



## What is the procedure for a registered charity in Scotland to change into a Company Limited by Guarantee?

**Note:** for more complex organisations, this process may take up to a year or more. You should still allow several months for a more straightforward change in legal form. Frequent and timely contact with the Office of the Scottish Charity Regulator (OSCR) will reduce the possibility of unnecessary delays.

The main order of events would normally be as follows:

### 1. Check your current constitution

You need to see if your current constitution (or Trust Deed) gives you the power to wind up or dissolve the organisation and transfer the assets. You are winding up or dissolving the original charity and setting up a new company (which will be registered as a new charity) and transferring everything: assets, liabilities, employees, pensions, etc. into the new charitable company.

- If the trustees **DO** have the power to wind up or dissolve and transfer the assets, please go straight to no.2
- If the trustees **DO NOT** have the power to wind up or dissolve and transfer assets, please read no. 1a

#### 1a. Provision of evidence of unanimous support amongst the members and/or interim steps to take

An Unincorporated Association is not recognised as a legal entity separate from its members. That is, without its members it does not exist. The consequences of this are that Unincorporated Associations do not have the capacity to enter into legal relationships (contracts; and/or hold title or land in their own name). It is the members that do so (and that are ultimately liable).

If the constitution of an Unincorporated Association DOES NOT have an explicit Power to wind up or dissolve the charity and transfer assets, the members can still proceed with the proposed action. However, evidence of this should be provided at the time of application to OSCR. Provided that all of the Unincorporated Association members agree to the incorporation unanimous support amongst the members for incorporation process should be able to continue as at point 2, below.

Should some members disagree with the proposed incorporation, the charity, if its constitution contains a clause allowing the members to amend it, may take steps to insert a clause giving them the power to wind up or dissolve the charity and transfer its undertakings. The charity may then proceed to apply for consent to change legal form.

If the charity is a Trust, constituted under a Deed of Trust, and the Deed does not contain a clause empowering the Trustees to wind up or dissolve that Trust, then if



there is a clause allowing the Trustees to amend the Deed, they may proceed to draw up a Supplementary Deed of Trust giving themselves the power to wind up or dissolve the Trust. The charity may then proceed to apply for consent to change legal form.

Alternatively, if the Deed of Trust contains a clause giving the Trustees the power to expend all of the capital and income of the Trust in furtherance of its charitable purposes, then this implicitly gives the Trustees the power to wind up or dissolve the Trust

If none of the above situations apply, please contact OSCR on 01382 220446 to discuss charity reorganisation.

## **2. Prepare a draft Memorandum & Articles of Association – the “Constitution” for a charitable company.**

If your organisation has an existing constitution, this could form the basis for developing a memorandum and articles. See SCVO’s Guide to Forming a Company Limited by Guarantee which includes a model incorporating all the elements needed to comply with charity and company law.

Go to: [www.scvo.org.uk](http://www.scvo.org.uk) click into Information and then Frequently Asked Questions

**Note:** this may also be a good time to review the aims and objectives of your organisation to ensure they are still relevant; and your governance structure to make sure it is effective. If you decide to change the name of your organisation, this also needs consent from OSCR.

## **3. Follow the procedure outlined in your constitution**

A general meeting of members needs to be called, usually giving a set period of notice. If this is not at an annual general meeting (AGM) it is usually referred to as an extraordinary general meeting (EGM) or a special general meeting (SGM).

All members must be provided with full details of the special resolution to incorporate as a company limited by guarantee and the procedures detailed within your constitution must be followed. This should include the quorum for the meeting to go ahead and a minimum number of votes for the special resolution to be agreed. The draft memorandum and articles may also be given to each member as part of the papers of the special resolution to allow them to raise any questions or issues they may have at the general meeting.

## **4. Send the draft memorandum and articles to the Office of the Scottish Charity Regulator (OSCR) along with a completed ‘Change in Legal Form’ application**



You must get OSCR's prior approval of your new draft memorandum and articles before you can register the new entity as a company limited by guarantee and complete the remaining steps with Companies House. A timeline setting out when the transfer of assets and liabilities etc., from the current charity to the new company limited by guarantee is intended to take place is also required at this stage.

