

The Scope of This Guidance Leaflet

This leaflet is one of many written for the volunteer (“amateur”) Trustees of the 75% of “small” (less than £250K/yr) charities which do not employ a full-time professional management team.

It will be useful for the Trustees of new charities seeking to get registered with the Charity Commission;

This leaflet, like all the others available from Small Charity Support, is NOT presented as a full and comprehensive professional opinion/advice on Charity Law and all the associated regulations.

Rather it is just a personal commentary on charity issues, and how to deal with them, from the perspective of the proverbial “[Person on the Clapham Omnibus](#)”.

For more details see the Small Charity Support website.

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1. What is a “Governing Document”?

A charity’s Governing Document is a legal document which sets out the basis – *ie*: the rules – by which the charity will be run.

A charity’s governing document can be in one of several different forms, *eg*: A Constitution; Memorandum & Articles of Association; or just simply “The Rules” depending on what type of organisation the charity is.

The Governing Document for an Unincorporated Charity (UC) or for a Charitable Incorporated Organisation (CIO) – the two types of charity covered by this series of leaflets – will usually be its Constitution.

The Governing Document for a Charitable Company will be its Memorandum & Articles of Association and for a Charitable Trust will be its Trust Deed. But neither of those types of charity are covered by this series of leaflets. If you want to set up either of those types of charity you will need to get professional advice elsewhere.

2. To Be (Incorporated) or Not To Be ? That is the question.

2.1: Unincorporated charities...

....consist of just a group of people working together for a common purpose.

Such charities have no legal identity of their own. So if an unincorporated charity needs to enter into contracts with any individual or organisation – *eg*: to rent office space, or to own & run a vehicle, or to have its own telephone/broadband line, or to commit to providing services to another organisation – that can only be done by one (or sometimes more) of the Trustees acting personally. And because of that, Trustees who enter into such contracts remain personally liable for any consequences of that contract, even though they had entered into the contract on behalf of their charity.

To take an extreme “worst case” example: A Trustee of an unincorporated charity entered into a personal contract in order to employ someone as a part-time administrator on behalf of their charity. Unfortunately it all went badly wrong, ending up with the employee suing for

recompense in an employment tribunal. It was the individual Trustee who personally had to bear the full cost of that – legal fees, compensation, everything !!! In such situations, even if the charity was able & willing to help out (charity law might prevent the charity's funds being used for such purpose), if it had insufficient funds to meet all the costs incurred the individual Trustee(s) would still be obliged to find them from his/her/their own pocket.

2.2: Incorporated Charities...

....have a legal identity of their own and can enter into contracts in their own right.

Consequently, if something goes badly wrong it is the charity, and not its individual Trustees, which becomes liable to recompense any person or organisation who suffered loss as a result. If the charity does not have sufficient funds to pay all the compensation it becomes insolvent and would probably have to close down and the injured person/organisation would not get all the compensation they were entitled to.

It initially sounds a bit of “a no-brainer”!! Why would any charity not want to be registered as Incorporated in order to provide its Trustees with appropriate protection?

The answer, if you think about it, is equally obvious.

If charity Trustees are to be protected by law against the consequences to others of things “going wrong” in their charity then it is only equitable that the law should also provide some protection to those who might be harmed as a consequence of something that the charity did, or did not do.

That protection of others comes in the form of much tighter legal regulation and control of incorporated charities – ie:

- a) there is much more rigorous scrutiny of what the charity is being set up to do, and how it proposes to do it.
- b) They are obliged to have their Annual Report and Accounts independently examined and signed off in accordance with the Charity Commission directives (which are quite rigorous: see:
<https://www.gov.uk/government/publications/independent-examination-of-charity-accounts-trustees-cc31>)
- c) And their Annual Report and Accounts must be submitted to the Charity Commission which publishes them on-line for anyone to look at.

In short: the administrative responsibilities of running/managing an incorporated charity are more demanding than those for an unincorporated charity.

But don't think that registering a charity as incorporated gives the Trustees carte blanche to do what they like regardless of the consequences for others. All charity Trustees, regardless of the status of their charity, are required to act responsibly and in accordance with their charity's constitution (and, in particular, their legally defined charitable purposes which are an integral part of the constitution). Trustees of incorporated charities who step outside of what their constitution allows (including inappropriate use of the charity's funds as well as causing harm to other) can still be held personally liable for the consequences, even if their actions were due to carelessness or negligence rather than intentioned.

3. Trustees, Members, Friends/Supporters? Roles & Responsibilities

This is one of the areas where the law seems somewhat obscure and confusing.

