appointed on such terms as the Trustees determine (including as to remuneration) but unless it is "reasonably necessary for them to do so" the Trustees should not authorise the agent to appoint a substitute, cap his liability or act in a position of conflict. If a Trustee has been appointed as an agent he cannot be paid for his work unless there is express authority in the governing document or authority is obtained from the Charity Commission.

3.5.2 **Asset Management**

There are special restrictions for agents managing assets (this includes the investment of assets):-

- there must be an agreement which is in, or is evidenced in, writing
- no delegation is permissible unless the Trustees have prepared a written policy statement as to how the asset management function should be carried out
- the agreement with the agent must include an express undertaking from the agent that he will comply with the policy statement or any amended or substituted statement

These conditions apply to the employment of an agent under **any** power, not just the statutory power in the Trustee Act 2000.

3.5.3 **Nominees and Custodians**

In addition to appointing an agent, the Trustees may also appoint nominees or custodians. The law requires all Trust property to be held collectively by the Trustees in the absence of express authority to do otherwise. The new Trustee Act powers to appoint nominees and custodians are in addition to any powers that may be present in the Consolidated Trust Deed or in other legislation. (Clause 6(vi) of the Consolidated Trust Deed deals with the appointment of nominees). The Act specifies those persons who may be appointed. All appointments must be made or evidenced in writing.

Trustees may set the amount of remuneration and determine any other matters in relation to nominees or custodians as they think fit. Again, if a Trustee is appointed as nominee or custodian he cannot, in the absence of express authority, be paid for the work he does.

The Act requires that the Trustees follow guidance produced by the Charity Commission on the subject of appointment of nominees and custodians. The Commission's guidance on this subject (CC42) is contained in section 12 of the Trustee Information Pack.

3.5.4 **Responsibility for review of actions of agents, nominees and custodians**

Trustees have a duty to review the actions of their agents, nominees and custodians. The Trustees must consider

- whether the appointed person remains a suitable person to carry out the function

- whether the terms of the appointment remain appropriate
- the manner in which the appointed person is performing his/her functions

In addition the Trustees need to consider whether they should exercise any power of intervention that they have or to revoke the authorisation or the appointment and if they consider that there is a need to exercise such a power they are under a positive duty to do so. Finally, where the agent is carrying out asset management functions the Trustees must keep under review whether the policy statement has been complied with and whether the policy statement should be revised or replaced

A Trustee will not be liable for any act or default of the agent, nominee or custodian unless he has failed to comply with the duty of care when making the appointment or carrying out his duties to review the arrangements.

4 **Duties**

- 4.1 Unlike powers, most of which are contained in the Trust's governing document, duties are generally imposed by general law. The Trustees are subject to specific duties set out in the Charities Act 1993 and also have common law fiduciary duties.

Charity trustees hold the charity's property on trust for its objects and not for their personal benefit. The law calls this relationship of trust a type of "fiduciary relationship" and the general law imposes a series of duties on fiduciaries that stem from this relationship. Failure to observe these fiduciary duties constitutes a breach of trust and may result in personal liability for charity trustees.

4.2 **Primary Duty – to pursue the objects**

The primary fiduciary duty of the Trustees is to exercise their powers in good faith and in such a way as to further the Trust's objects thereby furthering the interests of the Trust's beneficiaries.

The primary duty of the Trustees is therefore to exercise their powers in good faith in pursuit of the Trust's objects as set out in clause 4 of the Consolidated Trust Deed.

The Trustees must use the powers set out in clauses 5 and 6 to promote these objects to the exclusion of any other interest, including the personal interests of the individual Trustees, employees, funders, or anyone else. The Trustees owe their duties to the Trust. They have no duty to either the Department of Health or the

Haemophilia Society even though both have a role in the appointment of a number of the Trustees. The Trustees must act independently of these appointing bodies.

4.3 **Duty on Acceptance of Trusteeship**

Each Trustee has a duty to acquaint himself with the provisions of the governing document of the Trust (i.e. the Trust Deed).

