

Revitalising Your Governing Document

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Identifying your organisation's Governing Document.

Charitable organisations can be set up in a number of ways and can be brought into being by a variety of different documents. The document which establishes the organisation will generally be the organisation's governing document until it is superseded by an amendment to it or by a completely new governing document. Any amendment or replacement must be formally adopted in accordance with the applicable law and/or the provisions of the governing document then in place.

Some examples:

- A deed can be used to establish a charitable trust. The deed may be in the form of a will, conveyance or a Deed of Trust.

- Memorandum and Articles of Association are used for the purpose of forming an incorporated body¹ under the Companies Act (“a Company”). The Memorandum of Association forms one part of the governing document. It deals with the organisation’s relationship with the outside world whilst the second part of the governing document, the Articles of Association, governs the organisation’s internal workings².
- An Industrial and Provident Society is also a corporate body which has “Rules” as its governing document rather than a Memorandum and Articles of Association.
- Other possibilities of corporate bodies include formation by statute / statutory instrument, other Order (e.g. orders in Council) and Royal Charter.
- A body may simply be formed as an unincorporated association. In such a case the body may have a simple set of rules, or constitution (or both) which govern it.
- Finally a “Scheme” is a legal document which normally takes effect under an order of the Court or the Charity Commission by which a charity may be regulated or its existing governing document amended³. Usually, using a Scheme as a governing document is indicative that the organisation is unincorporated⁴. Occasionally, a Scheme may only take effect by Royal Charter or Statutory Instrument.

¹ An incorporated body is one which has a separate legal identity from the Trustees/Directors and its Members/shareholders. An incorporated body can sue and be sued in its own name

² As from the 1st October 2008 the Articles will be the only constitutional document of a company. New companies will still need to prepare a Memorandum of Association before they can be incorporated but it will be very short stating that subscribers have agreed to form the company. Existing companies - those parts of the Memorandum not needed in the new form Memorandum will be deemed to be part of their Articles after 1st October 2008 including the objects clause.

³ The Commission has published leaflet *CC36 Amending Charities’ Governing Documents: Orders and Schemes* as well as Operational Guidance *Orders and Schemes* on the subject of the scheme making procedure

⁴ A Scheme can be used where, for example, an organisation has lost its governing document or its governing document is out of date/unworkable. In such cases an application can be made to the Commission (or Court) for it to make a Scheme for the organisation. In 2004 Geldards applied to the Commission for it to make a Scheme for one of its clients. In that particular case the organisation’s governing document was dated (approximately) 1922 and contained no power for the Trustees to amend it. Accordingly, an application was made to the Commission and a Scheme was granted.

In very basic terms a Scheme can be used by the Commission to modernise governing documents or to make them workable. Alternatively, a Scheme is sometimes imposed where there is appeal for public funds and no organisation is formed to control

The Importance of the Governing Document

The type of governing document the organisation has will indicate whether or not it is incorporated and will state what the organisation's objects and powers are. Generally the document will (or should) also include the organisation's administrative provisions. The document may be backed up with a subsidiary document.

Geldards' precedent Deed of Trust includes paragraphs with such headings as Name and Objects, Powers, the Trustees, Proceedings of Trustees, Property and Funds, Records and Accounts, Amendments, Amalgamation, Dissolution and Interpretation.

Geldards' precedent for an unincorporated association includes the following paragraph headings: Name, Objects, Powers, Membership, General Meetings, the Committee, Committee Meetings, Powers of the Committee, Property and Funds, Records and Accounts, Notices, Amendments, Incorporation, Dissolution and Interpretation.

A Memorandum and Articles of a Companies Act company or the Rules of an Industrial and Prudential Society will likewise cover these issues

It can be seen from the above that there are some common provisions in the different types of Governing Document. They will deal with such things as:

- Objects
- Powers (to invest, to borrow, to employ, to contract...)
- Calling of meetings and taking decisions (including notice periods, quorum)
- Identity of personnel (Trustees/directors/Members/shareholders etc...)

the use of the funds. In such a case the Commission can step in to establish a charity to give the funds a home. See for example a minor's welfare charity – the chances are it is governed by a Scheme or Schemes.

In light of the provisions of the Charities Act 2006 there should be less need for the Commission to impose Schemes in future because it enables Charities which have no power to amend its governing document to do so without recourse to the Commission (so long as the governing document does not prohibit it).