It is advisable that your current trustees get in touch with OSCR before you begin this process so that OSCR knows your plans and can clarify any requirements, contact OSCR on tel: 01382 220446. OSCR's guidance for their "Change in Legal Form" procedure can be found at [www.oscr.org.uk](http://www.oscr.org.uk) , and should be reviewed with your board before you begin the process.

In addition to the draft memorandum and articles of association, the "Change in Legal Form" procedure requires that you also send OSCR:

- a completed 'Change in Legal Form' application, available from [www.oscr.org.uk](http://www.oscr.org.uk)
- the current version of the charity's constitution
- a trustee declaration form for each proposed trustee of the new organisation. These too are available at [www.oscr.org.uk](http://www.oscr.org.uk).

**Note:** OSCR needs to receive the 'Change in Legal Form' application at least 42 days before it is intended that the proposed change becomes effective. This is a requirement of the Charities and Trustee Investment (Scotland) Act 2005 Act. However, the OSCR guidance states OSCR will confirm within 3 months of receipt 'whether the new body meets the charity test and can be entered in the Scottish Charity Register'. This is a more realistic timescale to work to and around, although OSCR will endeavour to conclude its involvement in the application process as soon as possible.

OSCR will assess the proposed new charity against the same criteria as any new application for entry onto the Scottish Charity Register to ensure it meets the charity test. They will also be checking to ensure the current charity has the power to wind up and transfer all its assets to the new charity; and will consider a new name if you are proposing to change the name of your organisation (though there is no requirement to do so).

It is important to note that the change of legal form process requires ALL assets and liabilities to be transferred. If there is heritable property, leases, employment contracts, or even pension liabilities this can incur significant delays and result in a process that is far from straightforward. To avoid unnecessary delays, OSCR advises that charities seek legal advice prior to applying to OSCR.



## 5. Seek approval from the Registrar of Companies to the proposed company name.

Once OSCR has approved the new name (if applicable) and draft memorandum and articles, you will need to check with Companies House to make sure the proposed name of the organisation is available (if you are not changing it, then the chances are it will be available). It is possible to omit the word “limited” from the name of the company provided that you make clear on your headed paper that you are a limited company. In **Form** IN01 - Section A3 allows for this purpose. But there are other words which can be used in the name **only** if there is specific justification for its use or if special permission is obtained. Companies House will be able to advise more fully on this but some of the “sensitive” words are: Association; Holdings; Foundation; Trust; Scotland; Scottish; Fund; Charitable; Institute; Federation; International; Group; Society.

Contact Companies House, 4th Floor, Edinburgh Quay 2, Edinburgh Quay 2, Edinburgh EH3 9FF.

Web: [www.companies-house.gov.uk](http://www.companies-house.gov.uk)

Tel: 0303 1234 500

Email: [enquiries@companies-house.gov.uk](mailto:enquiries@companies-house.gov.uk)

## 6. Appoint the Company Directors (Trustees) and choose the Registered Office.

At this stage you should also gather information about the first directors who will be required to set up the company. To register the company, you will need to have:

- **For the first directors (the same people you have named as trustees to OSCR already)**, you will need: Full name (including all middle names); any former name (ignoring for this purpose a maiden surname); Home address (which will appear in the Register of Directors which is in the public domain); Date of birth; Nationality; Business occupation; Any directorship (including a former directorship – identified as such - if held within the last five years). OSCR will be looking for a minimum of three trustees (directors).

**Note:** After 1<sup>st</sup> October 2009 it will no longer be necessary for directors to provide details of other current or former directorships. Also after 1<sup>st</sup> October 2009 directors will be able to provide a service address (which may be the company’s registered office) instead of their home address.

- **For the Company Secretary (if you choose to have one)**, you will need: Full name (including all middle names); any former name (ignoring for this purpose a maiden surname); Home address.

**Note:** it is no longer a legal requirement to appoint a company secretary although the duties of the company secretary still need to be carried out. If your memorandum and articles state that you will appoint a company secretary, you need to follow this.



After 1<sup>st</sup> October 2009, the exemption for married women from disclosing the surname by which they were known before marriage will no longer apply.

- **For the proposed Registered Office (unless you are moving, this will be the current office address)**, you will need: Proposed address of registered office (including post code). This can be any postal address (other than a PO Box) to which official correspondence is served on the company.
- **For the first Members**, you will need: Full name (including all middle names, if the member is an individual); Address. In practice, the first members may be the same people as the first directors. It is a requirement of company law to keep an up-to-date register of members of your company.

