

**MULTIPLE SCLEROSIS SOCIETY**  
**COMMENTARY**  
**ON**  
**DRAFT ARTICLES OF ASSOCIATION**

The purpose of this commentary is to explain the draft constitution which has been prepared (the **Articles**) for the Multiple Sclerosis Society (the **Charity**), in view of the proposed changes to the governance and membership model.

**The Articles**

The Articles form an agreement between the company members (broadly equivalent to the shareholders in a trading company) and govern the mechanics by which the Charity operates. They also describe the purposes for which the Charity exists (Article 4) (the **Objects**), and the powers that it has to achieve the Objects (Article 5).

**Directors and Members**

Every company has directors and members. These are two different roles, although people may be both directors and members. Currently, the MS Society has a wide membership of approximately 26,000 people. In the new constitutional framework, it is proposed that the only members of the charity will be the directors (i.e. the Trustees) and the Chairs of the MS Society National Councils.

The members of a company have certain rights under statute which cannot be limited or removed by the company's constitution. Decisions of the members may be made in a meeting of the members (a "general meeting") or (with some exceptions) by a written resolution circulated to the members. A company's constitution may also, as in the case of the Charity, provide for the company's members to meet on an annual basis for the annual general meeting or AGM. In practice, most decisions of the Charity will be made by the directors, as the charity trustees. It might be thought, therefore, that the provisions in the draft Articles governing the members (Articles 10 - 22) will not, for the most part, be very relevant to the Charity. However, company law dictates that certain decisions (e.g. amending the Articles) must be made by the members (and will often dictate a required majority for such decisions).

It should be noted that there are also some decisions of a charitable company to change the constitution which cannot take effect unless Charity Commission written approval has been obtained in advance. These are known as "regulated alterations" and generally encompass changes such as changes to the provisions relating to trustee benefit and dissolution and changes to the Objects. We have not proposed any changes which would constitute regulated alterations.

The Articles are based on our legal advisor's (BDB Pitmans) in-house precedent which has been approved on multiple occasions by the Charity Commission. While the majority of changes below relate to the proposed changes to the governance and membership model, as it is proposed that the Charity adopts our precedent Articles wholesale, we are also suggesting changes which reflect changes in charity and company law which now automatically apply to the Charity or which have become possible because of changes in the law, to streamline the Charity's administrative processes and provide the charity trustees with greater flexibility.

We have included in *italic* font in the first column of the table below the relevant clauses of the Charity's current constitution which are being updated for ease of reference.

Article	Comment
<b>Definitions and interpretation</b>	
Article 1 - Definitions and interpretation  <i>(Clause 2 in the current constitution)</i>	Most of these terms are self-explanatory.  In a charitable company, the directors of the company are charity trustees for the purposes of charity law and often referred to as "trustees". The terms are often, therefore, used interchangeably. The Articles refer to the directors/trustees as "Directors" throughout, as is the case for the current constitution. In this commentary, we refer to "charity trustees" throughout.
<b>Objects and powers</b>	
Article 4 – Objects  <i>(Clause 4 in the current constitution)</i>	The Objects are as stated in the Charity's current constitution.
Article 5 – Powers  <i>(Clause 5 in the current constitution)</i>	This Article lists the powers of the Charity – that is, the things that the Charity can do to further the Objects expressed in Article 4. The powers included here are very extensive and enable the Charity to carry out all activities.

