

national federation of artists' studio providers (NFASP)

**MODEL
MEMORANDUM AND ARTICLES OF ASSOCIATION
FOR A CHARITABLE COMPANY LIMITED BY GUARANTEE**

EXPLANATORY NOTES

INTRODUCTION

These Notes, together with the accompanying model constitution, are intended to help NFASP members and their trustees to prepare a suitable constitution which will meet the requirements of the Charities Commission and Company law. Please note they contain general guidance only and are not intended to be a substitute for professional advice.

The following Notes relate to the accompanying model constitution for a charitable company limited by guarantee.

Before using this constitution, you will need to be clear what is the appropriate structure for your group. We recommend that you read the Introduction to the Guidance material which is on the NFASP's website http://www.nfasp.org.uk/resources_single.php?id=55

NFASP members may download, adapt and use the model constitutions, but are advised to have their documentation checked by a solicitor or other professional adviser before formally applying to register a company as a charity, or at Companies House.

Please note: this constitution has been prepared under English law; there are differences in the legal requirements for charities in Scotland. For the most up to date guidance for Scottish charities, you should check the website or contact the Scottish charity regulator: <http://www.oscr.org.uk/>

GENERAL

Where a word or phrase needs to be inserted, a brief description appears *[in italics in square brackets]*.

Where there is a suggestion or choice between alternatives, a suggestion appears [in normal type in square brackets].

The model uses the term 'Charity' to describe the charitable company, although 'Company' is equally good.

'Director' means one of the members of the company's Board of Directors, or charity trustees; it does not refer to an employee who is an 'executive director' (or similar) but who is not on the company's Board of Directors.

PRELIMINARY

Name of Charity

Private companies are required by law to include the word 'Limited' in their name. Charities can (and most do) elect not to use the word in their name by completing an additional Companies House form in the pre-incorporation process.

Registered office

The registered office (a requirement of Company law) must be in England and Wales or Wales if the charity is to be within the jurisdiction of the High Court and the Charity Commission and eligible for charity registration.

MEMORANDUM

The Memorandum of Association is compulsory and must follow the prescribed form required by the Companies Act 2006. It no longer contains the Objects of the Charity which now appear in the Articles.

SPECIFIC ARTICLES

1. OBJECTS

The objects (i.e. the main purposes) of the charity must be exclusively charitable under English law, or the company will not be a charity and registration as a charity with the Charity Commission will therefore be refused.

If it is intended that the charity should also be registered as a charity in Scotland and/or Northern Ireland the objects must not extend to purposes which are not charitable in those jurisdictions. (Guidance on this, including recommended forms of words, can be found on the Charity Commission's website at OG32 and <http://www.oscr.org.uk/>)

Legal or other professional advice may be required to be certain that the Objects are correctly expressed as charitable purposes, and that the proposed activities are for the benefit of the public within the meaning of the Charity Commission's Guidance on Public Benefit (see http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx)

Although specific advice will always be required on the wording of the Objects for any proposed new charity, the following generic wording reflects two of the main charitable Purposes permitted by law:

Objects

- 1. The advancement and promotion of the arts and in particular the social economic and cultural contribution of the visual arts for the public benefit.*
- 2. The advancement of education and the furtherance of public knowledge understanding and appreciation of the arts and in particular the visual arts*

2. POWERS

This Article spells out the principal means by which the charity will seek to promote its Objects.

The model includes the powers used by most charities, but also includes paragraphs which can be adapted to the company's proposed activities, all of which must be conducted in furtherance of the charity's Objects.

2.6 Fundraising

The Trustees should be aware of the law relating to the activities the charity is to undertake. Where professionals are employed, for example, the Charitable Institutions (Fund-Raising) Regulations 1994 will apply, and there are special rules governing public collections, lotteries and the sale of alcohol.

The prohibition on 'taxable trading' (see Article 14) is essential to avoid the charity's inadvertently incurring an unnecessary liability to corporation tax. Where a charity will be relying on taxable trading to raise funds it is common for a separate, non-charitable trading company to be used for the purpose, with some or all of the taxable profits being passed to the charity under Gift Aid. Legal or accountancy advice will be needed.

