

## Governance & Structures

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### 3.1 Why Have a Constitution?

Constitutions have often been fairly daunting documents, with long paragraphs and sentences full of unhelpful legal jargon. Many organisations have struggled to comply with their Constitutions simply because the document is too difficult to work with.

But Constitutions don't have to be like that, and shorter plain language jargon-free documents are much more common now.

Reasons why a good clear Constitution can be a real asset to an organisation:

- (a) For definition and clarity on key issues such as:
- the agreed scope of activity (often called the Objects).
  - how the group responsible for the organisation (eg. the Committee) is formed and how it runs.
  - whether other people can have a say in the organisation (eg. as Members who elect the Committee).
  - how potential conflict of interest is addressed in the organisation.

If the document is easy to read and to follow, it can be a practical tool which is helpful to everyone involved. Without this definition and clarity, people involved in the organisation may have different views on these issues, and the organisation will often suffer as a result.

- (b) Other organisations will want to see a Constitution so that they can understand who is responsible for the organisation and how this works. If the organisation has no Constitution, a bank is unlikely to open an account and most sources of grants will reject an application for funding.

### 3.2 Current Legal Structures for Organisations

Many groups have real difficulty deciding what legal structure to use. This is partly because there is no logic in the range of available legal structures. Many of the legal structures date back to the 19th century or earlier and the law surrounding them is often complex.

At present there is no legal structure specifically designed for a not-for-profit organisation. If that seems surprising, remember that Charity is a registration, not a legal structure: in order to register as a Charity, groups must first set up a legal structure. Section 3.4 "*Future Legal Structures for 'Not-for-Profit' Organisations*" looks at current proposals for two new designed-for-purpose legal structures.

Set out below is a brief summary of the main current legal structures which might be appropriate for an organisation involved in woodland ownership or management, whether this

is as a business or on a 'not-for-profit' basis. In the later section 3.5 "Not Legal Structures", there is some comment on other types of organisation which are often thought to be legal structures, but which in fact are not.

**NB:** *The summary of legal structures is intended for initial guidance only: anyone setting up an organisation should consider taking further appropriate advice.*

## (a) Sole Trader

- One person owning a business
- The Sole Trader may employ other people in the business
- Not a Company and the liability of the Sole Trader is potentially unlimited

## (b) Partnerships

- Usually a Partnership is set up to own and run a business
- The Partnership is owned by the Partners and the Partners share the profits or losses arising from the business
- The liability of the Partners is not limited: for example, if the Partnership enters into a contract, liability for the contract will be met by the Partnership, but if the assets of the Partnership are not sufficient for this, the Partners will be personally liable.
- Constitution: Partnership Agreement, but if there is no such Agreement, the Partnership Act 1890 will regulate the position between the Partners

## (c) Limited Liability Partnerships

- A new legal structure introduced by the Limited Liability Partnership Act 2000
- Usually set up to own and run a business
- The Partnership is owned by the Partners, and the Partners share the profits
- The liability of the Partners is limited (same as for Companies – see below), so the Partners have more protection than under the 'Partnership' structure if the business fails
- Constitution: Partnership Agreement which is registered with the Registrar of Companies at Companies House

## (d) Companies

- A legal structure developed in the 19th Century
- Regulated by the Companies Act 1985
- Companies are 'incorporated' with the Registrar of Companies at Companies House
- Directors are elected or appointed to run the Company
- A Company also has Members (see below)
- Constitution of a Company: this is in 2 parts which are together known as the Memorandum and Articles of Association: broadly speaking, the Memorandum of Association sets out the scope of the Company and defines the share capital (for Companies Limited by Shares) or the guarantee (for Companies Limited by Guarantee); the Articles of Association deal with issues relating to the Directors and the Members, and their meetings etc.

There are 2 types of Company:

### (i) Company Limited by Shares

- u A privately owned organisation
- u Members are known as Shareholders. Shares in the Company are the mechanism for private ownership of the Company. If there is just one Shareholder, that person owns the Company.
- u Share Capital represents the assets of the Company and is divided into Shares. For example, a Company might have a Share Capital of £1,000 divided into 1,000 Shares of £1 each. This £1 is known as the 'nominal value'; it doesn't mean that the assets of the Company are only worth £1,000. Each Share represents a proportion of the assets of the Company. If, in the example, the Company's assets are actually worth more than £1,000, a Shareholder should be able to sell Shares for proportionately more than their £1 'nominal' value
- u If the Company has £1 Shares, when the Shares are first issued, a Shareholder is liable to pay the Company £1 for each Share he/she receives