4.4 **Duty of Skill and Care**

In the exercise of his or her duties as a Trustee, each Trustee is under a duty to act with the same diligence and care as men and women of "ordinary prudence and vigilance would in the management of their own affairs". The courts have developed this duty to mean that trustees are expected to act as ordinary prudent men and women of business.

This duty assumes an awareness, but not detailed and technical knowledge, of financial and legal issues. However Trustees who hold themselves out as experts in a particular field, for example accountants, have a greater degree of responsibility placed on them.

The discharge of this duty may require the Trustees to seek and to act on professional advice.

In addition to this "common law" duty of care, the statutory duty of care imposed by the Trustee Act 2000 applies in some circumstances (see section 3.2 above)

4.5 **Duty to act in the best interests of the Trust**

Each Trustee is under a duty to act in the best interests of the Trust which means in the best interests of the beneficiaries, including both present and future beneficiaries, and not for any parallel purpose.

4.6 **Duty to participate in the management of the Trust**

Each Trustee is under a duty to participate **actively** in the management of the Trust. The Trustees will be collectively liable for any loss that results from the mismanagement of the Trust (subject to the indemnity provisions contained in clause 11 of the Consolidated Trust Deed). A passive trustee who leaves the administration of the Trust to his or her fellow trustees, or to non-trustees, will not escape liability and the indemnity provisions will not assist a Trustee who takes no part in the management of the Trust. While the Trustees have a wide power to

delegate they may only delegate their powers and functions. The Trustees cannot delegate their duties and so they remain personally responsible for the administration of the Trust.

4.7 Duty to avoid conflicts of interest

Trustees are under a duty to avoid putting themselves in a position where their personal interests conflict with their fiduciary duties to the Trust. This applies in relation to financial interests, as well as to political and sometimes moral or ethical views that they may hold.

As part of this rule, Trustees cannot buy assets from the Trust in the absence of express authority in the governing document or from the Charity Commission. This is known as the rule against self dealing.

Also as part of this rule, Trustees are under a duty to act gratuitously. It is a general rule of trust law that Trustees should not receive personal benefits arising from their position as Trustee unless those benefits are authorised by the Trust's governing document, by the Charity Commission, or by the Court. This means that Trustees cannot be remunerated for their services or sell assets or provide services to the Charity without express authority. The only such authority in the Consolidated Trust Deed is contained in clause 8 (which relates to professional charges).

Clause 10 of the Consolidated Trust Deed provides for the appointment of 'User Trustees'. It may be the case that these Trustees will receive benefits from the Trust. In that event, the Trustees in question would be receiving benefits from the Trust as beneficiaries of the Trust and not in their capacity as Trustees. Payments to Trustees in their capacity as beneficiaries of the Trust are authorised by clause 11. However, care must be taken to avoid any conflicts of interest arising as a result of their dual involvement. 'User trustees' should not for example attend meetings at which their eligibility to benefit from the Trust is discussed. Provided that the Trustees act in accordance with the conditions set out in sub-clauses (b) to (d) of clause 11 it should be possible to avoid conflicts of interests arising.

4.7.1 Example of conflict of interest

Set out below are some examples of ways in which conflicts of interest may occur and ways in which Trustees may benefit from them.

Direct financial gain or benefits to a Trustee

- The purchase or sale to the Trust of assets (whether directly or indirectly (e.g. through a nominee or agent)). This is known as the rule against self dealing.
- The award of a contract to an organisation in which a Trustee has an interest or from which a Trustee will receive a financial benefit.
- The employment of a Trustee in a separate post within the Trust.
- The remuneration of a Trustee for acting as a trustee.

Indirect financial gain or benefit to a trustee

- The employment of a close relative such as a spouse or partner of a Trustee by the Trust (because the finances of the Trustee and his close relative could be interdependent and the Trustee could therefore benefit indirectly from the arrangement).

