

REPORT TO: POLICY AND RESOURCES COMMITTEE - 14 March 2011

REPORT ON: LEISURE AND CULTURE NEW CHARITABLE ORGANISATION -
ADVICE FROM INDEPENDENT LEGAL ADVISERS ON
ORGANISATIONAL STRUCTURE AND FORMAT

REPORT BY: DIRECTOR OF LEISURE AND COMMUNITIES
DEPUTE CHIEF EXECUTIVE (SUPPORT SERVICES)

REPORT NO: 147-2011

1 PURPOSE OF REPORT

- 1.1 The purpose of this report is to provide the Committee with advice from the independent legal advisers (Burness) on the organisational structure and format of the Leisure and Culture New Charitable Organisation, and recommend to Committee the approval of the advice contained in Section 3 of Appendix 1 - "Choice of Vehicle - Options Analysis".

2 RECOMMENDATIONS

It is recommended that the Committee:

- 2.1 Accept the recommendations of the independent legal advisers (Burness) contained in Appendix 1 (section 3), "Choice of Vehicle - Options Analysis", namely:
- a) that we pursue Option 3 - the use of a Scottish Charitable Incorporated Organisation (SCIO) for operations.
 - b) that the new arrangements should also take account of the advantages of establishing a trading subsidiary, established as a Community Interest Company (CIC).
 - c) that a transition group or shadow board be established to guide the work of Burness, protect Dundee City Council's interests and take account of the interests of Dundee Leisure, to ensure the smooth transition to the new arrangements.
- 2.2 Agree that the membership of the transition group or shadow board, as detailed in c) above, would be as follows:
- Director of Finance - Marjory Stewart
 - Director of Leisure and Communities - Stewart Murdoch
 - One Member of the SNP Group
 - One Member of the Labour Group
 - One Member of the Conservative Group
 - One independent representative - Sinclair Aitken, past Chair of Dundee Rep.

3 FINANCIAL IMPLICATIONS

- 3.1 There are no additional financial implications arising from this report.

4 BACKGROUND

- 4.1 Reference is made to Article II of the Minute of Meeting of the Policy and Resources Committee of 10 February 2011, wherein the decision was taken to progress with the establishment of a Charitable Organisation which would become responsible for the management and operation of the City Council's Leisure, Cultural and Library Facilities - Report No. 71-2011 refers.
- 4.2 Reference is also made to Article VII of the Minute of Meeting of the Policy and Resources Committee of 10 January 2011 regarding the appointment of external Legal Advisers. Following the tender process, Burness were appointed.
- 4.3 The first task for Burness is to advise, from a range of different organisational structures, the one which would be most appropriate for the requirements of Dundee City Council. Appendix 1 is the Option Analysis undertaken by Burness, the recommendations of which are submitted for approval in this report.

5 POLICY IMPLICATIONS

- 5.1 This report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. No major issues have been identified.

6 CONSULTATION

- 6.1 The Chief Executive, Assistant Chief Executive and Director of Finance have been consulted on the contents of this report.

7 BACKGROUND PAPERS

None.

STEWART MURDOCH
DIRECTOR OF LEISURE AND COMMUNITIES

3 March 2011

PATRICIA MCILQUHAM
DEPUTE CHIEF EXECUTIVE (SUPPORT SERVICES)

3 March 2011

~~BURNISS~~

DUNDEE CITY COUNCIL

**TRANSFER OF THE OPERATION OF LEISURE, CULTURAL AND LIBRARY
FACILITIES TO A NEW CHARITABLE ORGANISATION**

CHOICE OF VEHICLE - OPTIONS ANALYSIS

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DUNDEE CITY COUNCIL

TRANSFER OF THE OPERATION OF LEISURE, CULTURAL AND LIBRARY FACILITIES TO OFFSHOOT ORGANISATION

CHOICE OF VEHICLE - OPTIONS ANALYSIS

1 INTRODUCTION

1.1 We understand that at the Policy and Resources Budget Meeting of Dundee City Council (“DCC”) held on 10 February 2011, the decision was taken to progress with the transfer of the operation of DCC’s leisure, cultural and library facilities to a charitable organisation.

1.2 Burness have been appointed as external legal advisors, to provide legal support in relation to the transition process.

