

Eighth edition

Voluntary but not Amateur

**A guide to the law for voluntary organisations
and community groups**

Ruth Hayes and Jacki Reason

BWB In association with
Bates Wells and Braithwaite

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The history of *Voluntary but not Amateur*

As the '8th edition' on the front cover suggests, *Voluntary but not Amateur* (VBNA) has a long history. A glimpse through early editions provides for fascinating reading. The most striking feature is the rapid escalation in VBNA's size. The first edition, published in 1985 in pillar box red, was a mere 68 pages, with text printed in 12 point and with cartoons throughout following the fate of the Crumbly Mansions Community Association as it grappled with the law. Over time the cartoons disappeared and the print size decreased to make way for more text. By the time of the fifth edition in 1998 the book had grown to such a size as to demand an index. The current edition is more than four times the size of the first VBNA.

VBNA's widening girth reflects an expansion in the law. Early editions, for example, covered health and safety legislation on one page, whereas the subject now demands a dedicated chapter; maternity rights were dealt with in a column and paternity rights in a couple of sentences as a matter of good practice. Alongside new legislation came a clutter of acronyms such as SORPS, TUPE, CRB, PUPER and WEEE that now need explaining. The voluntary sector itself played a role in bringing about changes in the law. For example, its activities can no longer be summarised under the 'four heads of charity' described in previous editions, but now require thirteen, and the growth in the social enterprise movement saw the creation of community interest companies.

VBNA also provides advice and information on good practice, again giving an insight into the concerns of the time. Early editions had whole chapters on using computers (including the ambiguous headings: 'Manipulating figures' and 'Choosing a dealer'). They also had a chapter on fundraising – remember the Manpower Services Commission and the Urban Programme? These have been replaced with sections on 21st-century concerns such as contracting to provide services, use of e-mail and internet policies, the green office and developing family-friendly working practices.

VBNA has always been a production with a cast of thousands: on page xiv are listed the many people who have helped us to put together the present edition. But special thanks must go to the London Voluntary Service Council, which dreamt up the idea of VBNA back in the 1980s (when we were both working in the Council's Research and Information Department) and published the first seven editions, before graciously handing the publication over to the Directory for Social Change in 2007. Ultimately, though, VBNA is a tribute to every one of those heroic staff and committee members who over the past 20 years have learned to manage the fast-growing complexity of voluntary sector law and good practice.

Foreword

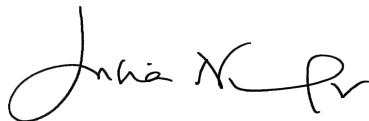
In the 24 years since the first edition of *Voluntary but not Amateur* was published, both the voluntary sector and wider society have seen extraordinary changes that were unimaginable in 1985. Coincidentally, we were in the midst of recession then and today find ourselves in another, which may well turn out to be even worse. Charities and voluntary organisations will be needed more than ever, but will face a tough climate for fundraising. Also media coverage will undoubtedly be harder to come by as other issues take the front pages.

Faced with the dual problems of escalating demand for services and increasingly stretched income, the sector needs resilience, effective governance and a first-principles approach. One of the strengths of *Voluntary but not Amateur* is that it summarises the processes people need to master when involved in running a voluntary organisation. It captures both best practice scenarios and legal requirements in one comprehensive volume, helping voluntary organisations understand everything from organisation management to employment law, campaigning and fundraising. It provides a back-to-basics resource for those running voluntary and charitable organisations, as well as a comprehensive update of recent legislation.

In 2009, the sector needs to work even more effectively than before, and so it has to be as clear about its role and as focused on its direction as possible. It must ensure its resources go where they will make the most impact, not on unnecessary duplication or ineffective recruitment practices.

We need a robust and well-equipped voluntary sector that will survive the tests ahead. Planning for these is a real challenge in itself, especially for smaller organisations. *Voluntary but not Amateur* is an excellent place for them to start.

I am delighted to welcome this new edition, and hope it will be used even more widely than its predecessors.



