



Stewartry Council of Voluntary Service

**Incorporation as a
Company Limited by Guarantee
and Not Having a Share Capital
(A Private Company Ltd by guarantee)**

An overview for Voluntary & Community Groups

Introduction

The following information has been put together by Stewartry CVS due to the many and varied enquiries regarding incorporation of charities. This guidance does not deal with gaining charity status or the regulation of Charities by the Office of the Scottish Charity Regulator (OSCR) under the new Charities and Trustee Investment (Scotland) Bill. Stewartry CVS can supply separate information and guidance on these matters.

The information has been created by combining and editing different sources of material from SCVO Guidance compiled by Burness solicitors and the Companies House website www.companieshouse.gov.uk. Our thanks to Stephen Philips of Burness solicitors for checking and adjusting.

For comprehensive guidance on the Companies Act please see the Companies House website.

1. A Company is a legal entity

The key point to recognise is that a company is a separate legal entity.

- This means that it is a legal entity in its own right.
- It is separate from those who manage or run it, and has 'limited liability'.

2. What does limited liability mean?

Limited liability gives the Directors of the company protection if the company fails.

This means that if a company is put into liquidation, the people who direct the company will only be required to pay what they have already paid or agreed to pay towards settling its debts. (or in the case of a company limited by shares any money which he/she/it still requires to pay for shares)

However, the limit of liability does not extend to a liability which a person might incur in his/her capacity as a Director, as distinct from his/her capacity as a member. There are a range of legal duties imposed on Directors of a limited company which could give rise to personal liability if not carried out. See below under responsibilities. Broadly speaking, however, it is extremely unlikely that a director would find him/herself personally liable unless s/he acted in a manner which was highly irresponsible.

3. Companies and Directors

All companies must have officers. This means at least one director and a company secretary. The directors must manage the company's affairs in accordance with its articles of association and the law. Certain responsibilities apply to all directors, whether executive or non-executive, and to all types of company whether trading or not. The company secretary is the chief administrator of the company.

4. Can anyone be a director?

Generally it is up to the members to appoint the people they believe will run the company well on their behalf. The only restrictions that prevent anyone becoming a director are:

- the person must not have been disqualified by a court from acting as a company director (unless he or she has been given leave (permission) to act by a court for a particular company);
- the person must not be an undischarged bankrupt (except with leave of the court);
- in Scotland, anybody under the age of 16; and
- in the case of a company which is a charity, someone would be prohibited from being a director if he/she had been disqualified from acting in the management or control of a Scottish charity (unless a specific waiver had been obtained)..

5. What responsibilities does a director have towards Companies House?

Every company director has a personal responsibility to ensure that statutory documents are delivered to the Registrar as and when required by the Act. In particular:

- annual accounts ;
- annual returns (Form 363);
- notice of change of directors or secretaries or in their particulars (Forms 288a/b/c); and
- notice of change of registered office (Form 287).

So far as disadvantages of incorporation are concerned the registration and filing requirements should not be regarded as major obstacles. At the end of the day, this is largely a matter of completing the right forms and guidance is available from either Companies House themselves or Stewartry CVS.

6. How to Incorporate

For voluntary organisations wishing to register as a Company Ltd by Guarantee with Charitable status, normally Stewartry CVS will draft a Memorandum and Articles of Association with your group and send these in draft format to the Office of the Scottish Charity Regulator (OSCR) for an assessment of whether a company incorporated as such would gain charitable status. For advice and guidance on drafting a Memorandum and Articles of Association call Stewartry CVS.

The waiting time with the Office of the Scottish Charity Regulator (OSCR) is 6-8 weeks and they may come back wishing further detail or clauses built into the Memorandum and Articles of Association. It is advisable to go through this procedure first if time allows as it saves paperwork and changes being made and registered with Companies House as Resolutions at a later date.

Supporting papers are required from the organisation to vouch the activities which the organisation will be carrying on in practice.

An organisation can choose to incorporate first without charitable status and pursue this status at a later date. It is not recommended however that the memorandum and articles of association be adopted prior to OSCR being happy with the wording (unless there is a special need to have a legal entity in place at an early stage).

