

Are your Memorandum and Articles of Association fit for purpose?

Since the introduction of charitable incorporated organisations two years ago, there are now over 5,000 listed on the Charity Commission Register of Charities. However, a charitable company limited by guarantee structure still represents the vast majority of incorporated charities.

A company limited by guarantee has trustees and members (akin to shareholders in a company limited by shares). Members have the final say in constitutional changes and have a range of other rights including the ability to appoint and remove trustees and to vote at general meetings. A company has its own legal personality and the members have limited liability. This means that the directors of the company (who are the charity trustees) are not directly liable for the debts or performance of the charity's obligations. The company enters into contractual arrangements as itself rather than through the trustees personally.

The key governing document of a charitable company is its Memorandum and Articles of Association. A charitable company is registered and regulated both by Companies House and by the Charity Commission. This means that if a charitable company wishes to make any changes to its governing document, it will need to register the changes with Companies House and with the Charity Commission. If the changes are regulated changes, the charity will require the prior written consent of the Charity Commission before making such changes.

What are regulated changes?

Charity law provides that only regulated changes to the Memorandum and Articles of Association require the prior consent of the Charity Commission, these being:

- (a) any change to the objects (the purpose of the charity)
- (b) any change to what happens to the property of the charity on winding up (the dissolution clause)
- (c) any change which authorises the charity's funds or property to be used to benefit the trustees or members, or people connected with them

Reasons why you may wish to amend your Memorandum

There are number of reasons why your Memorandum might benefit from being updated. Here are some examples:

Objects: One of the key clauses in a governing document is its objects clause. This sets out the purposes of a charity which must be for the public benefit. Charities will need to consider whether these objects are still appropriate for the charity. What may have been appropriate objects for a charity established, say 15 years ago, may no longer work in today's changing environment.

The objects clause is commonly changed if it refers to terminology which is no longer appropriate or is outdated. For example, an offenders' rehabilitation charity which refers to 'prisoners' in its objects may no longer be appropriate as the charity may wish to assist individuals who are 'offenders' and not all offenders will be prisoners. Similarly, the use of terms such as 'handicapped' may no longer be appropriate. A charity's objects may refer to the charity working in a particular borough or area and the charity may now wish to have a wider geographical focus or to be seen as a national charity.

Company law requires that where any changes are made to the Memorandum of Association (see below), the provisions previously contained in the Memorandum need to be amalgamated into the Articles of Association meaning the Memorandum becomes a redundant document.

It is essential that trustees consider their objects and establish whether they are still fit for purpose. It is also wise to incorporate a degree of flexibility in the objects to future proof them.

Trustee payments: Under the Companies Act 2011, trustees are able to benefit from additional provisions which will enable them to be paid for services or goods which they supply to the charity. A charity will only be able to benefit from these provisions if the current Memorandum does not contain a prohibition on all payments to trustees. Many older Memorandums do contain such prohibitions and so a change to the Memorandum would be required if a charity wished to pay trustees for providing goods or services. A trustee cannot be paid simply for acting as a trustee.

Reasons why you may wish to amend your Articles

There are number of reasons why your Articles might benefit from being updated. Here are some examples:

Conflicts of interest: Do your Articles contain a conflict of interest provision? The Charity Commission is particularly keen for charities to include in their governing document, provisions which deal with how trustees will manage potential and actual conflicts of interest and duty which may arise when carrying out their trustee duties. Typical conflicts arise where a person is a trustee for Charity 'A' and also a trustee for Charity 'B'. In this capacity, the trustee for Charity 'A', could gain information which would be beneficial for Charity 'B'. A charity needs to be clear as to how such a potential conflict will be managed and it should have a relevant provision in its Articles as well as having a separate conflicts of interest policy.

Quorums: Do you struggle to meet a quorum for either Board meetings or member meetings? Some charities may have once had a large membership which has dwindled over the years, and so now struggle to reach a quorum. Consider amending such provisions.

Notice periods: The Companies Act 2006 brought in changes to reduce the notice periods required for AGM and general meetings and to remove the requirement of holding an AGM. However, you will only be able to take advantage of these provisions if you change your Articles.

Meetings: Could you benefit from holding Board meetings by electronic means including telephone and video conference calls? You can only use such methods if your Articles enable you to do so.

Electronic communication: If you have a large membership, could you benefit from sending AGM and general meeting paperwork to your members by email or by placing the information on your website? Such provisions could save your charity significant postage, printing and administrative costs.

Any change must be made by special resolution

Any change to the Memorandum and Articles of Association requires the members to pass a special resolution to make such changes. Such resolutions require at least 75% of those members who cast a vote to be in favour of the resolution.

Filing requirements at Companies House and the Charity Commission

When the special resolution has been passed to amend the Memorandum and/or the Articles of Association you are required to file a new copy of the Articles at Companies House.

Once Companies House has updated its register you must notify the Charity Commission of the changes by using their online form.

Reviewing your Memorandum and Articles of Association

Corporate governance is critical to the successful running of an organisation. Trustees must ensure that their charity's key governing document remains fit for purpose. If you have not reviewed your Memorandum and Articles within the last five years you should do so. Our team regularly carries out reviews of Memorandum and Articles to ensure that this key document still works for the charity and enables the charity to operate effectively.

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