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| OG50 Incorporation of charity trustees |
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# Casework Guidance

# A1  Overview of law and policy - 14 May 2019

## 1.  Definition

Trustee incorporation confers legal identity on the trustees of a charity as a group. Only the trustees (and not the charity) will be incorporated.  An incorporated body of trustees is able to act in its corporate name as a legal person; it enjoys and is subject to the same powers, restrictions, rights and liabilities as the charity trustees before incorporation. It is different from charity incorporation which may involve the registration of a charity as a company with Companies House.

## 2.  Policy summary

The incorporation of charity trustees is governed by Part 12 (ss.251 to 266) of the Charities Act 2011.

Under these provisions, where:

* the trustees of a charity apply to the Commission for a certificate of incorporation of the trustees as a body corporate (see OG 50 B2); and
* the Commission considers that the incorporation of the trustees would be in the interests of the charity;

the Commission may grant a certificate of incorporation subject to such conditions and directions as they think fit to insert in it (see OG 50 B4).

The Commission may also under these provisions:

* amend a certificate of incorporation either on application of the incorporated body, or of their own motion (see OG 50 B5);
* dissolve an incorporated body of their own motion in certain specified circumstances indicating the failure or inability of the incorporated body or relevant charity to operate, or on application of the trustees of the relevant charity that this would be in the best interests of the charity (see OG 50 B6).

## 3. The legal background

### 3.1 History

Occasionally, caseworkers will come across charities with certificates of trustee incorporation from before the current legislative regime (e.g. the 2011 Charities Act). It is therefore useful to understand the historical context and why we now adopt a more liberal approach to trustee incorporation than in the past.

The Charitable Trustees Incorporation Act 1872 empowered trustees of a charity established for religious, educational, literary, scientific or public charitable purposes to apply for a certificate of incorporation. The Commissioners would grant such a certificate if they considered incorporation to be expedient in the light of the charity's circumstances. Conditions or directions on certain specified matters relating to the makeup of the trustee body could be inserted into the certificate.

In practice, applications for such certificates were not generally encouraged, and where granted, this was only to long established, permanently endowed charities of some substance and reputation. It was usual instead to recommend the services of the Official Custodian. As a result, the few certificates of incorporation which were granted were mainly for certain religious charities where changes of trusteeship were frequent and where there were religious objections to using the services of the Official Custodian.

**IMPORTANT NOTE:**3.2 The current law

The 1872 Act was substantially amended by s.48 and Schedule 4 to the Charities Act 1992, and the resulting provisions were consolidated into Part 12 (ss.251 to 266) of the Charities Act 2011. The amendments, which are so substantial that in effect they amount to an entirely new statutory provision:

* extend the scope of the provisions to include all charities;
* empower the Commission to grant a certificate of incorporation of the trustees if they consider this to be in the interests of the charity (particular matters to be taken into account are no longer prescribed);
* confer unlimited discretion on the Commission to impose such conditions or directions as they think fit on granting a certificate of incorporation;
* simplify the procedure and conditions under which the charity trustees  may apply to the Commission to become incorporated (see OG 50 B2);
* empower the Commission to amend a certificate of incorporation on the application of the incorporated body (see OG 50 B5);
* empower the Commission to amend a certificate of incorporation of their own motion subject to:
	+ informing the trustees of the relevant charity of their proposals; and
	+ inviting those trustees to make representations to them;
* empower the Commission to dissolve an incorporated body on the application of the trustees of the relevant charity where they are satisfied that dissolution would be in the interests of the charity (see OG 50 B6);
* empower the Commission to dissolve an incorporated body of their own motion where they are satisfied that:
	+ the incorporated body has no assets or does not operate;
	+ the relevant charity has ceased to exist;
	+ the institution previously constituting, or treated by the Commission as constituting, the relevant charity has ceased to be or was not in fact a charity at the time of the body's incorporation;
	+ the purposes of the relevant charity have been achieved so far as possible or are, in practice, incapable of being achieved; and
	+ prescribe the manner in which documents must be executed by the incorporated body and remove the requirement for the incorporated body to have a common seal.

The Commission is required to:

* keep a record of all applications and certificates and preserve all documents  sent to them under Part 12 of the Act;
* make available for inspection documents submitted to them under Part 12 of the Act and provide a certified copy or extract of any such document if requested.

# B1 The effect of incorporation - 14 March 2012

## 1.  Rights, powers and restrictions

### 1.1 What is the status of the charity trustees?

When a certificate of incorporation is granted the trustees of the charity:

* become a body corporate which takes on the name specified in the certificate;
* take on any relevant rights and liabilities of the trustees - but see paragraph 2 below with regard to the continued liability of trustees).

