

Factsheet 30



Becoming a Company Limited by Guarantee

Voluntary organisations normally consider becoming companies as they grow and take on greater responsibility eg deliver services under contractual agreements, own or lease a building, employ staff, etc. A charitable company operates in similar way to any other voluntary or community organisation. It has a committee elected by the membership with a number of officers – chair, treasurer and secretary. In a charity, members of the committee are known as trustees. In a company, committee members are known as directors. A charitable company has both trustees and directors.

Advantages

An unincorporated association, an organisation with a constitution and a committee, is not recognized in law as having an independent existence. The law only recognizes individuals and companies. This means that committee members are jointly and individually liable for fulfilling any contracts and are liable for any negligence/breach of statutory duties. Insurance cannot always be relied upon to cover every eventuality and there are situations where your organisation may not be insured eg unfair dismissal and discrimination. If your organisation employs staff, owns a building, has large contracts, etc. then it is important to consider becoming a Company.

Incorporation, registering as a Company, means that an organisation has a legal entity in its own right. In a Company members of the committee do not normally have personal financial responsibility for contracts and debts, and are not normally individually liable for negligence. Documents are signed in the name of the Company and if someone wants to sue, claim damages through an employment tribunal, etc. then in most cases they take action against the company and not an individual.

The organisation can hold property and take legal action in its own name. The personal liability of members to pay any outstanding debts if the company is wound up is limited. This is the sum that members guarantee to pay when they join the company. However, committee members are still liable under charity law if they are found to have acted unreasonably or fraudulently.

Disadvantages

There are some minor costs involved in setting up and registering a company.

There can also be expenses in submitting the annual returns and accounts to Companies House. Accounts need to be submitted in a format acceptable to Companies House. For a charitable company to qualify for total audit exemption it must qualify as small, its gross income must not be more than £90,000 and its balance sheet total must not be more than £2.8 million. Charitable companies which qualify as small and have a gross income between £90,000 and £250,000 and a balance sheet total of no more than £1.4 million qualify for partial exemption [needs a qualified accountant to produce an accountant's report]. Organisations need to talk to Companies House or their financial adviser to clarify their own individual situation.

Companies House will fine both the directors and the company if annual accounts or other requested information is not received on time or in the correct form.

Stationery and other documents will have to be changed to include your company registration number.

As a Company you must notify Companies House when a director leaves or joins and work to company regulations.

Directors can still incur personal liabilities eg if they carry on 'trading' when they knew, or ought to have known, they didn't have the resources to meet their debts, they were 'recklessly indifferent' as to whether creditors were ever paid, etc.

The existing members will have to re-register and sign up as members of the company if they want to stand as directors or vote at meetings. Non members can still attend general meetings.

Registered members have to be individually informed of Annual General Meetings and sent information, including full copies of the company accounts, in advance.

Directors names and home addresses are publicly available, unless they can show good reason why they should be kept confidential.

Registering as a Company

If your organisation is not yet registered as a charity with the Charity Commission and wish to become both a registered charity and a Company Limited by Guarantee, then the preferred process is to register the company first. This will save your organisation having to re-register with the Charity Commission. If your organisation is already a registered charity then it is still a relatively easy process to also become a Company Limited by Guarantee.

The committee will need to look at the advantages and disadvantages of becoming a Company. The Charity Commission publication CC22-Choosing and preparing a Governing Document gives guidance on the different types of governing documents an organisation might adopt. If it is agreed by the Committee that becoming a Company is the best way forward then this decision will need to be ratified by the membership, either at an AGM or EGM. The constitution for a company are known as Memorandum and Articles of Association, model examples are available from the Charity Commission. These will need to be agreed by the membership, as all members of the new company need to sign. There is usually no need to alter your organisations original objects.

It is a good idea to contact existing funders to ensure that your proposed change of status will not effect their ability to continue funding your organisation.

The Process

By becoming a Company you are effectively setting up a new organisation. Throughout the process keep accurate minutes of all meetings. Remember it is very important to keep the membership fully informed and to have their agreement. With regard to the process there are 4 basic steps:

- Register the Company. Organisations will need to complete Form 12, Form 10 and Form 30(5)(a), as well as signed copies of the Memorandum of Association and Articles of Association.

