

Amending charity governing documents (England & Wales)

Guidance note

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Amending charity governing documents (England & Wales)

Introduction

Reviewing your governing documents on a regular schedule (annually or more often) enables your organisation to remain focused on its mission and vision, or to recognise when this mission and or vision need amendment. It is part of responsible and transparent practice that demonstrates your sport organisation as thoughtful, reflective and responsive to stakeholders.

Purpose

Good governance practice in all charity organisations, including the sport sector (and related) means that trustees, with the senior management team, regularly review the charity's governing document to ensure that it remains relevant and provides the organisation with the necessary powers to fulfil its charitable objects. All trustees should have become familiar with the governing document when they joined the trustee board¹ as part of their comprehensive induction.² A prudent charity secretary/ governance professional or chair should include a periodic review of the governing document,³ particularly in light of any legal or regulatory changes, as part of the annual trustee meeting agenda. The Charity Governance Code recommends that trustees periodically review their organisation's charitable purposes and regularly review policies and procedures concerning board strategies, functions and responsibilities, alongside other considerations.⁴

This guidance note highlights the main ways in which a governing document can be amended. It will cover some of those internal issues that could pose some difficulty to any proposed changes in the charity's operations and governance, including mergers. This guidance covers the legislative issues around charities regulated by the Charity Commission in England and Wales.⁵

1 For further information see The Chartered Governance Institute guidance note *Charity trustee recruitment*.

2 *Specimen induction pack for charity trustees (England & Wales)* can be found on the ICSA website.

3 For example, every two to three years and when any significant changes occur to the operating environment of the charity.

4 Charity Governance Code, Recommended Practice 1.3.1 and 4.5.5.

5 More information can be found in further guidance notes referred to throughout.

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Reviewing the governing document

Every charity has a governing document that sets out the aims and charitable purposes of the organisation and how it should be governed. It is good practice to review the governing document every so often to ensure that it is fit for purpose and its provisions are followed. Some areas that should be reviewed include the following.

- What type of organisation is the charity – trust, incorporated association (charitable company or charitable incorporated organisation), unincorporated association, Royal Charter body, charity established by Act of Parliament, or community benefit society with charitable status? Who is the principal regulator, if the charity is exempt from Charity Commission registration?
- Is the charity meeting its stated objects?
- Are its objects out of date and do they need revising?
- Is the charity working outside the scope of its objects (*ultra vires*)?
- Is the document inflexible and inhibiting the way the trustees govern the charity?
- Does the governing document give the trustees power to amend?
 - If yes, exactly what is the extent of those powers, and are they compatible with current charity legislation?
 - If no, will it be necessary to approach the Charity Commission for a scheme,⁶ or any other body?
- Is the governance framework up-to-date?
 - Is there the right mix of skills and experience among the trustees necessary to achieve the proposed action?⁷ If not, are there ways in which those skills can be obtained – such as co-option (or other methods)?
- Does the governing document expressly permit the charity to merge with another charity with similar objects, dissolve or transfer assets, or is there an implied permission?⁸
- Is the charity required to gain approval from any other body for changes to the governing document, such as the Office of the Scottish Charity Regulator, Charity Commission for Northern Ireland, the Privy Council or Homes England?

Any queries or concerns arising from any of these questions should be discussed with the Charity Commission, or the charity's professional advisers, so that trustees gain a clear understanding of the full powers at their disposal and how they should be used.

⁶ Charity Commission 'Schemes' are covered in CC36 *Changing your charity's governing document*.

⁷ The guidance note *Specimen skills register for charity trustees* can be found on the ICSA website.

⁸ Under the Charities Act 2011 s84B the Charity Commission is empowered to direct that a charity be wound up and its assets transferred to another charity if it is satisfied that the charity does not operate or that its purposes can be more effectively promoted if it ceases to operate.' This power can only be used following a statutory inquiry and it is for the trustees to wind up the charity. Trustees can appeal the direction to the Charity Tribunal.

