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CHARITY STRUCTURES COMPARED

There are three basic structures for charities:

CHARITABLE TRUST, CHARITABLE COMPANY OR CIO (CHARITABLE INCORPORATED ORGANISATION)

If you plan to set up a new charity, you generally have a choice between these three main structures.

- (a) **A Charitable Trust**, with a Declaration of Trust or Trust Deed or a constitution as the governing document. This is an unincorporated charity.
- (b) **A Charitable Company Limited by Guarantee**, governed by a Memorandum and Articles of Association or, since The Companies Act 2012, Articles. This is an incorporated charity registered with Companies House as well as the Charity Commission.
- (c) **The CIO (Charitable Incorporated Organisation)** (governed by a Constitution). This is a relatively new type of incorporated charity, available since December 2012, (a year earlier in Scotland).

ALL THREE ARE EQUALLY CHARITIES

They simply have different legal structures. They can each provide the full range of charitable objects and powers that you may need. With each structure, the trustees remain subject to general charity law and must always act with appropriate care and must keep within the charitable objects and powers. The type of charity you should register generally depends on what the proposed new charity is intending to do.

WHETHER TO BECOME AN INCORPORATED CHARITY OR NOT?

There are key considerations when deciding whether to register as an incorporated type of charity, or an unincorporated charity:

(a) Is liability likely to be an issue? If the charity plans to do things that may involve liability, being an incorporated charity will provide

'limited liability' for members and trustees. Liabilities might arise if trustees sign contracts of any kind or employ staff, and so on.

In an unincorporated charity, the trustees will almost inevitably be personally liable in respect of what a charity does and how it does it. (It is important to be aware that trustees could still be held personally liable regardless of the charity's legal structure, if they were deemed to have behaved recklessly, fraudulently or to have operated outside the charity's objects and powers).

(b) Will the charity own assets? An incorporated charity has its own legal identity and as such can hold assets in its own name. Assets of an unincorporated charity are instead held by a nominee (often 'holding trustees') on behalf of the unincorporated charity - this results in the charity having to go through an administrative and/or legal process each time trustees are appointed or retire, which can cause a problem if it is not done at the time. It can also be costly if solicitors are needed.

(c) Will the charity be entering into contracts? Again, as an incorporated charity has its own legal identity, it can enter into contracts in its own name. On the other hand, trustees of unincorporated charities must enter into contracts personally on behalf of the unincorporated charity. This can add to the burden of administering the charity and risk is there if it is not done properly. Therefore incorporated status is likely to be an advantage for any charity that plans to:

- a) Take a lease or buy the freehold of a property
- b) Raise finance
- c) Employ people
- d) Give advice or to enter into contracts to provide goods or services
- e) Organise events involving members of the public

WHEN IT MAY BE MORE APPROPRIATE TO BECOME AN INCORPORATED CHARITY

This type of charity is likely to be suitable when:

The intention is to do no more than to hold funds with a view to making straightforward grants and donations to other charities or other organisations, or individuals fulfilling appropriate charitable purposes i.e. a grant making trust/foundation;

The charity is established for a particular purpose that does not involve significant potential liability i.e. a league of friends organising hospital visits, or a charity promoting a particular religion; or

The charity is established simply to raise funds for a particular purpose i.e. raising funds for school equipment.

Please note that a "Friends of....." charity would become a charitable

association (as opposed to a charitable trust) on the basis it has a voting membership. It would be governed by a constitution but would equally be an unincorporated charity.

An unincorporated charity is generally simpler to administer and cheaper to establish than an incorporated charity.

LOOKING AT THE CHARACTERISTICS AND KEY DIFFERENCES BETWEEN THE TWO TYPES OF INCORPORATED CHARITIES

If it is felt an incorporated structure is the most suitable vehicle for the new charity, the next decision will be the type of incorporated charity to become.

(a) The Charitable Company Limited by Guarantee:

This is a long established legal form governed by a well developed body of statute and case law. As a company, it is subject to company law and therefore is answerable to both Companies House and the Charity Commission. However, the filing and reporting requirements of both these bodies are very similar, although Companies House does impose financial penalties for the late filing of accounts. The directors of the company are also the charity trustees.

The charitable company comes into existence as a legal entity as soon as the company has been registered with Companies House (which is generally a straightforward formality) and before it has been registered by the Charity Commission (which can take 6 to 8 weeks). This can be an important consideration if there is urgency in taking out a contract or lease, or a building is being purchased.

The existence of a Register of Charges in company law means lenders should be more confident lending to a company.

In the future (subject to secondary legislation) a charitable company will be able to easily convert to a CIO. For those cautious about the workability of the CIO, they may prefer to opt for the 'traditional' charitable company in the knowledge that they could convert if, with the benefit of hindsight, the CIO turns out to be the best option. Please note there will be no reciprocal option for a CIO to convert to a company.

(b) The CIO (Charitable Incorporated Organisation):

This is a relatively new legal form specifically designed for charities. The CIO has been modelled on the company framework and has the advantages of being an incorporated structure but without the burden of dual registration with Companies House and the Charity Commission. It is only regulated by the Charity Commission which simplifies annual filing requirements.

As a fairly new legal form, the CIO is likely to be less recognised by third parties than a company limited by guarantee would be, which could lead to practical difficulties – though this will become less of a potential issue as time goes by and more and more CIOs are registered (the Charity

Commission has been accepting applications to register CIOs since December 2012).

Consideration may need to be given to the fact that a CIO only comes into existence as a legal entity once it has been registered by the Charity Commission, which can take approximately 6 to 8 weeks. This timescale may become an issue if the trustees need to take a contract/lease etc out in the name of the CIO in a shorter time frame. One notable gap in the CIO legislation is the lack of a Register of Charges, which may result in CIOs finding it difficult to secure lending arrangements. As lenders grow more used to the concept of CIOs this problem should abate.

ACCOUNTING REQUIREMENTS

The requirements are broadly similar for charitable trusts, charitable companies and CIOs in that the Charities Accounting Regulations have placed equal expectations to keep accounting records and to produce annual accounts to certain standards on both unincorporated charities, charitable companies and CIOs.

Unincorporated charities, charitable companies and CIOs with an annual turnover in excess of £1,000,000 will require a full audit. For unincorporated charities, charitable companies and CIOs with an annual turnover of less than £1,000,000 but with fixed assets totalling £3.26 million or more – an audit will be required.

For unincorporated charities, charitable companies and CIOs with turnover and fixed assets under these limits, an independent examination at the appropriate level will be required.

This briefing is meant to help you to understand the main differences between the different types of charities and to help you to decide the most suitable option for your proposed charity. It is important to take advice specific to your situation, if necessary.

These notes were prepared by Rachel Garnett and updated by Daryl Martin to help charities stay strong and safe.

Daryl Martin – Feb 2017

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