

# Running a Charitable Company

NOVEMBER 2009



This advice note is designed to provide a general guide on the administration requirements that charities and other not for profit organisations which are incorporated as companies limited by guarantee must adhere to. It also includes the latest provisions of the Companies Act 2006 which organisations may wish to avail of. In addition, it outlines the duties and potential liabilities of directors. Please note that this guidance is not a definitive guide to the law.

This advice note will help your committee/board to adhere to Principle 2 of the Code of Good Governance: The board's responsibilities, legal requirements and obligations

## DIRECTORS

The directors are the persons charged with running a company on behalf of the members. Some people will not be eligible to become a director, for example, an undischarged bankrupt. The new minimum age for directors is 16, however for a charitable company it is unlikely that anyone under the age of 18 will be eligible to serve as a charity trustee. Whenever a director joins the company, Form AP01 should be completed and when a director retires, Form TM01 should be completed and both sent to Companies House.

Directors are responsible for ensuring that certain administration and reporting requirements are implemented and adhered to as outlined below.

## MEMORANDUM AND ARTICLES OF ASSOCIATION

The Companies Act 2006 has introduced a new format for a company's governing document. For companies incorporated after 1 October 2009, the memorandum will contain only the company name and a list of the subscribers whereas the articles contain the details of how the company is to be run. The memorandum, once filed with Companies House, cannot be amended but the articles, may be changed from time to time in accordance with the procedures set down in the articles. Companies using the old style memorandum and articles (incorporated prior to October 2009) may continue to do so but if changes are going to be made, companies may consider adopting the new style and with it incorporating the new changes in company law (NICVA's Governance and Charity Advice Service can assist with this).

## REGISTERS AND RECORDS

A company is required to keep the following registers and records at its registered address:

### 1. Register of Members

This is a very important document and should not be ignored as it is the members who have the right to vote and control the company. This can be in a bound or unbound book or on a computer so long as it can be printed out and must be updated within 14 days of a name being added to the register or any details changed. Draw up and send out company membership forms and/or have members sign the register of members. The register

- should contain the name and address of every company member, the date of becoming a member AND the date of ceasing to be a member

- should state the class of membership if the company has different categories of membership
- must be updated within 14 days of a name being added to the register or any details changed
- must have an alphabetical index if there are more than 50 members and the register is not alphabetical, indicating where to find each member's name in the register
- must keep former company members on the register for ten years (previously 20 years) after they have ceased to be a member
- must be open for inspection by the public every working day. The right to inspect and take information from the register overrides the Data Protection Act, however a person requesting such information must provide their name and address and the purpose for which the information will be used. If the company thinks the information is not going to be used for a proper purpose then it must apply to the court (within five days) in order not to comply with the request.

## 2. Register of Directors

Every time a director joins the company the following details should be entered in the register of directors:

- Full name, with forenames in full
- Any former name(s)
- Usual home address. Since 1 October 2009 directors can use service addresses instead of their home address, but a separate register of directors' residential addresses will still have to be kept by the company (not open to the public)
- Nationality, date of birth, occupation
- Details of directorships of all corporate bodies currently held (or in previous five years)
- The date elected as a director
- The date of ceasing to be a director.

## 3. Register of Secretaries

Since April 2008 there is no longer a requirement to have a company secretary unless the articles of association state that there must be one. However the duties of the company secretary will still have to be carried out so companies may choose to continue to have one. Due to the administrative nature of the role, an employee is permitted to be appointed as company secretary. Please note that this does not make them a director and they should not be treated as such unless a director is appointed in this role. If a company has a company secretary the following details should be entered in the register of secretaries:

- Full name, with forenames in full
- Any former name(s)
- Service address
- The date appointed as company secretary
- The date of ceasing to be company secretary.

## 4. Register of Charges

A charge is a mortgage or other loan secured on the company's assets. If the company borrows any money on a mortgage or by a secured loan, make sure this is recorded and notified to Companies House within 21 days.

The register should include:

- The date of the charge
- Name of the parties
- Details of the property secured by the charge
- Amount of the charge
- The date it is paid off
- Must give Companies House notice of the charge and also inform them when it's paid off. Obtain relevant forms from Companies House.