The Charity Commission guidance publications on Membership charities (*ie*: charities which have a formal membership structure in addition to their Trustees) is now rather dated (last revision 2004).

RS7 – Membership Charities (full version)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284722/rs7text.pdf

RS7a – Membership Charities (Summary)

<http://forms.charitycommission.gov.uk/media/95429/rs7atext.pdf>

The main conclusions were:

- Properly managed, membership brings a lot of benefits to a charity by promoting inclusion of charity's supporters, volunteers and donors;
- Where difficulties arise it is usually due to poor understanding of the different roles and responsibilities of different members (*ie:* of Trustees and Members), particularly in the small number of cases where lack of knowledge of such differences is exploited to promote partisan opinions.

This series of leaflets deals with 4 types of membership structures for small charities:

- a) Very small unincorporated charities – the members of which are usually just the Trustees;
- b) Small unincorporated charities – which have a membership from which Trustees are appointed;
- c) Foundation Charitable Incorporated Organisations – in which there are only Trustees (all of which are required by law to also be Members);
- d) Association Charitable Incorporated Organisations – in which there are both Trustees and Members.

3.1: Charitable Incorporated Organisations (CIOs)

Charitable Incorporated Organisations are required by law to have BOTH Trustees AND Members. AND all Trustees must also be Members of the CIO.

***ie:* the Trustees of CIOs “wear two hats” – they are Trustee-Members.**

There are two models of CIOs – A Foundation model and an Association model. The main difference is that Foundation CIOs have only Trustee-Members – it has no Members who are not also Trustees – whereas Association CIOs has both Trustee-Members and Members who are not Trustees.

The Charity Commission Model Constitution for an Association CIO defines the duties and responsibilities of Trustees and Members as being to:

Trustees: *“...manage the affairs of the CIO and may for that purpose exercise all the powers of the CIO in the way he or she decides in good faith would be most likely to further the purposes of the CIO”;*

Members: *“...exercise his or her powers as a member of the CIO in the way he or she decides in good faith would be most likely to further the purposes of the CIO”.*

In the Model Constitutions for both types of CIOs the powers of Trustees are all the powers that the CIO has to function as a charity, namely to:

- a) borrow money;
- b) buy, sell, lease or rent property;
- c) employ staff
- d) invest the charity's money
- e) do anything else needed to further the charity's purposes.

But the Model Constitutions also specify some things that Trustees CANNOT do – those are powers given exclusively to Members, namely to:

- f) amend the Constitution (though amendments to clauses which might affect the charitable status of their charity require the approval of the Charity Commission);
- g) approve the amalgamation of their charity with another charity;
- h) wind up their charity;
- i) appoint or dismiss Trustees (though Trustees have some interim powers in this respect)

In practice this means that:

although the responsibility and powers for the day-to-day running the charity (*eg*: appoint a member of staff or fund a new project) in accordance with its Constitution lies exclusively with the Trustees, acting through their Trustees Meetings, and does not require the approval of Members;

if the Trustees wish to make constitutional changes, as specified in f) to i) above, they have to “swap hats” to become Members and convene a General Meeting of ALL the members of the charity (even though, in the case of a Foundation charity, “all the members of the charity” are just the Trustees themselves);

in the case of the Association Model for a CIO (*ie*: with Members in addition to Trustees) although it would be a very unwise Board of Trustees which ignored and disregarded the views of the charity’s Members, in legal terms the Membership has no powers to dictate to the Trustees how the charity is to be run and managed beyond either making changes to the Constitution or by dismissing Trustees and appointing others in their place (or both!).

3.2: Unincorporated Associations

The Charity Commission Model Constitution for Unincorporated Associations only provides for charities having Members as well as Trustees, and in that respect is essentially the same as for Association CIOs. As with CIOs, it is the Trustees who have the responsibility and powers to run and manage the charity while the Members have only limited powers to change the Constitution and to appoint trustees. And as all Trustees of Unincorporated Associations must also be Members of their charity they, too, so must “swap hats” depending on the nature of the business (and, therefore, the type of meeting – Trustees meeting or General meeting), to be transacted.

3.3: Other Types of “Members”

It is legal – but not recommended – for the Constitution of a charity to include provision to create special classes of Members, each with their own voting rights. This gets very complicated very quickly and is beyond the scope of this leaflet. So if you are thinking of creating special classes of Members with different voting rights you will need professional advice.

However, the Model Constitutions for Association (Trustees + Members) do contain provisions for the CIO to create what it calls “informal” (*ie*: “non-voting”) Members if they wish. This can be useful if the charity wants to recognise volunteers, supporters, donors (and others) as “belonging to” the charity – *eg*: get regular newsletters, are able to attend meetings (including the AGM), but without them having to take on the obligations of full Membership (*eg*: the obligation to make a financial contribution if the charity winds up in debt).