Conflict of loyalties

- Where the interests of the Trust conflict with a Trustee's duty to act in the best interests of another organisation which has either appointed him as a Trustee or where he acts in a fiduciary capacity e.g. where a Trustee is also a director of a trading company which intends to enter into a contractual arrangement with the Trust.

4.7.2 Declaration of Interests

We recommend that the Trustees adopt a conflict of interests policy and complete a Declaration of Interests form on an annual basis to ensure that the Trust is managed transparently and that the Trustees do not inadvertently breach the rules concerning conflicts of interest. The Declaration of Interests form requires the Trustees to declare any interests they may have (in, for example, companies, charities or local authorities) and its principal aim is to encourage transparency. The conflict of interests policy provides a means of managing

conflicts of interest, by, for example, ensuring that Trustees who have a conflict of interest do not attend and vote at the part of the Trustee meeting at which the matter is discussed. Examples of a conflict of interest policy and Declaration of Interests form can be found at Section 13 of the Trustee Information Pack.

4.8 Duty to protect the Trust's Property

Each Trustee is under a duty to ensure that proper safeguards are put in place to protect the Trust's property and funds. This duty must be borne in mind whenever tasks are delegated to employees, committees or to one or more of the Trustee body.

The Trustees must preserve the assets of the Trust so that they can be used effectively to further the Trust's charitable purposes. The Trust's resources, for example, its office premises or its employees should be used only for purposes which fall within the objects of the Trust. Where, as in the case of the Skipton Fund Ltd, resources are used by and for the benefit of another body, the Trustees should ensure that arrangements are on an arm's length basis and that they receive payment for the use of their resources.

In order to discharge this duty the Trustees must ensure that the Trust's property is adequately insured and that funds are invested prudently.

4.9 Duty to take professional advice where appropriate

Each Trustee must be aware of his or her responsibilities as an employer of staff, an owner of premises and an investor of funds. The Trustees must take professional advice on these matters whenever it is appropriate to do so.

4.10 Statutory duties

In addition to these fiduciary duties Trustees are subject to statutory duties.

The Charities Act 1993 imposes a number of important duties on charity trustees including the duty to keep proper accounting records and to prepare annual audited accounts for the Trust. All trustees are under a general duty to keep clear and accurate accounts of trust property and to produce them when required. The Charities Act requires the Trustees to ensure that accounting records are kept in respect of the Trust which are sufficient to show and explain all the Trust's transactions. The statutory requirements are expanded by the Charities SORP.

Details of the accounting and reporting requirements can be found at section 9 of the Trustee Information Pack.

5 Liability of Trustees

5.1 Contractual Liability

While the Trust itself is an unincorporated charity, the Trustees will on occasion need to enter into contracts with third party suppliers of goods and services.

The Trust is an unincorporated charity and the Trustees are (by the Certificate of Incorporation granted by the Charity Commission on 8 January 2008) a body corporate⁶ with the name 'The Incorporated Trustees of The Macfarlane Trust'. Contracts entered into after 8 January 2008 should be entered into by the body corporate and not by the individual Trustees.

Section 50(4) of the Charities Act 1993 provides that after the grant of a Certificate of Incorporation, the trustees of a charity, notwithstanding their incorporation, are chargeable for such property as shall come into their hands and are answerable and accountable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity and its property, in the same manner and to the same extent as if no such incorporation had been effected. It is our view (as a matter of statutory interpretation and supported by an opinion from Counsel obtained for another client) that this clause relates only to the duties which the Trustees owe to the Trust and that it does not extend to contractual obligations to third parties. However, there is no authority on this issue as it has not been tested in the courts.