- u The liability of Shareholders is limited to any part of the nominal value which has not been paid to the Company. So if £1 has actually been paid for every Share, and the Company becomes insolvent, the Shareholders will not be liable to pay anything more. This is 'limited liability'.
  - u Profits can be distributed to Shareholders as Dividends
  - u The liability of the Directors is not limited. If a Director is also a Shareholder, he/she will enjoy limited liability as a Shareholder, but not as a Director. However, a Director is in fact usually protected by the existence of the Company, particularly because a Company can enter into a contract in its own right: the Director would sign the contract on behalf of the Company. So any liability under the contract is the liability of the Company, not of the Director: an important exception to this arises if the Director, when agreeing the contract on behalf of the Company, knew or should have known that the Company couldn't honour the Contract, in which case the Director might become personally liable in relation to that contract when the Company is wound up.
  - u Directors can also be personally liable -
    1. if the Company becomes involved in some illegal activity
    2. if the Company acts 'ultra vires' – meaning 'beyond its powers': the Company's Constitution (the Memorandum & Articles of Association) will set out the Company's powers, and the Directors are responsible for ensuring that the Company acts within its powers
    3. if there is a serious breach of health & safety regulations and the Directors are found to be personally at fault: effective risk management is important in any organisation, and Company 'status' does not allow Directors to avoid this responsibility
  - u If the Company is wound up, any surplus remaining (ie. after creditors have been paid) will be divided between the Shareholders.
- (ii). Company Limited by Guarantee**
- u There is no share capital, and so in this case Membership is not a clear mechanism for ownership of the Company. However, the Memorandum of Association can provide that when the Company is wound up any surplus will be divided between the Members.
  - u Since under Charity Law the assets of a Charity are public assets and do not belong to the Members or to the Trustees of a Charity, the legal structure of a Company Limited by Guarantee can be registered as a Charity if (a) the 'objects' of the Company are charitable, and (b) the Memorandum of Association states that any surplus on winding up will not be divided between the Members. (With very few exceptions, a Company Limited by Shares cannot be registered as a Charity.)
  - u Since there are no Shares, the Members are just known as Members.
  - u Liability of the Members is limited: each Member guarantees that if the Company is wound up and there is a deficit, he/she will contribute a sum specified in the Company's Constitution, usually £1.
  - u Profits are not distributed to the Members
  - u The position on Directors' liability is the same as for a Company Limited by Shares (see above)

## (e) **Industrial & Provident Societies (“IPSs”)**

- A legal structure developed in the 19th Century: particularly popular in some areas (Lancashire, Yorkshire), and fairly rare in others (South East England).
- Regulated by the Industrial & Provident Societies Acts and the Financial Services Authority
- A Committee is elected or appointed to run the Society
- An IPS also has Members
- IPSs are ‘incorporated’ and Members have limited liability
- Constitution: Rules of the Society
- There are 2 main types of IPS:

### **i. Cooperative**

- u A trading enterprise
- u The Members are the workers who carry on the production and trading activities of the Society.
- u The Members own the Society and share profits or losses: this is therefore private ownership, but it is geared towards the workers, in contrast to a Company Limited by Shares where the Shareholders often have no direct involvement in the day-to-day activity of the Company

### **ii. Charitable IPS**

- u The Constitution of this type of IPS will define a purpose which is clearly for the benefit of the community
- u In Charity Law (see below) a Charitable IPS is an ‘exempt charity’: this means that it is exempt from registering with the Charity Commission (and the Charity Commission won’t put an IPS on the Register of Charities)
- u A Charitable IPS can apply to the Inland Revenue for the same tax exemptions as those available to registered Charities

## (f) **Trusts**

- Not an appropriate legal structure for a business
- Trusts may be private (family ownership etc) or charitable (grant-making trusts): if charitable, the Trust can be registered with the Charity Commission
- The Trustees are the decision-making body, and together hold ‘title’ (but not beneficial ownership) to the assets of the Trust
- Trusts don’t usually have a Membership
- Trustees don’t have limited liability
- Constitution: Trust Deed (sometimes called Declaration of Trust)

## (g) **Unincorporated Associations**

- Literally an Association which is not incorporated, so not a Company
- Not an appropriate legal structure for a business
- A Committee is elected or appointed to run the Association
- An Unincorporated Association also has Members
- The Members do not have limited liability. However, it is unlikely that a Member would sign a contract, so the fact that Members’ liability is not limited is not usually a problem: Members do not in any way guarantee the liabilities of the Association, and are not committed under the Constitution to contribute if the Association is wound up leaving a deficit.
- The position of the Committee is much more precarious, as the Association is not incorporated, so unlike a Company it cannot enter into a contract in its own right: if a Committee member signs a contract, the other party to the contract can potentially sue the Committee member personally under the contract (but while the Association still has assets, the Committee member has a right to be reimbursed by the Association)
- Constitution: Rules of the Association

### 3.3 Summary of Organisations

To summarise, here are a few key characteristics of Organisations:

#### Privately owned Organisations

- Sole Trader
- Partnership
- Limited Liability Partnership
- Company Limited by Shares
- Company Limited by Guarantee (non-charitable)
- IPS Cooperative
- Trust (non-charitable)
- Unincorporated Association (non-charitable)

#### Non-Private Organisations

- Company Limited by Guarantee (charitable)
- Charitable IPS
- Charitable Trust
- Unincorporated Association (charitable)

#### Limited Liability

- Limited Liability Partnership
- Company Limited by Shares
- Company Limited by Guarantee
- IPS

#### Organisations with a Membership

- Company Limited by Shares
- Company Limited by Guarantee
- IPS
- Unincorporated Association

### 3.4 Future Legal Structures for 'Not-for-Profit' Organisations

Until now, there have been no legal structures specifically designed for 'not-for-profit' organisations.

