

CHARITIES

Focus for Charity Trustees during Crisis Governance

29 April 2020

The Covid-19 pandemic has created challenges for charities around funding and fundraising, volunteering and maintaining good governance practices while remote working. This note outlines some of the key areas for consideration applicable to most charities in charting a course through the crisis.

During a crisis it may be tempting to conclude that the board of charity trustees cannot easily meet and that operational activity is more urgent than strategic activity and therefore the board need not meet. This is not the case. Boards can and should meet to provide support and strategic direction just as much in an urgent crisis as during the normal course of business.

There are then two questions: how do the charity trustees meet (when locked down); and what should their priorities be?

HOLDING MEETINGS

- **Continue to hold board meetings**
Board meetings should continue insofar as possible. The extent to which meetings may be held remotely should be confirmed and where necessary constitutional changes made to facilitate such meetings.
- **Facilitate short notice meetings**
Practical arrangements (lists of contact details and times) should be compiled to ensure that either board meetings can be held at short notice to address urgent or unexpected business.
- **Learn virtual etiquette**
It is advisable for the chairperson of the board and trustees to acquire experience in virtual meetings and managing teleconferences. Boardmatch

Ireland has put together virtual guides for boards/committees.

- **Check that virtual meetings are allowed**
Some charities may have particular rules around meetings so it is advisable to check the charity's governing document. If the charity is a company and the governing document is silent on the issue of holding of virtual meetings then the Companies Act provides for telephonic and electronic attendance at meetings unless the optional provision has been disapplied.
- **Take minutes**
However such a meeting is held it is crucial that appropriate minutes of the meeting are taken including a record of key decisions made.
- **Check written resolution procedure**
Before using a written resolution procedure make sure that any formalities are properly addressed in accordance with the constitution. Often such resolutions must be unanimous to be effective.

IMMEDIATE GOVERNANCE PRIORITIES

Each organisation has its unique circumstances but some of the following main considerations are likely to be relevant for most charities:

- **Continuity of mission**
The board of charity trustees are primarily charged with ensuring that the organisation's resources are applied to the mission. It is therefore appropriate to understand to what extent the continuity of mission is compromised and where necessary to consider and agree any change in priorities or necessary compromise ranking of priorities during the lock-down period or any period where funding is adversely impacted.
- **Liquidity and insolvency**
From a governance perspective it is essential for a charity to understand how it will function without core fundraising events which can no longer take place as a result of social distancing. It is advisable that charities maintain open lines of communication around cash flow and liquidity with donors and government agencies and that discussion with banks and credit institutions happen sooner rather than later if cash flow becomes a problem. The measure of insolvency is not a simple calculation of expenditure exceeding income. The solvency of a charity will instead be determined by the ability to pay debts as they fall due, taking into account current, contingent and prospective liabilities. Where liabilities exceed assets, charity trustees need to consider the balance sheet when making any judgement as

to whether the charity is able to pay its debts as they fall due. In assessing the solvency of a charity, charity trustees should consider whether there are reasonable grounds to conclude that the charity can continue to operate through its difficulties, and apply a common-sense approach.

Charity trustees of Trusts and unincorporated associations are potentially personally liable for the debts of the organisation. In all cases where uncertainty remains then an insolvency practitioner should be consulted.

- **Security of funding – contingency planning**

As funding falls in organisations with employees a major consideration is the ability and potential to suspend or delay aspects of a charity's operations and the implications for employees in terms of temporary lay-off, short time, voluntary pay/benefit cuts and potentially the last resort of redundancy.

- **Revisit risk analysis**

A key part of governance is risk analysis and it might be considered that the COVID-19 crisis and in particular funding, is one big risk. Nevertheless it makes sense for there to be a quick review of the risk register to check to see if there are indirectly heightened risks or perhaps opportunities arising from the changed circumstances.

- **Impact on employees**

Charitable companies have a statutory obligation to have regard to the interests of employees. Charities have the same obligations to employees who are unable to attend work as do other employers. They also have the same eligibility for the Temporary Wage Subsidy scheme. Guidance on this scheme is available from many sources at this stage including the Department of Employment Affairs and Social Protection and the Revenue Commissioners.

- **Rightsizing statutory compliance**

Charities which are companies have statutory obligations to hold AGMs and to make annual filings and filings relating to changes in directors. These are mandatory and must be addressed within the relevant timeframes. There may be some scope to delay within those timeframes (in particular where an early audit and production of the annual report and accounts is customary it may be possible to delay an audit to a less stretched, non-remote-working time). However it is important to bear in mind that there may at that point in the future be a significant queue of work built up for auditors to get through. The Charities

Regulatory Authority has extended the deadline for COVID-19 affected CRA annual returns due between 12 March 2020 and 29 June 2020 out to 30 June 2020.