They do, of course, not have the right to vote at meetings and are not included when calculated whether the meeting is quorate.. And unless the Constitution specifically allows it, they do not have the RIGHT to speak at meetings (though they are usually allowed to speak if they wish).

3.4: The Pros & Cons of Membership

As the Charity Commission Review RS7, Membership Charities, points out, having a membership structure can bring into the charity a diverse and valuable range of views, opinions and expertise – and builds valuable bridges and networks between donors, volunteers, supporters, staff and beneficiaries to enhance the quality and value of the charities outputs and outcomes.

Two of the “cons” of having a membership structure are administrative:

- a) The legal necessity to make/keep an accurate, relevant and up-to-date list of members (including their membership status, *eg*: date of joining/leaving, contact details,

qualifications) can create a significant administrative overhead which, inevitably, has to be paid for from donor funds;

- b) The administrative overheads of having to comply with the legal requirement to keep members adequately informed (*eg*: copies of minutes and other documents relating to General Meetings of members) and to make arrangements for them to participate in General Meetings (*eg*: arrangements for proxy and or postal voting).

But a much bigger potential problem – which has little to do with whether or not a charity has, or wants, a membership structure – comes from the way in which the roles and powers of a charity are split between Trustees & Members.

The potential confusions inherent in that split are significantly exacerbated by the fact that the same individuals in some circumstances are required to exercise the power and responsibilities of Trustees while in other circumstances the powers and responsibilities of Members.

AND there is yet further inherent confusion in allowing some people to be called Members without having any of the powers and responsibilities of Members at all (*ie*: as “Informal” or “non-voting” Members).

As the Charity Commission Review RS7 points out, Trustees & Members not properly understanding the distinctions and overlaps of their respective legal responsibilities and obligation is the most common cause of disputes and acrimony in Membership Charities. This is particularly so when Members feel that they are entitled to have much greater control over the way that their charity is run than their rather limited Constitutional powers.

3.5: Which Structure to Choose When Setting Up a New Charity?

When first setting up a charity it is important to bear in mind that it is quite easy to change from a governance structure in which its Trustees are its only Members (in the sense of formal Members with full powers and voting rights as defined by the Constitution) – *ie*: a “Foundation” structure – to a governance structure which has both Trustees and additional Members with full powers – *ie*: an “Association” structure.

Provided that nothing else in the Constitution changes (*ie*: there is no change in the charitable purposes or the powers of Trustees), changing from a Foundation (Trustees only) structure to an Association (Trustees + Members) requires little more than the Trustees – wearing their “Members” hats – proposing and approving the appropriate change to the Constitution and then notifying the Charity Commission of the change for its approval.

Changing from an Association (Trustees + Members) structure to a Foundation (Trustees only) structure is much more complicated because it is ONLY the Members who can approve the change in the Constitution which will remove all their rights as Members.

It’s like “asking turkeys to vote for Christmas”.

So, whilst it is theoretically possible – and if the Members are willing to approve the change – it is similarly just a case of notifying the Charity Commission of the change (again, provided that there is no change in the charitable purposes or the powers of Trustees), in practice getting Members to abdicate their powers can be more contentious.

So unless there is an unavoidable compelling reason to set up a charity initially with a Membership Constitution, it is generally better to set up the charity first with a “Trustees Only” Constitution, if necessary with provision for a non-voting Membership.

Then, if a full Membership Constitution is subsequently found to be necessary it can easily be implemented.

After-all, a good well-connected and transparently run charity will be communicating with and listening to its “Members” and implementing their suggestions and recommendations whether or not those Members have formal voting rights.

4. Completing the Model Constitutions

4.1: Which Constitution Does My Charity Need?

There are three main types of Unincorporated Charities:

- a) Very Small Unregistered;
- b) Registered (Trustees only – no Members with voting rights);
- c) Registered (Trustees & Members);

and two types of Incorporated Charities:

- d) Foundation (Trustees only);
- e) Association (Trustees & Members).

The Charity Commission provides model Constitutions for both Unincorporated and Incorporated Charities. They can all be downloaded from the website:

<https://www.gov.uk/government/publications/setting-up-a-charity-model-governing-documents>

4.2: Very Small (Unregistered) Unincorporated Charity:

Suitable for charities with an annual income under £5000 that do not own a building or employ people and do not intend to register with the Charity Commission.

