

Explanatory Memorandum

This explanatory memorandum has been prepared for the information and benefit of members in relation to the business to be conducted at the annual general meeting of BaptistCare NSW ACT (**Company**) on 11 November 2021.

This explanatory memorandum should be read in conjunction with the special resolutions and the proposed constitution.

1 Background and reasons for the proposal

The proposed amendments to the constitution have been prepared by Mills Oakley, a law firm retained by the Company to advise it on the appropriateness of the current constitution. After Mills Oakley advised the Company that the current constitution needed improvement in some areas, Mills Oakley was instructed to prepare the proposed amendments to the constitution.

The board has been working closely with Mills Oakley to ensure that the proposed amended constitution:

- (a) reflects modern and current accepted best practice in corporate governance;
- (b) as far as is reasonably possible, retains the key components of the Company's internal governance procedures (except where to do so would contravene the law or result in an unnecessary risk of internal governance issues arising); and
- (c) complies with the current applicable laws.

Under section 136(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), amendments to the Company's governing document may only be made through a special resolution of members.

There are several references in the proposed changes to the constitution to section 111L of the Corporations Act. Section 111L "switches off" several provisions of the Corporations Act for charities. Where the constitution effectively reinstates a provision of the Corporations Act which has been switched off by section 111L, we have included "notwithstanding section 111L of the Corporations Act". Otherwise, it can be somewhat unclear as to how the clause should be interpreted.

The constitution only referred to the Corporations Act and ASIC. We have also included references to the Australian Charities and Not-for-profits Commission and the statute which establishes it.

2 Director remuneration

The constitution of the Company currently does not allow for the remuneration of the directors. Under the proposed change to clause 1.8, subject to prior approval of the board, directors may receive remuneration for the services they provide to the Company as directors.

In recent years, accepted best practice in corporate governance and increasing regulations impacting provision of human services, particularly aged care, have led to a significant increase in the workload for directors of organisations like BaptistCare. (There has also been a simultaneous increase in personal liability for directors.) Consequently,

many such organisations remunerate directors for their work. We found¹ this the case for the majority of “for-purpose” organisations with a sole or major focus on aged care and for those organisations with a focus on affordable housing.

In recommending this change, the board considered the importance of volunteering, ministry and service, as well as Biblical principles of compensation. These include fairness, generosity and sensitivity to community expectations.

The performance of directors is central to providing the quality of governance that is needed to meet the demands of our changing operating environment. What was once volunteering is now work, where performance is assessed and a significant time commitment is expected. For directors in full time employment, this often involves taking leave to attend meetings and visit operational sites as well as training for professional development. Remunerating directors can also provide an opportunity for people to join the board who might otherwise be excluded because of the impact of the time commitment on their capacity to earn an income. This could lead to an increased level of diversity on the board.

The board believes the amounts paid to directors should be modest when compared to companies of similar size and complexity. This recognises the ongoing aspects of service and ministry in the role. Our sister organisations BapCare (Victoria) and BaptistCare (WA), as well as Baptist Financial Services, all pay directors and have similar director pay scales. Using this as a guide, the aggregate of annual director remuneration for BaptistCare NSW&ACT would not exceed \$225,000.

If this amendment to the constitution is accepted, the board would seek approval for the remuneration of directors from the NSW Government under our fundraising arrangements and prepare and implement a director remuneration policy.

3 Membership

Clause 2.2 currently provides that the members of the Company may be life members, honorary life members and ordinary members. The clause does not set out the rights and obligations of each class.

The new clause 2.2 has been made much easier to follow by including a separate numbered sub-clause for each membership class, setting out the rights and obligations of each class.

We have also made each membership class a separate defined term.

Please note that it is no longer possible for the board to admit any members as life members. Those who are currently life members will continue to be life members. This change has been made because the original purpose of life membership was to give members the option of making a lump sum payment in lieu of annual membership fees and receiving life membership upon doing so. The payment of membership fees was removed some time ago and membership is not for a fixed term. As a consequence, the class of life membership is no longer needed but will continue to be recognised for existing life members.

¹ A survey carried out by a consultant engaged by BaptistCare in 2018 found that 45% of organisations surveyed (all of whom were similar to BaptistCare), remunerated their directors; 68% of organisations with a sole or major focus on aged care remunerated their directors; and 71% of organisations with an affordable housing focus remunerated their directors.

This proposed change in no way changes honorary life members who are in a different class of membership.

4 Other provisions

The more salient terms of the new constitution, as compared with the current constitution, are as follows:

TOPIC	CLAUSE		EXPLANATION
Guarantee by Members	Current	1.6	Members provide a guarantee of \$100, except members who joined on or before 20 March 1992 who provide a guarantee of 10 cents.
	New	1.6	The law <u>does not allow</u> the members' guarantee amount to be changed from the original amount when the Company was first registered. This is not even permitted by changing the constitution or even by agreement with the members. The clause has been amended to only refer to a guarantee amount of ten cents (reflecting the original amount of one shilling).
Objects of the Company	Current	1.7	Clause 1.7 currently provides an introductory statement of the Company's objects, to which the ensuing more specific subclauses are subservient. This introductory statement is fairly long and includes some powers rather than solely objects. The objects of the Company include: <ul style="list-style-type: none"> - establishing all types of public benevolent and public charitable institutions, in particular homes for elderly persons, etc.; - providing homes, social and affordable housing and related support to people in Australia who are disadvantaged; - maintaining kindergartens, child welfare centres or clinics for children; - providing religious services, worship and teaching; - assisting with obtaining employment or pecuniary assistance; and - providing welfare counselling, mediation and advisory services; etc.
	New	1.7	The clause has been amended to a shorter introductory statement which focuses on providing relief to people who are disadvantaged, vulnerable and marginalised. The subclauses have been reduced to five (i.e. 1.7(a) to 1.7(e))