### 1.2 What powers does the incorporated body have?

The incorporated body will;

* be able to enter into contracts, although see paragraph 2 below for the effect incorporation has on individual trustees' liabilities;
* have the same powers and be subject to the same restrictions and limitations as respects the holding, acquisition and disposal of property for or in connection with the purposes of the charity as did the trustees before incorporation;
* have vested in it all real and personal property (generally this covers land and investments) belonging to the charity other than any that is vested in the Official Custodian for Charities. The holder(s) of any stocks, funds or securities belonging to the charity have a duty to transfer them into the name of the corporation, as they cannot pass automatically across on the grant by us of a certificate.

### 1.3 What is the effect on gifts and donations made to the charity?

* Any gifts or donations made to the charity before the trustees are incorporated, but which do not take effect until after incorporation, take effect as if made to the incorporated body.

### 1.4 What does the certificate of incorporation cover?

It is important to remember that only the trustees and not the charity itself is incorporated by the grant of a certificate.

The certificate of incorporation can only have effect in relation to the charity or charities comprised within it.

**NOTE:**  There appears to be some conflict between rule 30(1)(c) of the Public Trustee Rules 1912 and Part 12 of the 2011 Act. The 1912 Rules suggest that where we incorporate the trustees of charity A under Part 12, we could also empower the corporation to act as custodian trustee of other unspecified charities. There seems to be no basis in Part 12 for providing such a power. If we are asked to include some such power in a certificate of incorporation, the matter should be referred for legal advice.

### 1.5 National Health Service charities

Section 11 of the National Health Service and Community Care Act 1990 provides for trustees to be appointed for NHS trusts, and for orders to be made transferring trust property from the NHS trust to those trustees.

In such cases, any certificate of incorporation granted by us must cover all the charities administered by the section 11 trustees at the time of granting the certificate. Any new charities that the trustees come to manage after that time would have to be covered by a new certificate.

However, a gift given to a charity covered by a certificate of incorporation, after the date of the certificate, which does not have the effect of creating a new charity, would be covered by the existing certificate. If in any doubt as to whether a gift creates a new charity or not, caseworkers should consult a lawyer.

### 1.6 The effect on accounting responsibilities

The charity remains the accounting entity, and accounts should be submitted in its name. However, the incorporated trustee body has the responsibility for maintaining, preparing and filing accounts.

## 2.  Liability of trustees

**IMPORTANT NOTE:** While, in the case of a corporate charity created under the Companies Act 2006, the charity trustees (i.e. its directors) are the agents of the incorporated body, where the trustees of the charity become a corporate trustee body under Part 12 of the 2011 Act, any relevant rights or liabilities of those trustees shall become rights or liabilities of that corporate body.

Therefore, incorporation does not affect the liability of the trustees who remain answerable and accountable for their own acts, receipts, neglects  and defaults and for the due administration of the charity and its property as if the incorporation had not been effected.

What this means, in relation to contracts, is that, in the case of a 2006 Act company, it is primarily the company itself that is subject to the contractual responsibilities. In most cases, the charity trustees themselves are not subject to those responsibilities, because they are merely the company's agents.

However, in the case of an incorporated trustee body, it is the members of the corporate body at the time of entry into the contract who will be collectively subject to the contractual responsibilities, just as they would have been had no incorporation taken place.  Of course, under section 31 of the Trustee Act 2000, they will normally be able to indemnify themselves against such liability out of the trust property, but nevertheless they are primarily responsible.

Members of an incorporated trustee body cannot escape their responsibilities by resigning membership of the body (i.e. trusteeship). So for instance, if trustees A and B enter into a contract to borrow money from a bank (X), and then C replaces A as a trustee, it is A and B who remain liable under the contract, until X agrees that A can be replaced by C as the party liable under the contract. [This applies whether or not the trustee body has been incorporated under Part 12]. However, a body of trustees incorporated under Part 12 does not have to renegotiate all its deals each time there is a change in its composition.

## 3.  Continuity of property ownership

The principal advantage of incorporation is that of perpetual succession. Because the property of the charity is vested in the name of the incorporated body, the need to transfer land or investments when new trustees are appointed is avoided.

While it was formerly the case that the property of a charity had to be vested in, or under the control of, all of the trustees jointly, unless they had express authority to do otherwise, there is now a default power under the Trustee Act 2000 to appoint a corporate nominee.

However, trustees may still prefer to incorporate under Part 12 of the 2011 Act, instead of using this new statutory power. This may be because:-

* it could be cheaper for trustees to form an incorporated body under Part 12 than to employ a professional nominee, or to incorporate the charity as a company under the 2006 Companies Act; or
* where land is held, the nominee may have to have trust corporation status. A 2006 Act company which was formed to act as a nominee for the trustees would not necessarily have that status; or
* in the case of some religious charities, the Part 12 structure may be preferred, if it is argued that there is some doctrinal preference for trust property to be held in the names of believers.

