

*The voice of the Voluntary Arts*

## Incorporation and recent changes to company law

**Since January 1998, when our last briefing on incorporation was published, company law in the UK has undergone a major change. The Companies Act 2006, which is coming into effect in stages up until October 2009, is designed to simplify and update the process of setting up and running a company for the twenty-first century.**

This briefing will provide a reminder of what incorporation means and an outline of the main changes brought about by the Act in the UK. The final section will look at the status of company law in the Republic of Ireland.

### A. Overview

#### Forming a company

Incorporation is the word used to describe the formation of a company. A voluntary arts group will often start off as an 'unincorporated association', and then, a bit further down the line when they reach a certain level of income (through membership, ticket sales or trading), make the decision to form a company. Others may decide to form a company from the outset, usually with the help of business advisors.

The main advantage of forming a company is that it is considered a legal entity in its own right. Just like a person, it can enter into contracts, own property and defend court prosecutions without its governing members having to act on its behalf. This can be particularly useful when it comes to employing staff. Adopting a company structure will also enhance your organisation's credibility and encourage it to grow and develop.

Most companies in the UK and Ireland are 'limited' companies (a type of 'private' company). Some are 'limited by shares', meaning that the money that the company's shareholders

(the people that own the company) would lose if the company fell into debt would be limited to the amount they had already invested in the company.

However, this structure does not often suit non-profit making voluntary arts organisations; they are more likely to opt to become companies 'limited by guarantee' (this briefing concentrates on this type of company). In a company limited by guarantee, there are no shares or shareholders. Instead, there are members who promise to pay a certain small amount (i.e. £1) if the company is wound up while owing money.

Members of the company must be entered in a 'register of members', which must be kept at the registered office.

Directors are elected from the membership to form a Board. The Board is financially and legally responsible for the company, although directors are still protected by the limited liability of the company's structure. Directors can be held personally liable for debts, however, if they are 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. They make sure the company is acting legally (i.e. not trading outside of its 'objects' – another word for the company's objectives or aims) and that money is being properly spent.

The company must have a registered office. This does not have to be the premises from which the company operates; it can be a private home. However, 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.

#### After incorporation

Information about the company is kept by the national registrar (*for contact details see the Further Resources section*) and is accessible to the public. It is essential that the company sends



any changes (names, address, directors and their details, etc.) to the registrar as soon as they occur.

Every year the company must file its annual return and accounts. The annual return is a snapshot of general information about the company, including its directors, registered office address and other information. There are fines and penalties payable for not filing changes or submitting accounts on time.

Companies limited by guarantee are also liable for corporation tax, for which they must file a return with HM Customs & Revenue (UK) or the Office of the Revenue Commissioners (RoI) each year. However, companies that are also registered as charities are usually exempt from paying corporation tax, and will not be required to file a form annually. They may, however, be asked to fill one in on an irregular basis as a type of 'spot check'. Companies may use an auditor to help with the relevant paperwork in this area.

## B. Incorporating a company

To incorporate a company limited by guarantee in the UK, you currently need to file the following four documents with Companies House (England and Wales), the Registrar of Companies (Scotland) or Companies Registry Northern Ireland. In the Republic of Ireland, you will need to apply to the Companies Registration Office (see *Section F for more details*).

- **Company details form** – this will include the address of the registered office and the details of the directors etc.
- **Declaration of compliance** – in the UK, this is the document stating that your company agrees to the terms of the Companies Act. Once the memorandum and articles of association (see *below*) have been completed, this must be signed in the presence of a 'Commissioner of Oaths' (such as a solicitor, Notary Public or Justice of the Peace).
- **Memorandum of association** – this states the company name, the address of the registered office, its objects and its liability (in this case 'limited by guarantee').
- **Articles of association** – this describes how the company will be managed and run. Company registrars such as Companies House include guidance on how articles should be laid out on their websites.

In 2008, the standard registration fee is £20 (England, Scotland and Wales), £35 (NI) or €100 (RoI).

## C. The Companies Act 2006 (UK)

The Companies Act 2006 received Royal Assent on 8 November 2006. The Act, which is being introduced in phases until October 2009, replaces existing companies legislation (with the exception of provisions relating to

company investigations and Community Interest Companies – see *Section D*) to make it easier to set up and run a company.

The main changes affecting companies limited by guarantee are laid out below. They include clearer duties for directors, the removal of the requirement for a company secretary and Annual General Meetings, an easier way for companies to take decisions by written resolutions, and more freedom to use electronic communications.

The following is merely a summary, and is not intended to be legally comprehensive. For more details about any of the issues featured here, please refer to your national companies registrar (see *Further Resources for contact information*) or an independent business advisor.

### I. Main changes already in effect since the 2006 Act:

- **Directors' duties** – there is now an official statement on the duties of company directors.