Therefore, if a contract is entered into after the grant of the Certificate of Incorporation and the party to the contract is the body corporate, the body corporate will be liable under the contract and the individual trustees will have no liability (this is based on the established legal principle that a corporate body has a separate legal personality and contracts are entered into by the body corporate and not by those who are responsible for running it). However this conflicts with the Charity Commission's view (as set out in its publication CC43) that the grant of a Certificate of Incorporation does not confer any limited liability on trustees and that they retain the same powers and remain subject to the same restrictions and

⁶ Section 50(3)(a) of the Charities Act 1993 makes it clear that the grant of a Certificate of Incorporation makes the Trustees a body corporate.

liabilities as before. Their view is not explained and therefore the basis on which it was reached is unclear.

Contracts entered into before the Certificate was granted would have been entered into by the individual Trustees of the Trust. The Trustees will be liable under those contracts (unless they are novated - see below), subject to their entitlement (pursuant to section 31 of the Trustee Act 2000) to be reimbursed from the Trust fund or to pay out of Trust fund expenses properly incurred by them when acting on behalf of the Trust.

The Certificate of Incorporation vests in the body corporate all real and personal property held by the Trustees for the Trust and it requires the trustees to transfer those assets into the name of the body corporate⁷. Therefore, steps are required to transfer the Trust's assets into the name of the body corporate, by way of assignment or novation. If contracts are not assigned or novated in favour of the body corporate, then the individual Trustees will remain liable on those contracts although the individual Trustees would still, in principle, be entitled to the statutory indemnity described above for expenses properly incurred. However, the body corporate would be entitled to enforce a contract because of the vesting provisions referred to above.

5.2 **Liability for breach of trust**

The Trustees must administer the Trust in accordance with the terms of the Consolidated Trust Deed and with the requirements of charity law. The Consolidated Trust Deed sets out the Trust's objects and the powers that the Trustees can exercise in pursuing those objects. A breach of trust will occur when the Trustees act in a way that is contrary to the terms of the Consolidated Trust Deed or when they fail to perform their duties as trustees. For example, if the Trust's resources are used for purposes not falling within the Trust's objects, a breach of trust occurs. When that breach of trust results in a financial loss to the Trust the Trustees may become personally liable to make good that loss.

The Consolidated Trust Deed empowers the Trustees to take out trustee indemnity insurance. Before exercising the power the Trustees should take into account the degree of risk to which they are exposed, the value of the indemnity required, the cost of the insurance premiums, and whether the insurance is in the interests of the

⁷ Section 51 of the Charities Act 1993

Trust. Trustee indemnity insurance does not however extend to losses arising from a reckless breach of trust.

If the Trustees are familiar with the contents of the Consolidated Trust Deed and have an understanding of charity law, they are unlikely to commit a breach of trust. Trustees can also reduce the risk of committing a breach of trust by taking and following professional advice or consulting the Charity Commission on any point on which they are uncertain. If a breach of trust has occurred for which the Trustees are personally liable they are able to apply to the court to ask to be excused from liability. The court will consider whether the Trustees have acted honestly and reasonably and ought fairly to be excused. The Trustees should not rely on the existence of an insurance policy or the indemnity clause in the Consolidated Trust Deed to relieve them from liability for a breach of trust.

5.3 **Other types of liability**

The Trustees owe a duty of care to their employees, to their beneficiaries and other members of the public visiting the charity's premises. As a charity which employs staff, the Trustees must by law have employers' liability insurance.

When appointing new Trustees, employees or volunteers who will work or will have contact with beneficiaries who are children or vulnerable adults, the Trustees should consider whether it is necessary to undertake criminal record checks to ensure the eligibility of the individuals concerned and to ensure the safety of the Trust's beneficiaries.

In addition, the Trustees have a duty to safeguard the property of the Trust and it is important they insure it adequately. If they do not do so and the property is lost or devalued the Trustees may be personally liable for the loss.

6 **Good governance**

- 6.1 In addition to the powers and duties considered above the Trustees should have regard to principles of good governance. While these fall short of legal requirements they are standards to which the Trustees should try to adhere in the administration of the trust. Failure to do so could lead to criticism by the Charity Commission and, if a failure was responsible for a loss of the Trust's assets it may be difficult for the Trustees to be able to persuade the Charity Commission or, ultimately, the Court, that they have acted reasonably.

