



Annual General Meeting 2021

Item: Review of ADEPT's organisational status

Recommendation:

Having reviewed the options and taken legal advice, the Leadership Team recommends to members that:

- ADEPT converts from an unincorporated association to an incorporated company limited by guarantee.
- A task & finish group drawn from the Leadership Team progresses the conversion, then presents the final documentation to members for approval at the General Meeting in November 2021.

Introduction

Over the past five years the membership of ADEPT has grown from 50 to 90 council members, which represents 75% of county and unitary councils outside of London. It has also expanded to include local enterprise partnerships, combined authorities, sub-national transport bodies and corporate partners drawn from the private sector. The subsequent growth in income, augmented by event sponsorship, has resulted in the association registering with HMRC to become VAT registered in 2019 and paying corporation tax¹. Since 2016/17 the association has achieved a surplus.

The association now manages its own finances – whereas historically, financial management was provided by the Honorary Treasurer's home authority - with the accounts independently audited every year and approved at the AGM. It holds more than £100,000 in reserves. It buys in the services of various individuals / companies to provide administrative, financial, communications and policy support plus events management and training activities. The Chief Operating Officer (COO) is employed by East Sussex County Council; ADEPT repays all costs associated with the post. The Association does not hold any assets.

Why review the organisational status?

The ambition is to ensure the association continues to provide excellent services for its members and key stakeholders. However, as the association continues to grow, the structure of the association becomes more of an issue.

ADEPT is an 'unincorporated association'. An unincorporated association is a membership organisation, and it can be / do whatever its members want (as set out in its governing documents). It is commonly used by smaller organisations, especially those without staff or premises, and the constitution sets out the rules under which it will be run. Members can vote, usually at the AGM. There is no statutory framework of principles supporting the governance of unincorporated bodies.

¹ Corporation tax is based on surplus income from event sponsorship, the commercial partnership with Proving Services and the Leadership Development Programme. Subscriptions & associated costs are not subject to tax.

However, an unincorporated association is not a legal body so it cannot enter into contracts or own property in its own right, or directly employ any staff. The Leadership Team currently enters into contracts on behalf of all members, and they can be personally liable if something goes wrong. This includes situations where they are not 'at fault', including dealing with any debts. If there is not enough money in reserves to pay creditors, members of the Leadership Team may have to pay the debts themselves. It is worth stressing the likelihood of this is small; nonetheless it remains a risk.

Incorporation is a process through which an organisation goes from being a collection of individuals (in the eyes of the law) to a single entity which is legally separate from the individuals involved. An incorporated organisation has 'legal personality' which means it can enter into contracts, buy or lease property, and employ people in its own right. Any debts or obligations belong to the organisation, rather than to the individuals running it. This gives the trustees / directors greater protection, although they still have personal liability for debts caused by negligence or poor financial management.

Unlike an unincorporated association, incorporated entities are subject to a statutory framework of principles which set out how those entities must be governed. For some, the flexibility provided by remaining unincorporated is helpful; they are subject to less formal rules and their administrative burden is lower. However, to the extent that these differences are perceived as advantages, they need to be balanced carefully against the disadvantages of unincorporated status (as set out above).

It therefore feels timely to review the association's organisational status.

Alternative structures

There are several alternative structures to consider, and the advantages and disadvantages of each approach are set out in Table 1. Both structures will result in ADEPT becoming an incorporated entity (with its own legal personality).

1. Company limited by guarantee (CLG)

A company limited by guarantee is a type of corporation used primarily, but not exclusively, for non-profit organisations that require a legal personality. It does not have a share capital or shareholders, instead it has members who act as guarantors of the company's liabilities. Members undertake to contribute an amount specified in the Articles of Association - usually £1 - in the event of insolvency or in the winding up of the company. It is 'incorporated' and has voting members. It is controlled by a group of directors who are normally unpaid. There is **limited liability** for the directors: in most cases the directors will not face personal liability for the liabilities of the CLG, although there are some exceptions.

Companies are registered with and regulated by Companies House. To establish a company, the organisation must adopt a legal governing document called Articles of Association (i.e. the constitution) and submit them to Companies House.

The organisation can also register the new company with the Charity Commission at a later date, to become a charitable company limited by guarantee, and must do so in order to benefit from charitable status. If the company wishes to register with the Charity Commission, it may be required to adopt amended objects which are exclusively charitable (and it will need to demonstrate that it has at least £5,000 of income).

2. Charitable Incorporated Organisation (CIO)

ADEPT could also consider becoming a CIO – which is an incorporated structure specifically for charities. CIOs must be registered with and report to the Charity Commission, regardless of their income. As part of this process, ADEPT would need to prove it has ‘charitable purposes’ that help the public (known as being ‘for public benefit’). Charitable purposes include things that contribute to: relieving poverty; education; religion; health; saving lives; citizenship or community development; the arts; amateur sport; human rights; religious or racial harmony; the protection of the environment; animal welfare; the efficiency of the armed forces, police, fire or ambulance services.

Unlike charitable companies, CIOs do not need to register with Companies House. This means the reporting requirements are simpler for CIOs than for charitable companies (which are regulated by both the Charity Commission and Companies House). CIOs are required to adopt a model constitution approved by the Charity Commission. It is possible to amend this model constitution, although the regulations which apply to CIOs do set out a number of provisions which must be included in the constitution. As for a company limited by guarantee, there is **limited liability** for the trustees: in most cases the trustees will not face personal liability for the liabilities of the CIO, although there are some exceptions.