## 4.  Execution of documents by incorporated trustees

### 4.1 Means of execution

A document may be executed by an incorporated body of trustees either:

* by having affixed to it the body's common seal (if it has one - see OG 50 B3); or
* by being signed by a majority of the trustees of the relevant charity and expressed to be executed by the incorporated body; or
* by being executed in pursuance of an authority given under s.261(1) (see 4.2).

### 4.2 Authority for trustees to execute documents on behalf of an incorporated body

Subject to any provisions in the governing document of the charity, the trustees of the relevant charity may authorise any two or more of their number to execute documents, including deeds, in the name of and on behalf of, the incorporated body. This may be:

* a general authority; or
* an authority limited as the trustees think fit.

The authority must be:

* in writing; or
* by resolution of a meeting of the trustees.

The authority may be given so as to make the powers conferred:

* exercisable by any of the trustees; or
* restricted to named persons; or
* restricted in any other way.

Subject to any express restrictions, the authority remains in force until it is revoked, notwithstanding any change in the trustee body, and is valid for all purposes.

# B2  Incorporation of charity trustees -  14 May 2019

## 1.  General approach

As a result of the divestment of the Official Custodian, and the revised provisions of the 2011 Act, more charities are now likely to be in a position where they could benefit from the incorporation of the trustee body. Trustees may well see incorporation as an effective and less costly alternative to the appointment of a nominee company or custodian trustee, but we should be sure, before granting a certificate, that they are aware of, and have explored the alternatives, and that it is positively in the interests of the charity for us to do so.

The Commission has agreed that certificates of incorporation should be granted to charity trustees where it is in the interests of the charity to do so. We should interpret "the interests of the charity" to mean that some factor exists which would positively improve the administration of the charity as compared with a situation where the trustee body is not incorporated.

Staff should adopt a positive and flexible approach towards applications for certificates of incorporation. However, the Trustee Act 2000 now offers a viable alternative in many cases in the form of a default power to appoint a corporate nominee or custodian. Caseworkers should be aware of this alternative, and should be sure that trustees have given due consideration to it before applying for Part 12 incorporation. (See section 2).

## 2.  Effect of Trustee Act 2000

The Trustee Act 2000, which came into force on 1 February 2001, confers upon trustees statutory default powers to appoint nominees and custodians. This is in addition to any constitutional powers, any existing statutory powers, and to any powers provided by the Court or the Commission which enable trustees to allow trust property to be held otherwise than by themselves collectively.

The new powers (found at sections 16 and 17 of the Act) apply to all charitable trusts except:

* trusts established by schemes made under sections 96 and 100 of the Charities Act 2011 (and their statutory predecessors), which are common investment funds and common deposit funds, with the exception of pooling scheme CIFs established under section 96 of the 2011 Act (and its statutory predecessor);
* trusts which have a custodian trustee - the statutory duties of a custodian trustee are not compatible with the appointment of a separate person as nominee or custodian;
* trusts where the specific assets are vested in the Official Custodian for Charities - for the same reason as applies to trusts with a custodian trustee. (However, trustees can appoint nominees and custodians for other assets not vested in the Official Custodian);
* trusts where the governing document provides to the contrary.

In addition, section 18 stipulates that where trustees invest in or retain securities payable to bearer, the trustees must appoint a person to act as a custodian of those securities.

In the light of these new powers, trustees should consider whether it is a more satisfactory way of achieving the objective of providing for continuity in the ownership of the charity's property to appoint a nominee rather than to seek incorporation under Part 12. It is not essential to appoint a professional nominee under the Trustee Act provisions. An option is for the trustees to incorporate a company under the Companies Act 2006 to act as a nominee.

## 3.  Status of charity applying for incorporation of its trustees

An application for incorporation may be made to the Commission by the charity trustees of:

* a registered charity
* an exempt charity, or
* an excepted charity

A certificate of incorporation cannot be granted where the Commission considers the relevant charity should be registered under s.29 of the Charities Act 2011, but it is not registered.

Where an application is received from the trustees of an unregistered charity, the basis for it not being registered should be checked and if there is any doubt as to its proper status, the papers should be referred to Registration for urgent consideration of whether the charity should be registered.

The question of registration must be dealt with before the application for incorporation of the trustees can proceed.

## 4.  Form of application and documents to be submitted

All applications for incorporation of trustees must be:

* in writing
* signed by the trustees, and
* accompanied by such documents or information as the Commission may require.