- Trustee payments (conditional)
- Trustee Liability etc...

When an organisation proposes to take any action it must ensure that the thing proposed is:

1. in the furtherance of the objects of the organisation;
2. within the organisation's powers;
3. considered and decided upon in accordance with all of the administrative provisions contained in the governing document. For example provisions regarding who can take the decision (trustees/membership), quorum and notice provision, appropriate consents are obtained etc....; and
4. recorded in the appropriate places

Why revitalise the Governing Document?

However carefully the governing document has been drafted it will require amendment from time to time for a variety of reasons including:

1. As a result of a change in the law. A simple example is legislation that changes local government boundaries that has implications for an organisations' area of benefit. Possibly, the new "public benefit" test could require an organisation to consider a change.
2. To remove unnecessary burden. Some of the recent changes brought about by the Companies Act 2006 for example have/will have the potential to render some governing documents more onerous than otherwise necessary. The Companies Act 2006 allows certain companies not to hold an AGM and allows them not to lay their accounts before the company in general meetings⁵. The Act also removes the requirement for a company secretary in certain cases⁶.

⁵ As from 1st October 2007 private companies (i.e. not plcs) will no longer be required to hold an AGM. A company whose articles expressly require an AGM will have to remove this requirement in order to take advantage

3. To remove unnecessary prohibitions. If the Trustees of a charity believe it is the best interest of the charity and unless it is expressly prohibited by the governing document new section 73F of the 1993 Act permits trustee indemnity insurance to be bought and paid for out of the funds of the charity, subject to the rules of that section. Accordingly, if a governing document has an express prohibition against such a payment then the charity will not be able to take the benefit of s73F⁷.
4. The need to alter the management of the organisation. For example it may be thought appropriate to delegate more power to the board, or that the board is too large or too small to be effective.
5. The need to change the objects or the activities of the charity to ensure that either or both remain suitable and workable⁸.
6. Where the organisation is considering a step which is not catered for in the governing document. For example, merger or dissolution, or even a payment to a person who is a trustee.
7. Where the governing document is simply out of date or over complicated. For example language and concepts are out of date. Fresh wording could be introduced to bring about more certainty to its provisions.
8. Procedural impracticality. For example notice requirements, majority of votes needed to pass a resolution or quorum requirements are impractical.

⁶ From 6th April 2008 private companies will no longer be required to have a company secretary but can choose to do so.

⁷ Ss 36 and 37 of the Charities Act 2006 (inserting S73A – 73C into the 1993 Act) provide, subject to various conditions, for payment of trustees out of charity funds. One of the conditions (condition D) is that the trust of the charity does not contain any express provision that prohibits the relevant person from receiving the remuneration (s73A(6)). These provisions will come into force from a date to be appointed.

⁸ An example of this is a typical object clause found in some charities for the benefit of the blind: " to provide persons with talking newspapers/ magazines by the provision of recorded tapes...". This type of object clause is by today's standards very limiting. The charity could be providing the same services by CD, spoken emails, Braille or other technologies.

9. The need to resolve an impasse which cannot be resolved another way inexpensively (see the case of *Versani v Jesai* [1998] 3 all ER 273).
10. The desire to take advantage of the benefits of incorporation.

How to amend your Governing document (1)

Is Charity Commission consent required?

The first thing to note is that the consent of the Charity Commission will be required in certain circumstances:

- a) Where the governing document itself states that consent is required.
- b) Where the governing document provides that there is to be no amendment.
- c) Where the governing document is silent on the issue and there is no statutory power to amend.
- d) Where the organisation is incorporated and the proposed amendments contain a "regulated alteration" as defined by S64(2) of the Charities act 1993 (as amended by the 2006 Act S31) the prior written consent of the Commission is needed for:
 - Any alteration of the objects clause;
 - Any alteration of a clause that directs the application of property of the company on its dissolution;
 - Any alteration that would provide a benefit to be obtained by a director or member (or a connected person)⁹.
- e) Where the change relates to the payment of Trustees or similar (but see footnote 7 above).

⁹ "Benefit" and "connected person" are defined by S64(2B) of the 1993 Act.

How to amend your Governing document (2)

Express power to amend

In accordance with the amendment clause in the Deed/constitution. The instrument itself may itself contain the power of amendment. This is more common in modern documents. The power may be a limited one and may be subject to conditions or provisos. For example a specific procedure maybe specified or Commission consent may be required. Requirements should be complied with strictly. For example by a Trustee resolution followed by a Deed of Variation. Alternatively, by resolution of the Members taken at a duly convened meeting.

