

icsa

The Chartered
Governance
Institute



Virtual and hybrid AGMs: A guide for charities

Guidance note

February 2021

Virtual and hybrid AGMs: A guide for charities

This guidance has been produced jointly by VVV and The Chartered Governance Institute.

This guidance note is not intended to be and should not be relied upon as being legal or regulatory advice. Users of this guidance note should consult their own advisers directly, as well as taking account of their own situation, the provisions of their articles of association or other constitutional documents and any changes in the legislation or government advice, before taking any action based on it. None of the individuals, firms or organisations involved in the preparation of this guidance note represents or warrants that it is accurate, suitable or complete and none shall have any liability arising from, or relating to, the use of this guidance note.

Virtual and hybrid AGMs: A guide for charities

Introduction

This guidance aims to provide a practical 'how to' guide for charities approaching their first virtual or hybrid annual general meeting (AGM) as a consequence of the pandemic and resulting social distancing measures. This guidance will primarily address charities structured as charitable companies limited by guarantee (CLGs) and charitable incorporated organisations (CIOs). The guidance refers to the flexibilities provided by the recent Corporate Insolvency and Governance Act 2020¹ (CIGA) and draws on the experience of organisations that have already held virtual or hybrid AGMs.

In this guidance a virtual meeting means a meeting where none of the participants are physically in the same place for the meeting but are in communication with each other by video conferencing; a hybrid meeting means a meeting where some but not all of the participants are physically present in the same place but all are in communication by video conferencing.

The governing documents of some charities include a requirement to hold an annual general meeting of members. For both CLGs and CIOs, the members and the trustees may be one and the same, or they may be distinct groups of individuals. Whatever your charity's structure, you need to be aware of the legal requirements imposed by the governing document and relevant law. For the many charities established as CLGs, this will mean understanding the requirements of company law.

Some charities, for example ACEVO, have done away with the formal AGM, replacing it with other forms of member engagement. Other charities may use written procedures or unanimous assent to make decisions, again doing away with the need for a physical meeting of members to pass resolutions.

Where a charity still holds an AGM, it should be borne in mind that the AGM is a form of a general meeting of members, with some specific features.

The following guidance must be read in conjunction with your charity's governing document. Many of the powers relating to the calling and holding of the AGM will be covered in the governing document.

¹ CIGA does not apply to every type of charity. For further information on CIGA and AGMs please see *AGMs - impact and implications of the Corporate Insolvency and Governance Act 2020 on charities, social enterprises and mutuals* <https://www.icsa.org.uk/about-us/coronavirus-update-from-the-institute>

Virtual and hybrid AGMs: A guide for charities

Obligation to hold an AGM

A CLG or CIO will only be required to hold an AGM if its governing document requires it to do so.

Where AGMs are required to be held, it is not unusual for an AGM to be required to be held within 15 months of the previous AGM or within six months of the charity's year-end, but this must always be checked.

During the lockdown and while social distancing requirements applied, it has not been possible for many charities to hold a physical AGM safely. CIGA provides flexibility to some incorporated bodies (CLGs, CIOs and other 'eligible bodies' listed in the Act) to postpone their AGM or to take advantage of modern technology to hold virtual or hybrid AGMs where they would not otherwise have the power to do so. The provisions of CIGA currently apply until 30 March 2021.

The business of an AGM

For those charities that still hold AGMs, there are a number of actions which will need to be taken for the smooth administration of the charity. The typical business of a charity AGM includes:

- presenting the annual report and accounts to members for them to receive;
- approving the appointment or re-appointment of the auditors; and
- appointing or re-appointing trustees.

The occasion of an AGM may be a convenient time to deal with other business, for example passing a resolution to amend or replace the governing document. Still, care needs to be taken to ensure that any additional formalities are complied with for the additional business to be transacted.

Virtual and hybrid AGMs: A guide for charities

AGM planning

The charity must give proper notice of the AGM.

For CLGs, every member of the charity and every director must be given notice.² For CIOs, all of the members entitled to vote at the meeting and any charity trustee who is not also a member must be given notice.³ For CIOs, the period of notice for an AGM in the articles of association is usually at least 14 clear days.

