

# Setting up a Company

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This guidance note is designed to provide general guidelines to assist Northern Ireland based voluntary organisations which are considering incorporating as a company limited by guarantee. These notes are not a definitive guide to the law. NICVA recommends that any voluntary organisation wishing to set up a company should take advice before finalising any documentation. Organisations which go through the process of incorporating as a limited company should also read NICVA's Advice Note 5: Running a charitable company for guidance on the legal administrative requirements for companies.

## **CHARITABLE STATUS**

It is possible for a charitable organisation to become a company limited by guarantee. If a charitable company is being established, particular care should be taken in drafting the articles of association to ensure that they meet the requirements of charity law.

## **KEY FEATURES OF A COMPANY LIMITED BY GUARANTEE**

### **Legal Identity**

A company has a 'legal personality' separate from the individual people who are involved in the company. This means a company can 'own' property in its own name, can enter into contracts, and can sue (and be sued) in its own name. This is convenient because normally there is no need for individual people (acting as 'holding trustees') to hold any property in their own names, or to enter into contracts, etc, on behalf of their organisation. Unincorporated organisations (ie any organisation that is not a company) must make arrangements for property to be held by individual people, who hold such property in their names on behalf of the unincorporated organisation.

A company is like a 'person' in the eyes of the law. That means that the directors of a company are not normally held personally liable if the company becomes insolvent. The company - legally 'a person' in its own right - is responsible for its own debts and liabilities. However, company directors must bear in mind that if they give 'personal guarantees' to a lender or in respect of any contract, then they would be held personally liable. The directors of a charitable company need not call themselves the board of directors and may continue to call themselves the management committee, or other relevant name.

A company may be perceived as more 'professional' than a simple unincorporated association. The corporate structure is well known in the business sector. Some funders may be more willing to give a grant to a company than to an unincorporated body.

The law governing companies is clearer and more detailed than that applying to unincorporated associations.

### **Limited Liability**

The members of the company are not normally legally responsible for its debts beyond the amount they have guaranteed, usually a nominal amount eg £1.

### **Democratic Structure**

Members have rights and responsibilities and can elect directors. Directors have powers and responsibilities under the Companies Act 2006.

### **Cost**

The cost of setting up a company is higher than the cost of setting up an unincorporated body.

For example, a fee is usually charged for drafting the memorandum and articles of association - the 'governing document' of a company.

There is a registration fee when registering the company at Companies House and producing the accounts in company format may also cost more.

There are ongoing costs of money and time in administration of the company once the company is up and running. For example, there is an annual fee for making annual returns to Companies House (ie details of the company's directors, secretary and official address). Dissolving a company also involves time and expense.

### **Bureaucracy**

The Companies Act 2006 is the new UK wide legislation which regulates companies in Northern Ireland (NI) replacing the NI Orders 1986-1990. The need to comply with company law could be a burdensome responsibility on members of a voluntary management committee. Most voluntary organisations incorporate when they secure funding and are able to pay workers with the time and know-how to ensure that company administration is dealt with efficiently.

### **Public Accountability**

Companies' details are stored on the index of company names (the index) which is open to the public. For a small fee anyone can look up details about an individual company. This is really an advantage in most cases - it assists those voluntary organisations which believe in openness and accountability to the general public.

### **Audit**

All companies are required to carry out an audit unless they qualify as a small or medium sized company. See NICVA's Advice Note 8: Accounting for NI Charities for full details.

