

# **The Barlow Steering Group CONSTITUTION FOR THE BARLOW MEMORIAL INSTITUTE REPORT TO THE TRUSTEES**

As per the AGM on 1 August, 2018 a resolution was overwhelmingly passed to set up a Working Group to consider the implications for The Barlow, be it a CIO, or other legal entity affording Limited Liability. The Working Group would report within 3 months and comprise of 12 volunteers. This Group was open to volunteers from the community and anyone wishing to volunteer was required to email: Clerk@nptc.myzen.co.,uk

A Steering Group was subsequently formed and all volunteers who put their name forward were accepted for service with John Richardson nominated as Chair, Pat Whalley as Secretary and Mark Sutherland as representative from the Board of Trustees.

This Steering Group has been run on a strict 10 week timetable with each week covering a specific topic:

1. Introduction
2. HMRC, Charity Commission, CC35
3. Existing Charity 2000 Scheme
4. CIC
5. CIO/Private Members' Clubs
6. Invitation to a representative of the Cricket Club
7. Trading Management instruction CC35
8. Review need for trading
9. Review proposed CIO as compared to proposed structure
10. Final recommendations, Eynsham CC v. HMRC

## Executive Summary

Having reviewed the various structures available to The Barlow Charity it is clear that the existing Barlow Institute 2000 Scheme is not fit for purpose as it does not comply with the Charity Commission guidelines (CC35) and in particular:

“Where trading (other than trading in pursuit of its charitable objectives) involves significant risk to a charity’s assets, it must be undertaken by a trading subsidiary.”

Therefore, the option to carry on with the existing 2000 Charity Scheme can only be undertaken if all high risk is removed, but high risk also includes major projects and major repairs, which are both envisaged in the near future for the Charity.

The recommendation from the Steering Group is for the existing Scheme to be slightly modified to make it more representative of the community but to have a subsidiary trading arm which would take the format of a CIC, the Directors of which would be appointed by the Trustees of the Charity. The function of the CIC would be to undertake the high risk activities of the Charity with the benefit of Limited Liability, leaving the existing slightly modified Scheme to undertake the low risk activities but with the Trustees still benefitting from Trustee protection insurance.

It must be remembered that limited liability does not restrict liability of Directors in cases of fraud; the same as an insurance policy will not cover fraud for a Trustee. For further understanding of the implications of the Steering Group recommendation it is recommended that the Trustees read CC35 in full (Trustees, Trading Tax) on how charities may lawfully trade.

## Modifications to The Barlow Institute 2000 Scheme

The 2000 Scheme is quite specific under clause 25 as to what amendments can be made to the Scheme – the most important being clause 25.4c which does not confer the power of the committee to dissolve the Charity which would have to be done before a CIO could have been approved by the Charity Commission. This would prevent a CIO being implemented.

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The introduction of a CIC would still require prior Charity Commission approval but would not involve the dissolution of the 2000 Scheme, only a modification to the Scheme.

The Steering Group recommend the following amendments to the existing 2000 Scheme, some of which can be approved by committee, but some require approval by the Charity Commission with final approval by resolution passed at the Annual General Meeting:

User Group Names to be changed from A, B, C and D to Sport, Junior, Senior and Other. The actual make-up to be brought up to date by the Trustees reflecting groups which actually hire or lease the Charity facilities.

Election of Group candidates should be down to the Group to decide and if Group Committees cannot resolve choosing candidates, these candidates to be chosen by lot.

Group candidates to hold position for 2 years instead of the present 1 year, with a stagger being created with only 2 out of the 4 Groups elected in the year. This will have the benefit that the Charity will always have a quorum of members which would include Parish Council nominee.

Two new Groups to be introduced representing the Volunteers and The Friends of the Barlow and the number appointed by NTPC (as Custodian Trustee) to be reduced by 2.

In clause 6(1) of the 2000 Scheme an additional proviso should be included to the effect that if the committee wish to dispose of any part of the Charity's property, they will be obliged to obtain a resolution from a general meeting of the members which will be required to be passed by 75% of the members voting.

In addition, the Trustees would have a representative Director from the subsidiary CIC sitting on the Trustee Board with the ability to appoint a mediator to resolve any disputes between Trustees and Director.

The Steering Group recommends the setting up of a Community Interest Company (limited by shares or guarantee). The intention would be to operate all the Charity's high risk trading through the CIC. In addition to ordinary trading of room hire or bar facilities, high risk also includes exposure of new build or repairs and the relationship to the Private Members' Clubs.

The operation of the CIC would be as a subsidiary of the existing Charity 2000 Scheme as modified by the previous recommendations. (Appendix (viii)) It must be understood by the Trustees that the CIC is a subsidiary of the Charity and as such, control must remain with the Charity (CC35).