Currently three legal structures can be registered with the Charity Commission as Charities: a Company Limited by Guarantee, a Trust, or an Unincorporated Association. But none of these structures are exclusive to Charities, and none of them are specifically designed for a 'not-for-profit' purpose. Not surprisingly, many groups find it difficult to decide which legal structure to adopt, and whether to register as a Charity.

Help is on the way for any group that wants to establish itself as a 'not-for-profit' organisation with a legal structure designed for this purpose.

Two new legal structures should soon be available:

#### (a) Community Interest Company

This new legal structure has been established by the Companies (Audit, Investigations and Community Enterprise) Act 2004, but it will not be available until later in 2005 since statutory regulations must first be issued.

The Community Interest Company ('CIC') will be a new Company specifically for social enterprises. Currently there is no specific legal structure for social enterprises which aim to work for the benefit of the community. The introduction of CICs is intended to support the identity and development of social enterprises.

CICs will have all the advantages of company status, but with some special features to ensure they are working for the benefit of the community. They will not have the benefit of tax exemptions available to Charities. CICs will report to an independent regulator on how they are delivering for the community and how they are involving their stakeholders in their activities.

Key features of the CICs will be:

- a new independent CIC regulator will be responsible for ensuring that CICs comply with their legal requirements,
- a "community interest test" must be passed before the regulator will register a CIC,
- an annual community interest test will be used to monitor how the activities of a CIC are benefiting the community, and
- a statutory "lock" on assets and profits of CICs will ensure that they remain for the benefit of the community.

## (b) **Charitable Incorporated Organisation**

The proposal to create this new Company structure – which will be available only for Charities – is included in the new Charities Bill which is currently progressing through Parliament. This will be a made-for purpose legal structure for Charities that want the protection of Company status. It will have a new simplified form of Constitution (*not* with the unwieldy name ‘Memorandum & Articles of Association’).

When this structure becomes available, the Company Limited by Guarantee will probably no longer be used for new Charities. For any existing charitable Company Limited by Guarantee, the Charities Bill sets out a procedure to ensure that conversion to the new style Charitable Incorporated Organisation will be a simple process.

## 3.5 **Not Legal Structures**

The following are often thought to be legal structures, but in fact are not:

*(Following each heading are suggestions of what might be the relevant legal structures):*

### **“Business”**

A Business is usually owned and run by a Sole Trader, Partnership, Limited Liability Partnership, Company Limited by Shares, or Industrial & Provident Society.

### **“Firm”**

A Firm usually describes a Partnership or Limited Liability Partnership.

### **“Charity”**

This is a registration, not a legal structure: the structures which can currently be registered are Company Limited by Guarantee, Trust and Unincorporated Association.

### **“Club”**

This is almost always a membership organisation, so possible structures are a Company Limited by Shares, a Company Limited by Guarantee, an Industrial & Provident Society or an Unincorporated Association.

### **“Cooperative”**

Usually refers to a type of Industrial & Provident Society. However, the Cooperative movement is in essence an applied philosophy for businesses in which workers fully participate, and other structures might allow for this.

### **“Social Firm”**

A business which is committed to participation by individuals, such as people with learning disabilities, who might well not achieve similar involvement in private businesses generally.

### **“Social Enterprise”**

A business involving local or wider communities.

### **“Community Business”**

### **“Community Enterprise”**

Other variations on the theme of business involving local communities: all the Business structures could be relevant, and possibly also Company Limited by Guarantee

### **“Voluntary Organisation”**

Any organisation which is registered as a charity, plus Charitable IPSs.

### **“Not-for-Profit Organisation”**

Similar sense to Voluntary Organisation.

### 3.6 The Committee: Structure and Authority

(In this Section references to Committee can apply equally to Board of Directors, Trustees etc.)

In designing the body which takes ultimate responsibility for the organisation, whatever that body is called, there are several issues to consider:

