



# Incorporating a Charity

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## 1. INTRODUCTION

- 1.1 It is very usual for community/voluntary organisations and charities to start as unincorporated associations with a simple constitution. However these organisations do not have separate legal identity and so the individual committee members can have unlimited financial and legal liability. Some of this liability can be covered by specific insurance but policies will not cover everything and committee members may still be sited in litigation. So this type of organisation is suitable where the level of financial and legal risks are low. However once activities and legal relationships expand, e.g. employing staff, operating a building, signing leases and contracts then organisations should consider incorporating. Incorporated bodies have their own legal identity and so the organisation can sign agreements/leases/contracts, take action in the courts, etc in its own name (rather than a named individual as for unincorporated bodies). Also it provides financial limited liability, in most cases to the assets of the organisation. The most common legal form for community/voluntary organisations and charities to use is a company limited by guarantee. However some will register as a Community Interest Company, otherwise known as a CIC, (and can chose either a company limited by guarantee or shares) or as an Industrial and Provident Society (IPS). However charities can only use a company limited by guarantee structure and in the near future Charitable Incorporated Organisation (CIO). This factsheet gives some brief guidance to how to convert an unincorporated charity to a charitable company. The Charity Commission have some guidance on their website: *Incorporating an existing charity as a company*.

## 2. OVERVIEW OF CONVERSION

- 2.1 Unfortunately it is not possible to simply convert an unincorporated charity to a charitable company you have to create the new company first, get it registered as a charity with a new number and then transfer all the assets, staff, liabilities, agreements, activities etc. to the new charitable company.
- 2.2 Below is a suggested series of steps to make sure that the incorporation is as smooth and efficient as possible.
- i. Decide to incorporate
  - ii. Check you can transfer assets and who must agree to it

- iii. Agree a timetable
- iv. Chose the right legal structure
- v. Select a name
- vi. Agree your new constitution
- vii. Register the new company with Companies House
- viii. List all the assets and liabilities
- ix. Register the new company with the Charity Commission
- x. Formal agreements with third parties to the transfer of any contracts and agreements to the new charitable company
- xi. Formal agreement by both organisations to transfer of assets and liabilities
- xii. Inform all interested parties of the change
- xiii. Retain or dissolve the old charity

### **3. DECIDE TO INCORPORATE**

- 3.1 You should review your current activities and plans for the future and assess the level of financial and legal risk involved. Then consider the advantages and disadvantages of incorporating and decide if it is in the best interests of the charity to do so.
- 3.2 Being a company will mean a bit more time spent on administration and having to use accruals accounting but also the need for more openness and transparency e.g. lists of members and directors must be available to the public if asked for.
- 3.3 If you need more information and help in assessing the cost benefit then contact BCVS.
- 3.4 As part of the decision process you might want to consult your members and other stakeholders, including funders, to see if they support the idea of incorporation or not. It would be a complete waste of time and effort if later on members vote against a decision or a funder refuses to transfer its funding.
- 3.5 If you have an auditor/independent examiner talk to them about your plans so they can advise you about accounting procedures and how to minimise their costs.
- 3.6 If your charity provides a pension to employees then check with your pension provider about any implications and procedure for transferring the scheme to the new company. You may need independent professional advice if the transfer will be complicated and/or involves some significant costs.
- 3.7 Depending on the size of the charity setting up a small steering group will probably be the best way forward.

#### **4. CHECK YOU CAN TRANSFER ASSETS AND WHO MUST AGREE TO IT**

- 4.1 You first need to check that your existing constitution allows you to wind up your charity and transfer your assets to the new charitable company.
- 4.2 If your constitution does not have a dissolution clause the Charity Commission accept that charities can gift to another charity with similar objects to further their own objects.
- 4.3 If there is a dissolution clause make sure you understand any procedure set out such as time period and who must decide (is it members, trustees, any outside body?). Check if there are any restrictions on where any remaining assets can be given, some constitutions name specific charities. If your dissolution clause seems unsuitable, or may make the transfer difficult, then you could change them (you could do this at the same meeting that agrees the dissolution and transfer). Remember you need the Charity Commission's prior approval before changing them.
- 4.4 Dissolution clauses very often set out time periods for decisions to be made. If it does then make sure your timetable incorporates this.

#### **5. AGREE A TIMETABLE**

- 5.1 Once you have decided to incorporate then decide on a timetable.
- 5.2 A key date to start with is the date of the transfer of the assets and liabilities, the Effective Date, i.e. when the new charitable company takes over running the activities etc.
- 5.3 Since the Charity Commission can take up to 8 weeks to register a new charity you should plan allow at least three months as a minimum but more like 6 months to ensure everything gets done.
- 5.4 If you are regulated by an external body such as Ofsted you will need to speak to them about the possible need to register the new organisation and how long this will take.
- 5.5 If there are no external reasons for a particular date then using the year end will reduce the need for additional accounting (see 15.2), and the tax year to reduce HMRC administration if you have staff.
- 5.6 Once you have agreed the Effective Date then you can work back. In your timetable consider if there are existing dates to be incorporated such as trustee meetings, member meetings and AGMs, meetings with funders etc.

