Drafting your constitution – Company Limited by Guarantee

A clause by clause commentary

Once you are clear about the key features to be reflected in the structure you can then turn your attention to the detail.

What follows is a clause-by-clause commentary on the model memorandum and articles. For many clauses, you will want to leave the wording as it stands and the comments are really intended only to explain what the clause is there for. In the case of other clauses, there are decisions to be made as between alternative possibilities.

Memorandum of Association

This sets out the name of each subscriber to the memorandum of association. It is a statement confirming their intention to form a company and become a member of that company. The wording should not be altered, otherwise there is a risk that the incorporation documents will be rejected by Companies House.

Articles of Association

4 – 6 See comments in ‘the objects of your organisation’

It is often useful, particularly in a case where the need to obtain charitable status limits the type of wording which can be used in article 4, to set out a brief outline in paragraph (a) of article 7 of the main activities which the company will be carrying on in practice.

7 Article 7 sets out a range of powers which will be appropriate for most projects. The steering group may feel that there is no immediate prospect of certain of the powers being used in practice. Nevertheless it is usually best to keep the full set of powers, rather than delete items from the list in case the power is needed at a future date. One of the points which should be borne in mind is that including reference to a particular power does not mean that the company **has** to exercise that power in practice e.g. the fact that article 7 includes a power to accept gifts does not in any way force the organisation to accept a gift in the future where the board felt that this would be inappropriate in the

circumstances because of ethical or other considerations. It might be necessary in some cases to add in some further powers to article 7.

8 The wording here reflects the usual principles which would apply in the context of a voluntary-sector company limited by guarantee. It also reflects the requirements which apply to a company which is seeking registration as a charity. The only qualification to that latter point is that OSCR will allow a key employee (project manager or equivalent) to serve as a director, providing this can clearly be justified as being in the interests of the charity ie as improving the management and administration of the charity. If any employee of the company is to serve as a director, then appropriate qualifications should be made to the wording of this clause.

9 The provisions of this clause should not be altered in any way - except that if the company is to have corporate bodies as members, the references should be should be altered to “they/it”, rather than “they”.

10 This is really only intended as general guidance, to help people understand the distinction between the members and the directors. It is not intended to list each and every aspect of the respective roles of the members and directors.

12 See comments in ‘Decide on membership’

14 It is important, by reference to the legal principles, that there should be some written record of people having agreed to become members. The application for membership could be kept very simple.

15-16 See comments under the heading of ‘should the board have power to veto any application for membership?’

17 It is, of course, quite possible to include a set of provisions which cover the collection of an annual membership subscription, if that is felt appropriate. Some suggested provisions are included as Supplement 7. Membership subscriptions do not normally represent a significant source of income for the company - but requiring the members to pay an annual membership subscription does represent quite a useful way of ensuring that you do not build up a long list of “sleeping” members on the register of members (who still have to be sent notices of AGM and copies of the annual accounts) who have not actually had any involvement with the company for a period of years. If people do not pay their membership subscription within a defined period they can be expelled from membership. An alternative arrangement might be to provide for annual re-registration i.e. where people have to send back a form re-registering as members, otherwise they will lose their membership.

18 This is a useful reminder of the statutory requirement to maintain a proper register of members. The list could be kept on a computer, rather than on paper, providing adequate precautions are taken for

guarding against the records being falsified (and detecting any falsification). Obviously, regular backups should be kept. It should be noted that if you are holding more than basic name and address information about members or if sensitive data about members can be inferred from their membership (eg medical condition or religious affiliation) you may need to obtain specific permission from each member to process the data. For more information about the provisions of the Data Protection Act 1988, contact the office of the Information Commissioner.

19 Again, the notice withdrawing from membership should be kept simple.

20 It would be possible to delete article 20 to simplify the articles. We would recommend, though, that it be retained, even where the steering group is fairly confident that the level of membership will be small. The procedure laid down by the model refers the question of expulsion to a meeting of the members, rather than this being something which the board can do itself. That is intended to reflect the possibility that the board might be wanting to expel someone specifically because s/he was raising legitimate points of concern. The requirement to specify the grounds for expulsion and to allow the member concerned to be heard on the resolution reflect the principles of natural justice and the procedure could (at least in theory) be subject to technical challenge if those elements were deleted.

23-24 In most cases, it will not be particularly appropriate to have an AGM during the year in which the company is formed but, if the steering group is being formed in the early part of a calendar year or if the steering group feels that there should be an early AGM so that democratic elections to the board can be held, the wording in brackets could be omitted.