- (a) **Size:** How many people? Too small can put a large burden on just a few people, but too large can be unwieldy.
- (b) **Skills:** What skills are needed on the Committee to enable it to perform its role effectively? It's not necessary to cover everything – some skills can be bought in when needed – but depending on what the organisation is set up to do, there will be some key skills and experience that will be particularly important.
- (c) **Stakeholders:** Are there any other organisations which should be represented on the Committee because of their key role or relationship with this organisation?
- (d) **Stability / Renewal:** A reasonably stable Committee membership will help the stability of an organisation itself. On the other hand, organisations can develop problems because an individual or small group of people on the Committee is too dominant. A balance between stability and renewal of the Committee membership is usually important. Some voluntary organisations go so far as to say in their Constitutions that no one can remain on the Committee for more than a stated number of years, and then can only return as a Committee member after a specific gap in time.
- (e) **How will each person join the Committee?** There are several 'routes' to joining and these can apply to most types of Organisations (except Sole Traders, Partnerships and Limited Liability Partnerships). The Committee can be structured so that different 'routes' can apply to different parts of the Committee. The routes are:
  - i. **Elected:** Members of the Committee are elected by the organisation's Membership at the Annual General Meeting (see Membership – below). It is possible to structure a Membership (eg. with separate sections of the Membership for different regions) in order to achieve a particular balance of representation.
  - ii. **Co-opted:** In a legal sense, Co-opting is to fill a vacancy that has arisen, for example if an Elected Member of the Committee has resigned. The rest of the Committee might then co-opt someone to fill that vacancy until the next Annual General Meeting.
  - iii. **Appointed by the rest of the Committee:** this is sometimes referred to as Co-opted, but it is not in fact the same 'route' as in ii above. Appointing here means that part of the Committee's Membership structure is specifically reserved for people who the rest of the Committee decide to appoint. After each election of Committee Members it can be useful for the new Committee to analyse the range of skills now round the table, as well as other issues such as gender balance. If part of the Committee Membership is reserved for 'Appointed' Committee Members, this allows the Committee to find people to fill the skills and other gaps that they have identified. Elections are intended to be a democratic process, but this won't necessarily result in a balance of skills etc. Appointing allows for this. The Constitution should say how long Appointed Members will remain for, but it should allow for re-appointment afterwards so that the Committee can retain a particularly valuable person.
  - iv. **Appointed by another organisation:** some organisations have particularly strong or important relationships with other organisations. In designing the Committee, it can be worth considering whether any other organisation should be specifically represented on it. If so, the Constitution should provide for this.

**v. Ex Officio:** this is where an individual is a Committee Member because the Constitution states that the person holding the office they hold is automatically a Member of the Committee. This was fairly common at one time, for example the local Vicar might be an ex officio Member of the Committee of various organisations in his Parish. While it is rarer now, it may be relevant to some organisations.

The Constitution should confirm not just the structure of the Committee, but also arrangements for the Committee and its meetings. Issues here include:

- u Specific roles or 'offices' of Committee Members - Chair, Secretary, Treasurer (Finance Director) etc. – and how they are elected or appointed.
- u How Committee meetings are called
- u Quorum for a Committee meeting
- u Arrangements for voting, and whether any issues require more than just a simple majority vote
- u Setting up Sub-Committees (see below)

The Constitution would not usually define the specific authority attached to roles such as Chair. However it is important that this is defined. The purpose of the role of Chair is to facilitate Committee meetings. The role does not carry specific authority, so if the Chair or any other Committee Member is to have individual authority, it is important that this is defined, agreed and kept under review.

A full Agenda for a Committee meeting can result in important issues receiving inadequate focus. In this context, Sub-Committees can perform a very useful function. A Sub-Committee can be set up either with a continuing role (eg. a Finance Sub-Committee to monitor finance) or with a short term role (eg. to oversee a move of premises or the development of a new project). For all Sub-Committees the main Committee should establish 'Terms of Reference' in order to define:

- u What is the purpose of the Sub-Committee?
- u Who are the Members of the Sub-Committee and how are they appointed?
- u Does the Sub-Committee have any authority (if so, this should be defined in the Terms of Reference) or is it set up simply to advise the main Committee?
- u How is the Sub-Committee to report to the main Committee?

Whenever the Committee delegates authority to a Sub-Committee or to an individual such as the organisation's Manager, the extent of delegation should be defined. This is important not just to control the use of that authority, but so that the people or person concerned are absolutely clear about what they are allowed to do. All decisions should be accountable.

As an example, it is important to clarify who has authority to commit the organisation to expenditure. Here, the delegated authority might be based on the following model:

*[NAME OF ORGANISATION]*

## *AUTHORISATION OF EXPENDITURE*

*The following Authorisation was set by the [Committee] on ..... [Date]:*

1. *Unless otherwise agreed by the [Committee], all expenditure must be within the agreed Annual Budget. Budget provision (both generally and under different heads of Budget) must be taken into account when authorisation of expenditure is considered.*
2. *Any expenditure on behalf of [the Organisation] of less than £..... may be authorised by the [Manager] or by the Chair or by the Treasurer, in each case acting alone and without further authority. (However, in the case of cheques etc, a second signature will be required: see 5 below).*
3. *All expenditure on behalf of [the Organisation] of between £..... and £..... must be authorised by any two out of the Chair, the Treasurer and the [Manager].*

4. *All expenditure on behalf of [the Organisation] of a value of £..... or more must be referred to a meeting of the [Committee] for authorisation.*
5. *All cheques and other bank instructions in relation to [the Organisation's] funds must be signed by two authorised signatories. No signatory will ever sign a 'blank cheque'.*
6. *For the purposes of this Authorisation, 'Expenditure' includes*
  - 6.1 *any payment whether by cheque or otherwise;*
  - or
  - 6.2 *entering into any contractual commitment on behalf of [the Organisation]; or*
  - 6.3 *agreeing to waive any debt (or part of a debt) due to [the Organisation].*
7. *Where two or more items of expenditure are in reality related they will be treated as a single item of expenditure for the purposes of calculating whether the level of expenditure involved is within the limit set in paragraphs 2, 3 or 4 of this Authorisation. Examples of this could be separate instalments payable under a single contract, or two cheques drawn in favour of the same payee where payment might normally be made by a single cheque.*
8. *If in doubt as to authority to proceed with expenditure, the Treasurer should be consulted, or the Chair if the Treasurer cannot be contacted.*