<b>Applying the Charity's property</b>	
<p>Article 6 – Application of income and property</p> <p><i>(Clause 6 in the current constitution)</i></p>	<p>This Article is unchanged from the current constitution.</p>
<b>Conflicts of interest and conflicts of loyalty</b>	
<p>Article 7 – Conflicts of interests and loyalty</p> <p><i>(Clause 71 in the current constitution)</i></p>	<p>Article 7 enables the charity trustees to comply with their statutory duty to avoid conflicts of interests and provides some practical guidance in how to handle conflicts when they arise.</p> <p>The general procedure to be followed where a charity trustee may have a conflict is for the affected charity trustee to declare their interest, withdraw from the meeting for that item (unless expressly asked to stay), not be counted in the quorum for that item, and not vote (Article 7.1). Article 7.2 sets out a procedure to address a situation where a charity trustee becomes aware of a conflict in relation to a decision to be made by a written resolution of the charity trustees (rather than at a meeting).</p> <p>Articles 7.4 to 7.6 enable the board, in certain circumstances, to “authorise” a charity trustee’s particular conflict of interests, provided the unconflicted charity trustees consider it in the best interests of the Charity to do so. “Authorisation” is a slightly misleading term, as authorisation does not remove the conflict, so the conflicted charity trustee must still comply with the conflicts procedures in Articles 7.1 to 7.3). The effect of “authorising” the conflict is that it removes the breach of statutory duty which could otherwise arise for the conflicted charity trustee simply by being in a position of conflict and it enables the unconflicted charity trustees to set out terms or procedures to manage the conflict (e.g. by relieving the conflicted charity trustee from other potential breaches of duty which could arise from the conflict).</p> <p>It is important to note that “authorising” a conflict under Article 7.4 does <u>not</u> authorise the charity trustee to retain any <u>benefit</u> received as a result of the conflict. Any benefit would need to be dealt with, in advance, under the charity trustee benefit provisions in Article 6.</p>

<b>Limited liability of the members</b>	
<p>Article 8 – Limited liability</p> <p><i>(Clause 3 in the current constitution)</i></p>	<p>It is a legal requirement for the Articles to state that the liability of the members is limited. Should the Charity be wound up, the liability of each member is limited to £1. This means that each member would be required to contribute no more than £1 towards any shortfall that the Charity might have on winding up.</p> <p>The personal liabilities of the charity trustees, which include those incurred as directors under company law, are separate and distinct from the liabilities of the members.</p>
<b>Dissolution/winding-up</b>	
<p>Article 9 – Surplus assets on winding up or dissolution</p> <p><i>(Clause 89 in the current constitution)</i></p>	<p>This Article sets out what is to happen to any assets which are left over after all creditors have been paid in the event that the Charity is wound up. Being a charity, the assets must be applied only for charitable purposes (as opposed to being distributed among the members for their personal benefit in the case of an ordinary trading company).</p> <p>This Article is unchanged from that of the current Constitution. You will see that it provides that it is the members who decide (in the first instance) where the assets should be transferred/applied. In the event that the members cannot or do not decide on this, the decision falls to the charity trustees, failing which it falls to the Charity Commission or the Court.</p>
<b>Members</b>	
<p>Clauses 10-11 – Members</p> <p><i>(Clauses 7-10 in the current constitution)</i></p>	<p>The members are broadly equivalent to the shareholders in a normal trading company.</p> <p>The members of the Charity have certain entrenched rights under the Companies Act to influence the board of charity trustees, such as the power to remove charity trustees and to amend the Articles.</p> <p>Article 10 provides that the only members are the charity trustees and the chairs of the Charity's National Councils.</p> <p>Charity trustees automatically become a member upon their appointment to the Board. We have stated that, upon being notified of their appointment as chair to the national council in question, that individual shall also be admitted to the Charity's membership (i.e. so that there is a mechanism for the Charity to be notified).</p>

	Article 11 sets out a set of circumstances where membership is terminated (including where a charity trustee or chair of a national council steps down from that role).
Articles 12-13 – Calling General Meetings  <i>(Clauses 11-18 in the current constitution)</i>	Articles 12 and 13 set out the process of calling and administering a general meeting, in accordance with the Companies Act 2006. These provisions would apply to the holding of an AGM, if the Board determines to call one.
Article 14 – Proxies  <i>(Clauses 16, 42-43 in the current constitution)</i>	The Companies Act 2006 gives company members a statutory right to appoint a proxy to attend, speak and vote at general meetings on their behalf, regardless of any provisions to the contrary in a company's articles. Article 14 has been included to reflect the Companies Act position.
Article 15 - Organisation at general meetings  <i>(Clauses 21-41 in the current constitution)</i>	This Article governs various organisational matters at general meetings.  It also sets the quorum for transaction of business at general meetings at <u>one half</u> of the total number of Members. The quorum needs to be a number or percentage of the members which is sufficient to be representative, but not so large as to make it difficult to be confident of holding a quorate members' meeting.
Article 16 - Attendance and speaking at general meetings  <i>(Clause 19 in the current constitution)</i>	This is a standard article which provides more flexibility for members' meetings, including allowing them to take place with members in different places from each other (provided everyone is able to communicate with everyone else, e.g. by video conference).
Articles 17 to 18 – Votes of members  <i>(Clauses 24-25 in the current constitution)</i>	These set out the voting rights of the members at a general meeting.