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			<p>and only highlight the public benevolent institution activities of the Company. Specifically, we have removed the references to the following activities:</p> <ul style="list-style-type: none"> - maintaining kindergartens, child welfare centres or clinics for children; - providing religious services, worship and teaching; and - providing welfare counselling, mediation and advisory services. <p>We have removed subclauses (i), (k), (l) and (n), as they are all powers – which are inherent to any company – and need not be contained in the constitution.</p>
Admission to Membership	Current	2.6	<p>The clause currently provides that no person shall become a member of the Company unless:</p> <ul style="list-style-type: none"> - in respect of a life member, their donation shall have been accepted by resolution of the board and they have executed an application for membership; and - in respect of ordinary members and honorary life members, they have provided the Company with their written agreement to become a member.
	New	2.3	<p>The amended clause provides that the secretary will receive an application for membership and forward the application to the board. The board will make a determination about whether to accept or reject the application. The secretary shall notify the applicant of the decision of the board.</p>
Rights of Appeal	Current	-	No clause is currently included.
	New	2.5	<p>The clause allows a member to appeal to the Assembly Council against a resolution of the board to remove the member as a member of the Company. A decision of the Assembly Council is final.</p> <p>Allowing appeals helps to ensure natural justice is enacted.</p>
Technology	Current	-	No clause is currently included.
	New	4.1	<p>We have included a provision allowing for virtual meetings to be held to the extent permissible under the Corporations Act. Hybrid meetings (that is, meetings held in a physical location with participants having the option of conferencing in) are still permissible.</p>
Notice for Member	Current	4.2	<p>The clause currently provides that no member shall move a resolution at a general meeting which has not been</p>

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Resolutions			approved by the board, unless the member has given not less than 28 days' notice in writing to the secretary of the resolution.
	New	4.3	The clause has been amended to ensure the member provides notice of the resolution to the Company in the form prescribed by the Corporations Act.
Quorum	Current	4.3	A quorum is 12 for member meetings. If a person attends a member meeting as both a member and a proxy, that person shall only be counted once towards the quorum.
	New	4.4	We have added an exception for what occurs if there are ever fewer than 12 members of the Company (even if that is unlikely to occur). The quorum in that instance is 75% of the total number of members. We have also amended the clause so that a person is counted twice (or more, if the person holds more than one proxy) if the person attends the meeting as both a member and a proxy.
Polls	Current	4.7	The clause currently provides that the result of the poll must be declared within 2 business days after the closure of the meeting by either notice in a newspaper nominated at the meeting by the chair or by another means approved by the meeting.
	New	4.8	The new clause provides that the result of the poll must be declared within 2 business days after the closure of the meeting by either notice on the Company's website or by another means approved by the meeting.
Number of Directors	Current	5.1	The composition of the board shall be not fewer than eight and not more than twelve persons, all of whom are elected directors.
	New	5.1	The composition of the board shall be not fewer than seven and not more than eleven persons, all of whom are elected directors.
Term of Directors	Current	5.4	This clause provides that the Directors shall not hold office for a term beyond the third annual general meeting. It also provides a definition for "term" in relation to directors normally and those directors appointed to fill a casual vacancy.
	New	5.3	The current clause is a bit difficult to follow. It has therefore been redrafted to be simpler (whilst still having the same effect as what is currently drafted).
Casual	Current	-	No clause was included.

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Vacancies	New	5.5	The board shall appoint an ordinary member to fill a vacancy until the next annual general meeting. Any time served on the board filling a casual vacancy will not count towards the maximum consecutive term.
Disclosure of Interest	Current	5.9	Directors who are conflicted cannot be present whilst a matter is being considered or voted upon.
	New	5.9	We have amended the clause to allow the director to be counted in determining whether there is a quorum.
Written resolutions	Current	5.11	The board is able to pass resolutions in writing and without a meeting being held.
	New	5.11	This clause was a bit convoluted and has been redrafted to ensure it is easier to follow (whilst still having the same effect as what is currently drafted).
Secretary	Current	6.1	The board shall appoint a secretary on such terms as it thinks fit.
	New	6.1	We have amended this clause to state that the board can appoint “at least one” secretary, as public companies limited by guarantee are allowed to have multiple secretaries.
Notices	Current	11.1	Members may give notices under the constitution to the Company by sending them by post or facsimile to the registered office. If a notice is sent by post, it will be deemed to be served on the second day after posting if within Australia, and the seventh day after posting if sent overseas.
	New	11.1	We have included clauses which provide how notices can be given to directors under the constitution, and how notices may be given by a member or director to the Company. We amended the time periods for receiving a notice to: (a) three business days, if within Australia; and (b) 14 business days, if overseas.
Winding Up	Current	14	If the Company is wound up and effect cannot be given to the provisions in paragraphs 14(a)(A) and 14(b), then such property shall be given to some charitable object that prohibits the payment of any income or property to its members. This, of course, does not make sense.
	New	14	We have amended this clause so that if effect cannot be given to clause 14(b) or 14(c), then the recipient of such property shall be determined by application to the Supreme Court of New South Wales.

TOPIC	CLAUSE	EXPLANATION
		A similar amendment has been made to clause 15(c) to ensure consistency in the terms of the constitution.

5 Recommendation

Assembly Council of The Association of Baptist Churches of NSW & ACT at a meeting on 12 October 2021 approved the proposed amendments to the Company's constitution. The board recommends that members approve the adoption of the proposed constitution.