## 3.7 Membership of an Organisation

As stated in the Section on Legal Structures, the following organisations have a Membership:

- Company Limited by Shares
- Company Limited by Guarantee
- Industrial & Provident Society (IPS)
- Unincorporated Association

For a Company Limited by Shares and a Cooperative IPS, Membership is a mechanism for ownership of the organisation.

For all of these organisations, Membership is also a means of achieving representation of, and accountability to, a wider group of people than the Committee or Directors. For some organisations – for example a local interest group – this function of the Membership is extremely important. Members

not only elect the Committee (or part of the Committee), they are consulted about key decisions.

If an organisation which is going to develop a wider Membership beyond its Committee is well advised to define various issues:

- What criteria (if any) must be satisfied for someone to become a Member of the Organisation?
- Will Membership be open to individuals only or to other organisations also?
- How will an individual (or organisation) become a Member? Most Constitutions state that a Member is 'admitted' by decision of the Committee. This means that there is some control over who becomes Members, but this should be handled consistently and with care.
- Will there be a maximum number of Members?
- Is there a need to balance different potential interests in the Membership? If so, this might be reflected in the Membership criteria. If an organisation is working in two communities, it can be sensible to ensure that each is reasonably represented in the Membership.
- Will the Members be asked to vote on issues other than election of the Committee? For example, will the Members be consulted on objectives and priorities for activities of the organisation in each year?
- Will Members be required to pay annual Subscriptions? Unless Members are prepared to pay a reasonable amount, it is unlikely that this will be a significant means of generating funds.
- How will details of the Membership be kept up-to-date? An organisation should keep a Register of Members, but it can be difficult to be certain that this is kept up-to-date. Subscriptions can be useful here: the Constitution could state that Membership lapses if the Subscription has not been paid within a certain time of it becoming due. If a Subscription is not paid, perhaps because the Member has moved address and has not provided the new address, then the Register of Members can be updated. Membership

can be a valuable means of reaching and engaging with a wider community. If the Annual General Meeting of Members is treated as a celebration of the past year's activities, that can be a valuable occasion for the organisation and for the morale of everyone involved. By contrast, if the AGM is really only used as an occasion to present the Annual Accounts and to elect the Committee, it is likely to be a fairly dry occasion, and attendance is often poor as a result.

## 3.8 Charities

Why register as a Charity? Advantages include:

- Benefiting from the public credibility that Charities enjoy. If you are ever asked "What sort of organisation is this?", replying that it's a registered charity almost always brings a positive response.
- A number of grant-making trusts and other private funders will only support registered charities: depending on the organisation's financial requirements and prospects, accessing the widest range of potential sources of funding can be very important.
- Charities enjoy a number of tax advantages: a common example is Gift Aid which allows the Charity to reclaim tax on a donation received from a taxpayer. In this way a donation of £100 can yield a total of £128 for the Charity.

On the other hand, some organisations shy away from registration because of their perception of the Charity Commission. But while generalisations can be dangerous, a well-run organisation should have little to worry about on that score.

The Charity Commission is effectively the public regulator of Charities. This involves various roles:

- **Registration of Charities:** the Charity Commission is responsible for the Register of Charities, and is the 'gatekeeper' to registration. In assessing applications for registration, the Charity Commission checks that the Objects of the organisation as stated in its Constitution are exclusively charitable,

and that the actual or proposed activities fall within the scope of the Objects. It is also concerned with the potential viability of the organisation, including its funding and relevant skills of the people involved.

- **Guidance to Charities:** an invaluable resource for the Charity sector is the Publications section of the Charity Commission's website – **[www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)** which provides an excellent range of guidance publications, all written in a practical and helpful way.
- **Assistance with constitutional issues:** if a Charity's Constitution does not include a specific power that may be needed – for example, power to borrow and to mortgage land owned by the Charity as security – the Charity's Trustees can ask the Charity Commission to authorise the proposed action. However, changing the Charity's Objects after registration is rarely allowed (see further below regarding Objects).
- **Investigation:** if the Charity Commission becomes aware that a Charity is acting in breach of its Constitution, it is likely to investigate this further. The Charity Commission has considerable powers under the Charities Act 1993 for this purpose. But here again, if the organisation follows the Charity Commission's own practical guidance – for example, their publication "CC60: The Hallmarks of a Well Run Charity" – this will help to ensure that problems don't arise.