A common approach would be to:

1. Hold a public meeting at which the principle of forming an organisation/company would be approved and a steering group appointed
2. Draft a Memorandum and Articles of Association and have them approved by OSCR, making changes where suggested, and any other relevant organisations or funders e.g. (Scottish Land Fund)
3. Hold a further meeting with a view to approving the terms of the Memorandum and Articles of Association and elect *prospective* directors. This election does not have full legal validity since, by definition there could be no members casting votes until the company has been formed and people admitted as members. However, it would nevertheless be seen to represent a democratic process
4. The Memorandum and Articles of Association then require to be signed in two places by the individuals and/or organisations who are actually the "founder members". These will *not necessarily* correspond with the prospective directors.
5. The prospective Directors need to also sign your Memorandum and Articles of Association documents in the two places shown (again alphabetically) with a witness putting in their name and address as well as signature.
6. Form 10 from Companies House requires to be signed by the prospective directors and the prospective Company Secretary - photocopying continuation pages for further directors. Companies House state in their guidance that they prefer names to be completed alphabetically.
7. When you are doing this it would be prudent to collect all the National Insurance numbers of prospective Directors as you will need these at a later date for Inland Revenue.
8. Complete Form 12 - this Declaration needs to be signed by a solicitor of Justice of the Peace who should see the Memorandum and Articles of Association. If you can have him/her at the meeting even better. Form 12 must be signed and dated after all the other documents are signed and dated. This is because Form 12 confirms that all other registration requirements have been completed. The form must clearly show if a person has signed on behalf of a corporate director. If it appears that the person who signed on the first half of the form is not a director, this will cause delay.
9. Form 30(5)(a) can be filled in which allows you to drop the acronym Ltd from your name.
10. Write a cheque for £20 and send with all the above paperwork it to Companies House at the address below. If you wish same day incorporation that can be done by Companies House for £50.

7. Annual Accounts – incorporated companies

All limited companies, whether trading or not, must keep accounting records and file accounts for each accounting period with the Registrar

An outline of what's needed

Governed by Companies Act and SORP (Statement of Recommended Practice)

- **Statement of financial activities**
- **Balance sheet**
- **Director's Report**
- **Auditor's Report (only if a full audit is required)**
- **Must be approved formally by the Board**
- **Send copies to members. Should be sent out to members with 21 days notice before General meeting**
- **Present to a General meeting**
- **File at Companies House**
- **10 month limit (late filing penalties) Late filing penalties – on a scale up to £1000 for a twelve month delay. See Companies House booklet, 'Late Filing Penalties'**
- **ARD - Accounting Reference date – automatically fixed as the last day of the month in which the anniversary of the company's incorporation occurs. The ARD can be changed as long as you change it before the accounting period has expired. Change only once in five years. Fill in form 225**

Audit exemption

For Incorporated Charities the following applies but bear in mind that funders will often ask for a full audit

- **£90,000 or less – audit exemption available**
- **£90,000 - £250,000 Independent examination**
- **£250,000 and over - Audit**
- **Companies House booklet, 'Accounts and Accounting Reference Dates', provides more information on preparing and filing accounts and about exemptions from filing.**

8. Role and duties of a company secretary

Does every company need a secretary?

Yes. Section 283(1) of the Act says every company must have a secretary. Section 283(2) states that a sole director cannot also be the secretary.

Does a company secretary need any qualifications?

The company secretary of a **private limited company needs no formal qualifications.**

Special duties

As the secretary is an officer of the company under section 744 of the Act, they may be fined for defaults committed by the company. For example failure to file with Companies House the company's annual return. The likelihood of incurring a fine just because forms such as those notifying changes of Directors are late is extremely remote; in practice, fines are levied only in relation to late filing of accounts and annual returns.