For CLGs, subject to the articles of association, the period of notice for an AGM is also at least 14 clear days. Where the notice period is stated in the governing document, the notice period is often given as 21 days.

Note that 'clear days' means that the day on which the notice is given (or deemed to be given under any notice provisions in the governing instrument) and the day on which the meeting takes place are excluded.⁴

Failure to observe the required notice period will render the meeting invalid.

For a CIO, an AGM may be called on less than 14 days' notice,⁵ if at least 90% of the members agree.⁶ The members of a CLG can also agree to accept short notice of an AGM; again, this requires at least 90% of the members to agree.⁷ This will therefore rarely be practical where the charity has a large membership.

The charity's governing document may specify that notice of an AGM can be given by post, by email or other electronic means, or by posting the details on a website and sending each member a link.⁸ The notice must contain the following:

- that the meeting is an AGM
- time
- date
- place – for a hybrid meeting this will include both the physical place and the videoconferencing platform, for a virtual meeting it will be the videoconferencing programme used

² s.310(1) Companies Act 2006.

³ Regulation 35, Charitable Incorporated Organisations (General) Regulations 2012.

⁴ A charity's governing document may include other rules about the way in which notice must be given. It is worth checking your charity's governing document to verify both the required notice period, exactly how that period should be calculated, and what other rules apply.

⁵ Except where a specified period of notice is required by the Charities Act 2011 or by the Charitable Incorporated Organisations (General) Regulations 2012.

⁶ The CIO's constitution can increase this up to 95% of the members.

⁷ The articles of association can increase this to up to 95% of the members.

⁸ Before deciding how to communicate with members it is worth checking the governing document to ensure it permits the use of electronic communications.

Virtual and hybrid AGMs: A guide for charities

- the business to be covered (for example the annual report and accounts, auditor appointment, trustee appointments)
- information about the rights of members to appoint a proxy
- the date of the notice and signature of the person authorised to call the meeting.

What happens if a charity has given notice of a physical AGM, but local lockdown restrictions later prevent that meeting from occurring?

For both CLGs and CIOs, if an AGM has been called and circumstances change before the date provided in the notice, the trustees do not have the power to postpone the meeting, unless, either, very unusually, they have been given that power under the charity's governing document or all the members agree to cancel the meeting.

If neither of those is possible, it will be necessary to approach matters in a different way. Usually the best solution will be to use the quorum provisions to facilitate an adjournment. The governing document will usually make clear what is to happen when a meeting that has been convened does not achieve a quorum. An inquorate meeting is invalid. The governing document will often provide for the meeting to be adjourned for a specified period if there is not a quorum. Then if the meeting is still not quorate, it will usually involve starting afresh and calling a new meeting, but the governing document may specify that those present at the adjourned meeting will be a sufficient quorum. The governing document should be carefully checked.

For an entity with quorum rules like this, if the applicable COVID-19 regulations make it unlawful to hold the meeting (e.g. because it would be a physical meeting of more than the permitted number), it may be appropriate to inform members that they will not be permitted to attend. In that way, it may be possible to bring about an inquorate meeting such that the provisions for adjournment operate.

Alternatively, when the meeting convenes, it may be possible under the governing document to adjourn. The most common provision about adjourning is that the chair may, and if directed by the meeting shall, adjourn. Where the chair has the power to adjourn in this way it may be appropriate to communicate to members in advance that, for whatever reason, the chair will adjourn the meeting. In this way, members can be saved the inconvenience of attending a meeting where no business will be transacted and, incidentally, may cause the meeting to be inquorate so that the quorum provisions are engaged as noted above.

Virtual and hybrid AGMs: A guide for charities

Choosing the right format – virtual vs. hybrid

Charity Commission guidance: CC48 Charities and Meetings⁹ defines a meeting as to where participants can both see and hear each other (*Byng v London Life Association Ltd 1970*). As such, it is widely accepted that companies may take advantage of electronic meetings via the use of suitable videoconferencing packages, subject to there not being a clear prohibition of such meetings in the governing document.

Unless the governing document provides otherwise, a charity can choose a meeting that is:

- physical, where everyone is in the same place for the meeting;
- virtual, where the meeting is held entirely by videoconferencing; or
- hybrid, with a mix of people¹⁰ in a physical location and others are joining via videoconferencing platforms.

