

MEMBER SERVICES

Advice Note 6: Setting up a Company

These guidance notes are designed to provide general guidelines to assist Northern Ireland based voluntary organisations which are considering incorporation. 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 from a solicitor before finalising any documentation.

THE FOUR LEGAL STRUCTURES USED BY VOLUNTARY ORGANISATIONS

(1) Association

An ‘unincorporated association’ comes into being whenever several people join together to carry out a mutual purpose, other than for profit. A temporary social gathering or a family gathering will not be an unincorporated association because there will be no intention to create legal relations (*Source: Unincorporated Associations, Law and Practice by Jean Warburton*).

Constitution is the document that governs an unincorporated association (ie an organisation that is not a company). Its democratic aspect is popular with modern community development organisations. The constitution is treated in law as being ‘like a contract between the members of the association’.

(2) Trust

A Trust is an unincorporated type of organisation without any members, just a number of trustees (two, three or more). To be charitable, a trust must have at least three trustees.

Trust Deed is the document that governs a trust. The trust deed names the trustees and provides for the administration of the trust. A trust is usually established by an individual or group wishing to settle their own property or specific property on charitable trusts.

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Every effort is made to ensure that the contents of this document are accurate, but the advice given should not be relied on as a definitive legal statement.

(3) **Company**

A company is an organisation which exists in its own right in the eyes of the law, separate and distinct from the individuals who are involved in it. A company is like a 'person' in law. It can sue (or be sued) in its own name, it can enter into contracts, and can own property in its own name.

Memorandum and Articles of Association are the governing documents of a company. The first part (the Memorandum) contains the name, objects and powers of the company. The second part (the Articles) contains rules for holding meetings, admitting members, dissolving, etc. A company is established when the Memorandum and Articles are signed and registered.

(4) **Industrial and Provident Society (IPS)**

This is a society carrying on an industry, business or trade. The IPS structure is appropriate if mutual, community-business, or co-operative ideals are to be incorporated. This is the structure associated with a co-operative society or a business conducted for the benefit of the community (eg a housing association). Like a company, it is a 'corporate body'. However, the registration fees for an IPS are more costly than those for registering a company. A minimum of seven members is required to set up an IPS.

Rules – this is the document that governs an IPS.

For further information about the range of legal structures available to voluntary organisations, see NICVA's *Advice Note 3: Legal Structures*.

DIFFERENT TYPES OF COMPANY

(1) **Company Limited by Shares**

This type of company is common in the commercial sector. The members own shares in the company and the members' liability towards the company is 'limited' to the amount **unpaid** on shares held by them. This enables the commercial company to invite persons to subscribe to the company by purchasing shares which are only partially paid, enabling the company at a later stage to call for further funds from its members to the maximum of the unpaid amount (one or more persons may form such a company by subscribing to the Memorandum of Association).

(2) **Unlimited (Share) Company**

There is no limit on the members' liability (two or more persons may form such a company by subscribing to the Memorandum of Association).

(3) Company Limited by Guarantee

This is the most common type of company in the voluntary 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.

(4) Public Company

The members' liability is limited to the amount unpaid on shares held by them, and which must have an authorised share capital of at least £50,000 at the time of incorporation. Two or more persons may form such a company by subscribing to the Memorandum of Association.

(5) Off-the-Shelf Companies

These can be bought from a company registration agent, company formation agent, solicitor or accountant. Off-the-shelf companies are nearly always limited by shares rather than by guarantee so care should be taken to get the right sort of structure if an off-the-shelf company is purchased. Registration agents keep their fees low by providing a basic service. They give little or no advice. Purchasers are expected to understand exactly what they want, specify it and find out for themselves the duties of company directors.

An off-the-shelf company may be useful if there is a need for great speed in setting up a company (eg in order to take on a lease). The company name can later be changed and the Memorandum and Articles of Association can be amended. However, in the meantime, the organisation may be operating a totally inappropriate type of company (eg non-charitable) so such a step should only be taken as a very last resort.

NICVA's Member Services team offers detailed information on setting up a charitable company limited by guarantee.