We also need:

* the trustees' case for incorporation (which consists of a number of questions which we could expect the trustees to have considered when applying)
* full name of each charity trustee and their signature confirming that they are applying for trustee incorporation
* a list of all the charity's assets: this should cover all land and investments belonging to or held in trust for the charity and should include details of the name(s) in which each item is held
* confirmation that the appointment of each of the trustees is valid
* proposed name or title of the incorporated body
* details of the minimum number of trustees required in the charity's governing document and confirmation that the charity has at least this number of trustees
* a copy of the governing document (if the charity is not registered), and
* if a seal is to be used, proposals for its design, custody and use.

# B3 Considering applications - 14 May 2019

## 1.  The trustees' case for incorporation

The most difficult applications to evaluate are those where the trustees are requesting incorporation, not because there is any pressing need at present, but because they feel it might be useful in the future. In such cases, we should continue to press the trustees for answers to the questions in the pack, and require them to provide good reasons as to why the charity's situation is likely to change over time, so that incorporation is in its interests.

The purpose of the questions of the application form is to assess:

(a)  the relevance of trustee incorporation to the interests of the charity: and

(b)  whether there are technically any problems in the light of the requirements of the 2011 Act, particularly with regard to the need for proper appointments that have been made.

Our general position should be that we will grant the certificate so long as there are no obvious problems with the appointment of the current trustees and so long as there appear to be opportunities to make use of the incorporated status now or at some realistic time in the future.

### 1.1 Activities

The trustees are asked what are the principal activities of the charity. Although this has no direct impact on our decision, the answer should give us a idea of whether the charity is operating properly in accordance with its objects and that we would not be granting a certificate to a charity which is in breach of trust.

### 1.2 The trustee body

The trustees are asked various questions relating to the size and viability of the trustee body, for instance, how many does its governing document require, whether it presently has that number, and how easy it has been to recruit new trustees.

More detail on how and why this aspect should be considered is given in section 3 below.

### 1.3 Property

The trustees are asked how often they have to change the name in which the charity's assets are held.

They are also asked if they have incurred any difficulty or expense because of the way the charity's property is held, and to provide details.

Broadly speaking, if the trustees can show that they often have to change the name in which assets are held, and/or the way the property is currently held causes them difficulty or expense, this should count in favour of our granting a certificate of incorporation

Finally, they are asked to justify why, if the charity's property mostly consists of land, it should not be held by the Official Custodian for Charities.

### 1.4 Benefits to charity

The trustees are also asked to indicate how the charity would benefit from trustee incorporation. We should not proceed with trustee incorporation unless they are able to supply us with reasonable examples of how the charity would benefit .

## 2.  Trustee body

### 2.1 Appointment of trustees

Section 257 of the 2011 Act requires that, before a certificate of incorporation can be granted, the trustees of the charity must have been appointed to the satisfaction of the Commission. It is essential, therefore, that the information given in the application about the appointment of trustees is checked carefully and that any irregularities are corrected either by the charity itself or, if necessary, by making a Scheme or Order.

### 2.2 Viability of trustee body

It is also essential that we should be satisfied that the trustee body is, and will continue to be, a viable one.

For example we may wish to ensure:

* that the number of trustees does not fall below a certain number; or
* in the case of a local charity, that the trustees have a sufficient local connection.

This could be achieved either by the trustees amending the governing document themselves (if they have the power to do so) or by the Commission establishing a Scheme.

## 3.  Interests of the charity

The only test to be applied in considering if we grant a certificate is whether or not incorporation of the trustees will be in the interests of the charity. A charity that has numerous investment holdings is likely to find it much easier to satisfy this test, than one which holds only land. In the latter case, the main advantage of incorporation can be achieved more simply by making an Order vesting the land in the name of the Official Custodian.

## 4.  Why would we reject an application for trustee incorporation?

We will normally grant a certificate of incorporation where it is in the interests of the charity to do so: ie, it is likely to bring about a positive effect on the charity's administration compared with the situation if the charity had not incorporated.

Nevertheless caseworkers have, in general, approached applications for trustee incorporation on the assumption that they will be granted. They must bear in mind that the Trustee Act 2000 now permits the appointment of a professional nominee and this may be a more suitable course of action than incorporation under Part 12 of the 2011 Act.

**IMPORTANT NOTE:** The following reasons why we might reject an application should nevertheless be viewed flexibly, and caseworkers need to take all information provided by the trustees into account in reaching their decision. If there is any doubt, caseworkers should consult a senior caseworker or a lawyer.

A certificate will not (unless the charity is a religious one, in which case see section 6) normally be granted to a charity whose investments consist only of:

* shares in one or more common investment fund (the shares can be registered in the name of the charity rather than in the names of the individual trustees);
* government stocks on the Bank of England Register or shares in Charifund (M and G Equities Investment Fund for Charities) (these investments can be held in the title of office holders, e.g. the secretary and treasurer for the time being of the charities concerned, provided there is a permanent address);
* government stocks held on the National Savings Stock Register (these can be held in the name of the charity even if it is an unincorporated body);
* building society or bank accounts (these can be held in the name of the charity, the building society or bank being notified when the signatories to cheques change); or
* land or buildings (these can be vested in the Official Custodian).