## 5. Minute Books

Separate minute books should be kept for general meetings and directors meetings. Members of the company have the right to see the minutes of all General Meetings but do not have the right to the minutes of meetings of the directors. Minute books:

- Must be kept in a form which leaves it very difficult for anyone to alter them (take steps to make it easy to detect falsification)
- If kept in an unbound book then each page should be numbered and initialled by the chairperson or secretary (errors should never be covered by correction fluid but rather, crossed out and initialled)
- Any alteration to the minutes should be initialled by the secretary or chairperson.

## DISCLOSURE OF COMPANY DETAILS

A company must include certain information on most of its communications:

### 1. Company Name

A company is required to write its full registered name on all notices (of meetings, etc), official publications, cheques, invoices, receipts, letters of credit and conveyance whether in hard copy, electronic or other form. For example, NICVA's full registered name is Northern Ireland Council for Voluntary Action.

A company is also required to display its full registered name at its registered office and any other place or location where it carries on its business (except a location which is primarily used for living accommodation). A nameplate is not required however the name must be displayed continuously and must be easily seen by any visitor, it must be visible to the naked eye - on an electrical display for example.

If the premises are shared by six or more companies, each company is only required to display its registered name for at least 15 continuous seconds at least once in every three minutes. This will allow for electrical displays with alternating names.

### 2. Full Company Details

Companies are required to show the following company details on all business letters, order forms, emails, faxes and websites in a legible form:

- the company's full registered name
- for a company which does not use 'limited' as part of its name, it must state that it is a limited company
- the country where the company is registered (eg 'Registered in Northern Ireland')
- the company's registration number
- the address of the company's registered office
- if the word 'charity' or 'charitable' does not appear in the name of the company, the company must state that it is a charity, eg 'accepted as a charity for tax purposes by the Inland Revenue, ref no ...'

If the address of the registered office of the company changes then all of the above must change as well as informing Companies House within 15 days of the change.

### 3. Notice of winding up

If the company is intending to wind up then it must include a statement that it is being wound up on every invoice, order for goods, business letter or order form whether on hard copy, electronically or any other form, and on all of its websites.

## **ACCOUNTING AND AUDIT REQUIREMENTS**

Company accounts must be kept in accordance with company and charity legislation. They will include a balance sheet and profit and loss account for each financial year of the company, giving a true and fair view of the company's affairs, profits and losses.

Depending on the gross income of the company a full audit, partial audit or independent examination will have to be carried out on the accounts. Charitable companies in Northern Ireland are still subject to the audit regulations contained in the Companies (NI) Order 1986 as Companies Act 2006 does not make any provisions for charitable companies.

*See NICVA's Advice Note 8: Accounting for charities, for full details on audit and examination requirements.*

Accounts (whether audited or unaudited) must be returned to Companies House each year on time, within nine months of the end of the accounting reference period. They must be sent to the members before they are filed to Companies House.

Fines will normally be levied against a company and its directors if a company is late filing its annual accounts with Companies House. Late filing penalties are currently:

- Not more than one month late: £150
- Between one month and three months late: £375
- Between three and six months late: £750
- Over six months late: £1,500.

If a company wants to change the date of its financial year, Form AA01 'Change of accounting reference date' will have to be filed at Companies House.

A company is not permitted to change its financial year if the accounts are already overdue or extend the accounting period beyond 18 months (unless the company is in administration).

## **ANNUAL RETURNS**

The annual return which gives details of the company and its directors is separate from the company's annual accounts and must be returned to Companies House within 12 months of the last return (could face prosecution if returned late or not at all). The deadline is usually within 28 days after the anniversary of the incorporation date.

It is now possible to file the annual return (and other forms) online via WebFiling which is cheaper than filing it in hard copy. The Regulator would encourage companies to register for WebFiling but advises that companies should sign up for its PROOF (PROtected Online Filing) Scheme to help reduce the risk of fraud.

## **GENERAL MEETINGS**

General meetings or company meetings are meetings of the members of the company (annual or otherwise) and should be held in accordance with the requirements of the articles of association.

