

VAN BRIEFING

**BRIEFING FROM THE
VOLUNTARY ARTS NETWORK**

Incorporation

As you would imagine, there are substantial differences in the legal procedures involved in becoming a company depending on which UK nation you are based in, and the situation is different again in Ireland.

However, all four legal systems covered in this briefing share an idea of what a company is. Their various companies acts make provision for people to come together and form a company which then takes on a legal status separate from that of its members. This process is called Incorporation. As a result of this the company can buy property, enter into contracts and bring and defend court prosecutions in its own name and the members are not generally liable for any debts incurred.

Most companies in the UK and Ireland are limited by shares but while this structure is well suited to the needs of industry and commerce it does not suit non-profit making organisations which are more likely to become a Company Limited by Guarantee. In this type of company there are no shares and members undertake to guarantee to pay a certain, usually nominal, amount if the company is wound up. This briefing concentrates on becoming a Company Limited by Guarantee.

ENGLAND AND WALES

Becoming a Company Limited by Guarantee

Companies can be constituted as a "Company Limited by Guarantee" by having a group of Members and a minimum of two Directors who can be paid or employed by the company. Such a company will be regarded as having a non-profit distributing structure and this is often sufficient for funders and sponsors. Adopting a company structure will also enhance your organisation's credibility and will encourage it to grow and develop.

In order for your organisation to become a company, two groups of people will need to be formed.

1. **Members. A Company Limited by Guarantee has no shareholders but it does have members who guarantee to pay the sum of £1-£5 if the company winds up owing money. These members have voting rights at General meetings (Annual and Extraordinary), are involved in the election of and serving notice on removing Directors and in changes to the company. Members can be paid staff. There is no legal minimum or maximum of the number of members required. Members must be entered in the Register of Members. This is kept in the Statutory Records held at the Registered Office but not filed with Companies House.**
2. **Directors are elected from the group of members. If you are becoming a charity, the Directors will be unpaid. On the whole, the Board should be made up of responsible people who have an interest in and understanding of what the company is trying to do. It is often a good idea to have an accountant or solicitor on the Board but, like all Board members, these people also need to be fully committed to the organisation and understand what you are trying to achieve.**

The Board is financially and legally responsible for the company but members are still protected by the limited liability inherent in the legal structure. Board members can be held personally liable for debts if deemed to have acted imprudently or irresponsibly. The legal term for this is "wrongful trading". The Board should meet four times a year and should receive up to date financial information; making sure that the company is acting legally (i.e. not

trading outside its object) and that funds are being properly applied.

Remember, the Board is as a resource for your company. Consider the skills and strengths of your Directors and give them focused tasks. The Administrator and Artistic Director (if they are not already on the Board) can attend meetings to provide information and report on the day-to-day management of the company. They can participate in the discussion but cannot vote and should not have their contributions minuted.

Other points:

- **A limited company is a legal “person” in its own right. It can sue and be sued, enter into contracts, own property, employ people in its own name.**
- **Information about the company is kept at Companies House and the public have access to this information. It is essential that the company sends new information (changes of names, address, Directors and their details) to Companies House as they occur. Every year the company must file its Annual Returns. There are fines and penalties payable for not filing changes or submitting accounts on time.**
- **The company must have a Registered Office. This does not have to be the premise from where the company operates, it can be a private home but if you use your home for business purposes this can mean incurring a liability for Capital Gains tax on selling the property. Some companies use a solicitor or accountant as their registered office but there is usually a charge for this. Companies House must also be informed of changes to the Registered Office address.**
- **The company will need to register a Company Secretary/Administrator who carries out the legal and administrative aspects of being a company. A Company Secretary can be, but does not have to be, a Director. This person is responsible for:**
 - calling and arranging meetings;**
 - sending out agendas in advance;**
 - filing information about changes at Companies House;**
 - making sure accounts are sent;**
 - keeping the Statutory Records up to date.**

- **Accounts do not legally have to be audited, however, for funding purposes this may still be advisable. Some funders require an audited set of accounts to accompany any applications.**

The process:

- **Once Companies House receive the completed application forms and a copy of the Memorandum and Articles/Constitution the company wishes to adopt, a company is registered within fourteen days. There is a fee involved of £20.**

For application forms and further information contact:

Companies House

Crown Way

Cardiff CF4 3UZ

Telephone: 01222 380 801

Independent Theatre Council’s Incorporation Service

The information above has been compiled by the ITC’s Incorporation Service. Non-members can arrange an hour of consultation at the ITC offices to discuss these issues further and their application to specific companies. The fee is £25 + VAT to non-members. Call Mark Finn any Monday or Friday to arrange a time. (0171 403 1742). Members of ITC can nominate ITC to act as agent in the incorporation process; providing and overseeing all necessary material involved in the applications.

SCOTLAND

If your group is quite large and is responsible for organising events then it would be wise to set out your aims, responsibilities and procedures in a written document - this will then become your constitution. If you intend to apply for funds from a Trust, Local Authority or any public body then you will be asked questions about your purpose, history, financial position and chains of responsibility - all of which could be clearly and positively answered by a constitution.

The type of constitution you adopt will depend on the type of organisation you are and your status under Scottish law. The most common types of organisation, their status and constitutional needs are listed below:

An Unincorporated Association

This is a joint venture between two or more people and does not have a legal identity separate from its members. It has the advantage of being set up quickly and with little

fuss but may lack continuity if members change and this can be seen as a threat by funders. It also makes members personally responsible for any obligations or debts of the association.