2.12 Investment power

This provision is designed to confer a wide power of investment and ensure that it is exercised responsibly.

An 'investment' is normally an asset which (i) is capable of producing income and (ii) may also increase in capital value. In setting an investment policy and selecting investments, the Trustees should have regard to the needs of the charity for both income and capital growth, i.e. look to the longer term as well as the immediate future, and act with care. 'Financial expert' is defined in Article 14.

2.16 Insurance

There is a statutory power to provide indemnity insurance for Trustees (see Article 14) at the charity's expense. This may be advisable where the charity is involved in particular commercial risks, but does *not* protect the Trustees from possible personal liability towards third parties if the charity operates while technically insolvent. The Trustees should therefore be sure never to commit the charity to expenditure it cannot afford.

3. THE TRUSTEES

This Article sets out the composition of the charity's governing body, namely the people who are the directors of the company (as recorded at Companies House) and the 'charity trustees' (as defined in Article 14: Definitions).

In the model Articles the directors are called the 'Trustees', but they could equally well be called the 'Directors', the 'Board', the 'Council of Management' or some other term.

3.2 Appointment of Trustees

This provision automatically appoints as the charity's first Trustees the individuals who sign the Memorandum and Articles of Association as 'subscribers'. Subsequent Trustees are elected by the Members or co-opted.

3.3 Number and qualifications

The minimum number of Trustees should be at least three.

3.5 Term of office

Retirement of Trustees by rotation (with the first to retire being chosen by lot) is one way of attempting to ensure that the Board is refreshed by the appointment of new trustees.

Alternatively, and more consistently with current best practice, the charity can decide on an initial fixed 'term of office'; the period chosen for elected Trustees is often three years but could be five years or some other period. The Articles usually provide for a maximum number of terms of office.

3.6 Reappointment

To ensure that new trustees can be introduced, a limit can be placed on the number of consecutive terms which a Trustee may serve.

3.7 Termination of trusteeship

Various events can terminate trusteeship.

3.7(a) Disqualification

Statutory disqualification from acting as a charity trustee occurs if a charity trustee is involuntarily removed from his or her trusteeship by the Court or the Charity Commission, in the event of bankruptcy, where the charity trustee is disqualified under the Company Directors Disqualification Act or the Insolvency Act, and where he or she has been convicted of an offence involving dishonesty. The Charity Commission is able to waive disqualification if satisfied that there is no risk to the charity.

3.7(c) Absence from meetings

The length of absence which is chosen to set in motion the termination of a trustee's term of office will depend on the normal frequency of meetings (see Article 4.1).

3.7(d) Resignation

The law does not allow charity trustees to walk away from their responsibilities leaving no-one in charge of the charity.

3.7(e) Removal

There is a statutory power for the members in general meeting to remove a director, provided a fixed procedure is followed.

3.8 Co-opted Trustees

Co-opted Trustees have exactly the same status, voting powers and responsibilities as other Trustees. The difference is in the term of office, in that co-opted Trustees are usually only appointed until the next following AGM or (if the charity has opted not to have an AGM) for (say) one year, during which time a general meeting should normally be held to confirm the appointment.

4. TRUSTEES' PROCEEDINGS

This Article deals with meetings and other proceedings of the Trustees.

4.1 Number of meetings

The minimum number of meetings per year will depend on (i) the nature of the charity's activities and (ii) the extent to which work is delegated to committees and/or staff. It is suggested that the minimum number of meetings should not be less than two.

Quorum

Bearing in mind that decisions may be taken on a majority vote (see Article 4.5), the quorum is often fixed at one third of the Trustees, or a minimum number (say 3), whichever is the greater.

4.2 Video or telephone conferences

A meeting in person is generally preferable to a meeting conducted remotely, but where Trustees are separated geographically or are short of time a remote meeting may be needed. It should be borne in mind that (i) a telephone conference call is not the same as a series of separate telephone calls, which do *not* amount to a meeting; and (ii) the same rules about notice of meetings, the quorum, chairmanship, voting, minutes etc apply to a video or telephone conference as to a meeting in person.