In accordance with the amendment clause in the Memorandum and Articles of Association (and in accordance with Companies Acts). A special resolution (75% of the votes of those members or their proxies present and voting must be in favour and 21 days clear notice to members for a general meeting¹⁰) will be required to amend the Articles of Association¹¹. A special resolution is generally required where the Memorandum is being amended. (For example S4 of the Companies Act requires a special resolution for a change in the objects clause). NB Short notice is possible S369 Companies Act 1985 95% agreement needed)¹².

The change could also be effected by way of a written resolution. Previously, where there was a possibility that a resolution would receive the unanimous support of the members the directors/trustees could ask the members to pass a resolution by means of a written resolution rather than calling a general meeting. The procedure involved sending a copy of the resolution to all the members and to the auditor. Provided all members signed and returned the resolution then it will be validly passed as if passed at a general meeting. The Companies Act 2006 relaxed the requirement for unanimity. For a special resolution to be passed in writing only a 75% majority will be now required¹³.

¹⁰ The Companies Act 2006 will change this to 14 days in respect of an EGM.

¹¹ S9 of the Companies Act 1985 / S21 of the Companies Act 2006.

¹² Note also that commission consent may be required – S21 and 31 of the Companies Act 2006 ensures that changes are subject to S64 of the 1993 Act as amended. A regulated change made without the Commission's consent is ineffective S64(2). This point is discussed above in How to amend your Governing Document (1). Also the minimum agreement to short notice will be reduced to 90% under the Companies Act 2006.

¹³ As from the 1st October 2007.

For Industrial and Provident Societies amendments as per the adopted rules but also subject to FSA approval.

How to amend your governing document (3)

What happens if there is no power to amend?

Incorporated bodies – highly unlikely but check relevant statutory provisions. For example, in the case of a company there are express provisions which allow changes to the name, objects (subject to Commission consent) the Articles and other provisions¹⁴. There are similar powers in respect of Industrial and Provident Societies.

Unincorporated bodies – Section 41 of the Charities Act 2006 inserted new provisions into section 74 of the Charities Act 1993 to assist charities that have no express power to amend. Section 74C allows charities to amend its objects. Section 74D allows a charity to amend its powers and procedures.

Important amendments that should be considered

1. Remove any unnecessary provisions e.g. a provision requiring consent of third parties such as the Charity Commission¹⁵.
2. Remove any unnecessary prohibitions and consider inserting provisions that allow action. For example prohibitions of payment of trustee indemnity insurance premiums. The Charities Act 2006 allows such payments subject to rules but not if there is a restriction in the governing document which prevents this. (Charity Commission consent will be needed for these types of provisions to be removed).
3. Change objects where they are unduly restrictive and/or out of date.

¹⁴ Ss 28(1), 4, 9, 2(7) and 17 of the Companies Act 1985 although these will be repealed and (some) replaced by the Companies Act 2006 - for example the new S78 will deal with change of name and new section 22 will deal with changes to the Articles.

¹⁵ Consent from the Dti is sometimes required by Memorandum and Articles adopted in the 1960's. Such consent will not be withheld but must be obtained.

Other changes for consideration

Is your wording modern or old fashioned?

Objects clause still relevant?

Incorporated status¹⁶?

Other practical considerations

Consent of other third parties/terms of grants already made. Consideration should be given to criteria for eligibility for grant money. Also do the terms of a grant already received require you to obtain the funder's consent to the governing document?

The identity of the membership – are good records kept?

When making changes consider adopting a whole new document so all the rules are in one place rather than having to refer to several documents (i.e. consolidation of rules).

Conclusions

All trustees and other personnel should be able to identify and have access to the terms of governing document. They should be familiar with its provisions.

The governing document should be checked to ensure:

- That the rules are being followed;

¹⁶ S34 Schedule 7 of the Charities Act 2006 inserts amending S69 of the 1993 Act makes provision for a new form of incorporated body, a Charitable Incorporated Organisation (CIO) from a date to be appointed.

- It is up to date with technology and the current law;
- That it is not too restrictive or burdensome;
- That it reflects current practices of the charity.

If not changes should be considered.

This briefing note is intended solely as an overview of the law. It was last updated on 17 October 2007. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

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