## 7. Hold the first members meeting

It is the usual arrangement that all initial members who sign the memorandum and articles do so at the same time, in the presence of a single witness. It therefore makes sense to keep the numbers at this meeting down but you should ensure that enough people sign the incorporation documents as first members to form a quorum for the first meeting of the members. Other directors and members can be admitted after the company is formed.

## 8. Incorporate the Company

You are now ready to incorporate because you have:

- a) OSCR approval
- b) formally adopted the memorandum and articles
- c) appointed the initial directors

This is what you need to send to Companies House:

- a signed copy of the new **Memorandum of Association**
- **Articles of Association**
- A completed form IN01, available from Companies House - <http://www.companieshouse.gov.uk/infoAndGuide/companyRegistration.shtml>

The completed forms should be sent to Companies House, together with a cheque for £20 to meet the incorporation dues.

If the company name includes one of the “sensitive” words listed above, a letter should be included justifying the use of the word.



The certificate of incorporation which brings the company into existence will normally be issued within 8 – 10 days (unless there are any problems with the documentation).

If you need to set up the company more quickly, it is possible to achieve same-day incorporation on payment of £50 if this is received correctly before 3pm.

## **9. Bank Accounts**

Once the new memorandum and articles have been formally adopted and registered with Companies House, a new bank account must be opened in the name of the new legal entity. The old bank account must then be closed and all associated administrative actions dealt with.

## **10. Wind up and Removal of current charity**

The next step is to ensure the removal of the current charity from the Scottish Charity Register.

You must submit a Change in Legal Form (Wind Up and Removal) form to OSCR, which is available at: [www.oscr.org.uk](http://www.oscr.org.uk).

This should be submitted along with the approved and recognised Memorandum and Articles of Association for the new organisation. The following supporting documentation must also be provided to OSCR at this time:

- a copy of the certificate of incorporation;
- a copy of the adopted memorandum and articles of association;
- a final set of accounts for the original charity;
- copies of the closing bank statements for the unincorporated association's account(s) and opening bank statements for the charitable company's account(s), showing transfer of cash balances;
- evidence that the wind up action was taken in accordance with the processes laid down in the former charity's constitution, e.g. a signed minute of the AGM or Trustees' meeting during which the action was formally agreed.
- and a statement from trustees that the transfer has been completed

OSCR expects that the change in legal form and transfer of assets and liabilities will be completed for most charities within 12 months of having received consent from OSCR. Their guidance helpfully sets out a timeline for each step. It should not take 12 months for smaller organisations. However, where an organisation has lots of



employees, contracts, leases or property owned, there will be quite a bit of paperwork to sort out, some of which may be dependent on outside agencies.

Please note that the complexity of these procedures will vary from one organisation to another. It can be done without the help of professional advisors, like solicitors, but where the organisation is larger and has more assets employees, etc., it may be appropriate to get help from a professional advisor. SCVO is not able to provide legal advice, but for those groups who are members of SCVO, you will have access to two hours of free legal advice from one of our pro bono scheme firms (where your annual income is below £500,000). This may be sufficient, or at least a good start for some smaller groups. Please get in touch with our advice line if you would like more information about this service.

**Note:** When your organisation is registered as a company with Companies House and as a charity with OSCR you need to comply with both company law and charity law requirements.

Contacts:

**The Office of the Scottish Charity Regulator (OSCR)**

Web: [www.oscr.org.uk](http://www.oscr.org.uk)

Email: [info@oscr.org.uk](mailto:info@oscr.org.uk)

Tel: 01382 220446

**Companies House**

Web: [www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

Email: [enquiries@companies-house.gov.uk](mailto:enquiries@companies-house.gov.uk)

Tel: 0303 1234 500

All online forms at: [www.companieshouse.gov.uk/forms/formsOnline.shtml](http://www.companieshouse.gov.uk/forms/formsOnline.shtml)

**Scottish Council for Voluntary Organisations (SCVO)**

Web: [www.scvo.org.uk](http://www.scvo.org.uk)

Email: [enquiries@scvo.org.uk](mailto:enquiries@scvo.org.uk)

Tel: 0800 169 0022