Table 1: A comparison of the advantages and disadvantages of Company Limited by Guarantee (CLG) and Charitable Incorporated Organisation (CIO)

	Company Limited by Guarantee	Charitable Incorporated Organisation
Advantages	<p>A CLG is a distinct legal entity and is responsible for its own debts. The personal finances of the company’s guarantors are protected. They will only be responsible for paying company debts up to the amount of their guarantees (typically £1).</p> <p>Directors benefit from limited-liability protection, meaning (except in limited circumstances) they will not be held personally liable if the company falls into financial difficulty.</p>	<p>A CIO is a distinct legal entity and is responsible for its own debts. The personal finances of the CIO’s guarantors are protected. They will only be responsible for paying CIO debts up to the amount of their guarantees (typically £1).</p> <p>Trustees benefit from limited-liability protection, meaning (except in limited circumstances) they will not be held personally liable if the charity falls into financial difficulty.</p>
	Better reflects the growing operations of ADEPT and consequential such as VAT registration.	Wider range of possible grants that can be applied for from other charities and foundations, plus a range of charitable tax advantages.
	Provides a clearer structure as the operation and governance of a CLG are underpinned by statute – familiar / popular structure for many not-for-profit bodies.	Reputational benefits from being classified as a charitable organisation.
	Brings ADEPT into line with the organisational status of other local government bodies.	Only need to register with Charity Commission – who are the sole regulator.
	Relatively quick and cheap to register with Companies House.	Like companies, CIOs are incorporated and can hold assets in its own name.

	Adaptable - can register as a charitable CLG or convert to a CIO at a later date with the associated tax benefits, wider access to grant funding, reputational assurance of charitable status.	Specifically designed with charities in mind, unlike other legal forms which are adapted for charities.
Disadvantages	If choosing charitable CLG status - double regulation (Companies House & Charity Commission).	Relatively new corporate entity which has only been available since 2013 - the rules which apply to it are as yet untested and banks/lenders are more reluctant to provide loans.
	Charitable CLG status means being subject to two sets of filing / legal requirements (with Companies House and the Charity Commission).	Much slower and more complicated registration process with Charity Commission. The CIO does not come into legal existence until it is registered with the Charity Commission which can take several months.
	Registering as a charity requires being able to prove ADEPT is established for a charitable purpose i.e. for public benefit.	Less freedoms & flexibilities with trading / activities than a non-charitable CLG.
	Charitable CLGs are subject to some restrictions on activities (e.g. trading activities and political activities).	Less flexibility to create personalised governing documents.

Why recommend CLG over CIO?

Becoming a CLG deals with the immediate issue of incorporation – giving ADEPT a legal identity and providing more certainty, particularly in relation to financial risk - whilst still leaving open the option to become a registered charity at a later date.

How are other local government bodies constituted?

Other local government membership bodies have already moved to becoming a company limited by guarantee without share capital (i.e. not for profit), a charity, or both:

- ADCS – company limited by guarantee
- SOLACE – charitable company limited by guarantee; SOLACE in Business is a private limited company (where profits are reinvested back into SOLACE the charity)
- ADPH – charitable company limited by guarantee
- ADASS – an unincorporated charity.

What impacts will there be on the way ADEPT operates?

Becoming a CLG requires the adoption of Articles of Association. The Articles are the document that sets up the company and states the name of each 'guarantor' and their agreement to set up the company and become members. The Articles also set out how the company is run, governed and controlled. ADEPT already has a constitution so this should not be an onerous task, in addition it offers the opportunity to refresh the contents. Otherwise, other than being alive to the regulatory requirements, there should be no change to how ADEPT has operated to date.

The assets and liabilities (for example contracts, bank accounts, etc.) will also need to be transferred from the existing unincorporated association to the new CLG. This is a relatively straightforward process.

What will I have to pay?

Under a limited by guarantee structure, all guarantors agree to contribute a set amount of money as set out in the Articles of Association should the company become insolvent and subsequently enter liquidation. In effect therefore, members' personal exposure is limited to the amount of their guarantee which is typically a nominal sum of often just £1, barring any instances of fraud or negligence. We are yet to determine whether all members become guarantors or whether to limit this to the Leadership Team. This guarantee is separate to the annual membership fee.

There is a decision to be taken for ADEPT (either as a CLG or CIO) whether it will have all its current members be legal members / guarantors of the entity, or whether those will only be the directors / trustees. If this is the case, there would be other means set out in the constitution by which the wider membership may influence the running of the organisation.

Who will be the company directors?

This level of detail is yet to be determined. ADCS for example has a 'Council of Reference' where its principal purpose is to act as a consultative body, advising the Board of Directors as required, on behalf of the wider membership. Membership of the ADCS Council is constituted as follows:

- Board of Directors - including the five Honorary Officers of the Association (President, Vice President, Honorary Secretary, Honorary Treasurer and Immediate Past President)
- Chairs of each of the Policy Committees
- Chair of the Research Group
- Chair of the Associates Network
- Representatives from the regions.

There are close parallels to draw to existing ADEPT governance structures. However, this level of detail will be developed over the next six months, should the membership approve the recommendation to become a CLG at today's AGM.

What's next?

Having reviewed the options and taken legal advice, the Leadership Team recommendation to members is that ADEPT converts from an unincorporated association to a non-charitable company limited by guarantee.

If agreed the next step is for the Leadership Team to establish a smaller task & finish group, chaired by Nigel Riglar, to progress the conversion. This will involve agreeing the terms of the company's constitution before presenting to the members for approval at the next General Meeting (November 2021). Members are invited to participate in that process via various discussion groups such that consensus can be established.

Hannah Bartram
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ADEPT