<p>Article 19 – Written resolutions</p> <p><i>(Clause 44 in the current constitution)</i></p>	<p>The threshold for consent for a written resolution of the members mirrors that which would be required to pass a resolution had it been presented in a general meeting, the difference being that for a written resolution the required percentage is that of <u>all</u> the members eligible to vote, rather than only those present at the meeting who are eligible to vote.</p> <p>In other words, the Charity can pass written ordinary resolutions by a simple majority of those eligible to vote and written special resolutions with a 75% majority of those eligible to vote.</p> <p>Written resolutions will lapse if not passed before the end of 28 days beginning with the date on which the resolution is circulated.</p>
<p><b>Charity trustees</b></p>	
<p>Articles 20 to 21 – Charity trustees and appointment</p> <p><i>(Clauses 45-48, 54-58 in the current constitution)</i></p>	<p>The maximum number of charity trustees shall be 13 and the minimum 10 (Article 20.1).</p> <p>We have stated at Article 21.2 that there shall be no more than: eight “elected” directors, two “appointed” directors (who shall hold the roles of Chair and Treasurer) and up to three “co-opted” directors.</p> <p>Article 21.3 sets out that, in making appointments to the Board, the relevant appointing body shall ensure that there is representation from the MS community.</p> <p>Article 21.4 – 21.6 set out provisions in relation to the appointment of the three different categories of Directors: Elected; Appointed and Co-opted.</p> <p>The supplementary provisions regarding the appointment process for elected directors is contained in supplementary rules as opposed to in the Articles, for example the process by which candidates are nominated. These rules will be published online to ensure transparency.</p> <p>Article 21.8 allows the Members to co-opt an additional person to fill a casual vacancy amongst the Elected Directors, provided that the appointment only lasts until the next election.</p>
<p>Article 22 - Retirement of charity trustees</p>	<p>We have included suitable retirement provisions at Article 22.</p>

<p><i>(Clauses 50-53 in the current constitution)</i></p>	<p>All elected and co-opted directors may be re-appointed for a further term, subject to satisfying such criteria for re-appointment as may be established (e.g. performance reviews).</p> <p>Article 22.3 states that the Chair may have their term extended by a period of up to one year, following which they must retire, and that the Treasurer may be re-appointed for a further three year term, which may also be extended by up to one year, but that at the end of that period they must retire.</p> <p>Article 22.4 states that an Elected or Co-opted Director may become an Appointed Director (i.e. the Chair or Treasurer), in which case their remaining term of office will be the relevant term for the Chair or Treasurer and any previous term served may be disregarded. Article 22.4 also states that any Director may serve for a maximum of eleven consecutive years in office.</p> <p>We have included provisions at Article 22.5 which state that existing terms of office served by those currently on the Board shall be taken into account when calculating retirement and re-appointment provisions.</p>
<p>Articles 23 to 24 – Removal and Disqualification/Vacation of office of charity trustee</p> <p><i>(Clauses 60-61 in the current constitution)</i></p>	<p>Under company law the members have the power to remove any director from the board by Ordinary Resolution – this cannot be overridden and is reflected in Article 23.1.</p> <p>Article 23.2 allows the board to remove a charity trustee by a two thirds majority. It is expected that this power would only be used in extreme circumstances, for example if a charity trustee was being particularly disruptive or undermining the efforts of the board and the work of the Charity. It should not be seen as a means of dealing with a disagreement on the board when it may be better for the charity trustees to work through the problem. The process set out here requires such a decision to be made at a meeting of the charity trustees as well as by a higher majority vote.</p> <p>Article 24 sets out standard disqualification/removal provisions in circumstances where the law requires removal of charity trustees or where it is impractical for them to continue. Article 24 also includes power for the board to resolve to remove a charity trustee where the charity trustee in question has not attended board meetings for three consecutive meetings without leave (Article 24.7), as reflected in the current constitution.</p> <p>Article 24 also contains further provisions giving discretion to the board to resolve that a charity trustee's office be vacated in certain circumstances – for example, if a charity trustee's behaviour has caused the board to decide to make a serious incident report to the Charity Commission.</p>

