INFORMATION SHEET 1.5

An Independent Charity No. 1075060

BECOMING A CHARITABLE COMPANY

This information sheet is aimed at registered charities who are thinking about becoming a charitable company limited by guarantee. (If you are unsure about the structure to adopt, see Information Sheets 1.2 Definitions and Structures in the Voluntary Sector and 1.7 Charitable Incorporated Organisations. If you are charitable but not yet registered as a charity and want to become a company, you should register the company first. This will save you having to re-register and transfer assets at a later date.

WHAT IS A COMPANY LIMITED BY GUARANTEE?

There is no separate legal status for organisations which are not companies, unless your charity is registered as a Charitable Incorporated Organisation (CIO - see Information Sheet 1.7). This means that if your organisation is not registered as a company, it is legally seen as a collection of individuals.

Any contracts will have to be signed and agreed by individuals rather than by the organisation itself and everyone is individually responsible for what the organisation does. This applies equally to large registered charities and small community groups, which are all known as unincorporated associations.

If you register as a company, the organisation gets a legal identity separate to that of the members and you become an incorporated association.

Documents are signed in the name of the company and if someone wants to sue then they, in most cases, sue the company not an individual member(s).

There are two main types of company:

1. Companies where the members are anyone who has bought shares in them.
2. Companies limited by guarantee. Here the company membership is based on the same membership as your current organisation and every member has a single vote.

   Members guarantee that they will pay a nominal amount (usually anything from £1 to £10) to meet any debts if and when the company is wound up.

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

WHO ARE THE COMPANY DIRECTORS?

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. In a charitable company they are both trustees and directors.

Company Secretary

Companies may also choose to have a Company Secretary if they wish, although it is not compulsory. A Company Secretary is typically responsible for making sure that the company complies with company law, such as ensuring that the annual accounts are sent off on time, that Companies House is informed when the directors (trustees) change and that members receive proper notice of meetings. This role is different to the committee secretary role and they do not, for example, have to take the minutes or do all of the typing.

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FREQUENTLY ASKED QUESTIONS

Q: Will we have to change our name or add the word 'limited' at the end?

A: 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 on www.companieshouse.gov.uk.

Q: Why become a company?

A: Charities often become companies when:

- they regularly enter into commercial contracts
- they own or lease a building or employ a large number of staff
- the charity needs a separate legal identity to take on legal responsibilities
- they deliver charitable services under contractual agreements

Q: What are the advantages?

A: The charity gains a separate legal identity so that it can hold property and take legal action in its own name.

Also, you can limit the personal liability of members to pay any outstanding debts if the company is wound up. This is the sum that members guarantee to pay when they join the company. However, directors (trustees) are still liable under charity law if they are found to have acted unreasonably or fraudulently.

Q: What are the disadvantages?

A: There are some additional costs involved in setting up and registering a company. There are also ongoing expenses in submitting the annual returns and accounts to Companies House.

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

You have to fill in two sets of annual returns, notify Companies House when a director leaves or joins and work to both charity and company regulations.

Company law is more severe than charity law. There are fines on both the directors (trustees) and the company if you fail to get your annual accounts (nine months after the end of your financial year) and other requested information in on the due date.

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

Your current membership will have to re-register and sign up as members if they want to stand as directors (trustees) 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.

Q: Are there other ways of limiting our liability?

A: First you need to consider how likely it is that the trustees will become personally liable for the charity's debts.

If they have acted in good faith and have not

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been negligent, the charity can meet the cost. In general terms, charities should not sign sign contracts, take on leases or employ staff without the funds already in place and without taking suitable advice.

Perhaps the major concern is – are we going to be sued, say in an industrial tribunal? There are simple precautions you can take to minimise the risk:

- Always use written contracts which abide by the current legislation and set out exactly what is agreed
- When employing staff, take up references and act on them
- 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
- It may be possible when you are signing a contract to limit your potential liability to the assets of the charity
- When in doubt about something, always seek appropriately qualified professional advice. This should help ensure that you don't take decisions which lead you into liability

TRUSTEE INDEMNITY INSURANCE

It is possible for charity trustees to take out a form of insurance known as 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 are expensive, full of exclusions and rarely pay up. If you are thinking about taking out this insurance, your constitution must specifically allow you to pay for it. If not, you will need permission from the Charity Commission.