Baroness Neuberger DBE

Before you start – legal structures and charitable status

This chapter examines the advantages and disadvantages of each legal structure open to a voluntary organisation. It then describes which organisations are eligible for charitable status and outlines the restrictions of such status. Reference is made to a number of Charity Commission publications (usually indicated by a CC or RR reference) which, unless otherwise indicated, are available from www.charity-commission.gov.uk or 0845 3000 218 (textphone 0845 3000 219).

Legal structures

The legal structures for a voluntary organisation are:

Unincorporated	Incorporated
Unincorporated association	Charitable incorporated organisation (expected to be available during 2009)
Charitable trust	Company limited by guarantee
	Company limited by shares
	Community interest company
	Industrial and provident society

Any organisation, whatever its size, needs a set of **governing rules** defining what it is set up to achieve and including its internal rules and procedures (outlined in chapter 2). The governing rules are set out in the **governing document**. The precise form of this depends on the legal structure adopted.

Legal structure	Governing document
Unincorporated association	Constitution or rules
Charitable trust	Trust deed, deed of trust or declaration of trust
Charitable incorporated organisation	Constitution
Company limited by guarantee	Memorandum and articles of association
Company limited by shares*	Memorandum and articles of association
Community interest company	Memorandum and articles of association
Industrial and provident society	Rules

**A not for profit company may be limited by shares, although this is rare. It is extremely unusual for a company limited by shares to have charitable status.*

Throughout the book, we will be using the term ‘constitution’ to cover all forms of governing document. Constitutions are described in detail in chapter 2.

Most voluntary organisations will be run by a management committee, which can be known by a number of titles, including the following:

- committee
- executive committee
- management committee
- council of management
- board of trustees (most commonly used by charities)
- board of directors (most commonly used by companies).

Unincorporated associations

An unincorporated association is not required by law to seek approval of any kind before setting up, nor does it have to register with any regulatory body unless it is legally charitable (see *Charitable status*, page 11). However, it may still have to register with some bodies before starting to operate: for example, HM Revenue & Customs (HMRC), the local environmental health department, the Commission for Social Care Inspection or Ofsted. An unincorporated association with a small income, which does not intend to employ staff, enter into contracts or acquire property, may need only a set of basic rules. These should state the association's aims, the powers it has to achieve them and its management procedures.

Advantages

An unincorporated association is essentially a membership organisation and can draw up its own democratic constitution setting out the rules by which it will be run. It is quick and cheap to set up: unless you are applying for charitable status no other agency need be involved and there are no fees to pay, unless you take legal advice about the constitution. It is also simple and cheap to run: you do not have to submit accounts (unless the organisation is a charity, or accounts are required by a funder). It can generally be wound up more easily than companies, charitable incorporated organisations (CIOs) or industrial and provident societies (IPSs), provided the constitution allows for this (see chapter 10).

Unincorporated associations can register as charities and gain all the advantages of charity status listed later in this chapter. They must generally register if their objects are charitable and their annual income is over £5,000.

Disadvantages

An unincorporated association has no separate legal existence, and remains for most purposes a collection of individuals. As a result, in most cases:

- it cannot acquire property in its own name; property must be held by individuals or an incorporated body acting on its behalf
- legal proceedings cannot be taken by the association in its own name, but must be taken by individuals representing it
- its activities may be restricted as funders may prefer to donate larger sums to organisations with a more formal structure
- it may find it difficult to borrow money. Many banks and other financial institutions will insist on incorporation before providing loan finance
- individual members of the management committee can be held personally responsible for the association's obligations and debts (see *Liability of committee members*, page 20).

As a charitable unincorporated association develops, its trustees may apply to the Charity Commission to become an **incorporated body of trustees**. If the Commission accepts the application, this overcomes the first two disadvantages listed above, as the charity property is then held in the name of the association and the trustees can enter into contracts or take proceedings in the name of the incorporated body. See *Incorporation of charity trustees* (CC43) for further details. Applications must be made on the form in the application pack *How to apply to the Charity Commission for a Certificate of Incorporation* (CHY 1093), available from www.charity-commission.gov.uk.