27 Section 303 of the Companies Act 2006 provides that one tenth of the members of a company may (providing they comply with the detailed statutory requirements) require the board to convene an EGM. If it is felt that a more user-friendly set of provisions should appear in the articles themselves, the material in Supplement 8 of the additional clauses should be included.

28 It should be noted that the period of 14 days corresponds with the **statutory minimum**; and a provision referring to a shorter period would not be valid.

30 Again, the requirement to specify that a resolution will be proposed as a special resolution, and the requirement to state the exact terms of the proposed special resolution, reflect the statutory provisions and **should not be altered**.

33 The definition of “special resolution” reflects the relevant **statutory provisions**; it would not be possible, for example, to specify a percentage other than 75%.

36 The quorum for general meetings (meetings of members) should be set at a level which means that a reasonably representative sample of the membership would have to be present before the general meeting could proceed. Equally, though, it would be inadvisable to have too high a quorum, otherwise this can cause frustration and inconvenience where general meetings have to be reconvened, and people persuaded to attend, in order to make up the quorum. The quorum can be expressed as a specified proportion of the membership. If so, it may be appropriate to specify a minimum threshold (e.g. a quorum of one-third might seem appropriate if the steering group is anticipating 60 members, but it produces an inappropriate result where there are in fact only 6 members!). The other question is an upper threshold - e.g. if the membership were 600 members, it is quite unlikely that as many as 200 would turn up in person at the AGM.

38 If the company is to have a vice-chair (this could be added in to article 51), then it would be possible for the provisions to be extended so as to refer specifically to the vice-chair taking the role of chairperson if the chair is not present. The provisions then become rather more complicated, though, since you still have to cover the possibility that neither the chair nor the vice-chair might be present.

40 It is now a statutory requirement that a company limited by guarantee must allow voting by proxy.

46 It is no longer possible to give the chairperson of a general meeting a casting vote.

49-53 See comments under the heading of ‘The composition of your management committee’. In relation to article 50, it would be usual in the context of a company operating within the voluntary sector that employees of the company would be debarred from serving on the board; and that prohibition also reflects the usual requirements associated with charitable status. In the context of this model, there is no need for any express provision prohibiting employees of the company from being directors, given that under article 50 only a member may serve as a director and (by virtue of article 13) an employee would not be eligible for membership. If provisions are introduced whereby non-members may be directors of the company, an express provision would then require to be introduced and this is reflected in the wording of the relevant bolt-on provisions included in this module. It should be mentioned that in exceptional cases OSCR might be prepared to accept a key employee (eg. project director or equivalent) serving on the board providing this could be justified as being of significant benefit to the charity from the point of view of improving its management and administration (and providing the legal

requirements in relation to this were observed) …and if that were being pursued, then appropriate adjustments would require to be made to the articles. It should be borne in mind, though, that certain grant funders will not provide support to a body which has any employees on its board.

54 The period in paragraph (c) could be adjusted to suit whatever the steering group felt was appropriate. The same applies in relation to the reference to three consecutive meetings in paragraph (g). In relation to that latter point, it will be noted that, under the wording in the model, someone who is absent for more than three consecutive meetings will not **automatically** vacate office. Rather, it is up to the board to decide whether or not to remove them. Section 168 of the Companies Act 2006 states that any director can be removed (irrespective of what is contained in a company's articles of association) by way of an ordinary resolution providing the various detailed procedures laid down in the Act are followed. These procedures involve (broadly speaking) giving the director concerned 28 days' prior written notice of the intention to propose the resolution, and allowing them an opportunity to make representations.

55 This again is included as a reminder of the **statutory requirement** to maintain a proper register of directors. The personal details to be included in the register of directors correspond with the items of information which have to be completed on a form AP1 intimating the appointment of a new director to Companies House - plus date of appointment as a director and date of ceasing to be a director.

56 It would be possible, of course, to adopt different titles in relation to the officebearers eg. "convenor" or "chairperson" rather than "chair". It should be noted, incidentally, that the secretary of a company falls into a rather different category (eg. a secretary need not be a director of the company). The material dealing with appointment of the company secretary is contained in article 82.

58 It would be possible to provide that someone who had held a particular office for a specified time (e.g. three successive years) would not be eligible for re-appointment until a further year had elapsed.