#### **6. CHOSE THE RIGHT LEGAL STRUCTURE**

- 6.1 In the Introduction other legal structures were mentioned e.g. IPS and CIO. Consider the pros and cons of each to see which is best. Again seek advice from BCVS or elsewhere if unsure which structure is best for your charity.

- 6.2 The rest of this factsheet assumes you have chosen to become a company limited by guarantee.

## 7. **SELECT A NAME**

- 7.1 If you want to use your existing name you need to check it is not already being used by an existing company. You can check on the Companies House website the list of all registered companies. As long as your name is not very similar to an existing company there should not be a problem.
- 7.2 However you might want to take the opportunity to change your official name. Consider the pros and cons of this. Does your existing name already have a strong 'brand' i.e. people recognise and trust it and know what it does? Or does your current name no longer really describe what you do?
- 7.3 If you wish to change your name not only will you need to check the Companies House website but also the Charity Commission website to see if any existing charity has a similar name.
- 7.4 If on checking you find there is a charity or company with the same name then you could 'tweak' your name such as adding the name of the town or neighbourhood your charity works in.

## 8. **AGREE THE NEW CONSTITUTION**

- 8.1 A company's constitution since 2009 is called its Articles of Association and the Charity Commission publishes a model on their website (BCVS have a Word version which can be edited). Also some national umbrella bodies publish models which may be suitable (these are listed on the Charity Commission website).
- 8.2 However you do not have to use these, especially if you have developed particular ways of working. Therefore you can change clauses in the model Articles but if you make significant changes you will probably need legal advice to make sure they are legal. Beware using someone else's Articles if they are not based on a model or have not been checked by a legal expert as they may not be fully compliant with the law!
- 8.3 One important thing to consider is the Objects. If your current one is still suitable then they can be copied. However if you wish to change them then you need to make sure that they are compatible with your current ones so there will be no problem in transferring the assets. If the new Objects are significantly wider than your current ones then when you transfer your current assets they may have to be designated as restricted (e.g. if your current Objects are to help older people in Bournemouth but want to change this to the whole of England then you will probably have to ring fence these assets in the new charity to local work). One way around this is to get the Charity Commission to make a 'scheme' to enable the new charitable company to use the current assets for the new objects. You may need professional advice.

- 8.4 The task of drafting the Articles is best done by a small group but the final version should be shared with all the trustees to ensure they are happy with the structure and procedures of the new company.

## **9. REGISTER THE NEW COMPANY WITH COMPANIES HOUSE**

- 9.1 You can now register the new company. Unless you are in a rush then registering by post is the cheapest option. You need to download and complete the form IN01 from the Companies House website and send it with your final version of the Articles and the signed Memorandum (see 9.4) and the incorporation fee (currently £40).

- 9.2 To complete form IN01 you will need to decide the:

- i. first directors
- ii. first members who will be the guarantors
- iii. registered office

- 9.3 Usually the current trustees will be the first directors and members. Companies no longer need to have a company secretary but can if they wish. A company must have a registered office that Companies House and the public can contact which must not be a PO Box.

- 9.4 The first directors will also need to sign the Memorandum of Association which is just a single page and is downloadable from the same Charity Commission webpage as the model Articles.

- 9.5 As this is a new organisation membership cannot be automatically transferred. Also members will be your guarantors against any unpaid debts if the company is wound up. Therefore you will need to get new membership forms signed by members.

## **10. LIST ALL THE ASSETS AND LIABILITIES**

- 10.1 A complete detailed list needs to be made of all the assets and liabilities of the existing charity including:

- i. Property - freehold and leasehold
- ii. Equipment
- iii. Contracts
- iv. Employees
- v. Pensions
- vi. Special trusts and restricted funds
- vii. Endowments
- viii. Insurance