Again, however, these issues need to be viewed flexibly. Even if no investments are held, but the charity has regular contractual relations, there could be a sound basis for incorporation.

## 5.  Religious charities

Some Roman Catholic and other religious charities have religious objections to using the services of the Official Custodian, even where their only assets or their principal assets consist entirely of interests in land.

In these cases, particularly where several properties are involved or where changes in trusteeship are frequent, there may well be grounds for granting a certificate of incorporation despite the fact that the charity's assets consist only of land, or of land and other investments of the type listed in section 5.

## 6.  Title of incorporated body

The name of the incorporated body must be specified in the certificate.

There are no statutory requirements regarding the titles of incorporated bodies but, to avoid the public being misled into thinking that a charity itself is incorporated, we should decline to grant a certificate of incorporation to charity trustees who do not propose to include in their title either the word "Trustees" or the word "Governors". The word "Registered" should be avoided as far as possible as it might suggest to the public that the charity is registered under the Companies Acts.

Titles given to incorporated bodies should normally be expressed in one or other of the following forms:

* "The Trustees of the Charity of John Smith"; or
* "The Incorporated Trustees of the Charity of John Smith".

In appropriate cases, the word "Governors" may be substituted for the word "Trustees" and the word "Foundation" for the word "Charity".

## 7.  Trustees who administer more than one charity

Where a particular trustee body administers a number of different charities, the certificate of incorporation must apply to all of the charities of which the body is to act as trustee in a corporate way. If the certificate applies only to charity A, the trustees will not be incorporated for the purposes of any other charities that they administer.

So in cases where the body of charity trustees seeking incorporation administers more than one charity, the following approach should be adopted:

* where the body of charity trustees seeking incorporation has been specifically appointed (by Scheme or otherwise) to administer another charity or charities, the trustees should be incorporated by the name of the principal charity. Under that name, they can continue to administer the charity or charities which they have been expressly appointed to administer;
* where the body of charity trustees seeking incorporation has been constituted by a Scheme amalgamating a number of separate charities, the trustees should be incorporated by the name of the amalgamated charity;
* where the body of charity trustees seeking incorporation has been constituted by a Scheme bringing together a number of separate charities under a group name, there are two possibilities:
	+ the body of charity trustees can be incorporated by the name of the main or largest charity in the group; or
	+ the body of charity trustees can be incorporated by the name of the group.

If (as is likely) the charity trustees wish to be incorporated by the name of the group (for example, The Trustees of Newtown Municipal Charities), it will be necessary to make the certificate of incorporation in the matter of all the separate charities comprising the group.

If the trustees, as a group, are also common to other charities, the simplest solution may be to make a Uniting Direction for administrative convenience.

In each case, the name chosen should, of course, include the word "Trustees" or "Governors" (see section 7).

## 8.  Common seal

Under the 1872 Act an incorporated body of trustees was required to have a common seal, but under the 2011 Act this is a matter for decision by the trustees. If the trustees choose to have a seal, they should supply details of its proposed design and the proposed regulations for its custody and use, which demonstrate the following:

* The design of the common seal should include the name under which the trustees should be incorporated.
* Proper measures must be agreed by the trustees for its safe custody.
* Regulations must be agreed by the trustees for its use.

For more guidance on the effect of incorporation on how documents have to be executed, see section 4 of OG 50 B1.

## 9. Levels of authority

The levels of authority when dealing with incorporation cases are set in accordance with our Authorised Officer policy.

# B4  Granting certificates of incorporation - 14 May 2019

## 1.  Model certificates

The certificate of incorporation should take the form of either;

* a model certificate where the incorporated body of trustees **does not** have a common seal; or
* a model certificate where the incorporated body of trustees **does** have a common seal. (In this case, the seal must be impressed on the certificate of incorporation (and all copies) before the certificate is signed by an authorised officer).

In the second case, standard directions on the use and custody of the common seal are included. The standard directions relating to the use and custody of the seal may be varied, if requested by the trustees, provided that they sufficiently safeguard the seal's custody and use.

## 2.  Reminder of conditions

When sending the certificate of incorporation to a charity, the attention of the trustees should be drawn to the provisions of ss.260 and 261 of the 2011 Act regarding the execution of documents by an incorporated body of trustees (see OG 50 B3). Model letter OG 50 L2 covers this point.