### **1. Notice of General Meetings**

A company is required to send a notice of a general meeting stating the date, time, place and business to take place to every member entitled to vote and the auditors. The new rules from the Companies Act reduce the notice period from 21 days to 14 clear days however if the articles state 21 days then you must give this notice or change the articles.

Clear days' notice is required which means that the day on which the notice is issued and the date of the meeting should not be counted as part of the 14 days. In addition, you should allow 48 hours for the notice to arrive by post: if posted at the end of the week you should not calculate non-working days however you are permitted to count non-working days as part of the 14 day period.

The new rules also state that 90%, rather than 95%, of members can agree to hold a general meeting on short notice, however, if the articles state 95% then you must abide by this.

The notice should tell members of their statutory right to appoint a proxy.

## **2. Annual General Meeting (AGM)**

Whilst the Companies Act 2006 dispenses with the need for a private company to hold an AGM, a company is still required to do so if stipulated in the articles (usually within 15 months of the previous AGM). It would also be considered good practice for charitable companies to continue to hold an AGM.

### **2.1 Before the AGM**

At least two months before each AGM, make sure:

- The audited/examined accounts for the previous year are ready, remember to give your auditor/examiner sufficient time to carry out their work
- Make sure the register of members is up to date
- Prepare nomination forms (if relevant) as they may need to be sent out long before the AGM so that the nominees can be sent out along with the notice
- Send out a notice of the AGM to all members and the auditors.

Send the following along with the notice:

- Copies of any proposed ordinary or special resolutions to be put to the meeting
- A list of the present directors and details of those who will be seeking election or re-election
- The minutes of the last general meeting.

### **2.2 At the AGM**

- Present the annual accounts for consideration by the members
- Present the annual report which must give a fair review of the development of the company. (This should include the names of the directors, describe the company's principle activities, any changes in those activities or in its assets, and planned future developments)
- Ensure that all voting and other business is done according to whatever rules are contained in the articles
- Appoint the auditor/examiner for the incoming year (if required to by the articles)
- Make sure proper minutes are taken
- Take a supply of forms and at the end of the meeting, get the new and retiring directors to fill them in
- Update the register of directors.

### **2.3 After the AGM**

- Write up the minutes
- Send copies of any special resolutions to Companies House within 15 days
- Attach a copy of any special resolution to the original memorandum of association and any copies issued to members from then on
- Send forms to Companies House with details of the retiring and the newly elected directors within 15 days

- Send the annual accounts and report to each member before the accounts are filed at Companies House.

### 3. General Meetings

The new regulations also stipulate that there is no longer a need for private companies to hold a general meeting, except where there is a motion to dispense with an auditor or a director or if required to do so by the articles. A written resolution can be passed in place of the general meeting (see 5.3 below).

Send a copy of the proposed resolutions to be put to the meeting along with the notice of the meeting to all of the members and the auditors of the company and after send copies of the special resolutions to Companies House in the same way as for an AGM.

### 4. Proxy Voting

All company members now have a statutory right to appoint a proxy to attend, speak and vote (either on a show of hands or on a poll) on their behalf at general meetings of the company - even if the articles say otherwise.

All companies need to:

- Update/create proxy forms to include the right of the proxy to speak as well as to attend and vote or create a proxy
- Update the notice of the general meeting to tell members of their statutory right to appoint a proxy (directors risk being fined if they fail to do so)
- State on the proxy form the date and/or time when it has to be returned before the general meeting (the return date must not be more than 48 hours before the meeting)
- Consider updating the articles of if proxies haven't been permitted in the past, to avoid confusion.

## 5. Resolutions

Resolutions are agreements or decisions made by the members of the company which can only be passed by the members either in a general meeting or by written resolution. Private companies are no longer required to pass extraordinary or elective resolutions, but instead are only required to pass ordinary or special resolutions:

### 5.1 Ordinary Resolution

An ordinary resolution requires a simple majority vote 50%. It can be used for any decision (not requiring a special resolution) such as electing directors.