In particular –

- The appointment/removal of the Directors of the trading subsidiary
- The Directors terms of service including any remuneration
- The continuation or dissolution of the trading subsidiary

### Proposed make-up of the CIC Board of Directors

Responsibility for:

- BUILDING
- SPORT
- ESTATE
- FINANCE
- TRADING
- HR
- MARKETING
- CHARITY TRUSTEE

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It is envisaged that the Board of Directors are initially voluntary, however that may prove difficult to recruit a suitably qualified person for the financial position. Would suggest as a guide, 10% of turnover being the limit to cover all of the Board of Director's salaries.

Negative aspect of a CIC is the additional account reporting to both Companies House and the Charity Commission and therefore additional cost. As the CC35 recommends where financial viability is not anticipated within 2 years of operation, careful consideration should be given to the appropriateness of undertaking the planned trading activity.

One major implication is that any use of the Charity's land and building by a trading subsidiary, should be covered by a formal Lease or License of the property concerned from the Charity to the subsidiary. The trading subsidiary must pay a rent or fee which is comparable to that which would be payable for letting the property on the open market. Obviously, this will also be reflected in any sub-lease to the Private Members' Clubs which will also need to be at open market value.

In relation to the Private Members' Clubs, the Trustees need to take into account the recent case of Eynsham Cricket Club v. HMRC (Appendix (vii)) and in particular the current Constitution of Edgworth Cricket and Recreation Club, which records as its primary objective "The primary objective of the Club is to act as the agent for the delivery of The Barlow Trusts' (Reg. Charity 521333) recreational objectives and obligations". (Appendix (vi)) This seems to be passing off the Cricket Club as part of the Charity.

Obviously, HMRC might have a different opinion given the outcome of the Eynsham case, especially as Edgworth Cricket Club is actually a semi-professional club and can no longer assume an amateur status. This needs to be urgently resolved as the Cricket Club with this Constitution is putting the charitable status of The Barlow Institute at risk. The Edgworth Cricket Club's Constitution also seems to break the Charity 2000 Scheme by not allowing the free access to the recreation ground by use of the inhabitants, restricting it to only 3 days per year. This can easily be resolved by the issue to all residents of NTPC a free membership card, which would allow use of the Cricket Club and the bar charged at full price and with members receiving a reduced price.

The outcome of the Eynsham case would suggest that the Cricket Club is a Private Members' Club due to its semi-professional nature. There is scope to classify the cricket pavilion as a "village hall" with the tax advantages that would ensue, but would require a cultural shift in the relationship between the Cricket Club and the Charity to an "arms length" Landlord and Tenant relationship relevant to the playing season

Significant tax privileges apply to Charity fundraising events, ie qualifying events.

The event must be organised by a Charity or a trading subsidiary or another qualifying body for the Charity's own benefit. There may be no more than 15 events of the same kind in a Charity's financial year.

In such cases, where significant risk attaches to a Charity fund-raising event, the event must be conducted by trading subsidiary and not by the Charity itself.

The above could easily cover the additional cost of running the CIC and any profit thereafter could be gift-aided back to the Charity.

The Steering Group considered, amongst other things, the following documents in detail:

- (a) CC35 Trustees, trading and tax: how charities may lawfully trade (February 2017, published by the Charity Commission)      Appendix (i)

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- (b) Office of the Regulator of Community Interest Companies (May 2017, published by the Dept. for Business, Energy & Industrial Strategy) Appendix (ii)
- (c) The Association Model of a Charitable Incorporated Organisation (October 2016, published by the Charity Commission) Appendix (iii)
- (d) The draft CIO as proposed by the previous Trustees (August 2018) Appendix (iv)
- (e) The present 2000 Scheme Case No.69479 (22 March 2000, published by The Charity Commissioners for England and Wales) Appendix (v)

CC35 is essentially the HMRC rulebook which all charities must follow when trading. It forms the foundation for the establishment of any Constitution for a Charity.

It should be noted that if a Charity seeks to use a CIO as its Constitution it –  
“MUST be in the form to be specified by the Commission regulations (or as near to that form as circumstances allow). These regulations will specify that the Constitution should be in the form of one of our model Constitutions.”

Thus, there is very little room to amend the Commission’s model.

As part of the review of the present structure, we considered the proposed CIO as well as other forms of the standard CIO provided by the Charity Commission. The Charity Commission has two standard templates, a Foundation Model and an Association Model. In respect of The Barlow, the Association Model would be the most appropriate and the Government provides a standard template which it does not expect to be amended significantly.