An example of an organisation using a hybrid approach is Shell (with physical meetings in both the UK and The Netherlands joined by videoconferencing technology). Prior to the pandemic, Jimmy Choo plc was the first to hold a fully electronic meeting.

Under CIGA, the charity trustees can:

- disregard any requirements in the charity's governing document for a physical meeting to be held or for meetings to be held in a particular place – the directors/trustees will be able to determine the way the meeting is held;
- count members joining the meeting remotely as part of the quorum, even where the governing document says they must be present in person; and
- use electronic voting, regardless of what the governing document says.

CIGA provides in addition that a member does not have a right to attend the meeting in person, participate in the meeting other than by voting, or to vote by any particular means.

If an electronic approach to the AGM is chosen, it would be advisable for the charity to rehearse the use of new technology ahead of the meeting to identify and resolve technical issues for users.

⁹ <https://www.gov.uk/government/publications/charities-and-meetings-cc48>.

¹⁰ Subject to government limitations covering individuals gathering together and other social distancing requirements. Please check the government website for up-to-date information on lockdown measures in specific regions.

Virtual and hybrid AGMs: A guide for charities

Quorum

For both CLGs and CIOs, the charity's governing document will stipulate the minimum number of members required to attend an AGM in order for it to be valid – the quorum. Any AGM that does not have a quorum when it starts cannot continue, and if it stops being quorate at any point during the AGM, the meeting must stop, unless the governing document states otherwise. If that happens, subject to the governing document, the chair may adjourn the meeting and, where the governing document permits, the chair may set a new time and date for the adjourned meeting.

Voting arrangements

It is imperative that members are provided with the means to vote in a virtual or hybrid meeting. Within a hybrid or virtual meeting it may be difficult to pass a resolution via the traditional show of hands. However, there may be the option of voting buttons within some videoconferencing platforms. As with a traditional show of hands, the chair will count the votes and declare whether or not the resolution is passed. The notice of the meeting should make clear how votes may be cast.

The Companies Act 2006 gives members of CLGs the right to appoint a proxy, whatever the charity's articles of association say. Members of CIOs and charities established in other ways will need to refer to the governing document to see whether appointing a proxy is permitted and, if so, whether any restrictions apply. Where a member is entitled to appoint someone to act as a proxy at the AGM this permits the proxy to speak and vote at the meeting on behalf of the member. In most cases, the chair is appointed the proxy at an AGM. This gives certainty that the vote will be counted as there will always be a chair of the meeting. If a specific individual is nominated as a proxy, but is then unable to attend, the vote cannot be counted. Details of how to appoint a proxy must be included in the AGM notice and, for CIOs and charities established in other ways, must reflect the powers contained in the charity's governing document.

Questions from the floor

As with a physical meeting, good practice is that members should be given the opportunity to ask questions at the AGM relating to the business of which notice has been given. Depending on the number of members attending it may be administratively convenient if the trustees are advised of questions from members ahead of the actual meeting.

Virtual and hybrid AGMs: A guide for charities

Minutes and recording of votes and decisions

The business and resolutions of the AGM must be properly recorded and in the case of CLGs retained for at least ten years,¹¹ and with CIOs retained for at least six years.¹²

Recording of meetings and GDPR

The use of electronic platforms such as Zoom or Microsoft Teams makes it easy for viewers to take screenshots of those visible during the meeting and for recordings to be made of the event. You should consider these possibilities when organising a meeting and also take steps to ensure that people are aware of the extent to which they will be visible and, where necessary, have the opportunity to consent to any audio or video recording.

If electronic platforms are used, organisations should consider any relevant data protection and GDPR implications. This will be highly dependent on the circumstances, and organisations will need to take advice.

Other considerations

Where the previous AGM approved additional powers or authorised the board of trustees to undertake specific actions for a limited time period, re-approval may be required if the time period is coming to a close but the activity it supported is not yet complete.

Outside CIGA – Changing the governing document

CIGA does not apply to every type of charity and as such those organisations that cannot take advantage of the flexibility it offers will need to organise and hold AGMs in accordance with their governing documents and the relevant legal framework.