### 5.2 Special Resolution

A special resolution needs a 75% majority vote (eg to change the name of the company, or to make a change to its articles).

### 5.3 Written Resolution

A written resolution enables a company to pass a resolution without having to hold a general meeting. The Companies Act 2006 provides that it is no longer necessary for companies to have unanimous approval - even if the articles say otherwise - to pass a written resolution. The company can circulate a written resolution to pass a special resolution to be signed or agreed by 75% of members entitled to vote or 50% of voting members signing or agreeing a written resolution to pass an ordinary resolution. Written resolutions cannot be used to remove a director or an auditor.

Companies can use electronic communications (in accordance with the provisions for the use of electronic communications below) to

seek and receive agreement for a written resolution. In the case of an electronic version of the written resolution, it is sufficient that the member signifies agreement to as opposed to signing a paper copy.

If the company passes any special or written resolutions, copies must send copies to Companies House within 15 days after they are passed. (Failing to register resolutions with Companies House is a criminal offence for which the directors may be fined.)

## **6. Electronic communications**

New provisions of the Companies Act also came into force which allow for the wider use of e-communications for formal correspondence between the company and its members. This now means that any information or documents (it was previously limited to certain specified documents) can be communicated by email or any other electronic form including websites.

The company must acquire the consent of the member to receive the information in this way and fulfill the requirements of the Act.

The consent can relate to all general information or in specific circumstances and it can be withdrawn at any time. This could potentially result in savings for those companies which have large numbers of members.

## **DIRECTORS' DUTIES**

In addition to the reporting and administration requirements outlined above, directors have duties outlined in law. The Companies Act 2006 provides a statutory statement of directors' duties which replaces the common law rules and equitable principles which have been developed over the years. The following duties are owed by directors to the company:

### **1. Duty to act within their powers**

The directors must ensure that all decisions are within the scope of the objects and powers of the memorandum and articles (or the articles if incorporated after 1 October 2009) of the company and ensure that proper resolutions are passed.

### **2. Duty to promote the success of the company**

Directors are required to act in good faith in a way which they consider would be most likely to promote the success of the company for the benefit of achieving the company's purposes. Directors have to consider the long-term implications of their decisions, and have to take into account the interests of employees, suppliers, customers, the community and the environment, maintaining high standards of business conduct and the need to act fairly between members of the company.

### **3. Duty to exercise independent judgement**

A director is required to exercise independent judgement but not contrary to any provisions authorised in the memorandum and articles (or articles if incorporated after 1 October 2009).

### **4. Duty to exercise reasonable care, skill and diligence**

Directors must exercise the care, skill and diligence which would be exercised by a reasonably diligent person: with the general knowledge, skill and experience that the director has or which may reasonably be expected of a person carrying out the functions carried out by a director in relation to the company.

## 5. Duty to avoid conflicts of interest

A director must avoid a situation in which he/she has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. This applies in particular to the exploitation of any property, information or opportunity. It will be up to the directors to exercise their own judgement to resolve any conflicts that arise.

An ex-director is still subject to this duty if he/she became aware of a conflict of interest before he/she ceased to be a director.

*See NICVA's Advice Note on Conflicts of Interest for a sample conflicts of interest policy and register of interests.*

## 6. Duty not to accept benefits from third parties

A director is not permitted to accept a benefit from a third party conferred by reason of them being a director or his/her doing (or not doing) anything as a director.

## 7. Duty to declare an interest in proposed transactions with the company

Directors must declare to the other directors the nature and extent of any interest, direct or indirect, in a proposed contract, transaction or arrangement with the company (this includes when a person connected with the director stands to benefit).

**Connected person** - according to company law, a connected person includes a member of a director's family (his or her parents, children, step-children, civil partner and the children of a civil partner. Also includes someone with whom the director lives as a partner in an enduring family relationship including that person's children or step-children) and a company which the director

is connected or a firm which he or she is a partner. For a full definition of a connected person, see section 252-255 of the Companies Act 2006.