CHANGING FROM AN UNINCORPORATED ASSOCIATION TO A COMPANY

Set up new organisation

A new organisation (the company) will have to be set up. The first step is to draft a suitable Memorandum and Articles of Association for the new company. If the organisation is a charity, then the Inland Revenue (Bootle) should be shown a copy of the draft Memorandum and Articles 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.

Dissolve existing organisation

Usually, the existing organisation is dissolved. The company will have its own company number, and may have a new Inland Revenue number. Legally, it is a new charity.

Transfer or discharge assets, liabilities and obligations

Before winding up, the original association 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.

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 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 should 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.

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 and a legal adviser.

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 Inland Revenue (for Income Tax and PAYE purposes) and the Department of Health, Social Services and Public Safety (re National Insurance) need to be notified.

CHARITABLE STATUS

It is possible for a company also to be a charity and vice versa. If a charitable company limited by guarantee is being established, particular care should be taken in drafting the Memorandum of Association (especially the objects of the company). It is best to use a suitable model to make sure that the Memorandum and Articles meet the requirements of charity law. The draft should be submitted to the Inland Revenue (Bootle) for approval before the company is registered.

A model Memorandum and Articles for a charitable company is available from NICVA free of charge.

See NICVA's *Advice Note 1: Charitable Status* for further details.

CHANGING FROM AN UNINCORPORATED BODY TO A COMPANY – KEY ISSUES

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 there are no adverse consequences to incorporation.
- The Inland Revenue (Bootle) has approved the draft Memorandum and Articles of Association of the new company.

No transfer of assets should take place until:

- Legal advice has been sought, and the new company has been registered at the Companies Registry.
- The new company has passed (at a directors' meeting) or at a general meeting of the company's members 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.

REGISTERING A COMPANY

Northern Ireland companies must register at:

Companies Registry
1st Floor Waterfront Plaza
8 Laganbank Road
Belfast BT1 3LR

Tel: 0845 604 8888

www.companiesregistry-ni.gov.uk

The final version of the draft 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 and Articles of Association are signed by the subscribers and the signatures witnessed. They are then sent to the Companies Registry with the forms listed below and the fee (currently £35). The original of the Memorandum and Articles is kept at Companies Registry so the organisation should keep its own copies and should keep photocopies of all documents and forms sent to the Companies Registry.

Copies of all the forms are available free of charge from Companies Registry.

FORMS

Companies Form 21 names the Company Secretary and the first directors and gives the address of the registered office of the company.

Companies Form 23 is a statutory declaration of compliance with the requirements for forming a company. The Company Secretary, a director, the solicitor or another person who has advised the

company about its formation certifies on this form that all the legal requirements for setting up the company have been met.

The person who signs it is certifying:

- That the Memorandum and Articles have been properly drawn up
- That the objects set out in the Memorandum accurately reflect what the company is to do.
- That the directors and the Company Secretary named on Form 21 are legally eligible to hold the posts.

Form 23 must be sworn in the presence of a commissioner for oaths, notary public, justice of the peace or solicitor. A fee is charged for this service. The date on which Form 23 is sworn must be on or after the dates on which the other paperwork is dated.

If the company is exempt from having to use the word 'limited' in its name, as most voluntary organisations will be, **Companies Form 40(5)(a)** must be sworn in the same way as Form 23.

Companies Form 233 is the final form (it must be signed by a company director or secretary named in form 21) which may be submitted any time within the nine months after incorporation. Form 233 is the 'notice of accounting reference date' (ARD), which sets out the date when the company's accounting reference period (financial year) will end.

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.

DISCLOSURE OF COMPANY DETAILS – LEGAL REQUIREMENTS

As soon as a certificate of incorporation is received, a company must immediately include certain information on its communications. A company is required to write its full registered name on all notices (of meetings, etc), official publications, cheques, endorsements, invoices, receipts, promissory notes, bills of exchange, letters of credit and conveyance whether in hard copy, electronic or other form.

In addition, 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’ or ‘a charity for tax purposes, Inland Revenue ref no’.