<p>Articles 25 and 26 – Powers, duties and proceedings of the board</p> <p><i>(Clauses 63-69 in the current constitution)</i></p>	<p>Essentially, these provide that the board is empowered to conduct the business of the Charity and to take all decisions which are not required by statute to be made by the members.</p> <p>Article 26.8 sets the quorum for board meetings is <u>one half</u> of the total number of charity trustees entitled to vote on the matter. The quorum needs to be a sensible proportion of the charity trustees which is representative but allows for decision-making by an unconflicted quorum.</p> <p>Subject to the Articles, the charity trustees may regulate their proceedings as they fit, but a default mechanism for calling and holding board meetings is provided at Article 26.</p> <p>The Articles provide for flexibility in how board meetings may be held, allowing for the charity trustees to participate by e.g. telephone or video conference, or by any other suitable electronic means agreed by the board, so long as everyone can communicate with everyone else (Article 26.7).</p> <p>Charity trustees' decisions made at a meeting are made by a majority of votes (unless the Articles provide otherwise). Where the decision is by a written resolution of the charity trustees, the Articles require a simple majority of the charity trustees eligible to vote (Article 26.12).</p>
<p>Article 27 – Delegation by the board</p> <p><i>(Clause 69 in the current constitution)</i></p>	<p>This Article enables the board to delegate any of its powers to a committee (e.g. an audit committee, finance committee, fundraising committee etc.) provided that at least two members of any such committee are charity trustees (this requirement does not apply to National Councils). We have also included the ability to delegate to the Charity's National Councils.</p>
<p>Article 28 – Delegation of day to day management</p> <p><i>(Clause 69 in the current constitution)</i></p>	<p>This Article serves as a reminder to the board that it is their responsibility to determine the role and limits of delegated authority for senior staff.</p>



<b>Secretary, Administration and Accounting</b>	
<p>Articles 29 to 30 – Secretary and Minutes</p> <p><i>(Clause 74 in the current constitution)</i></p>	<p>Private companies are not required to have a designated and registered Company Secretary. That said, the functions of the secretary must still be performed and you may therefore wish to designate a secretary. Article 29 is drafted in such a way that the appointment is optional and may be terminated by the board at any time. Should the board wish to designate other honorary roles, it is free to do so.</p> <p>Article 30 is self-explanatory and reflects the statutory requirements (and good practice) for keeping Minutes.</p>
<p>Article 31 – Accounts, Records and Reporting</p> <p><i>(Clauses 75-76 in the current constitution)</i></p>	<p>This Article serves as a reminder that the charity trustees have accounting and reporting obligations under both company law and charity law.</p>
<b>Communication</b>	
<p>Article 32 – Communication</p> <p><i>(Clauses 77-84 in the current constitution)</i></p>	<p>This Article provides for the widest possible communication between the Charity and the members permitted by law – including by e-mail and website.</p> <p>Please note that, before the Charity can take advantage of e-mail/website communication, consent of the members to such forms of communication is required. As the Charity will have a membership wider than its charity trustees, it would be prudent to seek formal consent from the other members to electronic communications to the full extent possible.</p>
<b>Indemnity</b>	
<p>Article 33 – Indemnity</p> <p><i>(Clause 85 in the current constitution)</i></p>	<p>This Article gives charity trustees and former charity trustees a right to an indemnity. This Article is unchanged from that of the current constitution.</p> <p>Generally speaking, charity trustees cannot be exempted from liability where they are negligent, in default or in breach of duty or trust in relation to the Charity, save where the Court grants relief to that effect.</p>

<b>Rules or byelaws</b>	
<p>Article 34 – Rules or byelaws</p> <p><i>(Clause 86 in the current constitution)</i></p>	<p>This Article allows the board to make rules or byelaws if they deem it necessary (or convenient) to do so (for example operating rules and procedures governing the process for the elected trustees). If there is any conflict between the Articles and the rules/byelaws, the Articles take precedence.</p> <p>Rules/byelaws can be amended more easily than the Articles, and therefore provide greater flexibility.</p>

**BDB Pitmans LLP**

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