There is a registration fee of £20. Although the registration process is relatively straightforward, as a company is subject to company law it is advisable to seek professional legal advice. This particularly applies if you need to transfer assets and contracts from your existing organisation to the new company.

- Register, or re-register, with the Charity Commission. The process to follow is nearly the same whether registering for the first time or re-registering. New registrations complete an APP 1 and DEC 1, existing registered charities complete an APP 2 and DEC 2. Whichever of these apply a useful Charity Commission publication is: RTN – 1302 Charity Incorporation - How to 'incorporate' an unincorporated charity and apply for registration
- Transfer the assets from the previous organisation to the new Charitable Company. Although you may keep the same name, you are setting up a completely new organisation. You will need a new bank account, transfer of equipment guarantees, change insurance details, new employment contracts, transfer property deeds, etc. It is recommended to draw up full list of all assets being transferred.
- Close down the previous organisation. Present the final accounts at a meeting of members and approve a resolution to close the original organisation.

Charities can only become companies limited by guarantee [not by shares], as guarantee companies can still be run democratically, for the public benefit

and on a not for profit basis. Every member has a single vote. Members guarantee that they will pay a nominal amount eg £5 to meet any debts if the company is wound up.

Every company has to have Company Secretary. They are responsible for making sure that the company complies with company law. They must make sure that the annual accounts are sent off on time, tell Companies House when the directors change and ensure members receive proper notice of meetings. They can be a director or a member of staff, if a member of staff they will not have a vote. This is a different role to the committee secretary eg they don't have to take the minutes, etc.

Charities are exempt from using the word limited. When your company is registering with Companies House, you must complete Form 30(5)(a) and send it to the Registrar with your incorporation documents.

You should be able to keep your current name as long it is not the same as any existing company on the register and meets the usual requirements of decency and clarity. You can search the register of company names at the Companies House website.

Alternatives

Before going down the route of becoming a company you need to consider how likely it is that the trustees will become personally liable for the organisation's debts. If they have acted in good faith and have not been negligent, then the organisation can justifiably meet the cost, as long as they have sufficient funds. In general terms, organisations should not sign contracts, take on leases or employ staff without the funds already in place and without taking suitable advice.

With regard to employment and the possibility of employment tribunals it is possible to minimise the risk. Always use written contracts which abide by the current legislation and set out exactly what is agreed. Take up references and follow an agreed recruitment procedure. Make sure that working conditions and procedures are safe and that staff and volunteers understand them. Check that you are adequately insured. Think about how much money you set aside as reserves to meet potential liabilities such as redundancy costs. When in doubt about something, always seek appropriately qualified professional advice.

It is possible for charity trustees to take out trustee indemnity insurance. This is supposed to cover trustees against any claims made against them where they acted reasonably and prudently but they are found to have made the wrong decision. In practice the policies can be expensive and/or full of exclusions. A very useful information sheet [OG 100 C4] on indemnity insurance is available from the Charity Commission.

The Charity Commission recommends that you seek legal advice. This is particularly applicable if you need to transfer assets and contracts.

Within the Charities Bill there is a new corporate legal form for charities-Charitable Incorporated Organisation [CIO]. This will give charities a legal identity and limit members liability. If you are presently an unincorporated association then in order to become a CIO you will only need to register once with the Charity Commission, you will not need to register with Companies House at all. For existing charitable companies there will be a fast track process to register as a CIO. According to the Home Office it is unlikely that the CIO process will be up and running before spring 2007.

Further Help

Charity Commission

www.charitycommission.gov.uk Helpline 0845 300 0218

Companies House

The relevant company registration forms can be ordered directly from

Companies House. An *Incorporation Starter Pack* and copies of most forms

can be downloaded and/or ordered directly from the web site at:

www.companies-house.gov.uk Telephone 0870 3333 636

Law Works

A group of solicitors who provide pro bono support to voluntary organisations and will give free legal advice in this area.

www.probonogroup.org.uk Telephone 0870 7775601

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