

To incorporate or not to incorporate?

Things to consider:

- Is the charity going to be an operating charity?
- Is the charity or will the charity be quite large?
- Does the charity or will the charity have employees?
- Does the charity or will the charity undertake activities?
- Does the charity deliver charitable services under contractual agreements?
- Where the charity has contractual commitments does it regularly enter into commercial or high value contracts?
- Does the charity own or rent freehold or leasehold land or other property?
- Does the charity hold any bank accounts?
- Does the charity do business with non-charitable entities and banks?

Why incorporate?

If the answer to any of the above is yes then the risks to trustees may be high and continuing with the unincorporated structure may not be the best option, particularly where the assets and liabilities of the charity have grown since the charity was first formed.

The main reason for incorporating an Unincorporated Charity is to limit the personal liability of the trustees.

Some or all of the Charity trustees must undertake transactions on behalf of the body. Title to land and buildings must be held in the name of one or more individuals on behalf of the charity. Charity trustees may have personal liability for the charity's actions and unlimited liability when it is wound up.

Charity trustees risk personal liability where they are in breach of duty or act negligently irrespective of whether the charity itself is an incorporated or an unincorporated body. The other main area of concern is contractual liability. If trustees fail to comply with the terms of a contract (even if they have acted entirely properly) a liability can arise. The risk in respect of contractual liability depends on how the charity is constituted.

This element of risk should be considered very seriously and if deemed high the limitation of personal liability that comes with "incorporation" will begin to look more attractive to the charity's trustees.

Where the charity itself is a company, then contractual liabilities to third parties will be limited to the value of the company's assets. Provided the trustees (i.e. the directors of the company) have acted properly they will face no personal liability even if the assets of the company are insufficient to meet the claim.

Next steps?

This will depend on the type of organisation you choose and whether you decide to set up your charity as an Unincorporated Association, a Charitable Trust, or a Limited Company.

Limited Company

If a charity is a large organisation, which will own property, employ staff, provide charitable services under contractual agreements and enter into commercial contracts, it may be appropriate to form a limited company. Most charitable companies are Companies Limited by Guarantee.

Practical considerations

- Set-up of new corporate body in the form of a company limited by guarantee and registration at the Companies Registry
- Preparation of the new constitution or Memorandum and Articles of Association (approved by the Attorney General)
- Filing of forms to be signed by the new directors/trustees to incorporate the company at the Companies Registry
- Ongoing Statutory requirements and regulation for Registered Charities
- Filing of annual returns
- Preparation, auditing and filing of accounts
- Notification of changes
- Possible registration under DNFBP

Details of any changes to the Charity, its governing instrument and officials must be filed at the Central Registry, within one month after the change. Changes to be notified include:

- Changes of officials and their addresses and other contact details
- Changes of the charity's address and other contact details
- Changes to the governing instrument (before making any changes to a governing instrument, it is advisable to ensure that these changes will not affect the charity's charitable status)
- (Where a registered charity is also required to file details of these changes at the Companies Registry, the Central Registry will accept a copy of the relevant notification, e.g. Form 9N, provided that it is submitted to the Central Registry accompanied by the first page of the [Schedule 3 notification form](#) and which is signed by the Secretary or an existing Director)

Trust

A Trust is run by trustees, and its governing instrument is a Trust Deed.

Unincorporated Association

This is the most usual type of organisation for small to medium charities. The charity is run by a committee, and its governing instrument (the document which sets out the objects of the charity and how the charity will be run) is a constitution (or Rules).

Ongoing Regulation for Registered Charities

Preparation, auditing and filing of accounts

By virtue of the Charities (Accounts) (Amendment of Amounts) Order 2011 audit/examination requirements are:

Charity's Gross Income in the Statutory Requirement for External Examination of Charity's Accounting Year Accounts

Less than or equal to £25,000	No requirement for external examination (charities still have to file accounts with the General Registry within 6 months of year end.)
Greater than £25,000 but less than or equal to £250,000	Full Audit or an independent examination by an accountant, a qualified 'independent examiner' or a person approved by the First Deemster
Greater than £250,000	Full Audit by an accountant or a person approved by the First Deemster

However, it should also be remembered that, in addition to these statutory requirements, the charity will also have to comply with any specific account requirements detailed within its governing document (e.g. Constitution/Trust Deed/Memorandum and Articles of Association).

Not to incorporate?

It may be appropriate to remain unincorporated or to establish an unincorporated association where the organisation:

- is to be relatively small in terms of assets;
- has a membership;
- is to be run by charity trustees who will be elected by members or appointed to hold office for fixed terms;
- wants to take account of the views of local residents and organisations through membership or as users;
- wishes to carry out its work wholly or partly through the voluntary effort and contributions of its members

Advantages

Disadvantages

Little/no set up costs, least bureaucratic

Does not have a separate legal personality so ownership of assets lies with individuals acting on its behalf, usually office bearers/management committee

Relatively cheap and easy to run

Leases/formal contracts have to be entered into in names of office bearers. This can cause technical difficulties where there are changes in the people holding these offices

No formal registration requirements unless a charity, which will be accountable to the Central Legal Registry in conjunction with HM Attorney General's Chambers

organisation but only by individuals representing it. Similarly, legal proceedings would be taken out against individuals rather than the organisation

No detailed statutory procedures to be followed in relation to members' meetings, etc.

Management committee could be personally liable for debts if the organisation were unable to meet its debts and liabilities out of its own resources

No requirement to notify any public register of the people serving on the management committee, unless a charity

Because it is a more informal structure, may be seen as "less professional" in the eyes of potential funders

No annual return to file with any public register, unless a charity (see Ongoing Regulation for Registered Charities)

Can be a less intimidating structure for those considering whether to join as members or stand for election to the management committee

Where the charity is an unincorporated body such as a trust or an unincorporated association, it is the charity trustees themselves who are parties to the contract. Therefore, if the third party makes a claim for breach of contract the trustees will be personally liable to make up any shortfall where the assets of the charity are insufficient to meet the claim. The same is true in respect of tortious liability where trustees of unincorporated charities can face personal liability even if they have acted reasonably and with due care if the charity's funds are not sufficient to meet the full claim.

Where the organisation is to have a membership but is expected to have considerable resources and/or employ staff and become engaged in charitable purposes which involve commercial risks it is usually more appropriate to take the form of a charitable company.

Charities which are already set up as unincorporated charities can incorporate if their trustees are concerned about the risk of contractual liability.

If the trustees of an unincorporated charity enter into contractual commitments they should consider expressly limiting their liability under the contract to the assets of the charity from time to time.

Charities which are likely to enter into contractual commitments or undertake activities and operations which could give rise to personal liabilities for trustees should be set up as corporate bodies to avoid this difficulty arising.

It should be noted that incorporation only protects against contractual liability or tortious liability but provides no protection where charity trustees are in breach of their duties.

Incorporation however will not be the appropriate solution for all charities, if you would like more information regarding the legal and financial implications of constituting the proposed charity as either an unincorporated association or as a company and to discuss your needs to ensure that the structure adopted is the one appropriate to your particular circumstances please contact us by telephone on 01624 676868 or by email at mail@corlettbolton.com

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