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Governing body

The trustees are responsible for the governance of the charity. It is imperative that they are fully aware of their roles and responsibilities, and understand the implications of the process they are about to undertake. Given the likely complexities involved in changing a charity's governing document, it would not be sensible to depend solely on the skills and experience of a single member of senior staff or trustee.

Trustees should keep to the fore their duties and obligations to act in the best interests of the charity's purposes, its present and future beneficiaries.⁹ This includes being aware of the charity's conflicts of interest policy and register. Where the charity is reviewing its governing document as part of a proposal to work jointly with another organisation, or to merge with another organisation, trustees should be reminded to declare any associations with potential partners. It does not necessarily present a drawback where this is the case, as the trustee could be the most appropriate person to make an approach to the prospective partner.¹⁰ However, the parties involved should clearly address the conflict and manage the situation transparently.

There are both legal and stakeholder considerations to be taken into account when conducting a review of the governing document and any agreement to undertake amendments. Significant changes to the governing document are likely to require the approval of the members at a general meeting. Keeping members informed of proposals, and the reasons behind them, will assist in gaining understanding and positive support. With appropriate foresight and planning, this should be accommodated within in the AGM business cycle, but there may be circumstances where this is not possible.

Governing document amendments: legal considerations

Where a governing document does not contain a power to merge, there may be other provisions that can be used to achieve the same outcome. Where Charity Commission (or another regulator's) guidance has been sought, it is important that such guidance be retained and followed correctly. Any deviation from the procedures laid down by the governing document and/or the regulator could result in the whole process being ineffective, and possibly illegal.

As at all other times, official records and minutes of meetings should be kept and stored properly.¹¹

⁹ Further information on conflicts of interest can be found in the ICSA guidance notes *Managing conflicts of interest in a charity (England)*

¹⁰ This is discussed in further detail in the guidance note *Specimen charity merger documents – joint feasibility working party terms of reference and confidentiality agreement*.

¹¹ For further guidance, please see *The ICSA Guide to Document Retention*, 3rd edition, 2011.

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The most common types of governing document and mechanisms for changing them are covered below.¹²

Company limited by guarantee

A charity incorporated as a company limited by guarantee will usually have the power under the Companies Act 1985 to alter its (memorandum and) articles of association, but there are limitations on this power. For instance, the Charities Act 2011¹³ states that ‘regulated alterations’ – changing the objects of the charity, the application of charity assets, or the provision of benefits to directors or members – will be ‘ineffective’ without the prior written agreement of the Charity Commission. Where trustees are uncertain about whether or not they require Charity Commission approval, it would be prudent to consult the Commission before putting in place any actions to make any such amendments.¹⁴

Charitable incorporated organisations (CIOs)

Much like a charitable company limited by guarantee, a CIO can amend its governing document via a resolution at a general meeting being passed by a 75% majority,¹⁵ or by unanimous decision of the CIO’s members.

Any proposal to make a ‘regulated amendment’¹⁶ to a CIO’s constitution will require the prior written approval of the Charity Commission.¹⁷

Royal Charter bodies

Section 68 of the Charities Act 2011 covers the provisions for the Courts or the Charity Commission to make a scheme to amend the Royal Charter’s clauses referring to the charity’s administration or purposes, subject to the approval of the Privy Council.

¹² Further information on governing documents can be found in ICSA’s guidance note *Governing documents for charities (England and Wales)*.

¹³ See section 198.

¹⁴ Charities limited by guarantee wishing to amend their governing document in order to facilitate a merger may need to submit a special resolution at an annual or general meeting. Subject to the governing document providing otherwise, members should be informed of the meeting at least 14 days in advance, along with a copy of the resolution, agenda, proxy form or postal vote. Any special resolution will require a 75% majority of those present and voting. However, the governing document may require a higher majority and trustees should be aware of what the correct requirement is. The ICSA Solutions guide, *Companies Limited by Guarantee* can provide further information on AGMs and general meetings.