## 3.  New trustees

As with all other charities, trustees in an incorporated body of trustees have a duty to complete an Annual Return, which, among other things, includes any changes to the names and addresses of individual trustees each year.

New trustees should be subject to the same basic checks as trustees of charities applying for registration.

## 4.  Conditions or directions

### 4.1 Authorised officers’ powers

Authorised officers may insert into a certificate of incorporation such conditions as they think fit. The model certificate provides some standard ones such as the common seal (see below). The model provides everything the caseworker will normally need with regard to conditions or directions, and it will only be very rarely that they have to make up special conditions and that the guidance at section 4.4 will be relevant.

### 4.2 Common seal

Where the incorporated body has chosen to have a common seal, directions should be given as to its use and custody.

### 4.3 Model certificates

Both of the standard conditions referred to in sections 4.1 and 4.2 above are included in each of the model certificates.

### 4.4 Special conditions

Otherwise, the conditions or directions to be inserted in the certificate will depend on the circumstances of the individual case. Generally, it will be inappropriate to include conditions or directions relating to qualification and number of trustees, their tenure or avoidance of office, and the mode of appointing new trustees.

### 4.5 Effect of conditions and directions

**IMPORTANT NOTE:** All such conditions and directions are:

* binding upon the trustees and must be performed or observed by them as trusts of the charity;
* by virtue of s.338 of the 2011 Act, enforceable under s.336 of that Act. Failure to obey any condition or direction may, on the application of the Commission to the High Court, be dealt with, as would disobedience to an Order of the High Court.

## 5.  Recording trustee incorporation

### 5.1 Register Plus

It is the responsibility of Operations to record instances of trustee incorporation on Register Plus.

Staff granting certificates of incorporation should ensure that Register Plus is updated, **once a certificate has been issued**, and that the check box for "Trustees Incorporated" is filled.

**NOTE: Where a body of trustees seeking incorporation administers one or more other charities, Register Plus should also be updated in respect of those other charities, where a Uniting Direction has not been made.**

### 5.2 File Records

Section 264(1) of the 2011 Act states that "The Commission must keep a record of all applications for, and certificates, of incorporation under this Part".

During the consideration of an application, all papers relating to it should be kept on a case file.

Once granted, in the case of registered charities, the certificate of incorporation itself should be transferred to the Central Register file. In the case of unregistered charities, the certificate of incorporation should be placed on a Key Documents (KD) file.

Other papers relating to the application should be kept on the case file, which will be destroyed after retention for five years. The originals of papers essential to the history of the incorporation should be transferred to a Key Documents file, at the time the case is closed.

Any less essential papers relating to the incorporation can be kept on the case file, together with a note that the other papers have been moved to the KD file.

In cases where an application does not result in a certificate of incorporation being granted, the 2011 Act still requires us to keep a record of the application and preserve documents associated with it. Therefore, any relevant papers must be transferred to a Key Documents file even where a certificate of incorporation is not granted.

**NOTE:   The Records and Information Management Manual requires that Key Documents files are retained until five years after the charity is removed from the Register of Charities, and then destroyed. Where a Key Documents file is raised for a trustee incorporation application relating to an unregistered charity, whether or not the application is successful, the Key Documents file should be kept for at least five years after the decision is made, before destruction. If in any doubt about the correct retention policy to follow, caseworkers are advised to consult the Departmental Records Officer.**

Sometimes we will advise on trustee incorporation, without actually receiving an application. These can be dealt with as short cases, and the papers destroyed in accordance with short case policy.

## 6.  Levels of authority

Authority to grant a certificate under s.251 of the 2011 Act will be in accordance with our Authorised Officer policy.

# B5  Amending a certificate of incorporation - 14 March 2012

## 1.  When can certificates of incorporation be amended?

The Commission may amend a certificate of incorporation on application of the incorporated body or of their own motion.

## 2.  Application by incorporated body for amendment

An application from an incorporated body for an amendment to a certificate of incorporation should be sealed or signed in the manner provided for in OG 50 B3.

Unless the need for an amendment has arisen by virtue of the circumstances specified in section 5 below, the trustees should be asked their reasons for seeking the amendment to the certificate of incorporation. However, the 2011 Act does not require that the amendment is expedient in the interests of the charity. As with new applications for incorporation, staff should take a flexible and positive approach to applications by incorporate bodies of trustees for the amendment of certificates.

The Commission may amend a certificate of incorporation either:

* by making an Order specifying the amendment; or
* by issuing a new certificate of incorporation taking account of the amendment.

Where a new certificate of incorporation is issued, the trustees should surrender the sealed copy of the original certificate.

