

PROFESSIONAL BODY GOVERNING DOCUMENTS

Professional Guidance: Governance 1
Original Publication Date: May 2017©

BACKGROUND

- 1) A professional body (PB) is incorporated either under Royal Charter, or as a company limited by guarantee, or as an association Charitable Incorporated Organisation (CIO). Nearly all PBs are also registered charities, and this will be assumed in this note. An unincorporated association does not have a legal persona (so its trustees have potentially unlimited personal liability).
- 2) With the exception of a CIO Constitution, the governing document (GD) is in two parts. The first part is either a Charter (for Chartered corporations) or a memorandum of association (for guarantee companies). A Charter sets out the body's objects (which must be wholly charitable if the body is registered as a charity), the powers to further the Objects, certain property provisions, and provisions for changing the Charter or dissolving the corporation. A memorandum is a statement that the subscribers wish to be incorporated. The second part is the Bylaws (for Chartered corporations) or articles of association (for guarantee companies) which set out how the organisation will be run (including its objects in the case of a charitable guarantee company). They will typically contain sections on: membership; general meetings; officers and other trustees and their election and meetings; finance; and notices. Recently produced GDs will include a section on conflicts of interest and conflicts of loyalty. Some institutions have an older Mem & Arts which contains the objects, powers and dissolution provision within the Memorandum. A Charter is procedurally more difficult to amend than By-Laws, and the powers within the GD may limit or preclude the amendment of certain paragraphs: for example, prior Charity Commission (CC) consent might be needed. In particular, amendment of the charity's Objects requires prior consultation with the CC and almost certainly professional advice. A Charter differs from a Memorandum principally in the arcane grandeur of its preamble and conclusion. While not in 2 parts, the order and layout of a CIO Constitution are similar to those of other charitable GDs. The CC publishes model GDs for a company limited by guarantee and an association CIO, and a guidance document (CC36) for charities wishing to amend their GD.
- 3) An amendment to a Charter & By-Laws (or a new application) has to be approved by the Privy Council, whose Office (secretariat) will consult interested parties including government departments. An amendment to a charitable company's Mem & Arts has to be lodged at Companies House.



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- 4) Drafting of, and sometimes consultation on, amendments to the GDs is often handled by the institution's solicitors, particularly with larger institutions. Simpler amendments might be undertaken on a DIY basis. Don't take all solicitors' wording as gospel – they know the legalese but may be less familiar with the practicalities of how institutions operate.
- 5) The provisions of the GD need to be legally robust (otherwise they may be challenged in court); but they must also be understandable by the lay officers, trustees, staff and members who will have to work by them. They need to be clear, unambiguous and consistent with each other, covering the essential areas but not in excessive detail. Current practice is to consign details, particularly those which might need relatively frequent amendment, to Regulations or byelaws which can be amended by resolution of the governing body.

AMENDMENT OF AN EXISTING GD

- 6) This section gives a list of the more likely points to look out for. It is not exhaustive, and there is no substitute for the experienced eye.
- 7) If the Objects are being amended (but not otherwise), it is recommended to add the words "for the public benefit" if these or similar words (e.g. "for the benefit of society at large") are not already included. The reason for this is that since the Charities Act 2006 the public benefit of charities is no longer presumed and has to be demonstrated.
- 8) While the paragraphs being amended are the principal area of interest, look beyond these at the rest of the GD – it is the best opportunity to review it. In particular watch out for any inconsistencies between the amended paragraphs and other paragraphs. If the PB supplies only the amended paragraphs, ask for the complete GD.
- 9) The law of unintended consequences can loom large. Act devil's advocate or red team – try to imagine a set of circumstances in which a provision might produce an unintended, undesirable or unfair result. Even things like the size of a quorum or the type of majority for a particular decision (or a combination of the two) can cause problems if at the margin.
- 10) One needs to be clear on the key verbs in a GD. "Shall" (or "must" as preferred by the CC) is mandatory; "may" is permissive. "Should", in the sense of "ought to", is unlikely to have a place in a GD. "Will" is merely informative.