The Charity Commission has stated¹³ its intention to take a flexible approach for charities during the pandemic. Some charities will be able to take advantage of this to delay routine AGMs. Where a decision to delay is made to maintain the safety of members and staff during the pandemic, a regulatory challenge is unlikely.

¹¹ s.355 Companies Act 2006.

¹² Regulation 41, Charitable Incorporated Organisations (General) Regulations 2012.

¹³ In its Coronavirus (COVID-19) guidance for the charity sector published on 19 March 2020, the Charity Commission said: 'We want to assure charities that our approach to regulation during this uncertain period will be as flexible and pragmatic as possible in the public interest, whilst helping trustees to be aware of and think about the wider or longer impact of their decisions on their charity.'

Virtual and hybrid AGMs: A guide for charities

However, there may be pressing reasons why an AGM has to be held sooner rather than later, such as the appointment of trustees, or other important decisions that have to be made by the members and which cannot be deferred. If the charity is not within the group to which CIGA applies and does not have a clear basis in its governing document for holding meetings virtually or in a hybrid form it may be advisable to make suitable amendments to the governing document.

When thinking about including a clause to permit virtual or hybrid AGMs the following might usefully be considered and addressed:

- Does the governing document need to provide the trustees with the flexibility to postpone an AGM after the notice has been delivered but ahead of the actual meeting?
- Do the articles relating to member communications need to be amended to include electronic communications (email and/or website)?
- Should members be given the power to call a virtual, hybrid or physical general meeting?
- What are the GDPR issues arising from a move to more electronic communications and meetings?

Suggested model wording to amend governing documents to allow for the option to hold virtual or hybrid AGMs in the future is included in the appendix to this guidance.

Virtual and hybrid AGMs: A guide for charities

Appendix – model wording

1.
 - (a) The Charity shall in each year hold a general meeting as its annual general meeting in addition to any other meeting in that year and shall specify the meeting as such in the notices calling it; not more than fifteen months shall elapse between the date of one annual general meeting of the Charity and the next.
 - (b) The annual general meeting shall be held at such time and, subject to the other provisions of this Article, at such place as the board shall appoint.
 - (c) The board may decide to call any annual general meeting as an electronic meeting in accordance with this Article and if so, shall designate the meeting as such. An annual general meeting that has been so designated shall be referred to as an electronic AGM.
 - (d) An electronic AGM need not be held at any particular place and may be held without any number of those participating in the meeting being together at the same place.
 - (e) An electronic AGM meeting may be held, and any votes may be permitted to be cast, by such electronic or other means as the board shall decide.
 - (f) A member shall not have a right
 - (i) to participate in the meeting other than by voting; or
 - (ii) subject to article 3 to vote by any particular means.
 - (g) The notice calling an annual general meeting as an electronic AGM shall state that it is an electronic AGM and shall specify
 - (i) any place at which a member may attend the meeting in person or that there is no place at which a member may attend the meeting in person;
 - (ii) the electronic or other means by which the meeting will be held and the means by which a member may participate;
 - (iii) the electronic or other means by which votes may be cast at the meeting.
2. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, [ten] members present shall be a quorum, and for this purpose, a member shall be present at any meeting or any adjourned meeting if he is present in person or by proxy. A member or a proxy for a member shall be present at an electronic AGM if he is participating in the manner specified in the notice calling the meeting.
3. Every member shall have one vote whether on a show of hands, on a poll, or by proxy. Any reference in these articles to a show of hands shall include any other method of voting on a show of hands specified in the notice convening the meeting at which the vote is taken, and any vote cast by that method shall be counted in determining the result of the show of hands. The accidental omission to count any vote on a show of hands shall not invalidate the result of the proceedings.

Virtual and hybrid AGMs: A guide for charities

4. A notice may be served by the Charity upon any member either personally or by email or facsimile or by sending it through the post as first-class mail in a pre-paid letter addressed to such member at his or her registered address or any registered email address. Any notice if served by post shall be deemed to have been served on the day following that on which the letter containing the same was posted and in proving such service it shall be sufficient to prove that such letter was properly addressed and posted as a first-class pre-paid letter. Any notice sent by email shall be deemed to have been served on the day on which the email was sent and in proving such service a certificate signed by [the secretary or any Trustee] that the notice was sent to the registered email address shall be conclusive.