For an organisation involved in woodland ownership or management, relevant charitable Objects include:

- (a) "Advancing education in [the conservation of woodlands]"  
Education is amongst the central themes of charity status. In Charity Law it has a wide definition, including training and any activity intended to be educational.
- (b) "Promoting the conservation, protection and improvement of the physical and natural environment"

The Charity Commission's publication "RR9: Preservation and Conservation" gives guidance on how an organisation would qualify to be registered as a conservation charity. The Charity Commission would require independent expert evidence to demonstrate that 'the land or habitat concerned is worthy of conservation'. If the organisation promoted conservation generally, then it should either do this as an educational charity (*see (a) above*) or it should give examples of projects which would satisfy the test quoted for conservation Charities.

When drawing up the Objects of a Charity before registration, it is important to allow wide enough scope for all potential activities. The Charity Commission rarely allows Objects to be changed after registration since registration only relates to the specific Objects agreed at the time. A common example is where the Objects refer to a specific geographical area: if the organisation later wants to work in another area, it is unlikely that the Charity Commission will agree to the Objects being changed to allow this.

A key issue in Charity Law is the question of private benefit. Charity Law requires that any Charity must be primarily for the public benefit. If a conservation Charity carries out work on privately owned land, it should be able to demonstrate that any benefit to the private landowner will be incidental compared with the wider public benefit. Reasonable public access to the land is essential.

The other main point about private benefit is the personal benefit that a Trustee of a Charity might receive. Charity Law recognises the danger of conflict of interest where Trustees are responsible for the use of the assets of a Charity. The general rule in Charity Law is that a Trustee must not benefit personally from the Charity. The Charity Commission does allow exceptions to this rule, but these will be very limited and must be either stated in the Constitution or specifically agreed by the Charity Commission.

Charity Trustees can become personally liable for breaches of Charity Law. The most common situations where personal liability arises are:

- i. Unauthorised personal benefit of a Trustee
- ii. Activities outside the scope of the Charity's Objects

If an organisation is considering applying to register as a Charity, key issues to consider include:

- Legal Structure: Company Limited by Guarantee, Trust or Unincorporated Association? If the organisation is providing services or will take on contracts of any significance (eg. lease of land or premises), it is much safer for it to be a Company Limited by Guarantee.
- What will be the scope of the activities, and does this fit within charitable Objects? If not, there may still be advantage in running the charitable activities through a Charity and the other activities through another organisation. Charities are allowed to have subsidiary companies which carry on trading and other activities which are 'off limits' to a Charity. For a full discussion of this see the Charity Commission's publication "CC35: Charities and Trading".
- Who will be the Trustees? Remember that they should usually be people who will not benefit personally. It is very unusual for the Charity Commission to allow an employee or consultant to be a Trustee. For a Company Limited by Guarantee, the Trustees would be the Directors of the Company, in effect 'wearing two hats', one for Company Law and the legal structure, the other for Charity Law and the Charity registration.

## 3.9 Trading Subsidiaries of Not-for-Profit Organisations

Where an activity is run as a business, the legal structures of Company Limited by Shares and Limited Liability Partnership will help to protect the owners from personal liability.

A 'not-for-profit' organisation might set up a trading subsidiary for several reasons:

- To create a specific legal identity as a focus for an activity.
- To ring-fence liabilities of an activity.
- To carry on a trading activity without infringing the legislation which governs the organisation, for example rules of Charity Law.

In this context, "trading" means an activity carried on with regularity in return for money or other value. If an organisation decides to apply for charity status, it will be important to consider the special rules of Charity Law in relation to trading.

A registered Charity enjoys special status through tax exemptions and the public endorsement of registration. If it competes with businesses in the open market, it risks losing both registration and tax exemption.

There are two main exceptions:

(a) "Primary Purpose Trading": where the trading activity is carried out directly to fulfil the Charity's Objects. For example, a Charity whose Objects are "to advance education in the conservation of woodlands" may charge fees for attendance at its training courses. The activity is regular and the Charity receives payment, so in legal terms this is trading. However, the activity directly fulfils the Objects because it is educational, and this "primary purpose trading" is permitted. However, if the Charity sets up a shop to raise funds, the trading by the shop does not directly fulfil the Objects, and so it is not primary purpose trading and does not qualify for this exception.

(b) Charities are allowed to carry on trading activities which are not Primary Purpose Trading (also referred to as "Taxable Trading") up to the following limits:

Total of ALL incoming resources in a particular tax year of the charity	Maximum allowed TAXABLE TRADING turnover in that tax year
Under £20,000	£5,000
£20,000 to £200,000	25% of the charity's total incoming resources
Over £200,000	£50,000

"All incoming resources" means **all** income of the Charity from **all** sources.

An activity which is "primary purpose trading" can be carried on within the Charity's legal structure, as can non-primary purpose trading activities up to the limits in (b) above. Otherwise, taxable trading activities should be run through a separate legal structure, the trading subsidiary.

Key points on Charity Trading Subsidiaries:

- The Subsidiary must have its own legal structure, usually a Company Limited by Shares.
- The Charity owns all shares in the Subsidiary, and therefore owns and controls it.
- The Subsidiary's Directors usually include one or more of the Charity's Trustees, but the Charity Commission takes the view that some Trustees should not be Directors of the Subsidiary, and some Directors of the Subsidiary should not be Trustees.
- The Subsidiary pays tax on its profits in the same way as any other trading company.
- Net profits after tax are transferred to the Charity (usually by Gift Aid), and then the Charity reclaims the tax from the Inland Revenue. In this way, the Charity receives the full gross profits, but avoids risking its registration and tax exemption.

