



Public Governance Guidance Note

Introduction

The Hong Kong Institute of Chartered Secretaries (the Institute) is issuing this guidance note to help non-governmental organisations (NGOs) with their arrangements for annual general meetings (AGMs) in the context of restrictions relating to the COVID-19 pandemic – in particular the government's recent social distancing regulation¹ (the Regulation), which includes a prohibition against gatherings in public places of more than four persons to prevent the spread of COVID-19. While the Regulation was initially effective from 28 March 2020 to 11 April 2020, it is subject to renewals and is currently renewed through to 23 April 2020.

The focus of this guidance note is specifically on the arrangements for upcoming AGMs, which may draw in crowds of more than four persons. In this connection, while you may think that by arranging the AGM at your office, you can avoid the AGM being deemed to be held at a public place, this may not be the case. Under the Regulation, a place, like your office, could well be regarded as a 'public place', as long as a section of the public can access it. As your members could be regarded as a section of the public, there is a legal risk that your office could therefore be regarded as a public place for the purposes

of the Regulation. This is even where you are not charging your members for attending the AGM at your office². If you are using/paying for an external venue, then it becomes even more difficult to argue that your AGM is not a group gathering in a public place.

However, there are exemptions to the Regulation and this guidance note explains what these are and makes other practical suggestions from a governance point of view in case your NGO needs to conduct a physical meeting. This guidance note is also intended to support the Hong Kong Council of Social Service (HKCSS), a long-term collaborator of the Institute, to provide guidance to its agency members, the majority of which are companies limited by guarantee established under the Companies Ordinance (Cap 622) (CO).

Company NGOs

The Institute would like to make it clear upfront that NGOs established under the CO, including companies limited by guarantee, are exempted from complying with the social distancing requirements under the Regulation in relation to their AGMs. Such NGOs can go ahead with arranging their AGMs without worrying about limiting attendance to four persons.

1 Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap 599G of the Laws of Hong Kong).

2 As defined under the Regulation, 'public place' (公眾地方) means a place to which the public or a section of the public may, or are permitted to, have access from time to time, whether by payment or otherwise.

This is because of exemption 11 to the Regulation, which exempts 'group gathering at a meeting of a body that must be held within a specified period in order to comply with any Ordinance or other regulatory instrument that governs the operation of the body or its business'. However, while there is currently this exemption, the situation may change. This is because the Regulation is required to be renewed every 14 days and changes may be made. NGOs should therefore regularly check the latest wordings of the Regulation and related exemptions.

Moreover, if your NGO uses an external venue provider to provide the venue for your AGM, the provider may itself be required to comply with other regulations relating to social distancing. We have seen cases where venues have cancelled bookings because of other applicable regulations. Please monitor these risks relating to your upcoming AGM.

With these considerations, it may be helpful to try to keep your AGM small, including through the use of proxy voting and to consider the other practical COVID-19-related suggestions as set out under this guidance note.

Other NGOs

If your NGO is not a company incorporated under the CO, or if you are not otherwise sure if your AGM is covered under exemption 11, you will need to take legal advice as to whether your NGO is exempted from complying with the social distancing requirements of the Regulation, and/or whether there could be other arrangements made to comply with the Regulation. This will depend on the facts of each case. Your NGO may well find itself in a difficult position as it may need to arrange an AGM with less than four attendees.

A related question that has been raised where exemption 11 does not apply is whether NGOs can carry out their meetings by keeping groups of no more than four persons apart by 1.5 metres. This, for example, is how many people currently gather during the weekends in public spaces. In this connection, the position is unclear under the Regulation. This is because it is not clear if the different groups would be regarded as part of one group gathering for a meeting, which is not permitted, or separate group gatherings³, which is permitted. Again, please take legal advice on your proposed meeting for any applicable exemptions and/or arrangements.