Directors of charitable companies have additional duties (arising from trust law and charity law) which include:

- Act together and in person and not delegate control of the charity to others
- Act strictly in accordance with the charity's memorandum and articles of association
- Act in the charity's interests only and without regard to their own personal interests
- Manage the charity's affairs prudently and take a long-term as well as a short-term view
- Not (without explicit authority) derive any personal benefit or gain from the charity of which they are charity trustees
- Take proper professional advice on matters on which they are not competent.

## COMPANY DIRECTORS' POTENTIAL LIABILITIES

In company law the term 'director' includes a 'shadow director'. That is 'a person in accordance with whose directions or instructions' the directors of a company are accustomed to act. Company directors are not normally held personally liable if their company becomes insolvent, but they may be held personally liable under certain circumstances:

### 1. Negligence

If a director fails in his or her 'duty of care', this may be considered to be negligence. The standard of skill expected of a director is the standard of skill which could reasonably be expected from a person with that director's knowledge and experience, that is, it is relevant to that person's knowledge and skill.

Failure to take reasonable care is negligence. Examples of negligence:

- Signing a cheque or authorising a payment without asking why a payment is being made.
- Discovering that another director has been dishonest or negligent but not reporting this to the members of the company.
- Allowing one director to take complete control without the proper authorisation.

## 2. Fraudulent trading

A director could be personally responsible for the debts of the company if he/she 'traded fraudulently'. Examples of fraudulent trading:

- Carrying on business with the intention of defrauding the company's creditors
- Carrying on operating with the intention of defrauding another person's creditors.
- Any other fraudulent purpose.

Fraudulent trading is a criminal offence. A director found guilty of fraudulent trading could be personally liable to make such contributions as the Court thinks proper in the circumstances or even imprisoned.

## 3. Wrongful trading

Under the Insolvency (NI) Order 1989 a director may be personally liable if the company has gone into insolvent liquidation and he/she had carried on business after he/she knew or ought to have known that the company was heading for insolvency. The Court can order a director found guilty of wrongful trading to repay money and property or contribute such sum as the Court thinks is just.

## 4. Breach of statutory or fiduciary duty

Failure to comply with company law may result in criminal offences, even for innocent technical mistakes. These are usually punishable by fines which can range from hundreds of pounds for minor offences to fines of thousands of pounds for serious offences, or even imprisonment. Companies House will normally warn directors if they are consistently failing to comply with regulations.

## 5. 'Ultra vires' acts

These are acts which are beyond the scope of the objects and powers of the company. Where this happens and a company suffers loss as a result, the directors may be held personally liable, unless their actions were ratified afterwards by special resolutions of the company's members or if the actions were found to be acts to fulfil a previous legal obligation of the company.

## 6. Acts in breach of the charitable objects

This could be failing to ensure that the money or property of a charitable company was disposed of only in furtherance of the charitable objects of the charity.

## 7. Acts which took place when an individual was disqualified from acting as a company director

The Courts can disqualify individuals from acting as a company director. This is done by a 'Disqualification Order'.

**FOR FURTHER INFORMATION, PLEASE CONTACT:**

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Website: [www.nicva.org](http://www.nicva.org)

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

NICVA's governance and charity advice staff can assist with redrafting memorandum and articles of association into the new form articles to include the latest provisions of the Companies Act 2006 as well as offering specialised training on The Duties of the Directors of a Charitable Company.

**Companies House**

1st Floor, Waterfront Plaza  
8 Laganbank Road  
Belfast BT1 3LR  
Tel: 0845 604 8888  
Website: [www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

Since 1 October 2009, Companies Registry amalgamated with Companies House to form Companies House Belfast. Since this date there has been a new set of company forms which are available for download from the regulator's website:

**[www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)**

Companies House also produces a range of online guidance notes.

**[www.icsa.org.uk](http://www.icsa.org.uk)**

**Institute of Chartered Secretaries and Administrators**

Useful guidance notes for companies including the use of electronic communications.

**[www.opsi.gov.uk](http://www.opsi.gov.uk)**

**Office of Public Sector Information**

For more detailed information on the new legislation visit the Companies Act 2006

**[www.diycommitteeguide.org](http://www.diycommitteeguide.org)**

Online governance resources mapped to the principles of the Code of Good Governance.

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