COMPANY ADMINISTRATION

On incorporation:

- (1) Buy a common seal (only if needed).
- (2) Display the certificate of incorporation at the registered office.
- (3) Display a nameplate outside the registered office. It should say 'Registered office of'. This requirement does not apply if the company is exempt from using the word “limited” in its name.
- (4) Make sure all the details of the management committee members have been sent to the Companies Registry.
- (5) Draw up and send out company membership forms.
- (6) Make sure you have all the necessary registers and record books:
 - Register of members.
 - Register of directors and secretary.
 - Register of charges.
 - Minute books of general meetings and directors’/committee meetings.
- (7) Complete and return Form 233 within nine months of the date of incorporation.

Twelve months after incorporation:

Arrange for the accounts to be prepared and audited, and the annual returns form filed at Companies Registry.

Within eighteen months after incorporation:

Hold the first Annual General Meeting of the company.

Annual General Meetings – at least two months before each AGM, make sure the audited accounts for the previous year are ready to be sent out at least three weeks before the meeting unless the company has passed an 'elective resolution' to dispense with doing this. Make sure the annual report is ready to send out along with the accounts.

At least three weeks before each AGM, send out a notice and agenda of the Annual General Meeting to all members and the auditors. Send the following along with the notice:

- A copy of the annual accounts (audited unless the company claims exemption).
- A copy of the annual report.
- Copies of any proposed ordinary, special or extraordinary resolutions to be put to the AGM.
- Copies of resolutions of any kind to be put by members plus an explanatory statement if requested.
- A list of the present directors and details of those who will be seeking election or re-election.
- The minutes of the last AGM.

At each AGM, make sure that all voting and other business is done according to whatever rules are contained in the Articles of Association. Make sure proper minutes are taken. Take a supply of forms and at the end of the meeting, get the new directors to fill them in.

Within 15 days after each AGM, send copies of any special, extraordinary or elective resolutions to the Companies Registry. Make sure that a copy of any special, elective or extraordinary resolution is attached to the original Memorandum of Association and any copies issued to members from then on. Send forms to Companies Registry with details of the retiring and the newly elected directors.

Things to remember during the year

- Each time a director resigns or joins the company, send a copy of the appropriate form to the Companies Registry.
- Make sure each annual return is filed within twelve months of the last return.
- If you change the registered office of the company, you must inform the Companies Registry within fifteen days of the change.
- If the company holds an extraordinary general meeting, and passes any special, elective, extraordinary or written resolutions, you must send copies to Companies Registry within 15 days after they are passed. (Failing to register resolutions with Companies Registry is a criminal offence for which the directors will be fined.)
- Ensure the register of members and the register of directors and secretary is kept up to date.
- Ensure proper minutes are kept of all committee meetings, and general meetings.
- If the company borrows any money on a mortgage or by a secured loan, make sure this is recorded and notified to Companies Registry within 21 days.

RESOLUTIONS

There are six types of resolutions a company can pass:

- (1) Ordinary – ordinary resolutions require a simple majority vote, can be used for any decision such as electing directors, but cannot be used for decisions needing 3, 4 or 5 type resolutions set out below.
- (2) Ordinary but needing special notice – the proposer must give the company 28 days notice of such a resolution, eg a proposal to dismiss a director or auditor.
- (3) Special – special resolutions need a three-quarters majority vote at a meeting of which 21 days notice has been given to members (eg to change the name of the company, or make a change to its Memorandum or Articles).
- (4) Extraordinary – extraordinary resolutions need a three-quarters majority (eg to wind up a company due to insolvency).
- (5) Elective – elective resolutions must be passed at a meeting of which 28 days notice has been given to members. The notice must state that an elective resolution is proposed and what it says. An elective resolution can be cancelled at a later date by an ordinary resolution. An elective resolution requires 100% of all the members of the company to vote for it at a general meeting. It can be passed to enable a company to:
 - Dispense with the holding of Annual General Meetings in future years.
 - Dispense with the laying of reports and accounts before general meetings.
 - Dispense with having to appoint auditors each year.
 - Change the majority needed to agree to hold a meeting at short notice to not less than 90% of the members entitled to attend and vote at the meeting.
- (6) Written – a written resolution enables a company to pass a resolution without holding a meeting. The company can circulate a written resolution to be signed by **all** members entitled to vote at a general meeting.

Which type of resolution is needed depends on what is being decided. The first five types above can be passed at an AGM or an extraordinary general meeting. Resolutions can be put by either the committee or the members. The Secretary must normally be given six weeks notice of a proposed resolution. The company must notify all members of any proposed resolutions.