### **DIFFERENT TYPES OF COMPANY AVAILABLE TO VOLUNTARY ORGANISATIONS**

- (1) **Company Limited by Guarantee**  
This is the most common type of company in the voluntary and community sector. The members' liability is limited to the amount they have promised to contribute to the company's assets if it is wound up – usually a nominal sum such as £1. One or more persons may form such a company by subscribing to the Memorandum of Association.
- (2) **Company Limited by Shares**  
This type of company is common in the commercial sector but it is also used by some charities as the legal entity for their trading subsidiaries with the charity being a share holder. The Companies Act 2006 now requires that there must be at least one natural person as a Director. Other types of company found in the commercial sector are the public limited company and private unlimited company
- (3) **Community Interest Company (CIC)**  
The Community Interest Company (CIC) was introduced in 2007 as a new corporate structure for non-charitable social economy enterprises that want to use their profits and assets for the public good. The CIC may be a company limited by guarantee, a private company limited by shares or a public

limited company limited by shares and will have to register with Companies Registry with memorandum and articles of association and a community interest statement to confirm that the company will provide benefit to the community. It does this by describing its proposed activities, who the company will help and how. CICs are regulated by the UK wide CIC Regulator who can provide information and advice on setting up and running a CIC.

(4) Charitable Incorporated Organisation (CIO)

A new legal structure specifically for charities was introduced by the Charities Act (NI) 2008 called the Charitable Incorporated Organisation (CIO). The CIO is similar in some ways to a company limited by guarantee offering protection of trustees from personal liability without the need for dual registration with the company and charity regulators. The CIO will be regulated by the Charity Commission for Northern Ireland. Secondary legislation is required to make it a viable option for charities and it is envisaged that it will not be available before 2010. In the meantime, charities may incorporate as a company limited by guarantee and then convert to a CIO when it is available.

## **CHANGING FROM AN UNINCORPORATED ASSOCIATION TO A COMPANY LIMITED BY GUARANTEE**

The initial discussion as to the pros and cons of incorporating an organisation can be carried out well in advance of actually going about doing it. That will leave plenty of time for preparations to be made.

Paperwork can be drawn up in advance, but the date for incorporation and transfers should not be set until legal advice has been sought and it is clear that there are no adverse consequences to incorporation.

### **Set up new organisation**

A new organisation (the company) will have to be set up. The first step is to draft suitable articles of association for the new company (NICVA can assist with this). If the organisation is a charity, then the Inland Revenue (Bootle) should be sent a copy of the draft articles for approval before the company is registered. That way, the organisation can be sure that it is still going to be a charity after the new company is set up.

### **Transfer assets and legal obligations**

The assets and legal obligations of the existing unincorporated association need to be transferred to the new company. Most constitutions contain a power to make payments to another organisation with the same or similar objects, and/or a procedure for dissolving the organisation and transferring any remaining assets to another similar organisation.

## **Follow existing constitution**

Such procedures (in the constitution of the existing association) must be followed carefully. If an association does not have such procedures in its constitution, then all members of the association will have to agree to any transfer of assets.

## **Draw up formal deed of transfer**

In all except the most simple situations, a formal deed will need to be drawn up, setting out the relationship between the old and the new bodies. This is likely to:

- Include information and assurances about the extent of assets and liabilities transferred (warranties)
- Give promises by the new organisation, for example to protect members of the old unincorporated body against later claims (indemnities)
- Authorise the new organisation to enforce obligations or collect monies due to the old organisation, generally by power of attorney
- Oblige each side to preserve and make available for inspection all key records or documents
- Provide for any steps that need to be taken after the transfer date, such as notification of various parties.

## **Transfer land or buildings**

If the original body owns or occupies land or buildings, they must be transferred by a legal agreement. The transfer of a lease or tenancy agreement may require the consent of the freeholder or superior landlord (one above the landlord with whom the organisation has the lease or licence). All such transaction should be handled by a solicitor. Investments should also be formally transferred.

## **Transfer other property**

Movable property such as equipment, furniture and vehicles can be transferred simply by giving them over. Note, however, that guarantees on equipment may be invalidated if the equipment is transferred to another owner.

## **Transfer staff**

Transfer of staff to a new organisation is covered by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). Regardless of the number of staff, their contracts, statutory rights and virtually all contractual rights are transferred automatically to the new company.

