

The importance of membership in governance

Most charitable organisations have a two tier structure – members and trustees. Members are akin to shareholders in a profit making company. Whereas (given their rights to receive financial dividends on their shares) shareholders are seldom overlooked, members of charitable organisations have no such financial interest and are all too often forgotten. This can lead to considerable difficulties.

The role of members

Usually members are those people that come together to form the organisation and as part of the constitutional arrangements normally have the right to appoint the trustees who manage the organisation on behalf of the wider membership.

In an unincorporated association, a wide body of members often appoints a smaller group of people who may or may not themselves be members, to manage the organisation. They are often called the managing committee or trustee board or similar.

In incorporated charities (whether royal charter, charitable incorporated organisation or company limited by guarantee) the members are a fundamental part of the governance arrangements. The members enter into a 'contract' constituting the governing document. The members are able to change the terms of the governing document in accordance with the provisions set out in it or by reference to statutes and regulations. In most cases the members also have the right to appoint trustees to manage the organisation.

The importance of keeping a record of members

Where there is no list of members or clear way of identifying them, the foundations of the organisation's governance arrangements are undermined. For example if meetings are held to appoint trustees without inviting the correct members to attend then in certain appointments and subsequent decisions could be open to challenge.

In the context of a charity established as a company limited by guarantee, it is important to ensure that the members for company law purposes are appropriately identified and that the basis upon which they have become members and have agreed to be members is clear. This role must be clearly distinguished from 'associate' members (who may be referred to as 'members' but are in fact just supporters of, or donors to, the charity and have no constitutional role).

The Companies Act 2006 requires a company (whether or not also registered as a charity) to maintain a register of members. This must include the member's name and address, the date on which the person was registered as a member and the date on which any person ceased to be a member. Failure to comply can expose the company and its officers to a fine.

The register of members must be kept available for inspection either at the company's registered office or at an alternative inspection location notified to Companies House. It should be open to inspection by any member of the company without charge, and to any other person on payment of the prescribed fee.

A person wishing to inspect the register must request that the charity provide a copy and explain the purpose for which the information is to be used and whether any of that information will be disclosed to any other person.

The charity must comply with the request within five working days or apply to the court on the basis that the use to which the membership register is to be put is not a proper purpose. Clearly where members wish to call a general meeting and need the names and addresses of members in order to do so, this would constitute a proper purpose and the charity should not restrict access to the register. Failure to provide a copy (except in the case of a successful court application as above) can lead to a fine for the charity and its officers.

Register of members and the Data Protection Act

The register of members contains the names and addresses of individuals and so that information will constitute personal data for the purposes of the Data Protection Act 1998 (DPA). Given the nature of charities, members of charities often become members because they have a common interest in a particular matter. Where this relates to health, there could be circumstances where the data held in a register of members is or is capable of becoming sensitive personal data.

Where there is no clear register of members then, as well as potentially breaching the Companies Act and exposing the organisation to a fine, additional complexity arises if it is not clear who the members are or how they became members.

There is the possibility that an individual who the charity asserts is a member and in respect of whom there is an entry on the register of members could challenge the charity as being in breach of the DPA if the register of members were disclosed to a third party. The DPA permits processing where it is necessary for the exercise of any functions conferred by law on the organisation that is carrying out the processing (in this example the legal obligation to maintain and in certain circumstances to allow the inspection of the register of members under the Companies Acts).

However where it is not clear whether that person is a member, or the basis on which he or she has, or has not, become a member, the disclosure of that person's name to a third party may mean the charity is in breach of the DPA. This is because the charity will have disclosed personal information about an individual who is not (legally speaking) a member, so the charity cannot rely on the exemption set out above. Additionally, the charity will not have that person's consent to disclose their information.

What you should do

Bearing all this in mind, we recommend not only maintaining an accurate register of members and keeping that with the other statutory records required to be kept by a company and a charity, but also that you ensure that there is a clear application process for becoming a member and that records whereby individuals seek to become a member are appropriately maintained. Given that becoming a member of a company limited by guarantee requires the member in most instances to guarantee a nominal sum (usually £1) in the event of the company's insolvency, any application to become a member should be in writing.

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