- Charity Law prevents Charities from freely investing in their subsidiaries. Further advice on this is usually appropriate.
- A Charity should never guarantee liabilities of its trading subsidiary (eg. guaranteeing liability under the lease of a shop run by the subsidiary).
- If the Subsidiary uses premises owned by the Charity, or shares personnel or other resources, this arrangement should be on a commercial basis and the terms should be confirmed in an appropriate Agreement.

For fuller guidance see the Charity Commission's publication "CC35 – Charities and Trading".

## 3.10 Some Practical Examples

The following examples are intended to illustrate points about legal structures, and should not be taken as specific advice. Tax implications are not considered here: it is important to consider the tax position, and it is always sensible to obtain appropriate advice on this and on other issues.

### (a) "There are three of us and we want to buy a wood to run greenwood courses"

- Joint ownership can be achieved through any of the legal structures except sole trader.
- If you are borrowing to purchase the wood, aim to secure the loan on the wood as a property.
- Will you be entering into any significant contracts? If so, it would be best to set up a Company or a Limited Liability Partnership (LLP) to run the activity. If the three of you want to own the wood personally, you could do so, and you could lease it to the Company or LLP to run the activity. If you decide to set up a Company, you can also be the Shareholders and Directors of the Company.
- However, if you want to apply for public funding to buy the wood, that probably rules out private ownership. On the other hand, greenwood courses are an educational activity, and you should be able to register

the organisation as a charity (*see the separate section on Charities*).

### (b) "I want to buy a wood in memory of a relative who left me some money in her Will. Some friends are interested in helping me to manage the wood."

- There are various options for ownership of the wood:
  - i You could own it yourself, or
  - ii It could be jointly owned, or
  - iii You could set up an organisation which would be the owner

If you decided to retain ownership yourself, you would retain ultimate control over the position. Alternatively, if you want the wood to establish some form of community ownership, it may be appropriate to set up an organisation.

- If you retain ownership, but you want to involve your friends in management of the wood, you will then need to decide on an appropriate arrangement for this. There are a number of options, for example:
  - i You could involve your friends just through an informal arrangement, or
  - ii You could lease the wood (for a full rent or for just a 'peppercorn rent') to the organisation which would then be responsible for management, or
  - iii You might decide not to lease the wood, but to enter into a contract for its management.
- It is important to define your objectives, for example:
  - i Do you see the wood as being a personal asset?
  - ii Do you want to involve just your friends, or other local people as well?
  - iii Are you planning any specific activity involving the public, or is your main aim to protect and conserve the wood without any specific activity?

Issues such as these will be relevant when deciding on 'legal structures' for ownership and management.

- You are providing the money to buy the wood, so decide what safeguards for the future you want. The cautious approach is to retain ownership yourself, but might the others then feel less inclined to become involved?
- (c) **“We own land which we want to use to promote nature conservation. We will want to raise some funds for tree planting and other conservation work.”**
- How are you proposing to raise the funds? If this will be through bank finance, that is a private issue for you and you won't need to set up any other legal structure to do this. But if you want to access grants or public funding, your private ownership could be an issue. Each 'funder' sets their own conditions, so look at these carefully.
  - You could consider setting up a conservation charity and leasing the wood to the charity. However, if you remain the owner of the wood, Charity Law will prevent you from benefiting personally if you are a Trustee of the Charity.
- (d) **“We run an established Woodlands Initiative. To raise funds for our activities, we have decided to set up a consultancy service advising on woodland management.”**
- You are planning a business activity. A consultancy service can involve liability, so to protect your core activities, it may be sensible to run the service through a Company. If this is a Company Limited by Shares, all of the shares can be owned by the Woodland Initiative.
  - If the Woodland Initiative is a charity or if you are thinking of registering in order to obtain the benefits of charity status, there are various issues to consider (see the separate section on Trading Subsidiaries). If the consultancy service would be available to private woodland owners, you would have to run the consultancy service through a trading company because charities cannot provide a private benefit even if it is paid for. However, there is no problem in a charity owning a trading company which provides a consultancy service to private owners.
- (e) **“Several of us living in the village want to buy the wood together and to manage it just as a local wood for recreation.”**
- If you want to own the wood as a private asset, but to split up the ownership between you, this could be done through a Trust, or a Partnership, or a Limited Liability Partnership, or a Company Limited by Shares.
  - Alternatively, if you want to set up a not-for-profit organisation to own and manage the wood, the legal structure could be a Company Limited by Guarantee or an Unincorporated Association – or the new Community Interest Company when that is available (see separate section on Future Legal Structures). Of the current legal structures, the Company Limited by Guarantee would be appropriate if there is significant risk of liability, but you may decide that this is unnecessary for the ownership and management of a wood to be used for local recreation.
  - If charity status would be an advantage in raising funds to meet the cost of managing the wood, contact the Charity Commission and discuss whether this will be possible.
  - Alternatively, consider setting up a 'Friends of the Wood Group': this might exist simply to encourage local people to use and respect the wood. If the Group had no other responsibility, it would not need to seek Charity registration. This could probably have the simple structure of an Unincorporated Association.