1.3 Our understanding of DCC’s requirements are:

- To establish a charitable organisation as quickly as possible in order that the City Council can maximise fiscal benefits.
- To maintain the educational, social and cultural objectives of the services which will transfer to the new organisation.
- To retain the advantages achieved by the Dundee Leisure company (which operates as a social enterprise), creating the conditions for further innovation and development.
- To refine the existing arrangements in order that trading activity is more clearly governed - possibly through the establishment of a trading subsidiary.
- To develop proposals which will maintain the confidence and commitment of staff, service users and the general public.

1.4 There are three ways in which the intended outcome could be achieved, from the point of view of the corporate structure:-

- adapt the existing Dundee Leisure company, and use that as the vehicle for the combined operations (i.e. encompassing cultural and library services as well as leisure services)
- create a new company limited by guarantee with charitable status as the vehicle for the combined operations
- make use of the new legal structure for Scottish charities - the Scottish Charitable Incorporated Organisation - as the vehicle for the combined operations.

- 1.5 We have been asked to appraise each of the above options, and put forward our recommendation as to the most appropriate way forward for DCC.
- 1.6 Our analysis and recommendations - based on the information which has been provided to us by DCC officers to date - are contained within sections 2 and 3 of this report.

2 OPTIONS ANALYSIS

2.1 As noted in Section 1 (Introduction), the available options are as follows:-

- adapt the existing Dundee Leisure company, and use that as the vehicle for the combined operations (i.e. encompassing cultural and library services as well as leisure services) (“**Option 1**”)
- create a new company limited by guarantee with charitable status as the vehicle for the combined operations (“**Option 2**”)
- make use of the new legal structure - the Scottish Charitable Incorporated Organisation - as the vehicle for the combined operations (“**Option 3**”).

2.2 The above options are analysed in turn below.

Option 1 - Use of Dundee Leisure (suitably adapted) as the vehicle

2.3 This option would involve effecting a number of changes to the corporate structure of the existing Dundee Leisure company, as follows:-

- the name of the company would require to be changed, so that it reflected the full range of operations i.e. including cultural and library facilities
- a fresh set of articles of association would require to be prepared, to reflect the principle that DCC should be the sole member of the company (see below) and also the intended composition of the board; the new articles would also have to incorporate a new objects clause, so as to reflect the wider range of objectives which the company would be pursuing
- the membership would require to be restructured in line with the new articles of association
- additional directors would require to be appointed (and certain of the existing directors would require to resign) to ensure that the intended composition of the board reflects the new objectives of the company.

2.4 Under Scottish charities legislation, the consent of the Office of the Scottish Charity Regulator (“OSCR”) would be required in relation to both the change of name and the alterations to the purposes of the company as stated in the objects clause. The formal consent process would require to be followed, and allowing a minimum of six weeks’ advance notice to OSCR prior to effecting the changes.

2.5 In addition to a radical overhaul of the corporate structure, as outlined above, a suite of contractual documentation would require to be put in place to regulate the additional operations which the company was to carry on. One of the key documents forming part of that suite of documentation would be a formal Services Agreement - and it should be noted that it would be unsafe, by reference to current principles of EU procurement law, for DCC to award that contract to the existing company unless it was structured in such a way as to fall within the principles laid down by the leading European case on this issue, known as *Teckal*. Broadly, the

Teckal case established the principle that a services contract could be awarded by an authority to another body without following a procurement process, only if (a) the authority was able to exercise the same control over that body as it could in relation to its own departments and (b) the essential part of the body's activities were with that authority. In order to satisfy the first element of that test, it would be necessary for the articles of association of the existing Dundee Leisure company to be restructured so that DCC was the sole member of the company.

- 2.6 DCC would of course also have to carry through the transfer of the assets and operations associated with the cultural and libraries facilities (excluding land/buildings and museum collections - where rights of occupation and use would be granted, rather than ownership being transferred) to Dundee Leisure (as restructured and re-named). That would involve a formal Transfer Agreement; assignation (transfer) of contracts, with third party consents where applicable; the usual TUPE procedures in relation to transferring staff; and putting in place the appropriate pensions arrangements for the transferring staff. In addition, leases would require to be put in place between DCC and Dundee Leisure (as restructured and re-named) in relation to the cultural and libraries facilities.
- 2.7 The advantages and disadvantages of Option 1, as compared with Option 2, can be summarised as follows:

