

The information below is an overview of requirements and for further more detailed information, support and guidance plus associated templates etc please contact the BVA Group Development Team via telephone 01256 423816 or email admin@bvaction.org.uk
www.bvaction.org.uk

A governing document is the formal document that sets up a charity and which we recommend contains all the information about:

- ✓ What the purpose of the charity is set up to do (objects);
- ✓ How the charity will do those things (powers);
- ✓ Who will run it (charity trustees);
- ✓ What happens if changes to the administrative provisions need to be made (amendment provision); and
- ✓ What happens if the charity wishes to wind up (dissolution provision).

It should also contain the following administrative provisions:

- ✓ How the charity trustees will run it; and
- ✓ Internal arrangements for meetings, voting, looking after money, etc.

A governing document is obviously important. It is not just something that a charity has to have in order to be a registered charity. It is the charity trustees' **"instruction manual"**, as well as a legal document. We advise charity trustees to refer to it regularly to remind themselves what the charity's purposes are and how it should be run. Each trustee should be given a full copy of the governing document on appointment.

Recommended standard provisions

There are certain provisions that we recommend be included in a governing document, either because they are essential to a charity or because they will help the charity trustees to run the charity efficiently. Whilst there is no legal requirement for all these provisions to be included, we have identified those which reflect good practice and are likely to help trustees avoid some of the common pitfalls of running a charity. These provisions are set out below in approximately the same order as they appear in most governing documents:

- charity name;
- objects (including details of beneficiaries), to be solely for charitable purpose;
- Demonstrate 'Public Benefit';
- powers;
- charity trustees (including how they are appointed);
- meetings and proceedings of charity trustees;
- membership (not relevant for trusts);
- accounts & bank accounts;
- trustees not to have a personal interest;
- holding of land and investments;
- power of investment, amendment and power of dissolution.

GOVERNING DOCUMENT:

Constitution or Rules

TYPE OF ORGANISATION:

UNINCORPORATED ASSOCIATION

CHARITY TRUSTEES ARE CALLED:

Executive or Management Committee

The “**association**” part of this description means that it is an organisation consisting of a group of people who have decided to co-operate in furthering what the organisation is set up to do, and who have certain parts to play in its administration.

The “**unincorporated**” part of the description tells you that the organisation is not a company (which is incorporated). This means that the association will not:

- have limited liability and a legal personality of its own (ie the charity trustees may be liable for the repayment of any debts which they have incurred on behalf of the charity: such debts can be met from the charity’s own funds (if they are sufficient) unless the charity trustees had not acted prudently, lawfully, and in accordance with the charity’s governing document);
- be able to own land (and usually investments) in its own name. It will need to appoint either a custodian or holding trustee(s) to do this.

Which organisations use this type of structure?

It may be appropriate to establish an unincorporated association where any one or more of the following applies:

- ✓ the organisation is to be relatively small in terms of assets;
- ✓ the organisation is to be a local branch of a national charity, and a standard constitution exists for branches;
- ✓ it has a membership;
- ✓ the charity trustees are elected or appointed to hold office for a fixed period of time – usually one year;
- ✓ the charity trustees are to be elected by members;
- ✓ the views of local residents, local councils, and other bodies need to be represented through membership, or as users of the facilities; and
- ✓ the objects of the organisation are to be carried out wholly or partly by, or through, the members (ie where the members undertake office or voluntary work on behalf of the organisation).

Do you need a professional legal adviser?

Generally no.

How is a constitution put into operation?

In practice, it is normally put into operation by being **adopted** (accepted for use) at a formal meeting of those people who are, or will be, the charity trustees and the general membership. This means that you will require a final typed version of the constitution, which should be:

- signed by all the charity trustees, e.g. the committee members;
- dated the day of the meeting at which it was agreed.

It will also be necessary for the minutes of that meeting to formally record that the constitution was adopted.

What documents are needed for registration?

From 1 March 2012 it became *compulsory* to attach these documents at the point of submission: governing documents, trustee declaration, bank statement and other supporting documents, to be attached at the time the online application is submitted.

A full guide to the registration process is available on-line through the Charity Commission. Please follow the link:

http://www.charity-commission.gov.uk/Start_up_a_charity/Guidance_on_registering/The_registration_process_in_dex.aspx

To certify a document, a person authorised by the trustees should write on the copy "I certify this to be a true copy of the original" and then sign and date it.

<u>GOVERNING DOCUMENT:</u>	Trust Deed
<u>TYPE OF ORGANISATION:</u>	UNINCORPORATED TRUST
<u>CHARITY TRUSTEES ARE CALLED:</u>	Trustees

A trust cannot own land or sign documents in its own name. It will need to provide holding or custodian trustee(s) if the charity plans to own or lease land.

Trust deeds can be known by other names, such as a declaration or deed of trust, deed of settlement, or will trust.

Which organisations use this type of structure?

It may be appropriate to establish a trust where some or all of the following apply:

- ✓ the organisation is to be run by a fairly small group of people;
- ✓ there is no time limit on how long the charity trustees will be in office (although we recommend that the composition of the trustee body is reviewed regularly);
- ✓ new charity trustees are going to be appointed by the continuing charity trustees;
- ✓ the organisation is not going to rely on a membership for any part of its administration;
- ✓ the administration of the organisation is going to be simple;
- ✓ the organisation is to be a grant-making body only;
- ✓ land and buildings are to be held on trust for permanent use for the purposes of the charity; and
- ✓ there is to be a restriction on spending capital.