Note that becoming an incorporated body of trustees is *not* the same as the unincorporated association converting to an incorporated organisation (known as 'incorporation': see *Changing from unincorporated to incorporated*, page 8). In particular, only incorporation will protect committee members against being personally responsible, in most situations, for the association's liabilities and debts. If liability of management committee members is a concern, you should seriously consider forming an incorporated organisation (see *Minimising the risk of personal liability*, page 20).

The constitution

The Charity Commission and other organisations have devised model constitutions. Alternatively, you could adapt one being used by a similar organisation; see *Models*, page 34.

Charitable trusts

An organisation that has no need for members, is unlikely to employ many staff and wants a simple structure to allow a small number of people to manage money or property for a charitable purpose could consider setting up a trust. However, only those organisations with charitable aims may use this structure and if they meet the requirements for charity registration detailed on pages 11–14 they must register with the Charity Commission.

There are three parties involved in a trust:

- the first, and future, donors of money or property
- the trustees (the Charity Commission usually requires three), who become the nominal owners of the trust property
- the beneficiaries (the people who will benefit from the trust).

As with all voluntary organisations, the trustees must ensure that the property or money is used for the purposes set out in the trust deed (a trust's constitution); as with all charities, the trustees should not generally benefit personally from trust property.

Advantages

Trusts can be set up quickly and cheaply, although you may need legal advice to make sure that the trust is valid. Apart from asking the Charity Commission to approve the trust deed and, in rare cases, paying stamp duty to HMRC, you do not need to involve any other regulatory body (although it may be necessary to register with some bodies once operating). Small trusts are also cheap to administer. If the trust deed has provision for changes, amendments can be made fairly easily but, as with any charity, the Charity Commission may need to approve any alterations to the aims

and objectives clauses. Regulation by the Charity Commission gives a trust credibility.

Trustees can acquire and manage property on behalf of the trust, and the trust deed can give trustees powers to raise and borrow money to fulfil the trust's aims.

Disadvantages

Organisations set up as charitable trusts that meet the requirements for charity registration (see page 11) must register as charities and therefore be subject to all the restrictions on registered charities set out later in this chapter.

Trusts are essentially undemocratic. Unlike other legal structures, there is generally no membership structure, although the trust deed can allow for members and elected trustees. Trustees are generally the only people with legal powers to make decisions relating to the trust.

As with unincorporated associations, trusts have no separate legal existence. Property cannot be held in the name of the trust, legal proceedings cannot be taken in its name, and there is a risk that the trustees will be held personally responsible for the trust's obligations and debts (see *Liability of committee members*, page 20). Trustees can apply to the Charity Commission to be incorporated (see page 8), which enables them to hold property, enter into contracts and take court action in the name of the trust. But even if the trustee body becomes incorporated in this way trustees can be personally liable for the trust's debts. In order to avoid this, the trust may want to consider converting into an incorporated body (see *Changing from unincorporated to incorporated*, page 8).

The constitution

The constitution of a charitable trust is called a **trust deed, deed of trust or declaration of trust**. There are several models available, including *Charitable trusts: model trust deed (GD2)* (from www.charity-commission.gov.uk/registration) and the Charity Law Association's *Trust deed for a charitable trust* (approved by

the Charity Commission) available, for a charge, from admin@charitylawassociation.org.uk.

Limited companies

There are two types of limited company. In a company limited by shares members (shareholders) invest money in the hope of gaining a profit; this type of company is generally found in the commercial sector, although some social enterprises may take this legal form.

The second kind is a **company limited by guarantee**. This is appropriate for organisations that aim to pursue some social or political cause. There are no shareholders and any profits are generally reinvested in the company (profits cannot be distributed to the members if the company has charitable status). All members must guarantee to pay a nominal sum (usually £1, and almost always less than £10) if the company is wound up.

A limited company must have a two tier structure: that is, having both members and directors (board or committee members), but these can be the same people.

A limited company with charitable aims must register with the Charity Commission if it meets the requirements listed on pages 11–14.