Physical meetings

Assuming the exemption from complying with the Regulation applies, the Institute understands that a majority of NGOs will need to hold their AGMs as physical meetings because it is simply too late in the day to change this format. But, pausing here, the Institute reminds readers that, where 100% of the members agree in writing, it is possible to have a meeting by paper circulation of the resolutions under Sections 548 and 556 of the CO. The resolutions are passed when the NGO receives all members' agreement to them. There is no need for all members to sign on the same resolution as counterparts of the resolutions can be circulated for signing. In this context, NGOs should rethink if they need a physical meeting where agreement from all members is possible.

If a physical meeting is necessary, the following are our recommendations in relation to physical meetings.

General considerations	
Delaying the meeting	You may want to delay the meeting as far as possible. For example, an NGO that is limited by guarantee under the CO can hold its AGM up to nine months from the end of its financial year. This would allow you to wait and monitor further developments to better plan your AGM.
Proxy voting	In your AGM Circular (or the document calling for an AGM), you may wish to discourage people from physically attending the AGM, recommending that they vote by proxy instead. Members can appoint the Chair, or other eligible person, as proxy to vote in accordance with the voting instructions as specified in the proxy lodged by the member. This is discussed further below.

³ Under Section 10(2) of the Regulation, if the distance between any participant of a gathering in a public place and any participant of another gathering in the place is less than 1.5 metres, and the total number of participants of the gatherings is more than four, then each of the gatherings is a dispersible gathering.

Format of the meeting	You may wish to consider the format of your meeting and, in particular, how to manage Q&As. For example, might there be an option to handle these ahead of time or after the event via other channels? Members may then decide that there is no need to attend and/or appoint the Chair of the AGM as proxy to vote for them.
Venue-related considerations	
Venue	It will be advisable to select a venue which will enable you to expand for social distancing purposes, even where this is not mandatorily required because of your NGO's exemption to the Regulation. Also, you may want to select a venue that allows you to house attendees in different rooms. This would, however, require you to make the appropriate audio and visual arrangements.
Pre-registration of attendance	In the AGM Circular, you can request for pre-registration to ensure compliance with the Regulation as the scope of the Regulation may change from time-to-time and note that members may be turned away where the Regulation requires this to be done. This could potentially encourage people not to physically attend the AGM and send a proxy instead. Also, this could facilitate seating arrangements to minimise physical interactions during the registration process at the venue. You can request for pre-registration by post or other electronic means.
Seating	The seating should be spaced out for social distancing where possible, even where this is not mandatorily required because of your NGO's exemption to the Regulation.
Voting boxes	You may consider encouraging your members to place their voting forms in pre-arranged voting boxes to reduce physical interactions when collecting them.
Electronic voting	Unless your NGO's articles of association (articles) have specified a voting format, electronic voting as a means of voting at a physical AGM could be considered with a view to reducing physical interactions during the voting process, subject to cost considerations.
COVID-19 procedures	
Temperature screening	In your AGM Circular, you may want to make it clear that you will screen the temperature of attendees and refuse entry to those with a high temperature. You should make sure that there are appropriate isolation areas/facilities for those with a high temperature or other signs of a COVID-19 infection. If necessary, you should consider having a nursing station.

Health/travel declarations	In your AGM Circular, you may want to provide a health/declaration form and ask members to return this at the AGM.
Hand sanitiser	You should provide alcohol rubs/hand sanitisers at the venue.
Masks	In your AGM Circular, you may want to make it clear that you will turn away people without masks.
Microphones	Microphones should be disinfected after each use.
Other matters	
No refreshments	In your AGM Circular, please consider making it clear that you will not be providing refreshments.
No souvenirs	In your AGM Circular, please consider making it clear that you will not be providing souvenirs. If you normally do that, you may consider making a donation to charity instead.
Hygiene posters	You should publicise hygiene measures (for example put up posters) at the venue.

