

## Drafting your constitution – Scottish Charitable Incorporated Organisation (SCIO)

### Single tier model – 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 constitution for the single-tier SCIO model. 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.

#### Notes on specific clauses

- 1 -
- 2 This clause is only intended to ensure that the SCIO remains based in Scotland. It would be inappropriate to insert the full postal address here.
- 3 See comments in [‘the name of your organisation’](#)
- 4 See comments in [‘the objects of your organisation’](#).
- 5 The wording here closely reflects what is set out in the Charities and Trustee Investment (Scotland) Act 2005 (referred to below as “the 2005 Act”). The wording should be left as it stands, unless there is a need - for some exceptional reason - to restrict the powers of the SCIO in some way. The SCIO regulations state that the constitution of a SCIO must make provision about any restrictions on the powers of the SCIO.
- 6 This prohibits matters such as the payment of dividends to members - in line with the general ethos of a charitable organisation.
- 7 This reflects the principle under the 2005 Act that the members of a SCIO (under this model, the same people are both the members and charity trustees of the SCIO) are not liable for debts or other liabilities if the SCIO becomes insolvent.

- 8 This acts as a reminder to the charity trustees in relation to their duties; in principle (and in common with those serving on the board of e.g. a limited company), they could be personally liable if they breach those duties. Guidance on the duties of charity trustees is available from the [OSCR website](#).
- 9, 10 These clauses are really only intended as general guidance, to help people understand the main powers of the board. It is not intended to list each and every aspect of the various roles of the board.
- 11 This clause is best read along with clause 13. Basically (as noted in clause 13) the 2005 Act requires certain decisions to be taken by the members of a SCIO, but under this model (the single-tier SCIO model) the members are the same people as those serving as charity trustees.
- 12 As noted above, the key principle under this model is that no-one can be a member unless they are a charity trustee (and vice versa). If that is not what is intended, you should use the two-tier SCIO model.
- 13 See comments on clause 11 above.
- 14 - 23 The 2005 Act states that the constitution of a SCIO must make provision for the appointment of charity trustees and about any conditions of eligibility for becoming a charity trustee. It should be mentioned that OSCR would 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 are observed) ...and if that were being pursued, then appropriate adjustments would require to be made to the draft constitution – see Supplement 1 in the [additional clauses](#). 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.
- 24, 25 The period in paragraph 24.2 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 24.5. 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.
- 26 - 29 The wording here closely reflects the requirements under the SCIO regulations.
- 30, 31 -

- 32 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.
- 33 -
- 34, 35 -
- 36, 37 The provisions here closely reflect the duties of charity trustees imposed under the 2005 Act.
- 38 -
- 39 Clause 39 should be adjusted if the constitution will permit an employee to serve on the board (though this would be unusual – see comments on clauses 14 to 23 above). The SCIO regulations state that the constitution of a SCIO must make provision about any circumstances in which remuneration may *not* be paid to charity trustees, over and above the restrictions which already apply under section 67 of the 2005 Act.
- 40 -
- 41, 42 The reference to a code of conduct is in line with principles of best practice in governance.
- 43, 44 The SCIO regulations state that the constitution of a SCIO must make provision about the convening of meetings.
- 45 A figure has to be stated in relation to the quorum for meetings of the board. 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 SCIO 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 board members. Importantly, though, it should also be reviewed against people's expectations with regard to how many of the places on the board are likely to be filled at any given time, and the likely level of turnout.
- It is possible to include provisions allowing people to participate in meetings by way of video-conference or telephone-conference facilities; that is generally easier to arrange (and arguably more appropriate) in the context of board meetings. Provisions allowing for this are included as Supplement 2 in the [additional clauses](#).
- 46, 47 -

- 48 It would be possible to refer to the vice-chair as having the right to chair a meeting in the absence of the chair of the SCIO – if that is considered appropriate.
- 49, 50 -
- 51 It would be possible to state that the chairperson of a board meeting would *not* have a casting vote.
- 52 -
- 53 The SCIO regulations state that the constitution of a SCIO must make provision for procedures for dealing with any conflict of interest.
- 54 The provisions here reflect best practice from a governance point of view.
- 55, 56 The SCIO regulations state that the constitution of a SCIO must make provision about records of meetings.
- 57, 58 There is no requirement under the 2005 Act or the SCIO regulations to make minutes of board meetings available to the public. Clauses 57 and 58 could be omitted.
- 59 See comments on clause 11.
- 60 - 62 The SCIO regulations state that a SCIO must hold a meeting of its members within 15 months of the date on which OSCR enters the SCIO in the register, and at least once every 15 months thereafter. With reference to clause 62, in most cases, it will not be particularly appropriate to have an AGM during the year in which the SCIO is formed; but, if the SCIO is formed in the early part of a calendar year, or if the steering group feels that there should be an early AGM, the wording would still allow that to happen.
- 63 The SCIO regulations do not specifically state the matters which should be dealt with at each annual members' meeting; the terms of clause 63 reflect the agenda items which would normally be expected at an AGM in the charity sector.
- 64 -
- 65 - 69 The SCIO regulations state that the constitution of a SCIO must make provision about the convening of meetings. There is also a further provision in the SCIO regulations stating that a SCIO must give at least 14 days' notice of its annual members' meeting to its members and its charity trustees; and accordingly it is not possible to shorten that period of notice. The provisions which have been included within the model represent best practice, and allow for notices to be issued by e-mail (but on the understanding that where

a member has not supplied an e-mail address, they must be sent a notice by post).

