

Constitutional & governance review

The Arts Depot Trust Limited

26 April 2021

1 Instructions & summary

- 1.1 We have been instructed to review the Memorandum & Articles of Association and the draft Governance Guide for the Charity. We have agreed that our review would be of a 'medium depth', meaning we will address the main themes but without going into minute detail. There is to be a board meeting shortly at which our review will be considered and of course we would be happy to undertake further work and discussions beyond that.
- 1.2 In summary, our findings are as follows.
- 1.2.1 The Memorandum & Articles of Association are showing their age somewhat, in that they were last revised about thirteen years ago. Most provisions are adequate but there are many points to consider which, in our view, would bear improvement to make the Charity's life more straightforward. Three points stand out as being most in need of attention: there are no electronic meeting provisions; the conflicts of interest provisions are out-of-date; and there is no power to remove a trustee for detrimental conduct.
- 1.2.2 As to the Governance Guide, overall this is a very good document. It has some inaccuracies which need to be attended to (which would be straightforward). There are some points to consider adding, as to which see below in this report. The Code of Conduct is in our view rather too brief and has some important omissions. The Committee terms of reference need clarity as to what is delegated. There are some governance areas in need of more specific treatment, including equality, diversity and inclusion, safeguarding, risk management, staff, data management, fundraising, trading, major partnerships, and climate.

2 Memorandum & Articles of Association

- 2.1 We will deal with these two documents together. They were both last revised thirteen years ago and much has changed in that time including the relevant statutory law and best governance practice. Accordingly there are a number of changes we would recommend simply in order to keep the document up to date.
- 2.2 A specific point of updating is that these days all of the provisions which used to be contained within the Memorandum and Articles are now to be found only within the Articles of Association. Therefore when revising these documents, the two should be consolidated.
- 2.3 The statutory references which have become out of date can be corrected when the document is revised.
- 2.4 The full name of the Charity includes the suffix "Limited". If desirable, this could be omitted as part of the review, as not-for-profit companies may do this.
- 2.5 The objects are somewhat outdated when compared with language which might be used today, however, they are adequate. They appear to us to match what the Charity does in practice, which is the most important consideration. Any change would require Charity Commission's written consent, which may well not be given, as the wording does allow for the Charity's activities. We therefore recommend these are not changed. Of course a mission statement and other such expressions can be used alongside the formal objects.
- 2.6 The powers are adequate, although outdated in their wording. We suggest as part of the review that these are updated. This change does not require Commission consent.

- 2.7 The non-profit provisions, found in clause 5 of the Memorandum of Association currently, are in our view adequate. Please note any change to these is likely to require Charity Commission consent. We do note there is no exception listed to allow a trustee to be a beneficiary of the Charity's activities; however, this is not likely to present any difficulty in practice, so we do not recommend this is changed.
- 2.8 The guarantee, to be found in clause 7 of the Memorandum, is higher than usual at £25 rather than the usual £1. However, this is unlikely to have any impact in practice as the guarantee is very rarely called upon. A change to this would require the Charity Commission's written consent.
- 2.9 The alteration clause (clause 9 of the Memorandum) states that no change to the Articles of any kind may be made without the Council's consent. Changes always need the members' consent and, for regulated alterations such as changes to the objects, the Charity Commission's consent. The requirement for Council consent seems overly restrictive, given that the Charity cannot cease to be a charity and the requirement for Charity Commission consent for regulated alterations gives further protection. Whether this should be changed will depend on the nature of the relationship you have with the Council, which we realise is a key stakeholder.
- 2.10 We consider the following matters in relation to membership to be important.
- 2.10.1 The maximum number of members is given at 20. In practice we understand the members are the same people as the trustees even though this is not a formal requirement of the Articles. Members are appointed by the board.
- 2.10.2 There are provisions to allow for informal membership, such as friends or associates. Whether this is used in practice we don't know, however the Charity may allow for informal membership whether or not provisions are included in the Articles as to this. Some opportunity for streamlining is therefore available if you would rather omit this from the document. We should note that the existence of informal membership, alongside formal membership, can lead to confusion.
- 2.10.3 Members can retire by giving notice but only seven days' notice is required, so it would the Charity may well be inconvenienced if one or more members left with only that amount of notice. This needs to be considered alongside the point as to whether members and trustees should be *required* to be the same people rather than being the case as a matter of practice as is currently the case. If members are required by the Articles to be the same as the trustees, then one or two months' notice would be more appropriate for resignation.
- 2.11 The following observations may be made in relation to members' meetings.
- 2.11.1 These days, an AGM is optional for a company limited by guarantee. As your members are the same people as the trustees, it may be a separate formal AGM is not necessary. However, please see below in relation to trustees' appointments, which at the moment are made at the AGM.
- 2.11.2 Some of the terminology in this section is outdated, for example, *extraordinary general meeting* is no longer a term used by the Companies Act.
- 2.11.3 The notice period for AGMs and EGMs is given as 21 days, which is longer than the minimum required by the Companies Act, which is 14 days. Consideration could therefore be given to shortening that period.