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- 11)** The trustees are in law collectively responsible for the governance and strategic direction of the charity; they need a balance of skills and experience, and must meet frequently enough, to do so effectively. Institutions often used to have large, ponderous councils with all manner of regional and professional sector representation. Most have now restructured to have a smaller trustee board, often with a larger council having a strategic but advisory role, perhaps with specific delegated powers. While a council might be empowered to appoint some or even all trustees, it must not be able to remove a trustee, or give direction to or veto decisions of the trustee board. If a trustee board is wholly elected by the members, the resulting balance of skills is a matter of luck, so there needs to be a power to co-opt some trustees as well. All trustees, whether directly elected by members, serving ex officio, or appointed by the trustees or some other appointing body, have equal responsibilities in law so all shall be entitled to vote and be counted in the Board quora for its meetings. In addition, a trustee board may have the power to invite non-voting individuals (whether members or not) to attend some or all of its meetings in an advisory role to provide specific experience or expertise – often for a limited period.
- 12)** It is usual to specify a maximum number of years, or terms of office, for an individual to serve on a trustee board before standing down for at least one year, to ensure that new blood can be introduced. It is also desirable, for reasons of financial prudence, to specify a maximum period that the same person can serve as Honorary Treasurer (perhaps 6 years). These points, however, are only made as observations.
- 13)** Requirements for admission to particular classes of membership are a natural for Regulations. Specified minimum age limits or minimum periods of experience is a discriminatory no-no, although we believe that a suggested norm is permissible, e.g. “A typical candidate may have about 12 years of appropriate experience”. All the standard stuff about general meetings and meetings of trustees has to be in the GD, but procedural details can go into Regulations. A power for the trustee board to form and delegate to committees (of trustees and other members) is sufficient to allow committee detail to go into Regulations.
- 14)** Titles are a potentially emotive topic. There is no standard approach to which classes of membership are granted post-nominals, although post-nominals should not be granted for an entry class of membership requiring no qualifications or peer assessment. Neither is there standardization of classes of membership – it’s a matter for each institution.



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- 15) The key features of a disciplinary procedure need to be in the GD, together with a requirement for the Trustees to make Regulations covering the procedural details. There should of course be some reference to the professional code of conduct which the disciplinary procedures exist to uphold.
- 16) A mundane but essential part of the required clarity and unambiguity is a correct and consistent hierarchy of headings and paragraph numbering. For example:-
- **6.1**
Where a heading covers a group of paragraphs, all the paragraphs between that heading and the next heading must relate to that (preceding) heading. Likewise, if a paragraph has its own heading, each and every sub- paragraph must relate to it.
 - **6.2**
Where a paragraph contains an incomplete sentence (ending in a colon) leading into a number of sub-paragraphs, then each and every sub-paragraph (or bullet point) must independently follow on grammatically from the lead-in words. It is not uncommon for the last sub-paragraph in a long list, or one added as an amendment, to contravene this rule.
 - **6.3**
It is quite acceptable to revert to the main body of a paragraph at the end of a list of sub-paragraphs or bullet points, without starting a fresh paragraph, when the subject matter makes this appropriate. For example, a proviso intended to apply to a number of sub-paragraphs should be included in this way rather than as an additional sub-paragraph - or worse, within one sub-paragraph only.
- 17) There will usually be a list of definitions, at the beginning normally of the By-Laws or Articles, of words which are used with a particular meaning. Such a word will sometimes have an initial capital, but the same word without an initial capital may be used differently. For example, "Member" may be defined as a category of membership (cf. "Associate Member" or "Fellow") and "member" used generically to cover all categories of membership. There is no standard usage between one institution and another - just watch for consistency within one GD. Some institutions use the term "Corporate Member" to describe the classes of individual members who are professionally qualified and entitled to vote; others, more logically, describe these as "Voting Members". "Corporate Member" is also used by some institutions (and predominantly within other professions) to describe companies or other bodies corporate that are granted membership. While the solution is obvious, institutions may be unwilling to abandon long-standing terminology.



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- 18)** While legally “he” includes “she”, “his” includes “her” and so on, “he or she” and “his or her” are creeping in. The use of “they”, “them” or “their” as gender-free singulars, however, is not suitable for what is a legal document.

LM OR PA SEEKING A ROYAL CHARTER

- 19)** In addition to the points above, there are a few particular points to consider.
- 20)** The PCO publishes on its website a list of the main criteria to be met by a PB applying for a Royal Charter, although even if these are apparently satisfied the grant of a Charter is not automatic. (The application of the criteria was a subject of judicial review in the High Court and Court of Appeal in 2015 and they might be amended in the future.) The applicant body will solicit declarations of support, or at least of non-objection, from government departments and other chartered PBs. An application might be opposed by an existing body if, for example, it considers the applicant to be encroaching ‘on its turf’. The PCO takes the view that a Charter of Incorporation is granted: (a) to recognise a unique profession or subject discipline by grant of a Charter to its leading body – one whose bona fides has been tested; and (b) because it is in the public interest to grant a body powers to ensure the competence of its members to begin and to continue professional practice.
- 21)** The draft Charter and By-laws will probably have been based largely on the institution’s existing Mem & Arts, so it would be useful if possible to compare the two to identify the genuinely new material. The CC will, however, consider them as a new document, so mention of public benefit in the Objects is essential.