59 The reference to directions given by special resolution reflects the principle that the members of a company may, if they feel particularly strongly about an issue, requisition an EGM (see comments above) and direct the board to take a particular action or refrain from implementing a particular proposal. This is, of course, a power which is only very rarely exercised. One possibility which the steering group might want to consider is allowing such a direction to be given by way of ordinary resolution (the distinction between ordinary resolutions and special resolutions is explained in articles 33 and 35). While that might seem more democratic, it would generally be felt to be inappropriate, on the basis that the members might not be fully conversant with the

issues and/or that attendance at the relevant EGM might be low i.e. such that a policy direction might be passed by an unrepresentative sample of the membership. In relation to that latter point, the principle is that once directors have been elected to the board, they should, generally speaking, be allowed to get on with the job.

61-66 Although the provisions here may seem fairly complicated, the question of conflict-of-interest is seen as increasingly important within the voluntary sector and it is useful to have clear guidance within the articles. Indeed, as a matter of best practice, the board should develop a more detailed set of conflict-of-interest rules once the company is up and running. The steering group may also have its own views on how wide the scope should be in relation to conflict-of-interest e.g. they may feel that article 62 should be extended so as to cover a situation where a person was a member of the board of another voluntary sector body which was competing for the same grant funding. It should also be noted that if any employee serves as a member of the board (which would be unusual; but see comments on articles 49 to 53 above), the articles would need to make it clear that they would not be entitled to vote on any matter concerning their terms and conditions of employment.

68 It could be stated that the chairperson of the meeting would **not** have a casting vote. A further issue to be considered in relation to board meetings is whether a director should have power to appoint an alternate director (the equivalent of a proxy, but at board level) to attend and vote at a board meeting at which s/he is unable to be present.

Such an arrangement is often appropriate where the provisions dealing with the composition of the board specifically provide that a particular outside body will have power to nominate a director, but the argument in favour of alternate directors is much less persuasive in the case of directors who are appointed on the basis of their personal qualities. Over-use of the facility to appoint alternate directors can have an adverse effect on decision-making since the alternate director might not be aware of the discussions at previous board meetings; and it could also undermine the democratic election/re-election arrangements (since decisions might end up being taken through most of the year by an alternate director, rather than the director who had been elected by the membership). If the decision is taken to allow for alternate directors, the provisions set out as Supplement 10 should be included in the articles. These in turn could be modified eg. the provisions could state that only certain categories of directors could appoint alternate directors and/or the requirement that the board must approve an alternate director could be omitted.

69 A figure has to be stated in relation to the quorum for board meetings. As with the quorum for general meetings, a balance has to be struck between the objective of ensuring that decisions are not being taken by a very small number of people on the one hand, and, on the other

hand, not paralysing the company through being unable to take valid decisions because of difficulties in gathering a quorum. The proposed figure for the quorum should be compared against the figure which has been decided upon in relation to the maximum number of directors. Importantly, though, it should also be reviewed against people's expectation of how many of the places on the board are actually likely to be filled at any given time, and the likely level of turnout.

70 It would be possible to refer to the vice-chair if appropriate (see comments on article 38).

73-76 See comments above in relation to articles 61-66.

77 The provisions within article 77 are included as a general guide to the duties which apply under charities legislation. It should be noted that the requirements under company law (where the company is not a charity) involve slightly less onerous requirements – and it may therefore be appropriate to omit (or modify) the provisions within article 77 if the company is not intended to apply for registration as a charity.

81 It is useful (although not essential from a technical point of view) to pin down in the articles the arrangements which are to apply in relation to bank/building society accounts - in particular, the principle that the signing of cheques should involve the signature of at least one director, as one of a number of internal financial controls which should be maintained at all times.

93-94 The general principle reflected in article 93 is that the company should reimburse any director where s/he incurs liability in carrying out their duties as a director. The ability of a company to do that is, however, limited under the Companies Act 2006. Broadly speaking, a provision of that kind will be invalid if it indemnifies the director against liability which would otherwise attach to them in relation to negligence, default, breach of duty or breach of trust…unless s/he is ultimately absolved from liability by the court. Article 94 states, for the avoidance of doubt, that the company can take out insurance to provide cover for directors in relation to personal liability that they might incur in carrying out their duties. Careful consideration should be given to the terms of any such policy before it is taken out; as a general comment, though, it should be recognised that insurance of this nature will not cover every eventuality. It should be noted that the risk of a director incurring personal liability in the context of a voluntary sector company (other than in relation to eg. fines for late payment of accounts) is extremely low – and many companies take the view that insurance policies of this nature do not represent value for money. It is for each board of directors, however, to form a view on this issue and, of course, it is essential that insurance policies are maintained in relation to other matters such as employers' liability, public liability, property and so on.