¹⁵ Charities Act 2011 s224

¹⁶ Regulated amendments include any change to the stated objects of the charity, any change to the application of charity assets after winding up a charity or any change that permits the charity’s assets to be used to benefit trustees, members or connected persons.

¹⁷ Where there are discussions for a merger involving one or more CIOs, the Charities Act 2011 provides special regimes for transferring the assets of one CIO to another (ss 240 – 244) and two CIOs amalgamating to create a new CIO (ss 235 – 239).

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Charities established by Act of Parliament

For charities established by an Act of Parliament, section 173 of the Charities Act 2011 allows for the Courts or the Charity Commission to make a 'scheme' to alter its provisions. In this situation, the Home Secretary gives effect to the scheme by the use of a statutory instrument laid before Parliament. Advice from the Charity Commission and/or an appropriate specialist would be most advisable in this instance.

Small charities

As long as there is nothing in the governing document to the contrary, a charity with a gross income of less than £10,000 in the last financial year which does not hold any land with restrictions as to its use, and is not a charitable company, has a number of options open to it that do not require a scheme.¹⁸

Section 275 of the 2011 Act states that trustees can resolve to modify or replace the charity's purposes (with other charitable purposes) as long as they are satisfied that to do so would be expedient to pursuing the interests of the charity. As far as is practicable the replacement purposes are similar in character to the original. Such a resolution should be passed by at least two-thirds of trustees voting.

The resolution, along with a statement outlining the reasons the trustees resolved on this course of action, should be sent to the Charity Commission. The Charity Commission can then direct the trustees to give public notice for the resolution and invite representation from interested parties; they may also request further information and set specific criteria to be complied with regarding the change in purposes. Subject to any delays caused by the public notice or request for further information, the resolution should take effect after 60 days of the Commission receiving the resolution.

Section 280 of the 2011 Act provides for such charities to modify their powers and/or procedures regulating the administration of the charity. Again, a resolution agreed by the trustees is required. This must also be approved by two-thirds of the members voting at a general meeting for membership charities, unless no meeting takes place and no objections or dissent is received regarding the resolution. The resolution is then deemed to be passed and the powers amended accordingly.

¹⁸ Further details can be found in the Charity Commission's guidance *How to transfer charity assets*.

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Endowment charities

For those unincorporated charities with a permanent endowment, section 281 of the 2011 Act provides trustees with the power to spend all or part of the endowment capital. In such a case, trustees must be satisfied that the purposes could be more effectively carried out if all or part of the fund capital could be expended as well as income. The trustees would need to pass a resolution specifying that such funds would be expended in furtherance of the charitable objects.

Those endowment charities (unincorporated) with funds that consist of property entirely given by a particular individual or institution or two (or more) individuals/institutions in pursuit of a common purpose, plus a gross annual income of more than £1,000, and where the market value of the fund is in excess of £10,000 per year, can use section 281 to expend capital given for a particular purpose.

As before, the trustees must be satisfied that the charitable purposes set out in the governing document could be carried out more effectively if capital could be spent as income, and pass a resolution to that effect. A copy of the resolution and a statement outlining the reasoning for the decision must be sent to the Charity Commission. The Commission can then direct the trustees to give public notice of the resolution and invite representations from interested parties, provide further information about the situation leading to this resolution or details of compliance with any obligations placed upon the trustees pertaining to the resolution.

In deciding whether to concur with the resolution, the Commission must take account of any representations received from the public regarding the resolution, any evidence regarding the original wishes of the donor(s), and changes in circumstances since the donation. The Commission must not concur with the resolution unless it is satisfied that its implementation would accord with the spirit of the gift, and the trustees have complied with any obligation placed upon them. The Charity Commission must inform the trustees in writing of its decision to concur or not with the resolution within three months of receiving the resolution, or the date the trustees give public notice of the resolution. If the trustees have not heard from the Charity Commission in that time, or that they have been informed that the Commission concurs with the resolution, then the funds can be expended in furtherance of the charity's purposes.