The sections in the model Constitution you will have to complete are:

- 1: Name – Enter the proposed name for your charity
- 2: Charitable Purposes – Enter your proposed charitable purposes.
See leaflet **2: Charitable Purposes** in this series for more information on what is required.
- 6(2): The number of members which must be present for a proper AGM (often known as the “Quorum”). Don’t make it over-optimistically high or you may find that there are insufficient members at your AGM to be able to make any binding decisions.
- 10: The date on which the Constitution was approved by the founding Trustees. It is important that they ALL sign the Constitution.
HOWEVER, it is suggested that you keep the number of founding Trustees reasonably small – not less than 3 and not more than about 8 (10 is the maximum allowed by the Constitution) – otherwise you will have difficulty in convening Trustees meetings.

Remember that everyone who signs the Constitution becomes a founding Trustee until the first AGM and therefore ALL share equal responsibility for the running of the charity, even if they do not attend Trustee meetings.

Once the Constitution has been approved and signed by the initial group of founding Trustees (which cannot be larger than 10) you can then add as many members to your charity as you wish (see section 5 of the Constitution). Those subsequent members will be able to attend and vote at the AGM and stand for, and be appointed as Trustees as appropriate.

4.3: Registered Unincorporated Charity:

Suitable for charities where the annual income will be over £5000 and are therefore required to register with the Charity Commission. They will typically:

- be relatively small in terms of assets, *eg*: may own small capital items like computers or small vehicles but not large assets like property or fleets of vehicles;
- have a membership of people with like-minded interests, *eg*: local residents, conservation issues; people who have, or are carers for people with, a particular medical condition;
- be run by charity trustees who will be elected by members or appointed to hold office for fixed terms;
- want to take account of the views of their supporters and beneficiaries as members;

- wish to carry out their work wholly or partly through the voluntary effort and contributions of its members.

Because a Registered Unincorporated Charity has no legal identity of its own, for the reasons given above this form of charity is NOT suitable for charities which will own significant amounts of property, will employ staff, or intend to enter into contracts to provide its charitable services to other organisations.

The sections in the model Constitution you will have to complete are:

The date on which the Constitution was adopted by the meeting founding the charity;

- 2: Name – Enter the proposed name for your charity
- 3: Charitable Objects – Enter your proposed charitable objects (*ie*: your charitable purposes). See leaflet **2: Charitable Purposes** in this series for more information on what is required.
- 12(2)(a): Quorum – Enter the minimum number of members which must be present for a proper AGM. Don't make it over-optimistically high or you may find that there are insufficient members at your AGM to be able to make any binding decisions.

Signatures confirming the adoption of the Constitution at the inaugural meeting of the charity. The model Constitutions does not specify who should sign it. It is suggested that it be signed by ALL of the founding Trustees.

4.4: Charitable Incorporated Organisations (Foundation & Association)

There are two separate model constitutions for Foundation CIOs (Trustees only, no wider membership) and Association CIOs (Trustees plus a wider membership), though the majority of clauses are common to both.

Other than “membership” there is no legal difference between the two. Both are “CIOs”. A Foundation CIO can easily apply to convert its Constitution to the Association form to allow it to appoint members. In principle, an Association CIO can also apply to convert its Constitution to the Foundation form, but that necessarily involves all the non-trustee members agreeing to give up their membership rights and responsibilities.

4.5: Charitable Incorporated Organisation (Foundation)

Suitable for charities regardless of level of income which do not require a membership with voting rights (*ie*: more than just the Trustees) but do require the protection provided by incorporation. They will typically:

- Have employees and/or contractors;
- Wish to enter into contractual arrangements with other organisations, either for the procurement of goods and services (*eg*: lease or ownership of premises for their charitable activities; rent of office accommodation; the supply of services such as telephone, broadband) or for the provision of their charitable services to third parties (*eg*: local councils or social services).

4.6: Charitable Incorporated Organisation (Association)

Suitable for charities regardless of level of income which will have a membership with voting rights and require the protection provided by incorporation. They, too, will typically:

- have employees and/or contractors;
- wish to enter into contractual arrangements with other organisations, either for the procurement of goods and services.

4.7: The sections in the model Constitutions you will have to complete or delete:

Unlike the model constitutions for the Unincorporated Charities, those for CIOs contain a large number of options from which your charity can select the most appropriate for your purposes. The left-hand column of the models contains extensive guidance on what the various clauses mean and when and how they can or should be modified.

The guidance to the Charity Commission's model constitutions also says:

We are publishing the model constitutions in this format (PDF) to help charities and their professional advisers to prepare for the implementation of the CIO. We are currently looking into more flexible and user-friendly formats that will make it easier for promoters to complete the constitution.

More flexible and user-friendly formats will certainly be welcome.