Advantages

A company is an **incorporated organisation**. This means that it has a distinct legal identity separate from that of its members, and therefore:

- can buy, own and sell property in its own name
- may take or defend legal proceedings in its own name
- can protect individual members of the organisation and, in most circumstances, members of the management committee from personal liability.

The liability of individual members (people with a right to vote at general meetings of the members) and **board members** (also known as **committee members** or **directors**) is

different. As the extent of individual members' personal liability is limited to the amount they agree to guarantee, they are therefore almost totally protected against personal liability in an incorporated organisation.

Under company law the board of directors is responsible for running the company; the directors generally have no personal liability unless they:

- act fraudulently
- are fined for breach of a statutory duty or a criminal offence
- act in breach of trust or duty, or
- continue running the company when they know, or ought to know, that it is or will inevitably become insolvent.

Committee members' liability is discussed further under *Minimising the risk of personal liability*, on page 20. Insolvency is described in chapter 10.

Companies must have a membership, which usually has the power to elect, and always has the power to remove, committee members. The structure works equally well for any size of organisation.

Because a company is incorporated and therefore has a separate legal identity, owning and transferring property is relatively simple. Even when the committee or membership changes, ownership of the property remains in the name of the company, so there is no need for any formal process to transfer ownership.

Although most companies have to use the word 'Limited' as part of their name, the majority of voluntary organisations are exempt from this requirement (see *Name*, in chapter 2).

It may be easier for a company to borrow money, for the lender knows that the organisation, rather than a changing group of individuals, is responsible for repayment. However, banks may still ask for personal guarantees from individual committee members who will then be liable to repay the loan if the company defaults.

Once the memorandum and articles of association (the company's constitution) are agreed, company registration (with the Registrar of Companies) takes eight to ten working days provided there are no complications. The registration fee is small (£20 in 2008/09).

Disadvantages

Companies' activities are regulated by the **Companies Acts 1985 to 2006** and are usually subject to more controls and bureaucracy than other legal structures.

Annual returns and accounts must be submitted to the Registrar of Companies (for which there is a charge: £30 or £15 online in 2008/09). The company must keep registers of members and directors, which must be available for public inspection (see *Setting up registers*, in chapter 2).

Companies have to notify the Registrar of Companies whenever a committee member leaves or a new one is appointed, or a committee member's personal details change. They must also notify the Registrar if they enter into any legal charge (for example, if they borrow money from a bank and the bank has a mortgage over the company's property).

The constitution

The constitution of a limited company consists of two parts:*

- the **memorandum of association**, which contains the company's aims, the powers it has to pursue them, and the extent of members' liability
- the **articles of association**, which describe the company's rules, including its procedures for electing the committee members (company directors) and keeping accounts.

From 1 October 2009, under the **Companies Act 2006, the memorandum of association of all new companies will mention only the subscribers (that is, the initial members). All other provisions previously set out in the memorandum will be included in the articles of*

association, so companies will have a single constitutional document. Existing companies will not need to change their constitutions.

Community interest companies (CICs)

CICs, established by the **Companies (Audit, Investigations and Community Enterprise) Act 2004**, are limited liability companies designed for social enterprises (non-charitable, not for profit organisations pursuing community benefit). A CIC can be a private company limited by guarantee or by shares, or a public limited company. They are regulated by the Regulator of Community Interest Companies.

A CIC is registered as a company in the usual way, but also needs to satisfy a 'community interest test': that is, to show that its activities are being carried out in the interests of the community or wider public and that access to its benefits will not be confined to an unduly restricted group. CICs cannot distribute assets to their members – this is known as an 'asset lock'.

A CIC limited by shares has the option of issuing shares that pay a dividend to investors. The dividend payable will be capped in order to protect the asset lock.

An organisation that is legally charitable (see page 11) cannot register as a CIC, although it can establish CICs as subsidiaries.

Advantages

A CIC is a corporate body and therefore has the same advantages as any other company.

CICs are specifically identified with social enterprise and, for some organisations, may be a more suitable structure than having charitable status.

Unlike charities, CICs can usually pay their board of directors.