Employees should be notified of the identity of their new employer. There is no break in employment, so employment rights related to length of service are not affected.

## **Transfer pensions**

As a result of the Occupational Pension Schemes (Employer Debt) Regulations 2005, employers wishing to withdraw from a multi-employer pension scheme must fund any remaining debt on what is called a "full buy-out basis". This essentially means that they must fund the amount it would cost to buy out the members' benefits. This gives members greater protection should an employer stop participating in a pension scheme. Any change of structure, such as that which occurs when an organisation changes from an association to a company, or merges with another organisation, would trigger this debt. If your organisation is part of a multi-employer pension scheme (such as The Pensions Trust Growth Plan for example) you should contact a solicitor and your pension's provider for advice.

## **Transfer equipment, contracts etc**

If the unincorporated body has equipment, leases, hire purchase agreements, service contracts, maintenance contracts or contracts to provide goods and services, then it must seek the consent of the parties it made the contracts with to be able to transfer them over to the new company.

This is called a 'novation agreement' and ideally contains a clause releasing the original signatories from their obligation for the contract. A solicitor is well placed to advise on all such issues.

## **Inform funders**

Funding, grant-aid arrangements, service agreements, contracts and other funding arrangements which were given or promised to the original unincorporated association must be transferred to the new company. The funders should be made aware at an early stage of the plans to incorporate. Their consent may be vital. Indeed, it may be decided that incorporation would harm the organisation if funders were not prepared to deal with the new company.

## **Inform donors**

Donors who give tax effectively should be informed of the identity of the new company.

## **Open new bank accounts**

All bank and building society accounts will have to be in the full registered name of the new company, exactly as it is on the certificate of incorporation. Accounts may have to be closed and new ones opened up. This may not be necessary if the new company has exactly the same name as the old association. The bank will be able to advise further on its own particular procedures with this.

## **Transfer insurances**

Insurances must be transferred to the new company, or the old policies cancelled and new ones taken out. It would be essential to take advice from the insurers on this issue.

## **Assets and debts**

If debts outweigh the assets being transferred to the new company and the new company does not have adequate assets of its own to outweigh the debts, they cannot be transferred because this would mean that an insolvent company was being created.

## **Register members**

Membership – there is no automatic transferral of membership. Members of the original organisation must reapply for membership of the new company and must be entered on the register of members of the company.

## **Stationery requirements**

Stationery and written materials may need to be overhauled so that the correct information is on them (company law sets out regulations for the things that must appear on company stationery). Printed stickers with the new information may be used to achieve this, so long as they completely cover all references to the old name or old charity reference number. It is illegal to use stationery without the company number and details of the charitable status of the company.

## **Inform utility companies**

Accounts for gas, electricity, credit cards, as well as accounts with contractors or suppliers, etc, have to be transferred to the new company even if the name of the new company is exactly the same as the old association.

Everybody who does business with the body, or who may have a claim against it, must know they are now dealing with a corporate body rather than an unincorporated association. If this is not done properly, it could lead to the limited liability of the company's members being undermined.

### **Notify statutory bodies**

Statutory bodies such as the Revenue (HMRC) need to be notified for PAYE and National Insurance purposes.

## **REGISTERING A COMPANY**

The final version of the memorandum and articles of association must be typed in numbered paragraphs on white A4 paper with margins of at least 10mm (20mm on the edge which is to be bound).

The memorandum of association (the memorandum) is signed by the subscribers, usually the first directors, who agree to become the first members of the company and the signatures witnessed. Both the memorandum and articles of association are then sent to Companies House with the forms listed below and the fee (currently £40). The original of the memorandum and articles is kept at Companies House so the organisation should keep its own copies and should keep photocopies of all documents and forms sent to Companies House. The memorandum, once filed with Companies House, cannot be amended but the articles, which contain the details of how the company is to be run, may be changed from time to time in accordance with the procedures set down in the articles.

