

## Establishing a Scottish Charity

## Choice of legal form

One of the first questions to be considered when setting up a new charity is *what form should it take?* When an organisation is described as a charity in Scotland, it means it is registered with OSCR, but that doesn't indicate the legal form of the charity.

The most popular types of charity in Scotland are unincorporated associations, companies limited by guarantee, charitable trusts and SCIOs (in that order), although the SCIO form has only been available since 2011 and it is quickly catching up. There can be others, such as Industrial and Provident Societies, but they are less common and tend to depend on the nature of the work being carried out.

The next important question is do we want an incorporated organisation? If you intend to lease or purchase property, employ staff, or enter into any other significant contracts, the answer will almost certainly be yes. An incorporated organisation has legal personality, meaning it can hold property and enter into the contracts in its own name. In law it is regarded as a separate legal person from its members. By contrast, unincorporated organisations rely on individual members or trustees to enter into those contracts in their names. There are two significant downsides to this:

1. The individual risks personal liability for the obligations under those contracts. This is potentially quite serious; and
2. Property and contracts need to be formally conveyed to successor trustees, which can be burdensome.

If you want an incorporated organisation, we would suggest a **charitable company** or a **SCIO**.

## Good reasons to choose a SCIO rather than a company

On the face of it, setting up and administering a charitable company involves a bit more effort than a SCIO. It will have to be registered with Companies House and OSCR. You will have to file accounts and annual returns with both regulators. You will also receive a fine from Companies House if the accounts are submitted late. There are other legal requirements in company law (including the duty to notify Companies House on a change of directors) and we would recommend an introduction to company law if the trustees are not already familiar with it.

## Good reasons to choose a company rather than a SCIO

Interestingly, a SCIO must hold general meetings at least once every 15 months. That requirement has been abolished from company law; a company need only convene a general meeting if the members ask for it.

For more information or advice please contact our charity team



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Only a company can grant a floating charge. That is a type of security favoured by lenders and grant-makers and so it might be easier to obtain funding as a company, rather than a SCIO or another type of charity.

If you intend to charge fees or restrict access to certain beneficiaries, or if there is any possibility that the body might not continue to be a charity (see OSCR reports on fee charging schools, and also the St Margaret's adoption society case ), then SCIO status may not be advisable. If a SCIO loses charitable status it ceases to exist. In such case, it is not clear what happens to the property of the SCIO. By contrast, a company will continue to exist as a legal entity notwithstanding the loss of charitable status. This issue also causes concern for lenders.

If you don't require an incorporated organisation, we would suggest an **unincorporated association** or a **trust**.

### General notes

They are quite simple to set up. The members of an unincorporated association have a relatively free hand in the drafting of the charity's constitution. A trust will be established by a deed of trust, usually declared by one of the first trustees. Charitable trusts are also commonly created by will (automatically when the writer dies, or by the executors of the deceased following his or her instructions).

In each case, ongoing administration is fairly straightforward. Accounts and annual returns must be submitted to OSCR. There is no legal requirement to maintain registers of members or trustees, although that may be good practice in the case of an association with lots of members.

### Good reasons to choose an unincorporated association rather than a trust

Whenever a trustee of a trust resigns, or when a new trustee is appointed, it should be recorded by a deed of assumption and conveyance. If there are frequent changes, this can prove burdensome.

Trusts are single tier organisations, with one group of individuals having full control of the trust assets and activities. It may be desirable in some circumstances (such as a sports club with a large body of members) to opt for an unincorporated association with a two tier structure, where the members reserve the power to take important constitutional decisions, but they delegate the day-to-day management of the charity to a compact management board or committee.

### Good reasons to choose a trust rather than an unincorporated association

A trust is quite suited for a grant giving body where there is little risk of liability. The control rests with the trustees and they are not accountable to members or others. Funds can be held in a corporate nominee which can get round some of the succession issues.

### Following registration with OSCR

It's important to remember that registration with OSCR doesn't come with any tax breaks or reliefs. Whatever legal form the charity takes, if charity tax status is required, a separate application should be made to Her Majesty's Revenue and Customs.

#### Notes:

<http://www.oscr.org.uk/hot-topics/charity-regulator-publishes-schools-report>

<http://www.balfour-manson.co.uk/news-plus-events/comments/the-st-margarets-adoption-society-appeal-case/>

[www.balfour-manson.co.uk](http://www.balfour-manson.co.uk)

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