

2020 Annual General Meeting – Proposed Amendments to the Constitution*Introduction*

1. The Governance Committee has a duty to advise Council on constitutional issues. There are three separate resolutions on constitutional reform being tabled at this year's Annual General Meeting. In addition to the Governance Committee's proposal in relation to virtual meetings of Council, which is the subject of a separate paper, there are two further resolutions proposed by Members of Council, with which this paper shall deal in turn.

Proposal on the number of consecutive terms in a Board post

2. The issue of how many consecutive terms a Director should be able to serve in the same post arose in August following the opening of the period for nominations for elections at the 2020 AGM. There ensued considerable discussion between Directors, the Chair of Council and the Chair of the Governance Committee as to how many consecutive terms should be permitted. In the absence of any agreement as to what constitutional changes (if any) were needed, a consensus was reached in August that the Chair of Council in conjunction with the Governance Committee would produce a paper on the possible options, undertake appropriate consultation with Members of Council before tabling a formal proposal at Finance Council in 2021. This process has been put on hold pending consideration by Council at the 2020 AGM of the resolution below.

Number of terms – the Pearce Report

3. Before the implementation of constitutional reform in 2016 every Director was required to stand for election/re-election at every AGM and there was no limit on the number of terms a Director could serve. The recommendations of the report produced in 2015 by the Independent Constitutional and Governance Review Commission (the "Pearce Report") included recommendations that "Directors should serve for an initial period of three years but may serve for a further period of 3 years" and that "to help continuity and stability, Directors' three year terms should be phased in so that, as far as possible, each AGM should have only 3 or 4 elections or re-elections". So, the Pearce Report appears to contemplate a phasing-in period followed by two terms of three years each.

Number of terms – the current position

4. In working out what proposals would best amend the then existing constitutional provisions, the Pearce implementation committee was faced with having to balance the contradictory requirements of, on the one hand, the need for renewal, and, on the other, not prematurely forcing the departure from office of the most suitable candidate.
5. The solution adopted by the committee and approved by Finance Council in 2016 was described in the explanatory document provided to Council in the following terms: "...it is proposed....that a rota be established pursuant to which each position on the Board comes up for re-election every three years as part of a separate three year cycle for each such position. The intention....is that at any given Annual General Meeting no more than one of the Chief Executive, Director of Finance and the Non-Executive Chairman shall be due for re-election nor more than one of the Non-Executive Directors. This is designed to minimise the extent of disruption caused by Board changes. The election rota will come into effect for all Annual General Meetings from 2016 onwards....No limit is being set on the number of three year terms that can be served by any Director....However, Regulation No. 2 will include a

strong presumption that service in the same post will be limited to no more than two terms starting from the 2016 Annual General Meeting, subject to the availability of alternative candidates acceptable to Council". This was implemented by amending the articles of association and Regulation No. 2 (The Directors and Officers Responsibilities Regulations) (the "Regulations").

6. In detail, Article 58 obliges the Directors to maintain a rota with a three year cycle for each board position, Article 59 provides "At each Annual General Meeting held in or after 2017 Directors shall retire in accordance with the Board Rota and article 60 provides "Any Director who retires at an Annual General Meeting pursuant to Article 59 shall be eligible for re-election at such Annual General Meeting". The amendments to the Regulations include the insertion of a rota (with each post being given an initial term of one year, two years or three years to ensure an even spread of elections each year) and of the following wording: "Subsequent terms shall be 3 years for all posts". And then in the following paragraph: "It is in the interest of board renewal that no individual should serve continuously in the same post for more than two terms commencing from the 2016 elections. There is therefore a strong presumption that service in the same post will be limited to not more than 2 terms thereafter, subject to availability of alternative candidates acceptable to Council".

