

**SCVO MODEL CONSTITUTIONS**

**RECOMMENDED CLAUSES TO FACILITATE**

**REMOTE PARTICIPATION IN MEETINGS**

**GUIDANCE NOTES**

**Key features of the recommended new clauses**

*Rules for remote participation in meetings*

The recommended new clauses are designed to embed, within the constitution, a set of rules for remote participation in meetings which

(a) resolves all the various technical queries which remote participation can generate *and*

(b) promotes best practice from a governance point of view.

In line with those aims, the recommended new clauses cover quite a number of different aspects:

* Ensuring that information on how to connect and participate remotely is given to members (as part of the process of giving notice of the meeting), whenever arrangements are made for remote participation in an AGM or other members’ meeting;

* Highlighting other options for participation, to address the needs of those members who would have difficulty in accessing a computer or smartphone for remote participation in a members’ meeting;
* Optional clauses covering the possibility of inviting members to submit questions in advance of a members’ meeting, where a members’ meeting is to be run *solely* through remote participation;
* A requirement for the board to avoid creating unnecessary barriers to remote participation (eg through their choice of software), when making arrangements for remote participation;
* A requirement to ensure, so far as reasonably possible, that the manner in which the members’ meeting is conducted does not disadvantage those who are participating remotely, as compared with those people (if any) who are physically present (and vice versa);
* An *obligation* on the board to make arrangements for remote participation, where attendance in person at a members’ meeting would not be possible or advisable (due to public health legislation or guidance) for all - or a significant proportion - of the members;
* Confirmation that a members’ meeting could involve some people being physically present at one location, while others participate remotely - or it could *solely* involve remote participation (ie it could be a virtual meeting);
* Confirmation that the rules relating to remote participation of members will also (where applicable) extend to remote participation by (a) authorised representatives of members which are corporate bodies and (b) proxies;
* Addressing potential uncertainty regarding quorum requirements for members’ meetings, by stating clearly that a member participating through an audio or audio-visual link (providing this allows them to hear and contribute to discussions at the meeting) will be counted, in determining whether a quorum is present;
* Confirming how members can vote where they are participating remotely, by stating specifically that this can involve casting a vote orally *or* by some form of visual indication *or* by a voting button *or* by way of a message sent electronically (and similarly where a secret ballot is conducted, though in that situation this must be via some method that preserves anonymity);
* Addressing similar issues to the above in the context of *board* meetings, by introducing a further set of clauses covering remote participation in board meetings – and including an obligation on the board to facilitate remote participation, in a situation where public health legislation or guidance makes it impossible or inadvisable for *any one or more* board members to attend a board meeting in person;
* In the case of the recommended clauses for articles of association, addressing a small technical point arising from the wording in the Companies Act requiring notices of members’ meetings to specify the place of the meeting – the recommended clauses state that in the case of a virtual meeting, the place of the meeting should be taken to be the place where the chairperson of the meeting is expected to be.

*Minimising the risk of technical challenges*

In addition to the above, the recommended clauses include a set of provisions – closely following what was included in the special legislation – directed towards minimising the risk of technical challenges of the kind referred to above. Unfortunately, introducing provisions of this kind within a *constitution* can never create quite the same level of legal certainty (as regards their effectiveness in defeating a technical challenge) as would apply if the *legislation* was still in force – but it should certainly reduce any risk, and in practice it is extremely unlikely that a technical challenge of this kind would ever be pursued through the courts in this context.

One point to note, however, is that – unlike the position under the legislation – the wording within the recommended clauses blocks the rights of members (and board members) to challenge on these technical grounds *only* if the requirements of the constitution regarding remote participation are complied with. That is a deliberate feature of the recommended clauses, and is intended to reduce the risk that boards will ignore one or more of the safeguards to support good governance which have been built in to these new clauses.

*Written resolutions of the board*

In circumstances where a normal board meeting cannot be held, remote participation offers a good way to ensure that important decisions can still be taken. There are occasions, however, when a simpler solution would be to obtain board members’ agreement to a particular resolution without having a formal discussion; under some constitutions, that can then be regarded as being equally as valid as a resolution passed at a board meeting. The outcome of this process is normally referred to as “a written resolution of the board”. The resolution can be printed off and each copy signed by a board member (the signatures of all the board members do not need to appear on the same sheet) – but, as a matter of practice, it is becoming much more common for the resolution to be simply agreed to by the board members via emails, rather than being physically signed.