- ix. Bank accounts and investments
  - x. Debtors (those who owe the charity money) and creditors (those the charity owes money to)
- 10.2 If you have a written agreement or contract with another party such as a lease, loan, maintenance contract, etc you must seek their permission to renew the agreement (legally called 'novate') with the new charitable company on the same conditions. Therefore you will need to contact these parties to see if they will be happy to do so and any procedure to be followed.
- 10.3 If you employ anyone they will have the right to be transferred to the new charitable company if the same services are being delivered. This right is called **TUPE** and there are strict rules on how staff should be consulted and transferred. Guidance is available on the BIS website ([www.bis.gov.uk/tupe](http://www.bis.gov.uk/tupe)). Start talking to staff very early on so they feel informed and you can identify any potential difficulties early on.
- 10.4 If your charity has any restricted funds then you will need the permission of the funder to the transfer to the new charity. Again early conversations will help identify any difficulties.
- 10.5 If there are any guarantees on equipment check to see if the transfer will invalidate these. If so take expert advice.
- 10.6 If the value of liabilities are greater than the assets then you will not be able to set up the new charitable company unless the new company has other assets to cover the difference, as you cannot set up an insolvent company.
- 11. REGISTER THE NEW COMPANY WITH THE CHARITY COMMISSION**
- 11.1 The new company can then register with the Charity Commission which must now be done on line with some required documents sent by post.
- 11.2 In order for the Commission to register the charity they will need proof that the company has, or will have £5,000 in the near future. You can explain that you are incorporating and that assets will be transferred in the near future and attach your last accounts.
- 11.3 Once you receive your charity number you are now ready to start the actual transfer.
- 12. FORMAL AGREEMENTS WITH THIRD PARTIES TO THE TRANSFER OF ANY CONTRACTS AND AGREEMENTS TO THE NEW CHARITABLE COMPANY**
- 12.1 Using your list in 10.1 you can now get formal agreements from third parties to transferring contracts and agreements.
- 12.2 You can now also open a bank account.

12.3 If you are regulated by an external body such Ofsted or the Care Quality Commission you can start to register the new organisation if required to. In some cases you may need to get the charitable company registered first before you can start operating e.g. childcare.

### **13. FORMAL AGREEMENT BY BOTH ORGANISATIONS TO TRANSFER OF ASSETS AND LIABILITIES**

13.1 Depending on your dissolution clause the existing charity now makes the formal decision to transfer all assets and liabilities. This formal meeting could be held well before the actual event if you are confident about everything being ready by the agreed transfer date. The resolution could also empower the trustees to agree the actual date of dissolution and transfer of assets and agreements.

13.2 It is best if there is a formal agreement between the two bodies for the transfer.

13.3 If you have restricted funds which make it difficult to contact the funders (e.g. a lot of individuals) or an endowment fund then you will need to contact the Charity Commission to make a scheme for the new charity to become a corporate trustee of the funds.

13.4 In some cases a 'vesting declaration' could be used to make it easier to transfer all assets and liabilities, for instance where a landlord is resistant to novating a leasehold agreement. For more information go to the Charity Commission website.

13.5 You may want to keep some cash in your old charity account to cover any uncleared cheques and any unsettled bills.

13.6 The Charity Commission gives some guidance as how to show the transfer of the assets and funds in the accounts of the new charitable company.

13.7 If the transfer of assets temporarily puts the charitable company over the audit threshold (currently £500,000) then the Commission can give an exemption for that year so saving the charity a full audit fee rather than an independent examination.

13.8 The new company will also need to formally adopt policies and procedures. The easiest way is to minute at a meeting the adoption of those used by the old charity.

### **14. INFORM ALL INTERESTED PARTIES OF THE CHANGE**

14.1 Once you have transferred all the assets and liabilities the new charitable company is now up and running and so you will need to inform all those who need to know as well as others you think it would be good to know. This may also be a chance to do some positive PR work to raise the profile of your charity, etc.

- 14.2 As you are a new organisation you will need to update all your stationery and other means of correspondence such as newsletters, websites and e-mails. By law all letters, websites and e-mails need to have the company name, number, the part of the UK the company is registered in and registered office address. The company name must also be publically displayed at your registered office. Any correspondence that asks for funding or support must carry the charity number. Therefore to make sure you are covered make sure all electronic and printed material has all the above bits of information on them.
- 14.3 It is perfectly acceptable to use stickers that completely cover the old information on existing stationery.
- 14.4 If you employ staff then you will have to open up a new PAYE scheme with HMRC.

## 15. RETAIN OR DISSOLVE THE OLD CHARITY

- 15.1 Depending on your circumstances the two organisations may have to operate in parallel, this is perfectly acceptable. The unincorporated organisation could decide to appoint the new charitable company its 'agent' to run its operations on its behalf, so making day to day operations easier, but remember that legally these operations are the ultimate responsibility of the old charity until there is actual transfer of assets and agreements to the new one.
- 15.2 The Charity Commission recommends as good practice that the old charity should produce accounts and a trustee report covering the period from its last annual report until its closure. This will help to evidence continuity between the old and new organisation.
- 15.3 After the transfer it is most likely you will not have to keep the old charity and so you can go through the process of deregistering it with the Charity Commission
- 15.4 However there may be a need to keep the existing charity, for instance if you are aware that it will attract future legacies, or other gifts where you know the donor will not give to the new charity. Also there may be some liabilities that the old charity may face and so needs to retain some funds to meet these.
- 15.5 After a charity has closed the trustees must arrange for the accounting books and records to be kept for at least six years after the year they were made. Agreement with the new charity to keep these is the obvious solution.

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