THE PROCESS

By registering as a company, you are effectively setting up a new organisation. The basic process is:

1. Register the company
2. Register the company as a new charity
3. Transfer the assets from the old charity to the new charitable company
4. Wind up the old charity

There are a number of steps you will need to take to complete this process. These are:

Step 1

Your committee must first have a full discussion of the advantages and disadvantages of becoming a company. Be absolutely certain that this is the route you want to take.

Remember, the company is still subject to charity law and cannot spend the charity's money on 'uncharitable' activities. This includes covering debts incurred because trustees have acted unwisely.

Does your constitution give you the power to pass on your assets to the proposed company? You should talk to your funders and check that they have no problems with you becoming a company (and a new charity).

If the charity is in debt, the Charity Commission is unlikely to re-register you without guarantees of re-payment.

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Step 2
Discuss it with your membership, either at your Annual General Meeting or at a Special Meeting. Get the members' full agreement in principle before moving on as you will eventually be asking them to join a new (company) organisation.

Step 3
You will need to draw up and agree a new governing for the company. In company law this is known as the Memorandum and Articles of Association.

The Memorandum of Association gives details of those who wish to form the company and agree to be members of the company.

The Articles of Association deal with how the company is run and managed. You would normally keep your existing charitable objects for the new company.

Charitable companies need to include items in their Articles of Association not required by company law so you should not use a standard company format. VODA can advise you on this.

Step 4
Send your proposed company Memorandum and Articles to the Charity Commission and ask for them to be checked before you register as a company.

Step 5
Call a meeting of your members and have the Memorandum and Articles agreed and adopted. These have to be signed by everyone who is a member of the new company at this time, not just the committee.

If you have a lot of members, it makes sense and saves time to ask a small number to join the new company and sign the constitution. Everyone else can join later once you have registered.

Step 6
Register the company with Companies House. See information sheet 1.3a Legal Checklist for forming a Company Limited by Guarantee, which gives you further details about filling in the Companies House application form.

Step 7
Register the company as a new charity with the Charity Commission. Remember that this could take some time and it is not automatic. Also, the Charity Commission will not normally re-register a charity that is in debt.

Step 8
Set up a new membership system and start to get members for the company.

Step 9
Call a special meeting of the members of your original charity. Agree to transfer the assets from the charity to the charitable company. See Information Sheet 1.6 Incorporating an Existing Charity for more details about how to dissolve the existing charity and transfer the assets.

Remember that, although you are keeping the same name, you are setting up a completely new organisation, therefore you will also need to have prepared:

- new bank accounts
- letterheads including your new company and new charity registration numbers
- the transfer of equipment guarantees
- insurances for the new company
- new employment contracts for staff
- agreement to transfer the lease on your offices

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Some things such as property deeds, leases, shares need to be transferred using a legal document. We recommend that you also draw up a full written list of all the other assets you are transferring so that nothing is left in the ownership of the old organisation.

Step 10
Wind up the original charity. Call a meeting of members of the original charity at which you can present the final accounts showing a nil balance. Have them approved by the meeting and then approve a resolution to wind up the old organisation.

RELATED DOCUMENTS

1.1 Starting a Group
1.2 Definition and Structure in the Voluntary Sector
1..3 Writing Your Constitution
1.4 Registering as a Charity
1.5 Becoming a Charitable Company
1..6 Incorporating an Existing Charity
1.7 Charitable Incorporated Associations
1.8 Charitable Status and Sport

PLEASE NOTE
The information in this document is for guidance only and should not be considered legal advice.

IF YOU NEED FURTHER HELP...

VODA can help you to transfer clauses from your existing constitution into a new Memorandum and Articles. We can also advise on ways that clauses can be updated if necessary.

You should not use an off the shelf Memorandum and Articles from someone not used to working with the voluntary sector, as these may not contain all the clauses you need for a charitable company.

There are a series of guidance booklets available, free of charge from Companies House.

Applications to become charitable companies can be made electronically or paper based. Prices vary accordingly.

Application forms or guidance booklets can be ordered by telephoning 0303 1234 500 or downloaded from www.companieshouse.gov.uk.

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