The company secretary usually undertakes the following duties:

(a) *Maintaining the statutory registers.* These are:

- the register of members ;
- the register of directors and secretaries ;
- the register of directors' interests ;
- the register of charges

(b) *Ensuring that statutory forms are filed promptly.* You cannot simply send a letter to notify the Registrar that you wish to change the situation of the company's registered office (form **287**) or that changes have occurred among directors or secretaries or their particulars.(Forms **288a, 288b or 288c** as appropriate – see below). You may also use the annual return Form **363s** in some circumstances if the return is due at the convenient time. Changes of directors' and secretaries' details must be notified within 14 days.

(c) *Providing members and auditors with notice of meetings.* You must give them 21 days written notice of an annual general meeting. You must give them 14 days written notice of a meeting which is neither an annual general meeting or a meeting to pass a special resolution.

(d) *Sending the Registrar copies of resolutions and agreements.* You must send the Registrar copies of every resolution or agreement to which section 380 applies, for example special and extraordinary resolutions, within 15 days of them being passed.

(e) *Supplying a copy of the accounts to every member of the company, every debenture holder and every person who is entitled to receive notice of general meetings - also copies demanded by anyone under section 239 of the Act.* You must send accounts at least 21 days before a meeting at which they are to be laid - see section 238 of the Act.

(f) *Keeping, or arranging for the keeping, of minutes of directors' meetings and general meetings.*

(g) *Ensuring that people entitled to do so, can inspect company records.* For example, members of the company and members of the public are entitled to a copy of the company's register of members, and members of the company are entitled to inspect the minutes of its general meetings and to have copies of these minutes.

9. Annual returns - Form 363

An annual return is a snapshot of general information about a company giving details of its

directors and secretary and registered office address. Details of members, as distinct from Directors, do not have to be given for a Company Ltd by Guarantee.

Companies House will send a pre-printed 'shuttle' annual return form to the company's registered office each year. It details the information already held on Companies House database.

The details should be:

- checked closely (and amended if necessary);
- signed and dated; and
- returned to Companies House within 28 days of the date shown on the form, with the filing fee.

If you file the annual return late or not at all, the company and its director(s) and secretary can be prosecuted.

Please note that *annual returns* are quite separate from *annual accounts*. For more information about how to complete an annual return, refer to Companies House 'Annual Return' booklet.

10. Change of registered office - Form 287

Every company must have a registered office: it is the 'home' of the company to which all official documents, notices and court papers have to be sent by law. The address must be a physical location, not just a post office box. This is because people have the right to visit your office to inspect certain registers and documents, and to deliver documents by hand.

You can change your registered office address by sending a completed Form 287 to the Registrar. The change becomes legally effective only when Companies House has registered the form.

11. Change of directors and secretary and their details - Forms 288

There are three types of Form 288.

- Form 288(a) is used for the appointment of a Director or Secretary.
- Form 288(b) is used for an officer ceasing to act (resignation, removal, death etc).
- Form 288(c) is used for a change in details of an officer, for example, a change of name or new residential address.

All changes to directors' and secretary's details must be sent to the Registrar within 14 days of the change.

12. Resolutions

Copies of any special or extraordinary resolutions and certain types of ordinary resolutions, need to be sent to Companies House within 15 days of them being passed by the company - the booklet, 'Resolutions', gives more information about this.

13. Mortgages and charges

Details of any mortgage or charge created by the company must be sent to Companies House within 21 days. The registration of charges would invariably be dealt with by a bank or other lender; the effect of failure to register is that the benefit of the security would be lost, and it is for this reason that the lender would always take on the role of registering the charge itself.

See the booklet, 'Company Charges and Mortgages' or 'Company Charges (Scotland)'.

14. Where do I get forms and guidance booklets?

Statutory forms and guidance booklets are available, free of charge from Companies House. The quickest way to get them is through the website www.companieshouse.gov.uk or by telephoning 0870 3333636.

Or write to:

For companies incorporated in Scotland:

The Registrar of Companies
Companies House
37 Castle Terrace
Edinburgh EH1 2EB

Companies House will only acknowledge receipt of documents if you provide a stamped addressed envelope and a covering letter.

Please note: Companies House does not accept accounts or any other statutory documents by fax.

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