Duties of Company Directors

NICVA's Advice Note 5: Companies explains what is expected of company directors in the context of a charitable company. The pamphlet also explains the potential personal liability faced by company directors.

GLOSSARY OF TERMS RELATING TO COMPANIES

Promoter The person/s involved in setting up a company, regardless of whether they get involved in the company when it is finally set up. A solicitor or other person who assists in the formation of a company by ‘acting in a professional capacity’ is not a promoter.

Memorandum and Articles

The governing document of a company (in two parts). The Memorandum (which must be set out in a specified format) states the name, location of the registered office and the objects of the company and the limit on the members' liability. The Articles set out the company's internal rules and procedures.

Model formats for company Memoranda and Articles of Association are set out in the **Companies (Tables A-F) Regulations (Northern Ireland) 1986**. NICVA provides a model Memorandum and Articles for charitable companies based in Northern Ireland (or voluntary-managed not-for-profit companies).

Subscribers

The Memorandum ends with an ‘association clause’ which is signed by at least one (and usually more) person/s to state that they want to form a company. The same subscribers also sign the Articles. Their signatures on the Memorandum and Articles must be witnessed by someone who understands what they are witnessing (usually the person should be at least eighteen years old).

The subscribers are the company’s founder members, but they have no special rights unless stated in the Articles. Typically, the subscribers are the people who want to form the company, but in the case of an off-the-shelf company, they may be two companies, or employees of the agents who form the company. In this case they will resign their membership as soon as the company is sold to the organisation which purchases it.

The first directors

The Articles might say that the subscribers are the first directors of the company or that they appoint the first directors, or that the first directors are the people named in the Articles or are the people named as directors in the appropriate 'Form' supplied to the Companies Registry when the company is being registered.

Unless the Articles specify otherwise, the first directors constitute the governing body of the company until new directors are elected eg at the first Annual General Meeting, or at a general meeting held before the Annual

General Meeting or until new directors are appointed or elected according to procedures set out in the Articles.

Charity trustee

An individual (always a volunteer) who manages the affairs of a charity is viewed in law as a charity trustee. This applies to the directors or management committee of a charitable company as well.

Governance

Defined in the dictionary as the art or skill of managing an organisation, or “the system by which an organisation is managed and controlled”. A voluntary management committee or board is responsible for the governance of a voluntary organisation.

Not-For-Profit

A phrase used to describe organisations which do not have a profit motive, and whose objects are for the benefit of the public or a sub-section of the public who are in need.

Non-Profit-Distributing

Refers to organisations which do not divide up profits among their members or anyone else, but apply them to achieve the objects of the organisation.

FOR FURTHER INFORMATION, PLEASE CONTACT:

NICVA Member Services
61 Duncairn Gardens
Belfast BT15 2GB

Tel: 028 9087 7777
Fax: 028 9087 7799
Email: charityadviceofficer@nicva.org
Website: www.nicva.org

The following publications are available in NICVA’s reference library:

A Practical Guide to Company Law for Charities, 1991 ed by Bev Cross, published by Directory of Social Change in association with Sheffield Law Centre, ISBN 0-907164-73-0

Company Handbook and Registers for Voluntary Sector Companies Limited by Guarantee by Sinclair Taylor and Martin Solicitors (1999 and 2003)

The Law and Practice of Meetings by Ian Sherman (ninth edition), published by Sweet and Maxwell, ISBN 0-421-53910-0

The Voluntary Sector Legal Handbook (second edition) by Sandy Adirondack and James Sinclair Taylor, published by Directory of Social Change, ISBN 1-900360-7

Companies Registry produces a range of guidance notes and online forms. They can be contacted at:

Companies Registry
1st Floor, Waterfront Plaza
8 Laganbank Road
Belfast BT1 3LR

Tel: 0845 604 8888

Website: www.companiesregistry-ni.gov.uk

Companies Registry guidance notes include:

New Companies

Choosing a Company Name

Exemption from Using the Word 'Limited' in a Company Name

Directors and Companies Registry

The Duties and Responsibilities of a Company Secretary

Accounting Reference Dates

Late Filing Penalties

Liquidation and Insolvency