They are:

- to act within (their) powers;
- to promote the success of the company;
- to exercise independent judgment;
- to exercise reasonable care, skill and diligence.

For voluntary sector organisations, the 'success' of the company means success in achieving the company's stated purposes, rather than just financial success. In promoting success, directors have to consider the long-term implications of their decisions, and take into account the interests of employees, suppliers, customers and the environment.

For companies above a certain size, the directors' annual report must include a 'business review' setting out how the directors have complied with their duty to promote the success of the company. This should be a full and balanced description of how the company has been performing, along with the main risks it faces.

The director is liable for any loss the company suffers as a result of an untrue or misleading statement in the directors' report (but only if the director knew this to be the case or was reckless), or from the dishonest omission of any facts that should have been included.

**ACTION:** Find out from your company registrar whether a company of your size needs to include a business review with your annual report.

- **Company secretary** – private companies (which includes those limited by guarantee) no longer have to appoint a company secretary unless the articles say there must be one. If a company chooses not to have a secretary, the



secretary's duties must be carried out by a director or by a person authorised to do so by the directors.

**ACTION:** Decide whether you want a secretary, or whether someone else can carry out their duties. If you do not wish to have one, you may need to change your articles to reflect this.

- **Annual General Meetings** – private companies no longer have to hold an annual general meeting or other general meetings, unless their articles require it, the members demand it or there is a resolution to remove a director. To remove the requirement for an AGM, the articles must be amended.

**ACTION:** If you do not wish to hold an AGM, change your articles accordingly. For most voluntary sector companies, however, it is still good practice to hold AGMs.

- **Written resolutions** – these are decisions made outside of a general meeting. Unless the articles state otherwise, the proportion of votes required to pass a written resolution is now 50 per cent for an ordinary resolution and 75 per cent for a special resolution, and there will be a cut-off period of 28 days after the resolution is circulated, after which votes will not be counted.
  - **Electronic communications** – companies are now allowed to send and receive official information and documents electronically, providing that both parties consent. This rule does not apply if there is no legal duty to send or receive the information and documents.
- ACTION:** If you wish to send official documents via email, secure website or CD-ROM, ask permission beforehand from the people to whom you are sending the documents.

- **Details on documents** – companies must include their full name, place of registration, company number, registered office address and the fact that they are a limited company on all business letters, order forms, websites and in the footer of all business emails. They must include their full name (but not the other details) on all notices, publications, cheques, orders for money or goods, bills of exchange, promissory notes, invoices, receipts, bills of parcels and letters of credit. It has always been a requirement that the name of the company is clearly displayed externally at its registered address.

**ACTION:** Make sure your document templates are up to date with the latest company details, and that they are included on your website and in your email footers.

- **Register of members** – a register of company members must now be open for inspection every working day. The public now has a right to inspect and be provided with a

copy of register entries, but *only* if the enquirer provides their name and address, the purpose for which the information will be used. If the access is sought on behalf of others or the information will be disclosed to anyone else, the enquirer must supply similar details for the third party. Entries for former company members can now be removed from the register of members after ten years, rather than 20.

- **Claims by members** – company members can bring a claim, on behalf of the company, against one or more directors for failure to comply with their statutory duties as directors, provided they have consent from a court.
  - **Connected persons** – these are people whose involvement with the company might form a conflict of interest for a director. They now include the director's parents, children or stepchildren who are over 18 years old (those under 18 are already included), unmarried partners and unmarried partners' children or stepchildren who live with the director and are under 18 years old.
  - **Minutes of directors meetings, general meetings and records of written resolutions** – these must now be kept for a minimum of ten years. However, it is good practice to keep them longer than this.
  - **Notice** – you now only required to give your members 14 day's notice of an upcoming AGM or other general meetings, unless the articles state otherwise.
  - **Proxies** – company members now have a statutory right to appoint a 'proxy' to attend general meetings on their behalf, even if the articles explicitly say that proxies are not allowed. In all notices for general meetings there must appear 'with reasonable prominence' a statement informing members of their right to appoint a proxy.
- ACTION:** If your articles do not already include arrangements for proxy voting, you must put arrangements in place for both the appointment and termination of proxies.
- **Execution of company documents** – company documents can now be 'executed' (created and made into official company policies) by two directors, or by the secretary (if there is one) and a director, or by one director in the presence of a witness.
  - **Circulating accounts to company members** – private companies no longer have to present their annual accounts and reports at an AGM or send them to members 21 days before the AGM. Instead, the accounts and report, or



summary financial statement, must be sent to all members no later than the date the company delivers the accounts to their company registrar.

- **Filing period for accounts** – accounts must now be filed with the company registrar *within nine months* after the end of the relevant accounting reference period, rather than the previous requirement of ten months.