- 2.11.4 The quorum for members' meetings is five, which in our view is a sensible number if the maximum total number is 20.
 - 2.11.5 The Chair has a casting vote. This facility is no longer available under the Companies Act for members' meetings, although if it is already included in a company's Articles then it may remain. You should therefore consider whether this is in practice ever used.
 - 2.11.6 Other provisions in relation to members' meetings are adequate although outdated in some places. Please note one important omission is there is no provision for electronic meetings, which of course these days has become very important.
- 2.12 We have the following observations to make as regards trustees.
- 2.12.1 The minimum number of trustees is given as four and the maximum 20; three are to be appointed by the Council and 17 by the members. We assume that Council involvement is viable and desired. It is, we understand, a major stakeholder and is landlord of the Centre.
 - 2.12.2 The 'alternate directors' provision is contrary to modern best practice for charities and not regarded by the Charity Commission as appropriate. Accordingly this ought to be removed.
 - 2.12.3 There is a mention of debentures: we presume this relates to the acquisition of a position of privilege in relation to event bookings. If so, this does not need to be mentioned in the Articles. Any trustee who had such a privilege would need to observe conflict of interest provisions in relation to their role as a trustee of course.
 - 2.12.4 Appointment of trustees (save for the council appointees) is undertaken at each AGM with one-third retiring each year, thus giving an effective three year term. Trustees can serve two terms of three years before then having to step off the board for three years. That is an unusually long sabbatical; usually twelve months is deemed appropriate.
 - 2.12.5 The appointment of trustees by members is arguably an unnecessary and complex system of appointment given that the members and trustees are the same people. The Articles could simply provide for the board to appoint the 17, and this would also simplify many of these provisions considerably. The three year term of office could be retained if these provisions were revised.
 - 2.12.6 As regards termination of office, we recommend including provision for the removal of a trustee who has conducted themselves in a way which is detrimental to the interests of the Charity. If this was included there would be an appropriate procedure set out.
- 2.13 The following observations may be made in relation to board meetings.
- 2.13.1 The quorum is five, which is a sensible number unless the total number of trustees is low in which case it could represent a high percentage of that total.
 - 2.13.2 The Chair has a casting vote and whether or not that is often used in practice in our view it is a useful facility to have.

- 2.13.3 The conflict of interest provisions are not in step with the provisions set out in the Companies Act 2006 and governance best practice. We recommend these are revised.
- 2.13.4 As with the case of members' meetings, there are no electronic meeting provisions and we recommend that these are included.
- 2.14 The above represents the principal comments we have on the Memorandum and Articles of Association. However, there are a few important miscellaneous points.
- 2.14.1 The office of company secretary is now optional, so this could be reflected in the Articles rather than a statement that there shall be a secretary.
- 2.14.2 The ownership and use of a company seal is also now optional so again this matter could be reviewed.
- 2.14.3 Given the Charity's important relationship with the Council, consideration should be given to the need to avoid the Charity becoming a *regulated, controlled or influenced* company under the provisions of local government legislation. The Local Government & Housing Act 1989 Part V (and related regulations) provides that where there is a *business relationship* between a local authority and a company and also a certain amount of influence at membership or board level, then that company will be *influenced, regulated or controlled* (all of which are defined terms), which leads to various administrative and accounting consequences.
- 2.14.4 Without going into too much detail at this stage, those consequences are cumbersome and usually best avoided for both parties. In this situation, as the Council is the landlord of the Charity, there exists a business relationship. Accordingly, the best way to avoid the consequences referred to would be to ensure, in the Charity's Articles of Association, that those who are associated with the Council do not constitute 20% or more at either membership or board level (or that there is a mechanism to adjust voting strength if they do).
- 2.14.5 We recommend we review with you the extent to which this matter has been considered or ought to be considered and take the matter forward from there.