Similarly, for an endowment fund of a special trust¹⁹ that is treated as a separate charity, where the market value of the fund exceeds £10,000 and the capital was given by a particular individual or institution – or two or more individuals/institutions in pursuit of a common

¹⁹ Outlined in s.288, Charities Act 2011.

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purpose – the trustees can resolve to free themselves of restrictions so that capital can be spent. Trustees must be satisfied that by doing so would be a more effective way of carrying out their purposes. The same process of notifying the Charity Commission, as above, must then be followed before the fund can be expended.

Unincorporated charities

Unincorporated charities not already covered above usually have members who are involved in the running and governance of the organisation. It is therefore likely that the charity's governing document states that any decision to wind up the charity and transfer the assets is subject to a vote at a meeting of the members. Trustees should refer to their governing document to check the specific requirements, and ensure they are adhered to.

Charity Commission schemes

Under s69 of the Charities Act 2011, the Charity Commission has the power to make a 'scheme' for a charitable organisation. A scheme is a legal process by which the Charity Commission may change the charity's objects or governing document. It can only be used where the trustees do not have the powers to make the necessary changes themselves.

'This would largely cover changes which involve updating the purposes of an unincorporated charity with an income of more than £10,000, or where it holds designated land or to introduce changes for any unincorporated charity which might benefit the trustees or connected businesses or individuals.'²⁰

The trustees are responsible for requesting such assistance from the Charity Commission if a scheme is required, or the court can direct such action to be taken.²¹

The Charity Commission deems the following situations as being appropriate for a scheme:²²

- where the current charitable purposes:
 - can no longer be carried out, or not in a way detailed in the governing document;
 - have been met, or are being fulfilled in other ways;
 - do not provide a use for all of the charity's income or property;
 - are outdated in terms of area and places of operations or classes of people defined as beneficiaries;
 - are not deemed to be charitable in law;
 - have stopped being a useful way of using the funds or property;

²⁰ Section 4.1, Charity Commission's CC3.

²¹ There are only extreme circumstances in which the Charity Commission can instigate a scheme of its own accord: where the trustee board lacks quorum; or where trustees have been invited to apply for a scheme but have refused (this does not apply to exempt charities).

²² As outlined in CC36.

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- where changes are required that are currently expressly prohibited by the governing document or Act of Parliament; or
- where two or more charities with similar objects want to merge but do not have the legal power to do so.

The Charity Commission will review the broad aims of the scheme with the charity trustees, but the Commission will determine the final contents. Once an agreement has been reached between the charity and the Commission, the trustees are formally invited to apply for a scheme. A draft detailed scheme will be prepared and sent to the trustees for final comments. The proposed final draft scheme may then be published and the public invited to make comments, but this is to be decided by the Charity Commission in line with sections 88 (2) and 88 (4) of the 2011 Act. After the required period the trustees should send the following documents to the Charity Commission:

- an approved copy of the draft scheme; and
- a declaration confirming that each notice has been correctly published.

After this initial period of public inspection, where applicable, and providing the Charity Commission has not received any representations that require any further amendments to the scheme, a sealed scheme will then be sent to the charity with the instruction to publish it.

After receiving a sealed scheme the charity trustees will receive instructions to publish the final scheme, providing interested parties with the opportunity to appeal the scheme. The appeal process is limited to the charity, its trustees, or any officer or employee removed as a result of the scheme.

Possible future developments

In September 2017 a Law Commission report on the Technical aspects of charity law and regulation made several recommendations relating to charities changing their governing documents. A draft Bill accompanied the report, which if/when implemented will significantly reduce the complexity involved in changing the governing documents of charities. Interested readers can see the report, its recommendations and the draft Bill at <https://www.lawcom.gov.uk/project/charity-law-technical-issues-in-charity-law/>. ICSA guidance will be updated when the law changes.