## 3.  Amendment by motion of the Commission

The circumstances in which the Commission might, of its own motion, amend a certificate of incorporation are not specified in the 2011 Act.  In practice, this is likely to be necessary only very rarely. It is most likely where amendment to conditions or directions inserted in the certificate by the Commission is necessary, but the incorporated body of trustees is unwilling to make an application for amendment. Circumstances that might lead to such a situation are described in sections 6 and 7 below.

Before making an amendment of our own motion, we should:-

* inform the trustees of our proposals; and
* invite the trustees to make representations to us by a time specified within the notice, being not less than a month from the date of the notice;
* consider any representations put forward by the trustees within the time specified, and then proceed (without further notice) with our proposals either without modification or with such modification as we think desirable.

## 4.  Conditions and directions which may need to be amended

Section 1 of the Charitable Trustees Incorporation Act 1872 enabled the Commissioners to insert in the certificate of incorporation such conditions and directions as they thought fit relating to:

* the qualifications and number of the trustees;
* their tenure or avoidance of office;
* the mode of appointing new trustees;
* the provision of the names and addresses of  the trustees making up the incorporated body; and
* the custody and use of the common seal.

The description of conditions and directions was omitted from the 1992 and 1993 Acts and, with the exception of directions relating to the common seal, it is unlikely that they would be included in a certificate issued since 1 January 1993. However, there may be some instances where this has been necessary, and there will certainly be certificates issued under the 1872 Act which include such conditions or directions.

## 5.  Effect of the Commission’s regulatory powers

Where the Commission has exercised its regulatory powers under s.76 of the 2011 Act (power to act for protection of charities), for example by:

* appointing additional trustees; or
* removing a trustee; or
* establishing a Scheme for the administration of the charity;
* in respect of a charity whose trustees are incorporated, it is possible that the result may be contrary to conditions or directions in the certificate of the type described in section 4.

## 6.  Invitation to apply for amendment

In the circumstances described in sections 4 and 5 and in any other circumstances where it is apparent that a certificate of incorporation should be amended, the incorporated trustee body should be invited to make an application for an amendment. Only if the incorporated body is unwilling to make an application should consideration be given to an amendment of the Commission’s own motion.

**IMPORTANT NOTE:** Every case, where it is considered that such action may be appropriate, should be referred to a lawyer for advice.

## 7.  Notice to trustees

Where Legal Services advise that there are grounds for the exercise of the Commission's power to amend a certificate of incorporation of its own motion, the trustees should be:

* informed in writing of the Commission's proposals; and
* invited to make representations within a specified time, normally, **and never less than**, one month from the date of the letter.

## 8.  Subsequent action

The Commission is bound to take into consideration any representations made by the trustees within the specified time, but may then proceed with the proposed amendment, with or without modification in the light of those representations. At the expiry of the period of notice, action should be taken in line with the advice received from Legal Services, or, if necessary, the papers should be referred to Legal Services again for further advice.

## 9.  Forms of Order

A model Order for amendments made to a certificate of incorporation under s.262 of the 2011 Act is available to caseworkers in the Order Manual.

## 10. Levels of authority

Orders under s.262 of the 2011 Act, amending a certificate of incorporation, may be made by Authorised Officers in accordance with our Authorised Officer policy.

# B6  Dissolving incorporated bodies - 14 March 2012

## 1.  Circumstances of dissolution

**IMPORTANT NOTE:** The Commission may dissolve an incorporated body:

* on application of the trustees, where they are satisfied that dissolution would be in the interests of the charity; or
* of their own motion, where they are satisfied that:
	+ the incorporated body has no assets or does not operate: or
	+ the relevant charity (or institution treated as a charity) has:
		- ceased to exist; or
		- was not in fact a charity at the time of the body's incorporation; or
	+ the purposes of the relevant charity have been achieved so far as possible or are, in practice, incapable of being achieved.

 Dissolution is effected by an Order of the Commission under s.263 as and from such date as is specified in the Order.

## 2.  Effect of s.263 Order

An Order under s.263 will:

* dissolve the incorporated body of trustees;

and, unless a particular direction to the contrary is specified (see below);

* vest in the trustees, to hold for it in trust, all property at that time vested in trust for the charity in:
	+ the incorporated body; or
	+ any other person (apart from the Official Custodian).

Where the property of the charity can be automatically re-vested in the individual trustees by the section 263 Order, this will happen whether the property was vested in the dissolved corporation or someone else. However, the actual holders will be obliged to take any steps necessary to perfect the title of the trustees.

**IMPORTANT NOTE**:  It is possible that, where a certificate of incorporation applies to more than one charity administered by a particular trustee body, the dissolution of the corporation is expedient for one or more charities, but not for all of them. As each incorporation is distinct, even where made through the same certificate, it is possible for a section 263 order to be made in relation to one or more such charities, effectively leaving the incorporation in place in relation to any others. In such a case, we would have to issue an amended certificate of incorporation reflecting the changes (s.262(5)).