3 The Governance Guide

- 3.1 Overall, our assessment of this draft document is it is very thorough and helpful and should prove to be an extremely useful framework for trustees and others within the Charity, pulling together the various governance requirements of law, regulation and best practice.
- 3.2 There are a few inaccuracies, which would be straightforward to remedy, and there are a number of points to consider adding, which we will detail below.
- 3.3 At the start of the document is a section entitled *Status of Document*. We recommend adding here that the document has been approved by the board and will be reviewed annually. Annual review should be relatively straightforward most years just to ensure that it is up-to-date; a more thorough review could be undertaken every three years or so.
- 3.4 Trustee status is dealt with on page 6. We recommend here adding that trustees are both company law directors and charity law trustees and that they are subject to similar duties as a result of both statuses.

- 3.5 The point made about liability would benefit from expansion, to include that the company structure protects trustees, as does undertaking the role with due care and diligence, taking appropriate advice when necessary, and that the Charity Commission or a court can relieve a trustee from liability where they have acted honestly and reasonably. This is the counterpoint to the statement given that the indemnity found in the Articles can be removed by the Charity Commission or the courts in the case of trustees who have been deemed to have acted negligently etc.
- 3.6 In the section on regulators, we recommend adding also The Fundraising Regulator, The Information Commissioner and The Health & Safety Executive. We also recommend making mention of key Charity Commission guidance in this section, such as the *Essential Trustee, Trustees & decision making*, and also *The Charity Governance Code* (although this latter is dealt with later in the Guide).
- 3.7 In the section on duties, please note the duty to act in the interests of creditors only arises in insolvency situations; until that point trustees must always act in the best interests of the Charity. Also please note that the duties of charity trustees which are listed are not statutory duties, in that they are not listed in the Charities Act, but they are a matter of general law and regulatory oversight by the Charity Commission. Additionally, the recital of the list of duties contained in the Charity Commission's guidance is not quite accurate but may be made so easily.
- 3.8 The table on page 7, comparing the roles of the trustees and the executive team, is broadly a good reflection of the division of responsibilities but we recommend that those for trustees should include more of a role in considering and creating strategy, risk management, organisational change and the Charity's business model.
- 3.9 In the section regarding meetings of trustees on page 8, we note trustees are to meet four times a year and we query whether that is enough for such a busy charity. Also in this section, the number of trustees is given as a minimum of five although the Articles of Association say a minimum of four; obviously the two documents should harmonise. The note as to the rotation of trustees says that appointment is only at an AGM or an EGM; however, the Articles also allow the board to appoint trustees to casual vacancies.
- 3.10 The section as regards major stakeholders beginning on page 8 gives helpful information but we wonder perhaps whether this section should be included earlier in the document, for example, after "About Arts Depot". We also recommend that some guidance is included here that trustees have a responsibility to oversee the appropriateness, strategic fit, impact, and risk of significant partnerships and collaborations. This has been the subject of specific Charity Commission guidance.
- 3.11 The Code of Conduct included at page 13 is a fair treatment but is very short. Even though it sits within a comprehensive governance guide it should still, in our view, be fuller and include reference to relevant Charity Commission guidance and the Charity Governance Code (which is mentioned later in the guide), confidentiality, working outside of meetings, lines of communication and responsibility, and managing disagreements.
- 3.12 We recommend including a discrete section on policies, explaining their function and then listing all your policies. This could include conflicts of interest (which is included in full later in the document), safeguarding, equality diversity and inclusion, data protection and privacy, risk management, employment, financial, social media, climate, and anything else of central importance for your Charity's work. These policies do not all need to be appended, which would make the whole document very unwieldy, but at least listed and / or cross-referenced

so as to provide a comprehensive guidance framework for trustees and others. In as much as this document is electronic, then links can be provided.

- 3.13 The role of the Honorary Treasurer, at page 21, should be less onerous for your Charity, given you have an employed Finance Director; additionally it may not always be possible to appoint a trustee with the appropriate experience. Whilst financial understanding is critically important for the board, you may therefore wish to review whether having a formal honorary treasurer is a necessary requirement for your Charity.
- 3.14 Your committee terms of reference, beginning at page 22, ought to include a clear statement as to what decision making is delegated and what is merely for consideration and recommendation to the board. Without a specific delegation, then the default position is that everything is merely for consideration and no decision making power is given to the committees at all.
- 3.15 Lastly, we suggest consideration is given as to whether an organogram might be a useful addition to demonstrate the governance framework of the Charity, lines of communication and delegation and so forth. Often people find this an invaluable tool to which to have reference alongside the terms of reference and other provisions of a governance framework.
- 4 We hope this report is of assistance to the board and would be very pleased to discuss matters further and to assist with any redrafting.