Proxy voting

We mentioned the use of proxy voting above. This is because, irrespective of your NGO's place of incorporation and/or articles, there would likely be the option for members of your NGO to vote by way of proxy. We assume that you are familiar with proxy arrangements. As noted, you should, under your AGM Circular discourage members from attending the AGM and vote by proxy instead. You should suggest that the Chair of the AGM be appointed as proxy. We have to stress that this approach is to be adopted because of the current special circumstances for COVID-19 protection. Under normal circumstances, you would want, from a good governance perspective, to have more members attending your AGM.

Hybrid/virtual AGMs

The Institute has been promoting the use of hybrid AGMs for a number of years. This is where the physical meeting is held in tandem with an online webcast of the meeting (with facilities for members to vote). Using the hybrid format helps to limit the number of physical attendees, as members can opt to attend the AGM online. This is

permitted under Section 584 of the CO unless the articles state otherwise.

The problem is that some NGOs do have articles that require them to physically hold their AGMs and they cannot have a hybrid meeting. To plan ahead, in case your NGO has restrictive articles, you may consider amending your articles to allow for electronic meetings and voting for the future, as necessary. In a recent case, an NGO used a Google platform to hold its AGM and to vote for example. Hybrid meetings, therefore, offer a solution which could be within easy reach for most NGOs as a way to limit physical attendance at AGMs.

To assist NGOs to consider the matter further, please note that Article 38 of the Model Articles for a company limited by guarantee is commonly regarded as being not restrictive of the holding of hybrid meetings (see 'Holding meetings at two or more places') under Section 584 of the CO. Different law firms have different views as to whether virtual meetings where there is only an online meeting would be permitted, and in case the NGO desires a more tailored set of articles to allow virtual meetings, please seek legal advice.

Holding meetings at two or more places

Section 584, CO

- (1) A company may hold a general meeting at two or more places using any technology that enables the members of the company who are not together at the same place to listen, speak and vote at the meeting.
 - (b) the person's vote can be taken into account in determining whether or not those resolutions are passed at the same time as the votes of all the other persons attending the meeting.
- (2) Subsection (1) has effect subject to any provision of the company's articles.


Article 38 of the Model Articles – attendance and speaking at general meetings

- (1) A person is able to exercise the right to speak at a general meeting when the person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions that the person has on the business of the meeting.
- (2) A person is able to exercise the right to vote at a general meeting when:
 - (a) the person is able to vote, during the meeting, on resolutions put to the vote at the meeting, and
- (3) The directors may make whatever arrangements they consider appropriate to enable those attending a general meeting to exercise their rights to speak and/or vote at it.
- (4) In determining attendance at a general meeting, it is immaterial whether any two or more members attending it are in the same place as each other.
- (5) Two or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have rights to speak and vote at the meeting, and they are able to exercise them.

EGMs

On other types of general meetings, the Securities and Futures Commission (SFC) and Hong Kong Exchanges and Clearing Ltd (HKEX)⁴ have clarified that extraordinary general meetings and special general meetings of Hong Kong-listed issuers are exempted under exemption 11 if the meeting must be held within the specified period in order to comply with any law or regulation in Hong Kong; articles; or other regulatory instrument. The Institute cannot see any difference where the NGO is a Hong Kong incorporated company in relation to these types of meetings. That is, if the NGO needs to hold any other general meetings within a specified period to comply with the CO, the NGO is permitted to do so with an exemption from complying with the Regulation.

Board meetings

As to whether board meetings can be held, under the articles of many NGOs, it may be possible to hold electronic meetings. If for whatever reasons physical meetings are preferred, unless the NGO's board meeting is required to be held within a specified period under any Ordinance, or its articles, it is not exempted under exemption 11. However, there is exemption 4 that allows group gatherings at a place of work for the purposes of work. While it is not entirely clear, and depends on the facts of the case, this exemption 4 may be applicable to board meetings held at place of work for the purposes of work. Please note that the exemption is only applicable to the place of work, and not to any outside venue. In case of doubt, please seek legal advice. 

⁴ https://www.hkex.com.hk/News/News-Release/2020/200401news?sc_lang=en

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