**ACTION:** Make sure you file your accounts within nine months of the end of your accounting period.

- **Auditors** – where a private company has an auditor or auditors, their term of office will run from 28 days after circulation of the accounts until the end of the corresponding period the following year. For financial years starting on or after 6 April 2008, where an audit is carried out by a firm rather than an individual, the firm's senior statutory auditor must sign the audit and his or her name must be on all copies of the audit report circulated by the company.

Liability limitation agreements are now allowed, under which a company and its auditor can agree to limit the auditor's liability to the company.

- **Constitution** – the constitution that a company sends to the registrar of companies must include not only the memorandum and articles, but also certain resolutions and agreements, such as whether the company is allowed to provide information to its members via its website.

**ACTION:** National company registrars usually have all the necessary forms available to download from their websites. Check with yours to see what information you are required to submit.

- **Audit exemption for charitable companies** – for financial periods beginning on or after 1 April 2008 there are no longer special rules regarding audit exemption for charitable companies. They can qualify for audit exemption under company law in the same way as any other company. Charitable companies may also be subject to separate requirements for audit or other scrutiny of their accounts under charity law.

## 2. Main changes expected to come in on 1 October 2008

- **New directors' duties** – the new duties will be:
  - to avoid conflicts of interest;
  - not to accept benefits from third parties;
  - to declare interest in a proposed transaction or arrangement (rather than just in an existing transaction).

- **Objecting to a company name** – organisations will be able, in some circumstances, to object if someone registers a company with a similar name.
- **Minimum age for company directors** – company directors will have to be at least 16 years old. Any director who is under 16 on 1 October 2008 will automatically cease to be a director. The register of directors will have to be amended accordingly, but the companies registrar will not have to be notified.

**ACTION:** If you have directors under the age of 16, make arrangements for them to give up their directorship. When they reach 16 they may be re-elected in the usual way.

- **'Natural' directors** – every company will have to have at least one director who is a 'natural' person (a human being rather than a corporate body, e.g. a 'holding' company).

**ACTION:** Ensure that at least one of your directors is a person.

## 3. Main provisions expected to come in on 1 October 2009

- **Company formation** – the rules for forming a company will be simplified, with online incorporation via the WebFiling service and a full set of model articles for companies limited by guarantee.

For new companies, a memorandum of association will only be used for setting up the company, and will not have an ongoing role. All operational provisions, including the objects, will instead be included in the articles of association.
- **Company name** – it will be possible to change the company's name without a special resolution if the articles allow for this.
- **Directors' addresses** – all directors will be able to use a service address, rather than their private home address, in the register of directors and in the company's public records at their companies registrar. The service address can be the company's registered address or another address.

### Other items to note:

- **Late filing penalties** – from February 2009 the penalties for filing annual returns will rise, and will increase incrementally one month, three months, and six months after the original deadline. If you file late two years in a row, you will be fined double the amount automatically. (In the RoI, you get fined from the first day you are overdue and the amount increases daily.)



## D. Community Interest Companies and Designated Activity Companies

### UK

Community Interest Company (CIC) status has been developed for people in the UK who wish to develop social enterprises, i.e. businesses that benefit the community, not just the owners, employees or shareholders. For more information about the advantages and disadvantages of CICs in comparison with other organisation types, see VAN Briefing 106: **Community Interest Companies**.

To register a company as a CIC you will need to first register with your national registrar of companies as a company limited by guarantee or by shares (if you have not already done so), and then apply for CIC status to the CIC Regulator who, if your registration is successful, will continue to monitor you and ensure that the rules are upheld.

You will have to submit a 'community interest statement' to the Regulator, describing the company's intended activities and beneficiaries. If satisfied that your application meets the criteria, the Regulator will advise the registrar at Companies House (England and Wales), the Registrar of Companies (Scotland) or Companies Registry Northern Ireland, who, providing all the documents are in order, will issue a certificate of incorporation as a CIC.

Thereafter, as well as reporting to their company regulator, CICs must submit an annual report to the Regulator on how they are delivering for the community and how they are involving their stakeholders in their activities.

### Republic of Ireland

When the new Companies Bill is enacted (made into law) in the Republic of Ireland, Designated Activity Company (DAC) will be the new legal form for social enterprises – equivalent to CICs in the UK. DACs will vary from other types of limited company in that they will be able to designate a particular cause (as opposed to shareholders) as the recipient of their profits.

DACs, which may be formed for any lawful purpose, will come in two types:

- companies limited by shares, with the power to do only those things set out in their constitution;
- companies limited by guarantee *and* having a share capital, with the power to do only those things set out in their constitution.

