

## **Covid-19 : Guidance for charities on holding virtual AGMs**

**The Covid-19 pandemic is raising numerous issues for Scottish charities to deal with and forcing them to change the way they operate. One such issue is what to do about AGMs while still complying with Government guidelines on social distancing. Are virtual AGMs the answer?**

Like most legal matters, the position is not straightforward and depends on the type of charity and the wording of its constitutional documents, that is the articles if it's a company limited by guarantee or the constitution if it's a Scottish Charitable Incorporated Organisation (SCIO).

### **Is it possible to hold a virtual AGM?**

Typically, constitutions expressly allow for virtual trustee meetings to be held but not virtual AGM's. More recent constitutions may specifically allow electronic members meetings (e.g. the model articles for guarantee companies do so) but this is unlikely to be the majority.

#### ***If the constitution prohibits electronic members meetings:***

A prohibition can be express or it may be implied from other wording in the constitution. In this case it is not possible to proceed unless you change the constitution first. However, that in itself will cause issues in the current situation. In this case, the best advice would be to defer until the social distancing restrictions are relaxed and then proceed to hold a traditional AGM.

#### ***If the constitution specifically permits electronic members meetings:***

If electronic members meetings (as opposed to trustee meetings) are specifically allowed then it will be possible to convene a virtual AGM should you wish to do so.

#### ***If the constitution is silent on electronic general meetings:***

If the constitution is silent then on balance you should be able to proceed with a virtual AGM.

If the charity is a company limited by guarantee then section 360 of the Charities Act 2006 is relevant – this provides that “nothing in this part of the Act is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it”.

Listed companies have for some time been holding “hybrid meetings” – when there is a physical meeting at which the quorum is present but due to lack of space some attendees also participate on a video link from another location. This was tested in the case of *Byng v London Life Association [1989] 1 All ER 560*. The decision of the court was that it was not necessary for participants to be in the same place face to face in order for the meeting to be properly held.

This case, taken with the provisions of CA 2006, is likely to be sufficient authority for a charitable company to hold a virtual AGM when its articles are silent.

### **Our organisation operates as a SCIO (Scottish Charitable Incorporated Organisation) – are we permitted to hold virtual AGMs?**

The position with SCIOs is less clear, as SCIOs which have adopted the model constitution are unlikely to have an express provision allowing electronic members meetings and the section of the Companies Act referred to above does not apply to SCIOs.

However, OSCR is taking a pragmatic approach and has issued guidance confirming that it is happy for charities to hold virtual meetings even though the governing document is silent.

## **Even if it is permissible, is it necessary to hold an AGM during the current crisis?**

Private companies are only required to hold an AGM if their articles say they must.

SCIO's must hold one each year regardless of what the constitution says as this is a requirement under the SCIO regulations.

Constitutions rarely specify which month of the year the AGM is to be held – it just needs to happen during the calendar year. Although a charity usually has a set month for holding its AGM it should be possible to postpone it for a few months, unless you are up to the wire in lodging your accounts. However, even in this situation Companies House has introduced a three-month extension for lodging accounts during Covid-19. Furthermore, OSCR and the Charity Commission have also said that no charity will be penalised for missing annual reporting deadlines and will not be treated as being in default during the current crisis.

Therefore, postponement is sensible although you should also check whether there is a provision in your articles or constitution that AGMs must be held at least every 15 months.

Whether you decide to postpone or to proceed with a virtual AGM, record the decision and the reasons for it, particularly if holding virtual meetings is not the norm for your charity.

## **What are the practicalities to consider when holding a virtual AGM?**

Depending on the size of the membership, a virtual AGM may be difficult to run and the following points should be considered:

- Will the meeting be accessible to all members, bearing in mind that not everyone will be familiar with platforms such as Zoom or Microsoft Teams?
- How are votes to be conducted?
- Could those not able to participate virtually also appoint a proxy who will?
- In the unlikely event of a poll being demanded, how will that be dealt with?

The reality is that a mixture of the traditional procedure and the virtual is likely to be the best way to deal with this. Prepare your Notice of AGM and Proxy as usual and post this out to members if this is what you normally do. Ask for the Proxy to be returned in the usual way. It is then just the meeting itself which will require to be held electronically.

## **Could virtual AGMs become the new normal?**

Going forward, the widespread use of virtual meetings has undoubtedly been an eye opener for all businesses. Charities, who are always cost conscious, will have seen the benefits of virtual meetings and they are likely to continue when we get back to normal.

It would be advisable for all charities to check their constitutions now and amend them to specifically permit virtual members meetings to be held to deal with some of the practical issues currently arising from the need to hold purely virtual AGMs.

However, the purpose of the AGM is more than to just consider the accounts or reappoint trustees. It is a vital way that charities communicate with their members and often the formal part of the



AGM is dwarfed by a presentation on the future strategy of the charity. It would be unfortunate if the benefits of having a physical platform to engage with members were lost to the cost saving of holding all meetings on a virtual basis.

The listed company route of a hybrid meeting would most likely offer the best solution – a physical meeting supplemented by some virtual participation by those unable to physically attend due to health or distance issues.

If you would like advice regarding your charity or third sector organisation, please contact your usual contact or:

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