6.2 The Charity Commission has issued much guidance on issues concerning good governance. Leaflet CC3 – “The Essential Trustee : What You Need to Know” can be found at Section 7 of the Trustee Information Pack. It gives a general guide to the role and responsibilities of Charity Trustees covering powers and duties as well as good governance. For example, Section G3 of the Commission’s leaflet refers to the Trustees’ duty to protect the Trust’s property. Guidance is given on matters such as cash management and the operation of bank accounts. The guidance provides that if there is no provision in the governing document relating to the operation of bank accounts, the bank mandate must specify at least two Trustees as signatories unless the Trustees can reasonably claim that it is necessary for employees to sign cheques to allow the Trust to operate.⁸ Although not clear from the Commission’s Guidance, this is best practice rather than a legal requirement. Guidance has also been produced by the Governance Hub which is an organisation providing support to the voluntary and community sector. A copy of ‘Good Governance: A Code for the Voluntary and Community Sector’ can be found at section 11 of the Trustee Information Pack.

6.3 The Charity Commission has also identified a number of hallmarks of an effective Charity (see leaflet CC60 at section 8 of the Trustee Information Pack). These are standards that the Commission believes an effective Charity and its Trustees should try to uphold.

Each of the six hallmarks the Commission has identified describe an over-arching principle and are not legal requirements; they are aimed at charities with an annual income of £250,000 and above.

6.4 The hallmarks are:

6.4.1 An effective charity considers the impact that it wants to have and actually has on the people who benefit from it, is clear about its objects, vision, mission and values and how it will achieve them. For example, the Trustees should ensure that the activities undertaken are within the objects of the Trust.

6.4.2 The structure, policies and procedures of an effective charity enables it to achieve its mission and aims and deliver its services effectively.

For example, the Trustees should:

⁸ Clause 6(ii) of the Consolidated Trust Deed allows the Trustees to make such arrangements for the operation of bank accounts as they think fit including as to the number of Trustees or officers the Trust to be required to sign cheques.

- review organisational and Trustee structures;
- identify and regularly assess the risks to which they are exposed and decide how they will manage them; and
- identify and comply with relevant legislation and take professional advice where necessary.

6.4.3 An effective charity is run by a clearly identifiable trustee body that has the right balance of skills and experience to run the charity effectively, act in the best interests of the charity and its beneficiaries, understands its responsibilities and has systems in place to exercise them effectively.

For example, the Trustees should:

- comply with the law by ensuring that the trustee body is constituted in accordance with the governing document;
- recruit and select Trustees on the basis of the mix of skills, knowledge, experience and the diversity that they bring to the trustee body as well as the time they have to do the job well. (The Department of Health and the Haemophilia Society should be encouraged to have regard to this).
- undertake all appropriate checks to ensure that a prospective Trustee is both eligible and suitable to act in that capacity;
- have a policy for managing conflicts of interest on the trustee body (particularly in the case of the User Trustees); and
- have an induction programme for Trustees.

6.4.4 An effective charity manages and uses its resources so as to optimise its potential. For example, the Trustees should ensure that they have robust systems in place for internal financial control and the protection of the Trust's funds and should have a strategy in place for both the Trust's investments and its reserves which takes into account and plans for the needs of current and future Beneficiaries.

6.4.5 An effective charity is accountable to the public and other stakeholders in a way that is transparent and understandable. For example, the Trustees should ensure

that they comply with their legal obligation to produce an annual report and accounts and comply also with the Charities SORP.

- 6.4.6 An effective charity is flexible enough to influence and adapt to changes in the environment in which it works in order to meet the changing needs of those who use its services. For example, the Trustees should welcome feedback from their beneficiaries about the services the Trust provides and the areas where improvements could be made.

It should be emphasised that the hallmarks are not in themselves legal requirements, although they may well involve compliance with legal duties.

Berwin Leighton Paisner
26 June 2008