Do you need a professional legal adviser?

A trust deed is a formal document, so you may need the help of a professional legal adviser to complete and execute it.

How is a trust deed put into operation?

It is **executed**: this means that it needs to be signed and dated, in the presence of an independent witness, by those who are setting up the trust. The witnesses must then sign their name against each of those signatures and give their address. The purpose of this is to verify the identity of those signing.

The trust deed should refer to a specific amount of money or some other asset which will belong to the trust at the time that the trust deed is executed. It is acceptable for a nominal sum of money to be declared, say £5 or £10.

If the trust deed declares charitable trusts but does not refer to any actual assets which are held on those trusts at the time the deed is executed, then it is said to be **"in vacuo"**. We would not register the charity unless and until there was independent evidence that some property has actually been settled on the trusts of the deed. The minimum requirements for registration will still need to be met, eg an annual income of £5,000 or more.

Does it need to be stamped?

If the deed declares trusts over:

- ✓ stocks and shares, it should be sent to the H M Revenue and Customs Edinburgh Stamp Office, in case it attracts Stamp Duty
- ✓ an interest in land (ie the freehold or leasehold) it will not require stamping. A separate certification procedure is now in place for Stamp Duty Land Tax.
- ✓ Cash, it will not require stamping

Deeds executed before 1 December 2003 will require stamping.

Deeds executed after 13th March 2008 do not require stamping.

Further information can be found on the HM Revenue & Customs website (www.hmrc.gov.uk) or from the Stamp Office helpline: 0845 603 0135.

It is advisable to telephone the appropriate Stamp Office and ask what the procedure is before sending the trust deed. Your local telephone directory usually gives the address of the nearest office under "Inland Revenue (Stamp Office)". If it does not, telephone the Stamp Office helpline (see above).

What documents are needed for registration?

- ✓ A copy of your final executed Trust Deed and your signed Trustee Declaration to your application.
- ✓ Evidence of adjudication by a local Stamp Office or a valid Stamp Duty Land Tax certificate, and
- ✓ Certified copies of any supplemental deeds or deeds of variation showing subsequent amendments, duly signed and witnessed, showing evidence of stamping if necessary

To certify a document, a person authorised by the trustees should write on the copy "I certify this to be a true copy of the original" and then sign and date it.

<u>GOVERNING DOCUMENT:</u>	Memorandum and articles of Association
<u>TYPE OF ORGANISATION:</u>	COMPANY LIMITED BY GUARANTEE
<u>CHARITY TRUSTEES ARE CALLED:</u>	Board, Council of Management or Directors

A company has an advantage over a trust and an unincorporated association in that it is “**incorporated**”. This means that the law considers it to be a person, in the same way as an individual. Therefore a company, like an individual, can own land and enter into contracts in its own name.

A company is a legal person quite separate from its members and directors (who, in the case of charitable companies are usually called members of the council of management). The directors are agents of the company and as such are not normally liable personally for its debts. A person who acts as a director whilst disqualified from being one commits a criminal offence and may be personally liable. A director may be liable to make payments to the company:

- ✓ if he or she acts in breach of trust or duty to the company; or
- ✓ if he or she is responsible for fraudulent or wrongful trading by the company (sections 213/214 Insolvency Act 1986).

The company will also have “limited liability” which means, in the case of a typical charitable company, that its members are normally only liable for the debts of the company to the extent which they have undertaken to guarantee them (usually the limit of liability stated in the memorandum of association is a nominal amount, e.g. £5).

A company is subject to company law, as well as to charity law, and there are certain duties which must be observed, such as the annual filing of accounts with the Registrar of Companies.

However, charitable companies can never be the same as commercial companies. The main purpose of commercial companies is to make profits for distribution to their members. The constitution of a charitable company always precludes the distribution of profits to members. All the property of a charitable company is applicable for charitable purposes.

Which organisations use this type of structure?

It may be appropriate to establish a company where some or all of the following apply:

- ✓ the organisation is to be quite large;
- ✓ it will have employees;
- ✓ it will deliver charitable services under contractual agreements;
- ✓ it will regularly enter into commercial contracts; and
- ✓ it will be a substantial owner of freehold or leasehold land or other property.

Do you need a professional legal adviser?

Yes, because a company is subject to company law (which can be quite complex) you may well need the help of a professional legal adviser to set it up.

How is a memorandum and articles of association put into operation?

It is put into operation by being subscribed to by one or more people in accordance with the provisions of Part I of the Companies Act 1985 and by registration with the Registrar of Companies at Companies House, who will issue a **certificate of incorporation**. There is a fee for registering companies with the Registrar of Companies. (You can contact Companies House at Cardiff CF14 3UZ, telephone 0870 333 3636 or on their website at www.companieshouse.gov.uk)

What documents are needed for registration?

- ✓ Two certified copies of the Memorandum and articles of Association
- ✓ A certified copy of the certificate of incorporation, and
- ✓ Certified copies of any special resolutions showing subsequent amendments

To certify a document, a person authorised by the trustees should write on the copy "I certify this to be a true copy of the original" and then sign and date it.

Source: Charity Commission