Number of terms – the current position – points to note

7. It should be noted in relation to the current position that the Articles of Association take priority over the Regulations as a matter of law; Article 86(2) confirms this by expressly stating that "no Bye-Law or Regulation shall be inconsistent with, or shall affect or repeal anything contained in, the Memorandum or Articles of Association of the Company". So, in circumstances where a Director has, since 2016, served two terms in the same post and there is an alternative candidate acceptable to Council – these being the circumstances where the strong presumption in the Regulations would suggest a Director should not serve a further term – the legal position is that the Director can stand for a further term or terms; Article 60 takes priority. The strong presumption in the Regulations might be regarded as having a function of being a reminder of the importance of board renewal, but it does not operate as a legal constraint.
8. It should also be noted in relation to the current position that, although a normal term of office will last three years, there are circumstances in which it will be shorter. The first example of such circumstances arises as a result of the 2016 changes giving some of the Directors an initial term of one year or two years rather than three years (see paragraph 6. above). This will cease to be relevant after 2021. The second example, and this will remain relevant after 2021, arises where a Director leaves office in the first two years of the cycle of three years applicable to a post. The replacement Director is then required to be elected at the next Annual General Meeting and will then be due to stand for election again one or two years later rather than three years later.
9. A final point to note in relation to the strong presumption in the Regulations is that when it refers to a limit of no more than two terms there is ambiguity as to whether that means two terms of three years or whether it means two terms of whatever length (a term of one or two years followed by a term of three years).

Number of terms – the proposed changes

10. The proposed changes to the Articles of Association are set out in the 2020 AGM Agenda, which this note accompanies. They replace the existing Article 59 and Article 60 with

wording that imposes a maximum of two consecutive terms' service in the same board position, save that in circumstances where the vacancy is not filled at the relevant Annual General Meeting the Board may appoint the retiring Director to fill the casual vacancy that has just arisen. Consistently with the proposed changes to the Articles of Association, the resolution requires the Board to amend the Regulations so that they are in line with the revised Articles of Association.

11. Thus, whereas a Director is currently able to serve an unlimited number of consecutive terms in a post (because the strong presumption in the Regulations is overridden by Article 60), there would now be a limit of two terms. The proposed resolution does not require that those two terms be of three years' duration, so if a post becomes vacant in the middle of a three year cycle the replacement Director could be limited to only four years before being barred from standing for re-election for that post. Moreover, there is no definition of the word "term" and so it might be, when someone is appointed a Director by the Board to fill a casual vacancy under Article 57, that the period in office from the date of appointment till the next Annual General Meeting would count as a term – in which case a Director could be limited to a time period shorter than four years before being barred from standing for re-election for that post. In addition, the proposed resolution would preclude the current President and the current Chief Executive from standing for re-election in 2021 for their respective posts (both of them having at that point served a two year term followed by a three year term since 2016).

Number of terms – conclusion

12. The question of how long a Director should be able to stay in office is an important one; there is a very tenable view that the current position of having an unenforceable presumption as the only "limit" is lacking in clarity and not satisfactory. As for reform, the solution set out in the proposed resolution specifies two terms of office in the same post as the limit; this can amount in aggregate to a period of only four years in office (or possibly even shorter). This would appear to the Governance Committee to be too stringent a limit and unduly to favour board renewal as against retaining able incumbents. The Governance Committee would favour returning to its plan of considering the possible options with the Chair of Council, consulting with Members and putting a proposal to Finance Council next April.

Proposed amendment to the Direct Members Bye Laws

13. At the Annual General Meeting in 2017 the aggregate number of votes of Direct Members' Representatives at Council meetings was increased from ten to 40. Along with the greater number of votes there was a greater concern that it was important that the posts be occupied and there was a fear, particularly in relation to the lower tiers of membership, that it might be difficult to attract candidates. Accordingly, the requirement in the Direct Members Bye Laws that a Direct Members' Representative had to be a Direct Member of the same category (bronze, silver, gold etc) as the category he or she would represent as a Direct Members' Representative was replaced by a requirement of merely being a Direct Member. The resolution to be put to the 2020 Annual General Meeting seeks to reverse this change.
14. Recent experience is that there is no shortage of potential candidates who are members of the relevant categories; in this year's elections, following the giving of greater publicity to the possibility of standing, there were 22 candidates for the ten posts.