The traditional approach (and this is reflected in the model articles issued under the Companies Act) is to require each and every board member (not just a majority) to agree to a written resolution before it can be regarded as valid. That requirement is intended to address the additional risk (from a governance point of view) attaching to this procedure - and in particular the risk that, in the absence of formal discussions at a board meeting, there could be board members who have legitimate reservations about what is being proposed but little or no opportunity to raise these with the other board members. Having said that, if the constitution requires each and every board member to agree, that can cause practical difficulties (potentially to the serious detriment of the organisation, if a rapid board decision is essential to address a crisis situation) if one or more board members are on holiday or unable to respond for other reasons.

Taking account of the above, the recommended clauses state that the agreement of a majority of the board members in office at the time (note: this is not just a majority of those who express a view either way, but a majority of the total number of board members) is needed for a written resolution by the board to be effective. To address the governance risk noted above, the recommended clauses allow any one board member to request that a board meeting is held to discuss the matter in question – and, providing that request is received before whatever cut-off date was specified when the resolution was circulated among the board members, the written resolution will not be effective until the board meeting has taken place. At the board meeting, the board can either endorse the written resolution or, in the light of discussions at the meeting, may declare it invalid.

It should be noted that amending a constitution so as to take a similar approach in the context of *members’* written resolutions (as distinct from written resolutions by the board) will not necessarily be effective. In the case of a SCIO, the legislation states specifically that certain members’ written resolutions (eg written resolutions to amend the constitution) will require all members to be in agreement; and it is not possible to change that position via wording in the SCIO’s constitution. In the case of a company, matters which require a special resolution under company law (eg alterations to the articles of association) need to have the agreement of members representing 75% or more of the total number of votes that may be cast by the membership as a whole – and again, it is not possible to lower that threshold through provisions in the articles.

**Remote participation – the practicalities**

The recommended new clauses focus on setting the *legal parameters* for virtual participation in meetings, and deliberately stop short of setting out the full practical detail on how that should be managed at a nuts and bolts level. Those practical considerations will evolve over time as the technology changes, so including them in the constitution would create too much rigidity; and in any event, that would add too much to the length and complexity of the constitution.

Various resources are, however, available to guide third sector organisations on how best to approach remote participation in practice – and we would recommend that board members (and especially those who will be chairing meetings) make full use of those resources to ensure that both members and board members feel supported in using the technology, and that meetings involving remote participation are appropriately managed in line with principles of best practice. In particular, you might like to look at the [SCVO Digital how to guides](https://scvo.scot/support/digital/guides).

**Making the changes**

The recommended new clauses connect with provisions which appear in a number of places within a typical constitution – so unfortunately that means that the new clauses need to be woven into the various parts of the constitution, rather than just adopted as a single block.

To make that process simpler, we have shown the new clauses highlighted in green (or, in the case of optional clauses, highlighted in blue) on the SCVO model constitutions for a SCIO (two-tier), SCIO (single-tier), company limited by guarantee, unincorporated association, and trust. The wording of the new clauses follows the terminology appropriate for each legal form eg using “charity trustee” in the context of the model SCIO constitution, but “director” in the context of the model articles.

 It should be noted that – depending on what bolt-on provisions and/or other adjustments to the SCVO model have been made to a particular organisation’s constitution – the clause numbering in a given organisation’s constitution may well be different (even allowing for the changes to numbering arising from the insertion of the new clauses), so it will be important to look at the *wording* of the existing clauses of a particular organisation’s constitution (rather than at the numbering) to determine where each of the new clauses should be placed.

Once the board have agreed on the wording of the end-result constitution, the process of making the changes will need to be carried through in line with the legal form of the organisation and the wording of its existing constitution:

* For a SCIO, company limited by guarantee or unincorporated association, a formal resolution will need to be passed by the members, with appropriate notice being given of the members’ meeting in line with the terms of the constitution; assuming that the resolution is proposed at a members’ meeting, the resolution will need to be passed by the appropriate threshold:
	+ in the case of a SCIO, two thirds of the votes cast on the resolution;
	+ in the case of a company, 75% of the votes cast on the resolution;

and of course the members’ meeting will require to be quorate;

* For a trust, the changes will involve a formal supplemental trust deed (or deed of variation), signed by the trustees.

Once the resolution has been passed, there will be filing formalities to complete:

* In the case of a SCIO, a copy of the resolution and end-result constitution will require to be filed with OSCR along with the appropriate form;
* In the case of a company, a copy of the resolution and end-result articles of association will require to be filed with Companies House;
* Where the organisation is a company, unincorporated association or trust with charitable status, a copy of the end-result articles of association, constitution, or supplemental trust deed (or deed of variation), will require to be filed with OSCR along with the appropriate form.