## 3.  Rights and liabilities

When the incorporated body is dissolved, the rights and liabilities of the incorporated body are transferred to the trustees of the relevant charity (or if the incorporated body has been dissolved because the Commission is satisfied that it was not a charity at the time of incorporation, to the persons controlling the institution).

Any legal proceedings by or against the incorporated body may be continued (or commenced) by or against the trustees.

## 4.  Particular directions

The Order under s.263 may include directions that:

* all or any specific part of the property of the charity shall, instead of vesting in the trustees of the charity, vest in a specified person or persons (s.263 (4)(a));
* any specified investments or specified class or description of investments held by any person in trust for the charity shall be transferred either to the trustees of the charity, or to a specified person or persons (s.263(4)(b)).

## 5.  Dissolution on application of trustees

An application from the trustees of a relevant charity for dissolution of the incorporated body should be in writing and signed or sealed as in OG 50 B1.

It should include a statement of why the trustees consider dissolution of the incorporated body would be in the interests of the charity. This is the only consideration when deciding whether or not the application should be allowed.

Where any of the conditions for dissolution of an incorporated body of the Commission's own motion are satisfied (see section 1), it may be accepted without further enquiry that dissolution is in the interests of the charity. In any other case, it is for the trustees to make a case to show how dissolving the incorporated body will help the charity.

## 6.  Dissolution by motion of the Commission

The circumstances in which the Commission may dissolve an incorporated body of trustees of their own motion are laid down in s.263 (see section 1 above).

Where it comes to the notice of any Function that one or more of these circumstances may exist in the case of a relevant charity, the papers should be referred to Operations for consideration.

Operations should take action, normally by correspondence with the trustees, to establish the facts. If these enquiries confirm that the circumstances for dissolution exist, the trustees should be invited to make an application for the incorporated body to be dissolved. An application should be dealt with as described in section 5 above.

If however:

* the trustees decline or fail to make such an application; or
* circumstances make it impossible to invite them to do so,

But it appears that one or more of the circumstances set out in section 1 does exist, dissolution by motion of the Commission will have to be considered.

**IMPORTANT NOTE:** Every case where it is considered that dissolution by our own motion is appropriate, should be referred to a lawyer for advice. Proposals for the disposal of any assets still held in trust by the incorporated body for the charity, should be included in any submission to the lawyer.

## 7.  Forms of Order

A model form of Order for dissolving an incorporated body under s.263 of the 2011 Act is available to caseworkers in the Order Manual.

## 8.  Variation or revocation of Order

Any Order made under s.263 of the 2011 Act may be varied or revoked by a further Order.

## 9.  Recording dissolution of incorporated body

It is the responsibility of Operations staff to record the dissolution of an incorporated body on Register Plus **once the Section 263 order has been issued**, and to ensure that the check box for "Trustees Incorporated" is cleared.

## 10.  Levels of authority

Orders under Section 263 of the 2011 Act may be made by Authorised Officers in accordance with our Authorised Officer policy.

# L1  Model letter - refusal of certificate of incorporation where not justified by type of assets held or where the only asset is land

Dear Sirs

**Subject:**Incorporation of Trustees

**Charity:**

Thank you for your letter of                     enclosing the completed application form for a Certificate of Incorporation.

From the information you have supplied [and from that on our files], we do not feel that it would be in the interests of the charity to issue a Certificate of Incorporation on this occasion.  This is because       *[give reasons]*.

[As the property of the charity consists only of land, the main advantage of incorporation can be achieved more simply by our making an Order vesting the land in the Official Custodian. Further details may be found in our publication [**The Official Custodian for Charities' Land Holding Service (CC13)**](https://www.gov.uk/government/publications/the-official-custodian-for-charities-land-holding-service-cc13).]

If the charity's situation changes, please let me know so that I can reconsider the matter.

[The charity is, however, legally required to be registered and I have sent the files to our Registration Team to follow this up.]

Yours faithfully

# L2  Model letter enclosing sealed certificate of incorporation

Dear

**Subject:**         Incorporation of Trustees

**Charity:**          [*Name and Registered Number*]

Following your recent application, I enclose the sealed Certificate of Incorporation of the trustees of the above charity together with two extra copies.

I should like to take this opportunity to draw the trustees' attention to section 260 of the Charities Act 2011, which deals with the execution of documents by an incorporated body of trustees.

In summary, this provides that, if the incorporated body has a common seal, it may execute a document by the affixing of its common seal.

Whether or not it has a common seal, the incorporated body can execute a document either if: -

It has been signed by a majority of the trustees of the relevant charity, and is expressed as being executed by the body; or

Any two or more members of the body have an authority conferred on them to execute documents in the name of the body.