Advantages	Disadvantages
There would be no requirement to carry through a transfer process in relation to the leisure strand of the operations (although a Transfer Agreement would be needed in any event to cover transfer of the cultural and libraries strands, and the non-inclusion of leisure would not significantly simplify that document)	There could be a tendency to carry forward existing approaches and practice, as compared with starting afresh with a new organisation.
There would be no need to form a new company limited by guarantee (although a new set of articles of association would require to be drafted and put in place - so any saving in legal costs would be minimal)	There could be sensitivities within the existing company which could inhibit the ability to carry through the changes needed to ensure that the corporate and management structures were appropriately overhauled (and in line with DCC's objective to create an organisation in which the three main service strands were appropriately balanced)

There would be no need to pursue an application for charitable status (although there would still be a need to pursue formal applications for consent with OSCR)	This approach could feel to staff like a "takeover" by the existing company, which has no track record in managing the transferring functions.
The existing leases and contractual arrangements between DCC and the company applying to the leisure operations could be kept in place (but we would advise against that approach, given the benefits of applying a consistent approach to the property and contractual arrangements across all three service strands)	

Option 2 - Use of a new company limited by guarantee as the vehicle

2.8 This option would involve incorporating a new company limited by guarantee with charitable status, and arranging for the transfer to that new company of (a) the leisure operations of the existing Dundee Leisure company and (b) the cultural and libraries operations of DCC. Following completion of the transfer, the existing Dundee Leisure company would be struck off the register of companies. The key steps in that process would involve the following:

- a draft of the articles of association for the new company would be prepared and submitted to OSCR along with the application for charitable status
- after any adjustments to the draft articles had been made to satisfy any points raised by OSCR, the company would be incorporated at Companies House
- once the company had been incorporated, the appropriate documents would be submitted to OSCR to complete the charity application process
- application would be made to OSCR for consent to the winding-up of the existing Dundee Leisure company
- once OSCR's consent had been issued, the members of the existing Dundee Leisure company would pass a formal resolution, authorising and directing the board to proceed with the transfer to the new company, and confirming that application should be made for the company to be struck off

- two Transfer Agreements would be put in place - one dealing with the transfer by the existing Dundee Leisure company to the new company; and the other dealing with the transfer by DCC to the new company
 - following completion of the transfer, the existing Dundee Leisure company would be struck off the register of companies, and notification of that would then be issued to OSCR.
- 2.9 The leases in favour of the existing Dundee Leisure company - and contracts to which the existing Dundee Leisure company are party - would be assigned (transferred) to the new company. Adjustments would be made, where appropriate, to the lease provisions so that they were in line with the new leases (relating to cultural and libraries facilities) - see below.
- 2.10 The appropriate suite of documentation - including leases of the cultural and libraries facilities - would be put in place between DCC and the new company, creating a consistent and comprehensive legal framework across all three of the key service strands.
- 2.11 The advantages and disadvantages of Option 2, as compared with Option 1, are essentially the converse of those shown in the table set out in paragraph 2.7. Broadly speaking, one significant advantage of Option 2 is the ability to adopt a “clean sheet” approach, which enables the corporate structure, management structure, contractual framework and property arrangements to be built up in a straightforward and consistent manner in line with current principles of best practice - without being constrained by existing arrangements.

Option 3 - Use of a SCIO as the vehicle

- 2.12 This option would involve the formation of a new type of legal entity - the Scottish Charitable Incorporated Organisation (“SCIO”). The SCIO has been developed specifically as a vehicle for Scottish charities; it is based on Scottish charities legislation and is formed by OSCR rather than Companies House. A key benefit of the SCIO is that it avoids the complexities of company law, and the additional administration associated with the need to file notifications, accounts and annual returns with Companies House. Like a company limited by guarantee, the SCIO provides the benefit of limited liability and a clear corporate identity.
- 2.13 The board members of a SCIO are subject to the same duties as the charity trustees of any other form of charity. They do not also have to take account of the additional complexities arising from the various detailed duties of company directors laid down by companies legislation, and that is a further advantage of a SCIO as compared with a company limited by guarantee.
- 2.14 Burness has been involved in the development of the SCIO model from an early stage, including work with the Scottish Government Bills team as the legislation was being formulated in 2004/5; and more recently serving on the Working Party

established by the Scottish Government to guide the introduction of the SCIO. We were commissioned by the Scottish Government to prepare model constitutions for the SCIO to guide the consultation processes in 2004/5; which were subsequently overhauled for the purposes of the Working Party. We are currently liaising closely with OSCR in relation to the detailed aspects of the SCIO registration system and indeed will shortly be contributing to OSCR's draft guidance on SCIOs, as well as working with SCVO and other umbrella bodies on template SCIO constitutions. We are therefore intimately aware of the characteristics of the SCIO model, and the principles underlying those various features.

