

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

### Two-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 two-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 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 This is really only intended as general guidance, to help people understand the distinction between the members and the board. It is not intended to list each and every aspect of the respective roles of the members and the board.
- 10 The expression “charity trustees” is used throughout the constitution to refer to the members of the board; that should help to avoid confusion with the members of the SCIO.
- 11 See comments in [‘Decide on membership’](#)
- 12 The prohibition on employees being members of the SCIO is usual in the context of voluntary sector bodies. If you modify this clause so as to allow employees of the SCIO to become members, it might mean that certain grant funders will regard the organisation as ineligible for support. If, however, it is important for you that employees *should* be included within the membership, then that could be provided for, as long as the wording made clear that non-employees must always make up the majority of the membership.
- 13-15 It is essential, under the 2005 Act, to make provision about who is to be eligible for membership and how individuals/bodies are admitted to membership. Consideration should be given to discrimination and equalities issues, as a matter of best practice (see for example the Equalities Act 2010).

See also comments under the heading of [‘should the board have power to veto any application for membership?’](#)

- 16 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 in the [additional clauses](#). Membership subscriptions will not represent a significant source of income for the SCIO. However, 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 the AGM) who have not actually had any involvement with the SCIO 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 is 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; that is the

mechanism set out in clauses 22 to 24 of the model. Clauses 22 to 24 should be deleted if provisions covering an annual membership subscription are inserted. Provisions to cover this are included in the [additional clauses](#).

- 17 This is a useful reminder of the need to maintain a proper register of members. The wording closely follows the requirements imposed by the SCIO regulations. The register could be kept on a computer, rather than on paper, providing people are careful to keep back-ups. 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 [Information Commissioners Office](#).
- 18 Again, the wording closely follows the SCIO regulations.
- 19 The provisions here reflect the obligations imposed on SCIOs by the SCIO regulations; the wording should not, therefore, be altered.
- 20 The notice withdrawing from membership can be kept simple. It should be noted that the SCIO regulations state that a SCIO constitution must make provision about the processes for withdrawal and for removal of members.
- 21 The provision to the effect that membership cannot be transferred is in line with what is set out in the SCIO regulations - which prohibit transfer of membership of a SCIO.
- 22-24 If a membership subscription is introduced (see comments on clause 16), then the provisions of clauses 22 to 24 should be deleted.
- 25 The SCIO regulations state that the constitution of a SCIO must make provision about the process for removal of members. 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.
- 26-29 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 29, 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 so that democratic elections to the board can be held, the wording would still allow that to happen.

- 30 The SCIO regulations do not specifically state the matters which should be dealt with at each annual members' meeting; the terms of clause 30 reflect the agenda items which would normally be expected at an AGM in the charity sector.
- 31-33 In almost every case, the decision to convene a members' meeting will be made by the board e.g. in a situation where the board feels that a particular change to the SCIO constitution should be made. Clause 32 provides a procedure, though to allow the members to request the board to convene a special members' meeting; it is likely that that entitlement will be exercised only on very rare occasions. The reference to "two or more documents" is intended to cover the possibility that rather than having everyone sign a single piece of paper (ie with a long list of signatures), each person might sign their own copy of the notice
- 34-38 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/it must be sent a notice by post).
- 39,40 The quorum for AGMs and other 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 meeting could proceed. Equally, though, it would be inadvisable to have too high a quorum, otherwise this can cause frustration and inconvenience where 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. It is important to note that clauses 39 and 40 relate only to the quorum for members' meetings; the quorum for **board** meetings is to be specified in clause 86.

As noted in the comments against clause 44 below, it would be possible to allow for proxy voting; that has an impact on how the quorum provision is worded.

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. This could be done by setting up venues at different locations across Scotland, and making members aware that they could go to their local venue rather than have to travel to a single location.

Provisions to cover this are included in the [additional clauses](#). It may well be, of course, that a steering group was keen to allow participation in board meetings by video-conference/telephone conference facilities, but not have that facility for members' meetings; that is perfectly feasible.

41,42 -

43 If the SCIO is to have a vice-chair (this could be added in to clause 70), 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 of the SCIO 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.

44 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 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.

45,46 The requirement for a two-thirds majority in relation to a resolution amending the constitution (also the types of resolution referred to in paragraphs 46.4, 46.5 and 46.6) reflect what is stated in the 2005 Act, and therefore cannot be amended. While it would be possible to state that a resolution expelling a person from membership (paragraph 46.2) or a resolution directing the board to take any particular step (paragraph 46.3) would be valid if passed by a simple majority vote, it would normally be considered that a two-

thirds majority was more appropriate for those types of resolution, as envisaged by article 46.

47 It is quite possible, of course, to provide specifically that the chairperson will not have a casting vote, if that is preferred.

48, 49 -

50 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.

51,52 The SCIO regulations state that the constitution of a SCIO must make provision about records of meetings.

53 The wording here is included for those organisations who feel that they want to lay a heavy emphasis on transparency and openness. Clause 53 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.

54-64 See comments under the heading of '[The composition of your management committee](#)'. 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 – provisions allowing for this are included 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.

65 The period in paragraph 65.2 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 65.6. 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.

- 66-69 The wording here closely reflects the requirements under the SCIO regulations.
- 70, 71 -
- 72 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.
- 73 -
- 74-76 It would be very rare for the members to make use of the power under clause 76 to issue a direction to the board. Nevertheless, the inclusion of the clause is important - emphasising that the membership has ultimate control in relation to the SCIO.
- 77, 78 The provisions here closely reflect the duties of charity trustees imposed under the 2005 Act.
- 79 -
- 80 Clause 80 should be adjusted if the constitution will permit an employee to serve on the board (though this would be unusual – see comments on clauses 54 to 64 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.
- 81 -
- 82, 83 The reference to a code of conduct is in line with principles of best practice in governance.
- 84, 85 The SCIO regulations state that the constitution of a SCIO must make provision about the convening of meetings.
- 86 A figure has to be stated in relation to the quorum for meetings of the board. As with the quorum for members' 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 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.

As noted in the comments against clause 40, 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 in the [additional clauses](#).

87, 88 -

89 Again, it would be possible to refer to the vice-chair if appropriate (see comments on clause 41).

90, 91 -

92 It would be possible to state that the chair person of a board meeting would *not* have a casting vote.

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94 The SCIO regulations state that the constitution of a SCIO must make provision for procedures for dealing with any conflict of interest.

95 The provisions here reflect best practice from a governance point of view.

96, 97 The SCIO regulations state that the constitution of a SCIO must make provision about records of meetings.

98, 99 There is no requirement under the 2005 Act or the SCIO regulations to make minutes of board meetings available to the public. Clauses 98 and 99 could be omitted.

100-104 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.

105,106 The provisions of these clauses reflect good practice from the point of view of financial controls.

107,108 These provisions reflect the legal responsibilities of the board.

109,110 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”.

111,112 The provisions of these clauses reflect the requirements imposed by the 2005 Act.

113, 114-