*For more information on the Companies Bill, please see Section F.*

## E. Northern Ireland

The Companies Act 2006 is UK-wide and, once all its remaining provisions have come into effect, Northern Ireland companies

will be incorporated in exactly the same way as those in the rest of the UK. On 1 October 2009, the Companies Registry Northern Ireland will be integrated with Companies House in Cardiff (though the Northern Ireland office will remain in Belfast). Northern Ireland companies will have access to the WebFiling service from this date.

If a NI company wants to open a branch in England, Wales or Scotland they will not have to register separately with the Registrar for that nation, and vice versa. Companies registered in Northern Ireland will still retain the prefix 'NI' in their company numbers (just as those in Scotland will retain 'SC').

## F. Republic of Ireland

### Company types

There are four possible types of private company under the Republic of Ireland's Companies Acts 1963-2005:

- 'Private limited by share capital';
- 'Single member private limited by capital';
- 'Unlimited company';
- 'Guaranteed limited company with share capital'.

For community and voluntary groups wishing to incorporate, the most commonly used structure is that of a company limited by guarantee without share capital. In this type of company, there must be a minimum of seven members, including one secretary and a minimum of two directors, one of whom is required to be an Irish resident. As in the UK, the members promise to pay a certain (usually nominal) amount if the company is wound up owing money. The members are not required to buy any shares in the company.

### Registering

Before registering a company limited by guarantee without share capital, you must ensure that your company name is suitable, by referring to the Companies Registration Office website (*details in the Further Resources section*). The company name must be featured outside of every office or place in which its business is carried on, as well as on all business letters, notices, publications and other official communications.

To register the company, you will need to send the following documents, together with the registration fee of (in 2008) €100 (€50 if you are registering electronically), to the Companies Registration Office:

- **Memorandum of association;**
- **Articles of association;**
- **Form A1** – this includes details of your registered address, your directors and a declaration that one of the purposes for which the company is being formed is to carry out an 'Activity in the State'. This is any activity that a company may lawfully

carry out and includes the holding, acquisition or disposal of property of whatsoever kind. Each type of Activity of the State has its own 'NACE code'.

### New Companies Bill

The new Companies Bill, which is expected to be enacted in 2009, will reform and consolidate all existing companies legislation in a single companies code.

The draft Bill is available to view online on the Company Law Review Group website at [www.clrg.org/companiesbill](http://www.clrg.org/companiesbill).

## Further Resources

### VAN briefings

These are available to download for free from the VAN website at [www.voluntaryarts.org/briefings](http://www.voluntaryarts.org/briefings):

- 117: **Social Enterprise** (March 2008)
- 106: **Community Interest Companies** (March 2007)
- 55: **Constitutions Clarified\*** (July 2001)
- 23: **Incorporation\*** (January 1998)

\*These briefings are now out of date, and so should be used for background information only.

### Legislation

- **Companies Act 2006** (UK) – a copy of the Act is available from the Office of Public Sector Information at [www.opsi.gov.uk/acts/acts2006a.htm](http://www.opsi.gov.uk/acts/acts2006a.htm) or from the Companies Act publications page of the Companies House website. More information about the Act is available on the

Department for Business, Enterprise and Regulatory Reform website at [www.berr.gov.uk/bbf/co-act-2006](http://www.berr.gov.uk/bbf/co-act-2006).

- **Companies (Amendment) Act 1999** (RoI) – this, along with other recent changes in Irish company law, is detailed on the ODCE website at [www.odce.ie/en/company\\_law\\_enforcement.aspx](http://www.odce.ie/en/company_law_enforcement.aspx).

### Registrars and regulators

- **Companies House** – website contains details of the Registrar of Companies in England, Wales and Scotland – [www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)  
T: 0870 3333636
- **Companies Registry Northern Ireland** – [www.detini.co.uk](http://www.detini.co.uk)
- **Companies Registration Office (RoI)** – [www.cro.ie](http://www.cro.ie)
- **Office of the Director of Corporate Enforcement (RoI)** – [www.odce.ie](http://www.odce.ie)
- **Community Interest Companies Regulator (UK)** – website contains detailed information and the forms necessary to apply for CIC status – [www.cicregulator.gov.uk](http://www.cicregulator.gov.uk)
- **HM Revenue and Customs Charities (UK)** – for charities and corporation tax enquiries – [www.hmrc.gov.uk/charities](http://www.hmrc.gov.uk/charities)  
T: 0845 3020203

### Other information sources

- **Sandy Adirondack** – Sandy's website on governance and law for the voluntary sector in the UK contains a summary of the Companies Act as it affects voluntary sector companies limited by guarantee – [www.sandy-a.co.uk](http://www.sandy-a.co.uk)

Information contained here may go out of date and you are therefore advised to check its currency. Updated information may be available on the VAN website: [www.voluntaryarts.org](http://www.voluntaryarts.org)

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