- **Establishing appropriate communications**

Insofar as possible charity boards should maintain regular contact between the CEO, management, board members, staff and volunteers. It is crucial in such unusual and stressful circumstances that individuals know there are supports available to them, especially where they are operating in high stress environments.

Subject to ensuring that contractual obligations to grant-makers and funders are met, the production of impact reports and communications around annual reports may be a discretionary spend or a drain on physical resources which it may be preferable to suspend for the duration of the crisis.

VOLUNTEERING DURING THE CRISIS

There are several ways in which volunteering might become an issue during the crisis including:

- **The use of volunteers in greater numbers or for the first time**

If using volunteers for the first time, or in significantly increased numbers an organisation must be familiar with the rights and obligations both of volunteers and of the organisation to which they are offering their resources. Proper management of volunteer resources requires effort and resources which may lead to capacity issues which may restrict an organisations ability to accept offers of volunteer assistance. Liability can arise for an organisation, to beneficiaries, third parties and to the volunteers themselves, if volunteer resources are not properly managed.

- **The offer of staff as volunteers to other organisations**

Organisations who offer their staff as volunteers (whether charities or corporates) need to ensure that the nature of the volunteering as a corporate activity is understood and that there is an agreement in place to cover matters such as whose insurance covers the individuals. Where the staff are currently needed and able to work for their employing charity, then to re-deploy staff to another organisation may be a misapplication of the resources of the charity in breach of its own purposes.

- **Offering or “volunteering” an organisation's resources to assist another charity or the HSE in the provision of COVID-19 care and support**

Organisations which are not formed for health related purposes and the relief of suffering may well face difficulty in changing their direction to apply their resources to COVID-19 purposes. While charities must be generally for objects which are for the public benefit, this a subsidiary test which applies once the main object is otherwise charitable. It is not the case that all charities can do anything that is for the public benefit. Charities are much more restricted in this regard than private entities as they exclusively promote their own charitable object.

- **The desire of staff to volunteer personally (particularly during a period of lay off or short time)**

Where staff engage in personal volunteering it should be made clear to them that this is volunteering in a personal capacity and is not endorsed or covered by their employer.

HOLDING MEMBERS' MEETINGS

Charity trustees may be concerned with meeting their statutory obligations to hold an Annual General Meeting (AGM) and also with passing members' resolutions. It is important to note that these meetings are mandatory as a matter of company law for charitable companies; for other types of organisation they are likely to be contractual constitutional requirements. For all organisations that are registered charities there is a statutory obligation to file an annual return with the Charities Regulatory Authority.

The ability of an organisation to organise a virtual AGM depends on its constitution and its legal form. Companies have some built in flexibility in this regard under provisions of the Companies Acts. Those provisions do not apply to unincorporated associations or charitable trusts: such organisations are dependent on their constitutional provisions which may need to be amended to deal with virtual meetings.

Charitable companies

For Charitable companies there is no requirement that members have to be physically present at an AGM. Virtual meetings may take place using technology provided that members are given a reasonable opportunity to participate. The company may also make use of unanimous written resolutions to pass resolutions which ordinarily would have been passed at members' meetings.

• **Hold Virtual AGMs**

The legal situation is clear regarding holding members’ meetings while complying with social distancing requirements. Section 176(4) of the Companies Act states that any meeting – whether an AGM or an EGM – may be held in two or more venues at the same time using any technology that provides members, as a whole, with a reasonable opportunity to participate. As section 176(4) is a mandatory provision of the Act, it cannot be disapplied by a company’s constitution.

• **Consider Using Unanimous Written Resolutions**

Trustees should be aware that section 193 of the Act provides that a resolution in writing signed by all the members of a company entitled to

attend and vote on such resolution at a general meeting shall be as valid and effective as if it had been passed at such a meeting. Helpfully, such a resolution may be signed in counterparts, and so could be emailed to the members and signed by each of them individually. The resolution will take effect from the time that it is signed by the last member. However, a written resolution may not be used instead of a meeting to remove a director, or to remove or change a statutory auditor. Section 193 applies to charities incorporated as a Companies Limited by Guarantee (CLGs) unless the company’s constitution provides otherwise (in contrast to a Limited Company (LTD) where it is a mandatory provision).

Charitable Trusts and Charitable unincorporated associations

For Charitable Trusts and Charitable unincorporated associations it is important to check, and amend if necessary, the constitutional provisions around preparation and approval of accounts and the associated meetings to ensure that virtual meetings are possible.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

KEY CONTACTS

For more information please contact:



Philip Smith
Partner, Head of Charity Law
+353 1 920 1204
philip.smith@arthurcox.com



Sarah McCague
Of Counsel
+353 1 920 1051
sarah.mccague@arthurcox.com



Liz Hughes
CEO
Charities Institute Ireland
liz@charitiesinstituteireland.ie