- 2.15 We believe that the SCIO model will, within a relatively short period, be the legal entity of choice for the vast majority of applications in the charitable field. The company limited by guarantee, on the other hand, will tend to be seen as an outdated model for organisations with charitable status - particularly having regard to the burdens of company legislation and dual regulation referred to above. Against that background, we would consider that it would be appropriate for DCC to take advantage of the opportunity to make use of the SCIO model as the vehicle for the leisure, cultural and libraries operations. This would also reinforce the message that the structure for delivery of these combined operations was in line with principles of best practice and was fully fit for purpose.
- 2.16 A further consideration in the present context is timing. The process of incorporation and recognition as a Scottish charity is - in the case of a SCIO - carried out by OSCR as a single-step process; and that in itself should create a saving in time, as compared with creation of a new company limited by guarantee. Beyond that, though, OSCR is keen to see early and widespread take-up of the SCIO model as from the start date of 1 April of this year - and, although OSCR is unable to give any guarantee on timing, we believe on the basis of informal discussions with them, that there is a reasonable prospect of having a SCIO in place within a much shorter timescale than the three-month period associated with the usual process for a company limited by guarantee. Given the importance of achieving early transfer - and, in particular, achieving the financial savings associated with rates relief from the earliest possible date - we would consider that this represents a significant advantage of the SCIO model as compared with Option 2.
- 2.17 The various legal steps associated with the implementation of Option 2 - other than the charity application process and the incorporation process (see above) - would also apply in relation to Option 3.

2.18 The advantages and disadvantages of Option 3, as compared with Option 2, can be summarised as follows:

Advantages	Disadvantages
Much simpler legal framework for SCIOs - specifically tailored to the needs of charities - as compared with companies limited by guarantee	The SCIO model may not be immediately recognised and understood by the general public until it has bedded down
A simpler regime for board members' duties as compared with directors of a charitable company	An SCIO is unable to grant a floating charge (a type of security which companies can grant), unlike a company limited by guarantee; it is very unlikely, however, that banks or grant funders will see this as a significant issue
Less formal administration eg no need to file notifications of changes in board members with OSCR (unlike Companies House)	
Likely to involve a quicker incorporation/charitable status process - thus opening up the prospect of unlocking the benefits of rates relief at an earlier stage	

3 RECOMMENDED OPTION

- 3.1 While Option 1 may seem attractive at first sight - given that it would avoid the need to transfer one out of the three service strands - that is likely to be counterbalanced at a practical level by the difficulties of having to work with, and adapt, existing structures and practices. Also, Option 1 shares with Option 2 the disadvantage of maintaining a company limited by guarantee as the legal entity - a model which carries the additional burden of company law and a dual regulation system and which we believe is likely to be seen as outdated within a relatively short period. The SCIO model provides a “clean sheet” approach, based on a legal entity which has been carefully tailored to meet the needs of Scottish charities.
- 3.2 On the basis of the analysis set out in Section 2 and having regard to the considerations set out in paragraph 3.1, we would recommend that Option 3 - the use of an SCIO as the vehicle for the operations - should be pursued.
- 3.3 We would recommend that the new arrangements should also take account of the advantages of establishing a trading subsidiary. Our advice would be to establish this as a Community Interest Company (CIC). Appendix 1 sets out the possible relationship between different elements of the proposed structure and DCC.
- 3.4 Finally, to help to ensure the smooth transition to the new arrangements, we would recommend the establishment of a transition group or shadow board which would guide our work, protect DCC’s interests, and take account of the interests of the existing Dundee Leisure company.

25 February 2011

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DUNDEE CITY COUNCIL

TRANSFER OF THE OPERATION OF LEISURE, CULTURAL AND LIBRARY FACILITIES TO OFFSHOOT ORGANISATION

PROPOSED STRUCTURE