4.4 Written resolution

An alternative to a decision taken at a meeting is a written resolution, but this will not be valid unless signed by *all* the Trustees. This differs from the position with a written resolution *of the Members*, which will be valid if passed by the requisite majority of Trustees.

4.5 Voting

The model provides for the chair to have a second or casting vote at Trustee meetings in order to avoid deadlock, but the same provision cannot apply to meetings of Members, where the statutory provisions do not allow this.

5 TRUSTEES' POWERS

5.1 Secretary

Although company law does not require it, it is generally best for a charitable company to have a company secretary, who can be one of the Trustees. If there is a Secretary, a form must be filed at Companies House.

5.3 Committees

A specific provision is essential if the Trustees are to be able to delegate to committees. The charity will be legally bound by the committee's acts, and for this reason it is often best for at least two Trustees to be members of each committee. The Trustees should define the terms of reference with care. It is essential in all cases to insist that committees report back.

5.4-6 Rules and Regs

These provisions allow the Trustees to make rules of various kinds to govern different aspects of the running of the charity. There is no need to call them 'standing orders', 'bye-laws', 'rules' and 'regulations': they can all be called 'rules' if preferred.

5.7 Dispute resolution

Considerable financial and other damage can result to a charity from internal disputes, especially when they become public. This provision places on the Trustees the responsibility for ensuring that such disputes are resolved. ACAS provides assistance in employment cases. ACEVO (Association of Chief Executives of Voluntary Organisations) also provides guidance in this area. The NCVO and CEDR (the Centre for Effective Dispute Resolution) jointly provide a subsidised mediation service for charities and other voluntary organisations.

6 BENEFITS AND CONFLICTS

The law requires charities to restrict the occasions on which a Trustee may benefit from the charity, and to avoid or manage actual or potential conflicts of interest and duty. Once included in the Articles, this Article cannot be amended without the Charity Commission's consent (see Article 6.6).

6.1 Benefits to Members and Trustees

This provision reflects the legal principle that the Trustees as charity trustees (and those connected with them) must not receive any benefit from the charity, direct or indirect, unless there is an express provision in the Articles, or specific authority from the court or the Charity Commission. In the case of a charitable company such authority cannot be granted by the Members.

6.2 Permitted Trustee Benefits

This provision permits certain payments or benefits to be made to Trustees, including indemnity insurance provided by the charity in accordance with the statutory power (see Article 14, Definitions).

6.3 Contracts with Trustees

The Charities Act now allows charity trustees to be paid for work done or goods supplied to the charity, but various conditions apply, as reflected in the model language. The statutory power does not apply to the *employment* of Trustees or the provision of goods except in association with services.

The model language follows the statutory provision that only a minority of trustees should be remunerated for work done for the charity

6.4 Managing conflicts

This important provision adds safeguards to protect the charity from actual risk (and the appearance of risk) arising from conflicts of interest and duty among the Trustees, which inevitably occur from time to time.

6.5 Permission to act despite a conflict

This provision is necessary as a result of changes in the law introduced by the Companies Act 2006. It allows the Trustees to authorise a Conflicted Trustee (see article 14: Definitions) to continue to act as a Trustee even if he or she is affected by a conflict of loyalties or even a potential personal conflict of interest. There are two conditions: (i) the Trustee receives no benefit as a result of the decision (or any benefit received is authorised under Article 6.2), and (ii) the Trustees as a whole are satisfied that his or her continued participation in the decision-making is in the charity's best interests. The decision for the Trustees is always one which should be considered with particular care.

7. RECORDS AND ACCOUNTS

The keeping of adequate records is essential if a charity is to be properly run. This Article sets out the requirement to observe the statutory provisions and good practice (such as the retention of professional advice and the provision of adequate information to Trustees and Members).