The basic advantages and disadvantages of a CIO are as follows:-

**Advantages**

- The CIO is a separate legal entity and so it can enter contracts, hold property and employ staff in its own name. Consequently, any liabilities arising from the entry into such arrangement fall on the organisation itself rather than the trustees. Companies limited by guarantee have a similar benefit.
- Trustees of CIOs benefit from limited liability, as do directors of companies limited by guarantee, which is limited to the amount they have invested in the CIO or have guaranteed upon the winding up of the CIO.
- On begin entering onto the register of charities, a CIO is automatically given a registered charity number which facilitates correspondence with HMRC on charitable tax advantages and also serves to reassure potential funders and donors.
- CIOs do not have to register with Companies House and only need to be registered with the CC. As a result, CIOs are not required to file information at Companies House but file information with the CC, which, in contrast to Companies House, does not charge for the registration or the filing of information.
- The reporting and accounting requirements in the Companies Act 2006 do not apply to CIOs, rather charity law applies. CIOs are only required to report to and file accounts, an annual return and other documents with the CC.
- CIOs which have a gross income of less than £250,000 in any financial year may use the simpler receipts and payments basis to prepare its accounts.

**Disadvantages**

- Unlike a company limited by guarantee, a CIO does not exist until it is registered with the CC and the CIOs details are entered in the register of charities.
- There can be a delay in registering a CIO with the CC, as it takes up to 45 working days for the CC to process applications, especially if the CC has follow up questions in relation to the

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application. Companies limited by guarantee, on the other hand, can be incorporated relatively quickly and range from being incorporated the same day (for an additional fee) to approximately 5 working days.

- In the event a CIO loses its registration at the CC it will cease to exist. Companies limited by guarantee may lose charitable status, but continue to exist as companies registered with Companies House.
- The structure is still relatively new and may be seen as unfamiliar to funders and donors.
- Companies limited by guarantee can benefit from simplified filings if they are deemed to be small companies whereas CIOs are required to submit information to the CC regardless of size.
- It is likely that CIOs will be unable to take on secured borrowing as the CC does not have the ability to establish or maintain a register of charges over CIO property. Lenders, therefore, are reluctant to grant CIOs secured debt.

From the above, the most significant aspects which would rule out a CIO model as an appropriate format for the expected growth of The Barlow Institute would be the inability to secure borrowing, as the Charity Commission does not maintain a register of charges for the CIO. Therefore, lenders would be reluctant to grant the CIO loan facilities. In the event of a CIO losing its registration at the Charity Commission it would cease to exist. However, a company limited by guarantee may lose its charitable status, but would still continue to exist as a company registered with Companies House.

The only detrimental aspect of the proposed structure of a trading CIC, as compared with a CIO would be the increased cost of accounting, derived from the increased reporting requirement by both the Charity Commission and Companies House, as well as a community report to the CIC Regulator instead of the CIO which would only need to report to the Charity Commission.

This additional premium for accounting security we believe is a price worth paying, given the previous history of the accounting irregularities emphasised at the recent AGM. When reporting to Companies House, the accounts of the new structure would have to be audited and approved by an independent auditor and the CIC also has to submit a community report to the CIC Regulator.

In respect of the proposed CIO, it would appear that certain aspects of the standard Associate model had been modified to such an extent that it would be very doubtful that the Charity Commission would actually approve the proposed scheme. In particular, the appointment of Trustee members does not conform to the standard model and the proposed scheme does not take into account the need to dissolve the existing 2000 Scheme for which the Trustees do not, as part of the Scheme, have the power to dissolve. This power is reserved for the Charity Commission to determine and approve. It is doubtful the Charity Commission would give such approval due to the assets held by The Barlow and no mechanism is available for incorporation of those assets in the Proposed Scheme. The risk of those assets being sold off at a later date is highlighted as a defect of the CIO model and would be in contravention of the aims of the original benefactors.

The Scheme proposed by this Steering Group would be in line with the recommendation already received in the Sara Hilton Report dated September 2017.

We believe the proposed structure is right for the Charity in the circumstances where a high risk “trading arm” is envisaged, but this will incur substantial additional cost. A further option would be to reduce the level of risk to enable the existing Scheme to continue, but with suggested amendments. However, this would not cater for future expansion or account for the high risk of substantial repairs unless the Charity has sufficient funds in hand to allow the works to be completed from existing funds.

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**Appendix**

- (i) CC35 - Trustees, trading and tax: how charities may lawfully trade  
(February 2017, published by the Charity Commission for England and Wales)
- (ii) CIC – Office of the Regulator of Community Interest Companies: Leaflets  
(May 2017, published by the Department for Business, Energy & Industrial Strategy)
- (iii) CIO – Constitution of a Charitable Incorporated Organisation with voting members other than its charity trustees  
(October 2016, published by the Charity Commission for England and Wales)
- (iv) The draft CIO presented to the AGM on 1 August 2018
- (v) 2000 Scheme Case No.69479 dated 22 March 2000 (approved by The Charity Commissioners for England and Wales and applicable from 27 September 2000)
- (vi) The Constitution of Edgworth Cricket and Recreation Club, Document 2009
- (vii) Case of Eynsham Cricket Club and The Commissioners for Her Majesty's Revenue & Customs No.TC06047 - Released 29 December 2017
- (viii) Trading Subsidiaries – published and updated 26 March 2018
- (ix) CC27 – Providing Alcohol on Charity Premises (The Licensing Act 2003 Version November 2002)