- 70 It is important to note that under a single-tier model, the only people entitled to attend and vote at AGMs are those who are also the charity trustees (ie board members) of the SCIO. It would be usual, therefore, for the quorum set in the constitution for board meetings to be stated to apply to AGMs as well. Similarly, the provisions regarding the chairing of board meetings would be equally appropriate for AGMs and other meetings of the charity trustees in their capacity as members.

There is one point to note, however, in relation to this – if provision is made for proxy voting (see comments below on clause 71), that would have an impact on how the quorum provision should be worded.

- 71 It would be possible to provide for voting by proxy. Certainly, proxy voting would be appropriate where the “catchment area”, so far as the membership is concerned, is quite wide; and/or where it is felt that people with mobility difficulties should not be debarred from participating in members’ meetings. The disadvantages are that proxy voting introduces further complication and a greater amount of administration (particularly if proxy cards are sent out with the notices of meeting). Also, there is a risk that a particular faction might go round the members individually in advance of the meeting to collect proxy votes, without the members in question having the opportunity to hear the arguments for and against the resolutions at the members’ meeting. A set of provisions covering proxy voting is included as Supplement 6 in the [additional clauses](#).

It should be noted that the issues relating to voting by proxy relate only to meetings of the members; they do not apply to board meetings. While it might seem anomalous to allow people to vote by proxy at members’ meetings but not at board meetings where it is the same group of people in both cases, there is some logic in this – the nature of formal decisions at members’ meetings is that they involve a “yes/no” vote in relation to a resolution whose terms are spelt out in the notice, rather than the more flexible discussion and debate that occurs at board meetings, so proxy voting is certainly more suited to decision-making at members’ meetings as compared with board meetings. Also, the decisions that can be taken at members’ meetings can be quite fundamental (eg alterations to the constitution itself), so it could be argued that a particular individual should not be deprived of the ability to participate in the vote solely because they were prevented, for personal reasons, from being able to attend the meeting in person.

A further possibility is to allow the board to make arrangements for members to participate in AGMs and other members' meetings by way of video-conference or telephone-conference facilities. If that approach is taken in relation to board members, it would seem logical in a single-tier model (given that the members are the same people as those serving as charity trustees) to adopt the same approach in relation to AGMs and other members' meetings. Provisions to cover this are included as Supplement 3 in the [additional clauses](#).

- 72 -
- 73 The requirement for a two-thirds majority in relation to a resolution amending the constitution (also the types of resolution referred to in paragraphs 73.2, 73.3 and 73.4) reflect what is stated in the 2005 Act, and therefore cannot be amended.
- 74 It is quite possible, of course, to provide specifically that the chairperson will not have a casting vote, if that is preferred.
- 75, 76 -
- 77 It should be noted that the 2005 Act states that a resolution amending the constitution - unless it is proposed at a members' meeting - requires a written resolution signed by *all* of the members. A different position applies under company law, as regards written resolutions – but that is not relevant in the case of a SCIO. Accordingly, a constitution cannot validly state that a written resolution will be effective if signed by, say two-thirds of the membership. The same point applies in relation to other types of formal resolution.
- 78, 79 The SCIO regulations state that the constitution of a SCIO must make provision about records of meetings.
- 80 The wording here is included for those organisations who feel that they want to lay a heavy emphasis on transparency and openness. Clause 80 can be omitted, as there is no requirement under the 2005 Act or the SCIO regulations for minutes to be made available to the public on request.
- 81 - 85 It should be borne in mind that although the use of sub-committees can be appropriate in many cases, the board of the SCIO retains legal responsibility for exercising overall control and supervision.
- 86, 87 The provisions of these clauses reflect good practice from the point of view of financial controls.
- 88, 89 These provisions reflect the legal responsibilities of the board.

- 90, 91 The SCIO regulations state that the constitution of a SCIO must make provision about “those purposes which are the same as or which resemble closely the purposes of the SCIO, for which any surplus assets available to the SCIO immediately preceding its winding up or dissolution must be used”.
- 92, 93 The provisions of these clauses reflect the requirements imposed by the 2005 Act.
- 94, 95 -