This kind of structure is not really appropriate if you plan to undertake much trading, employ staff or receive public money. If you do choose this type of organisation then the constitution should be as clearly written as possible - there is no need for legal language. Write as openly as you can so that you are able to be fairly flexible and include contingency plans in case the organisation breaks down, for example how debts will be dealt with. This is very important if you hope to achieve charitable status in the future.

A Limited Company

As a legal entity entirely separate from its members, a limited company can hold property, deal with money and assume legal commitments while its directors incur no personal liability unless they break with its rules and procedures. The most common form of this for arts organisations is a Company Limited by Guarantee which generally means that every member agrees to pay a nominal sum of £1 in the event of its insolvency.

A company's constitution is set out in a document called a Memorandum and Articles of Association which lists the name of the company, the location of its registered office, its objects and the liabilities of members. Your Articles of Association will also need to list the number of members a company can have, who can become a member, what the management structure will be, how the management committee will be elected, its powers and functions and how meetings will be run.

Before setting up the limited company you need to check with Companies House. You can contact them at:

Companies House
37 Castle Street
Edinburgh EH1 2EB
Telephone: 0131 535 5800

You also need to complete various forms, some of which need to be signed by a solicitor, and to pay a £20 standard registration fee. Details of all the requirements are available from Companies House and your solicitor should also be able to help out.

The process of becoming a limited company is complicated and you will need legal advice. The disadvantage of an organisation becoming a limited company is the cost and time of complying with company law for example providing accounts, statutory records etc.

Do not underestimate the effect this will have on your organisation. You will probably need to pay for audits and the legal fees alone can be more than £700. However, the limited liability it provides is often seen as a prerequisite for trading and taking on staff and once you have got used to the administration it provides a level of security which is worthwhile in itself.

Special forms of words are needed for the formal documents but the underlying basic requirements are not dissimilar to those for an unincorporated association. Write down in advance the key features of your organisation and what you hope to achieve. List who your members will be and who will be directors or trustees then talk to your solicitors about the legal requirements and constitutions. A formal document need not be formidable and once you have written down the basic details about what your organisation needs to achieve and how it will be run a constitution will naturally follow.

The constitution needs to cover:

The title of the organisation and the names under which it trades.

The aims and how they are likely to be achieved.

Who is eligible to join and how to join.

How the organisation is managed and by whom.

Titles and functions of office bearers, how they are elected and how long they are in place.

How the organisation will report to the members, when you meet and how funds are used.

How you will cope with changes as the organisation grows and develops.

REPUBLIC OF IRELAND

The basis of company law in Ireland is set out in the Companies Act of 1963 which has been amended by subsequent Companies Acts. The operation of the act is overseen by the Companies Office in Dublin Castle which ensures that all applicants to register as a company comply with the legislation. The Department of Enterprise and Employment has overall control of the regulation of companies.

In order to set up a company you must first draw up your Memorandum and Articles of Association. The Memorandum contains the name of the company, its objects and sets out the amount members must contribute

were the company to be wound up. It also lists the first members of the company. The company can only act within its objects so the practice has grown up of writing very wide ranging objects which include any activity the company may wish to undertake in the future. The Articles are a much longer document and contain detailed rules about membership, the control of the organisation and the appointment of officers and procedural details about the calling of meetings and voting. Once these are drawn up you need to register the company with the Companies Office. There is a fee for this of £165 and this is for their administration alone, it does not include any solicitors' charges incurred in registering.

The company must have a minimum of seven members and there is no maximum number. The members of the company are in overall control but generally delegate their authority to a Board of Directors elected from the membership at an Annual General Meeting.

Sample constitutions and Memoranda and Articles of Association are included in the Combat Poverty Agency's "Guide to Legal Structures for Voluntary and Community Organisations". The Guide is essential reading if you are based in Ireland and want to change your legal structure. It costs £3 and is available from:

Combat Poverty Agency
8 Charlemont Street
Dublin 2
Telephone: 01 478 3355

The Companies Registration Office publishes an information manual to guide you through the registration process. This is available from:

The Companies Registration Office
Dublin Castle
Dublin 2
Telephone: 01 661 4222

NORTHERN IRELAND

As in other nations, a company under Northern Irish law has a separate legal identity and its members are not normally legally responsible for any debts incurred. The responsibilities of Directors in Northern Ireland are outlined in the Companies (NI) Orders of 1986 and 1990 and companies' details are held by the Companies Register which is open to the public. Company accounts must be kept in accordance with the Companies (NI) Orders and include a balance sheet and profit and loss account for each financial year, giving a true and fair view of the company's affairs, profits and losses. A relaxation in company law regulations in May 1995 means that small charitable companies with a gross income of less than £90,000 a year may be exempted from auditing.

Companies are governed by their Memorandum and Articles and once a company is registered it will have to notify the Companies Register of any changes to these. To register a company in Northern Ireland you need to complete forms 21 and 23 from the Companies Register, giving details of appointed Directors, and return them along with a copy of the company's Memorandum and Articles of Association. The fee to register the company is £35 and this includes a search to check that the name you have chosen is not already in use. For more information contact:

The Companies Registry
IDB House
64 Chichester Street
Belfast BT1 4JX
Telephone: 01232 234 488



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