## **COMPANY FORMS**

Since 1 October 2009 there is a new set of company forms and documentation which is required by the regulator.

### **Form IN01 - Application to register a company**

This form includes a statement of compliance with the requirements for forming a company which must be signed by every subscriber to the memorandum (it is no longer necessary to get a solicitor's swearing in form). It also names the company secretary and the first directors and gives the address of the registered office of the company. Some people may not be eligible to be a company director (eg on grounds of bankruptcy or some criminal offences). Directors of a company must be at least 16 years of age, however, if it is charitable then the minimum age of 18 would apply.

### **Form NE01 - Exemption from requirement as to use of 'limited' on name**

This form must be completed and filed with Companies House if the company wants to avail of the exemption from having to use the word 'limited' in its name, as most voluntary organisations will be.

### **Form AA01 - Change of accounting reference date**

This form sets out the date when the company's reference period (financial year) will end, which may be submitted any time within the nine months after incorporation.

When the registrar of companies is satisfied that the company's name is acceptable and that all paperwork is in order, a registration number is allocated and a certificate of incorporation issued (usually takes about two weeks from the time the forms are submitted). From the date on the certificate, the company comes into existence. A private company can start operating as soon as it is incorporated.

## **FIRST STEPS AFTER INCORPORATION**

### **Transfer or discharge assets, liabilities and obligations**

Before winding up the original association it must ensure that all its assets, liabilities and obligations are either transferred or discharged (ended). Even if both organisations have exactly the same objects, will carry on the same activities, and involve exactly the same people, the company is a new organisation, so everything must be legally transferred from the old association to the new company. If this is not done properly, problems could arise later about ownership of assets, liabilities and who is responsible for outstanding obligations.

Once the unincorporated body is ready to transfer the assets, liabilities and obligations, the new company should then pass an ordinary resolution to accept the transfer of the original organisation's assets, and to take responsibility for the original organisation's debts and its employees' contracts of employment either at a meeting of the directors or at a general meeting of the company's members

### **Dissolve existing organisation**

If all of the activities, assets and obligations have been transferred to the new company then it is usual for the original organisation (the unincorporated body) to be dissolved. This should be done in accordance with the dissolution clause in the constitution and a minute held of this meeting.

### **Administrative requirements**

A company is required by law to adhere to certain administration requirements including establishing and maintaining registers of members, directors and secretaries.

It is strongly recommended that you read NICVA's Advice Note 5: Running a charitable company which outlines the various legal requirements for companies including details on stationery, proxy voting, registers and accounting requirements. It also includes the duties and potential personal liabilities faced by company directors.

### **Companies House**

Second Floor  
The Linenhall  
32-38 Linenhall Street  
Belfast  
Northern Ireland BT2 8BG  
Tel: 0303 1234 500  
(national call rate)  
Website: [www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

Companies House produces a range of guidance notes and online forms.

### **The CIC Regulator**

CIC Team  
Room 3.68  
Companies House  
Crown Way  
Maindy  
Cardiff CF14 3UZ

Tel: 029 20346228. This is a 24-hour voicemail service.

Email: [cicregulator@companieshouse.gov.uk](mailto:cicregulator@companieshouse.gov.uk)  
Website: [www.cicregulator.gov.uk](http://www.cicregulator.gov.uk)

### **FOR FURTHER INFORMATION, PLEASE CONTACT:**

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Tel: 028 9087 7777  
Email: [cas@nicva.org](mailto:cas@nicva.org)  
Website: [www.nicva.org](http://www.nicva.org)

All of NICVA's advice notes can be downloaded from [www.nicva.org](http://www.nicva.org) as well as the most up to date information about company law and charity law reform.

NICVA's governance and charity advice staff can assist with drafting suitable memorandum and articles of association as well as offering specialised training on: *Setting up a Company Limited by Guarantee and The Duties of the Directors of a Charitable Company.*

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