### 3.11 Role of Charity Trustees

As a group, Trustees are responsible for everything to do with the Charity. They can delegate responsibility for the general running of the Charity to a management group and / or to the Charity's staff, but the Trustees will still be responsible for ensuring that the Charity is managed properly and within the law.

The Trustees should meet regularly (at the very least every 3 months) to discuss the management of the Charity and its financial position. If they want to, they can take advice on legal or financial matters to make sure that they handle their responsibilities according to the law.

This is a summary of the responsibilities of the Trustees:

1. Overall responsibility for running the Charity.
2. Ensuring that all activities are within scope of the Charity's Objects as set out in its Constitution.
3. Overseeing the management of the activities of the Charity.
4. Planning the future development of the Charity and its activities, setting objectives, and monitoring progress against the agreed objectives.
5. Establishing appropriate policies and procedures for the Charity and its activities, and making sure these are followed.
6. Employing and supervising the Charity's staff.
7. Planning the Charity's income and expenditure.
8. Making sure that proper financial accounts are kept, and regularly monitoring the financial position.
9. Identifying risks involved in the activities of the Charity and making sure that steps are taken to minimise risks.
10. Making sure that the Charity and all of its activities comply with the law.

If the Charity employs people to manage and run the services it provides, it is extremely important that

their roles are made clear, and that the Trustees allow them to pursue those roles on a day-to-day basis without unnecessary interference.

### 3.12 Role of Chair

The following is intended as a basis for discussion on the role of the Chair of a 'not-for-profit' organisation with a view to developing a Role Description. It is not necessarily a comprehensive list of all potential aspects of the role.

In my view, there are responsibilities which are an inherent part of the role, and for the purposes of discussion I recommend that these are considered separately to other responsibilities or authority which are not necessarily part of the role but which are often included within it. The extent of those 'optional' aspects of the role should be confirmed in the Role Description.

#### Inherent Responsibilities

1. Ensuring compliance with the organisation's Constitution.
2. Facilitating meetings of the organisation's management committee: agreeing agendas and chairing meetings.
3. Ensuring probity of process and decision-making.
4. Ensuring compliance with agreed policies and procedures for dealing with conflict of interest.
5. Identifying the need for external advice and/or consultation and recommending this to the Committee.
6. Ensuring appropriate induction of new Committee members.
7. Being available to individual Committee members for consultation.

#### Additional Responsibilities

The Committee should decide whether any of the following responsibilities are included in the role of Chair and, if so, should define the extent of authority in each case:

8. Supervision / line management of the [Chief Executive].
9. Authorisation of action / expenditure.
10. Delegation of authority to sub-committees and/or to the [Chief Executive].
11. Performance of any specific roles envisaged for the Chair in the organisation's policies and procedures.
12. Representation of the organisation in public and/or in relation to other organisations.

## 3.13 Public Funded Community Projects

### Role Definitions

The following are the key potential roles / relationships (a single agency may undertake more than one role):

#### (a) Delivery Agency

Responsible for delivering a Programme of Activity in accordance with an agreed Delivery Plan. Employs personnel for management of Programme and direct service delivery.

#### (b) Community Partnership

Medium for 'formal' representation of and accountability to the local community and key agencies working in the community in relation to the Programme.

Develops the Delivery Plan which is agreed with the Statutory Funder. Works closely with the Delivery Agency in ensuring that implementation of the Programme is carried out effectively and with credibility in the local community.

If the Community Partnership itself takes on the role of Delivery Agency, this will mean that the Delivery Agency's own Management Committee should be structured to facilitate community representation and accountability.

#### (c) Service Provider

Any organisation commissioned by the Delivery Agency to deliver a service funded under the Programme. Specification and terms of services are confirmed in a Service Agreement with the Delivery Agency.

#### (d) Asset Provider

For example, the landlord of premises used by the Delivery Agency in the delivery of the Programme. Enters into an Agreement with the Delivery Agency to confirm the terms for use of the asset (in the case of premises: a Lease).

#### (e) Statutory Funder

Government agency providing Funds for the Programme: Funds are provided subject to Conditions.

#### (f) Accountable Body

Local agency which holds Funds provided by the Statutory Funder, and is accountable to the Statutory Funder for the funds being used strictly in compliance with the Conditions.

Enters into an Agreement with the Delivery Agency for the provision of funds to be used subject to compliance with the Conditions.

The role of Accountable Body does not extend beyond this to any general control over the Programme or its implementation by the Delivery Agency. If (as is usual) the Accountable Body is a key local statutory agency, it may be represented on the Board of the Delivery Agency and / or the Community Partnership, but that representation should be seen as separate to its role and responsibility as Accountable Body which would be exclusively defined and regulated by the specific Agreement with the Delivery Agency.