8. MEMBERSHIP

All companies must have 'Members' to comply with company law. However, it is common practice in arts organisations for the same people to be both the Members and the Trustees (sometimes know as the 'oligarchy model'). The model Articles contain alternative language where the Members are a wider group of people who elect the trustees.

8.1 Members' register

A 'register' (or list, which can be in manual or electronic form) of Members is required to be maintained by every company under Company law.

8.3 Membership

This provision establishes 'open' membership which is essential if the Members are to receive charitable benefits, and do not simply support the charity. Some charitable companies confine membership to individuals, and do not therefore provide for member organisations. Some require special qualifications for Members.

8.6 Types of membership

This optional provision enables the Trustees to lay down different rights and obligations for, say, 'individual' and 'corporate' members. Members of a company have certain rights under company law (e.g. to vote at general meetings and to receive copies of the company's accounts). It can be expensive and time-consuming for a charitable company to comply with the company law requirements for a large membership. Where some of the members do not wish to participate in the management of the charity (e.g. where they just wish to support the charity and to be kept

informed of the its activities) it may be appropriate for the charity to establish one or more categories of 'informal' or 'supporter' membership, e.g. associate membership. Informal or 'supporter' members are not recognised in company law and do not have the legal rights of company members. Legal advice may be required in this area.

9. GENERAL MEETINGS

A general meeting is a formal meeting of the Members. Company law contains detailed provisions related to the convening of general meetings and the nature and conduct of business at such meetings. These rules apply to all charitable companies.

9.1 Attendance

This provision states who is entitled to attend general meetings. The charity may invite others (e.g. informal members - see Article 8.6 and the Note above - or representatives of funders) to observe or participate, but they do not have a right of attendance and cannot vote.

9.2 Notice and proxies

Notice is dealt with in Article 12 and 'written' is defined in Article 14. Company law requires provision to be made for attendance and voting by proxy (voting by proxy is no longer optional).

9.3 Quorum

The quorum chosen should be realistic for the organisation.

9.5-6 Voting

An ordinary resolution (which is defined in Article 14) is a resolution passed by a simple majority of the votes cast at the meeting. Note that there can be no provision for a casting vote at a general meeting (see note to Article 4.5 above). Where the ordinary resolution is in writing (see Article 9.7) it is necessary for the votes in favour to constitute a majority of the votes capable of being passed at the meeting. A written special resolution (e.g. to change the Articles) requires a 75% majority.

9.7 Written resolutions

See note to Article 9.5 above.

9.8 AGM

It is not necessary by law to hold an Annual General Meeting but many arts charities still choose to do so. An AGM provides a regular occasion for the members to meet.

9.9 Annual tasks for Members

This provision sets out the tasks which the Members are expected to perform either at an AGM or (if an AGM is not held) at least once a year.

9.11 Calling general meetings

This provision reflects the statutory requirements.

10/11. LIMITED LIABILITY and GUARANTEE

These provisions are required by Company law. The amount of the guarantee given by each Member can be decided by each company but £1 or £5 is common.

12. COMMUNICATIONS

Reference is made to the giving of notice in various places in the Articles, which can now be made electronically.

13. DISSOLUTION

It is not unusual for charitable companies to reach the end of their useful life and decide to dissolve. If so, the debts and liabilities must be provided for, and any assets remaining must be used for the Objects, or charitable purposes within or similar to the Objects, and this clause sets out various alternatives. The Trustees will not generally be relieved of their responsibilities as charity trustees until they have completed their tasks, and sent in a final report and statement of account to the Charity Commission. The Commission will then remove the charity from the register of charities. Removal from the register of companies is a separate matter, and sometimes companies which have ceased to operate are simply allowed to remain dormant (although annual dormant accounts and an annual return must still be filed).

April 2011

ACKNOWLEDGEMENT: NFASP and solicitor Nicholas Sharp are very grateful to barrister Francesca Quint of Radcliffe Chambers who has kindly agreed to NFASP adapting and quoting from the model Articles and Notes prepared by her for the Charity Law Association in the preparation of this Guidance.