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Governing document amendments: stakeholder considerations

Membership database

A charity that has a membership structure will need to spend some time looking at its membership database to ensure it is accurate and up-to-date and compliant with GDPR requirements. Members are likely to be the people that will have to vote on any resolution to amend the governing document or the charity's purposes or to agree to a merger. If time and governing document provisions allow, it is sensible to cleanse the membership registers of any members that have not engaged with the charity recently and are deemed to have resigned their membership in accordance with the governing document's provisions.

If the charity offers different types/levels of membership – such as full member, associate member, corporate member, or family membership – it may operate different voting rights for each grade. The charity's governing document should determine the voting rights of each type of membership. Unless the governing document states otherwise, it is likely that only full members will have the right to vote.

It is particularly important when considering a constitutional change to be clear as to whether there are specific requirements to be met. In all cases, it is advisable to formulate a stakeholder communications plan, since those associated with the charity are likely to be anxious about proposed changes. It is therefore essential that ongoing information is supplied to them in order for them to vote with the full facts available.

Where the governing document is not clear on the subject of voting rights, it is advisable to update them accordingly. Alternatively, it may be easier to establish byelaws, to clarify the situation, but the bye-laws must never conflict with the governing document.²³

Beneficiaries

Charity trustees have a duty to fulfil their responsibilities in the best interests of fulfilling the charity's purposes. Often this can be difficult, especially where the board is split as to what is in the best interests of the organisation. Differences of opinion and conflicts of interest (including self-interest) are likely to abound in any proposal that challenges the status quo for both the board and beneficiaries, especially where the proposal may result in services being stopped or the charity merging. Conflicts of interest can be managed by operating procedures by which trustee interests are declared and dealt with appropriately.²⁴

²³ Where there are bye-laws that conflict with the governing document, the governing document provisions will take precedence.

²⁴ Further information can be found in the ICSA guidance note, *Managing conflicts of interest in a charity (England & Wales)*.

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The trustees should be well placed to understand what constitutes the best interests of the charity, present and future beneficiaries, as a result of their ongoing training and awareness of the environment in which the charity operates. Closely monitoring the impact of the charity's activities, along with benchmarking itself against similar charities within the sector will help to identify any trends that may affect the charity and could provide useful information and guidance that can feed into any discussion and plans to amend the charity's governing document.²⁵

By involving members and beneficiaries in any impact reporting and benchmarking exercises, the trustees should be able to draw upon valuable information that could feed into developing a clear strategic goal – whether that involves a merger, joint working or collaboration. Good practice would see such activities being regularly undertaken as a method of ensuring the charity and its officers are delivering the mission.

Time should also be spent considering, from the stakeholders' point of view, what it is that makes the charity unique and stand out from the 'competition'. Whilst it may be hard to quantify the results, the greatest asset to the charity and its beneficiaries might be something intangible, and therefore hard to measure. Any diminution in the benefits and activities offered to the members and/or beneficiaries that could be potential 'deal breakers' should be noted and borne in mind throughout the process, as well as during any discussions to amend the governing document with a view to changing the way the charity operates.

Summary

Proper, and regular, examination of the charity's governing document is essential to ensure the charitable purposes are being met effectively and appropriately. A regular review of the governing document so that all trustees are aware of its contents will go a significant way to strengthening the governance arrangements of any charity.

Whether the review is undertaken because of a proposal to merge, collaborate or work jointly with another organisation, regardless of whether that proposal is implemented, it is likely that the charity will be better off in governance terms having subjected itself to the discipline of reviewing its governing document and acting on those matters that needed attention.

²⁵ The Charity Governance Code recommends that the board regularly considers information from other similar organisations to compare or benchmark the charity's performance. Recommended Practice 4.6.4.

