

Guidance Note: Incorporation

This guidance note is for charities considering changing from one legal structure to another; usually this takes the form of a charity seeking to incorporate. This note sets out the process charities should follow to meet the requirements for incorporation, along with helpful hints and tips on the wider implications charities should consider.

OSCR is working in partnership with stakeholders to develop detailed guidance on incorporation. This should be available in early 2017.

1. [Why incorporate?](#)
2. [How do we incorporate?](#)
3. [Further issues to consider](#)
4. [Further guidance](#)
5. [Checklist for incorporation](#)

1. Why incorporate?

Charities can take a number of legal forms. The legal form is the structure or entity, which then becomes a charity. In Scotland the four most common types of charity legal form are:

Unincorporated	Incorporated
<ul style="list-style-type: none"> Unincorporated association 	<ul style="list-style-type: none"> Scottish Charitable Incorporated Organisation (SCIO)
<ul style="list-style-type: none"> Trust 	<ul style="list-style-type: none"> Company limited by guarantee

On average OSCR receives 12 applications a month from unincorporated charities (unincorporated associations and trusts) wanting to change legal form to a SCIO or a Company. The decision to incorporate is becoming more common for a number of reasons:

- Unincorporated bodies, unlike companies and SCIO's, do not have legal personality. As a result, unincorporated bodies cannot enter into contracts in their own name, meaning the charity trustees have to do so and may be personally liable if something goes wrong.
- An unincorporated body may decide to change to a SCIO or company because it employs staff or to secure funding streams.

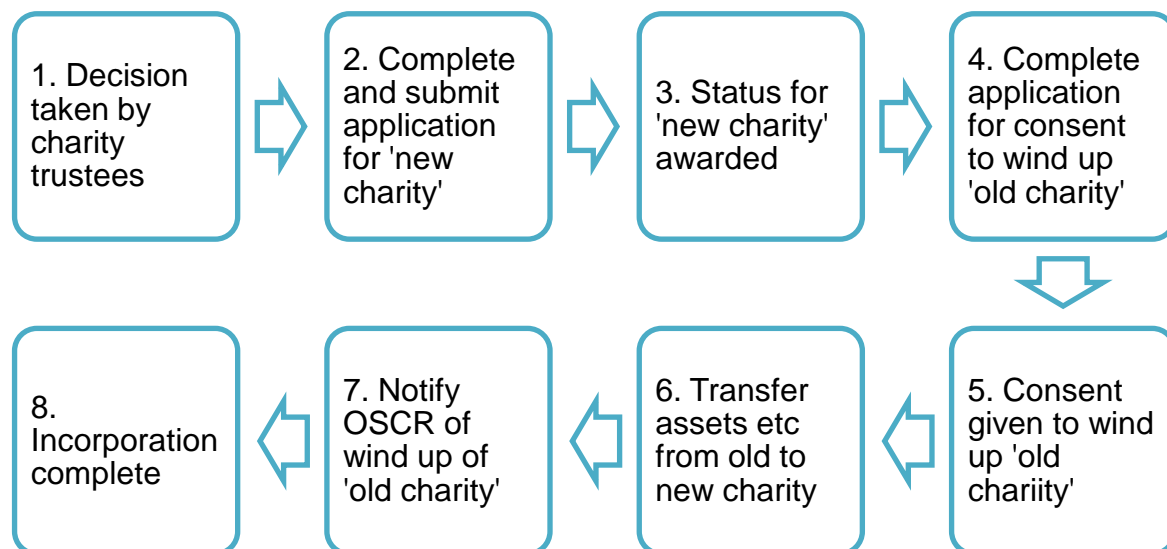
Incorporation is a significant decision for any charity; there are important actions the charity will need to take. You are creating a new legal entity and transferring assets to it. It is important that charity trustees and members understand the full implications of the decision, plan ahead and acknowledge that it will take time for the process to be completed.

2. How do we incorporate?

A charity seeking to incorporate must apply to create a new charity, and apply for consent to wind up the existing charity. Once status and consent is granted, the 'old charity' can then transfer the assets and liabilities to the 'new charity'.

Below is the step by step process that you should follow. The [Checklist](#) sets out wider implications you may need to consider and when. Further guidance that may be helpful in completing the process is referenced throughout this guidance note.

- **8 step process**



Step 1: Charity trustees should meet and consider the decision to incorporate. At this point it is important to check the [governing document](#) of the existing charity to see whether it gives the power to dissolve/wind up and transfer the assets to the new charity. If it does not, [reorganisation](#) may need to be considered (outlined further below). Before making this decision it is important that charity trustees consider the full range of issues, not just OSCR's requirements.

It is important to remember your charity trustee duties set out in the Charities and Trustee Investment (Scotland) Act 2005 (2005 Act), including acting in the interests of the charity. Full [charity trustee guidance](#) is available here.

Step 2: Complete and submit an [application for charitable status](#). This will either be an [application to become a SCIO](#) or the [standard application](#) if the charity is becoming a Company. A draft [governing document](#) should be supplied with the application.

Within the form there will be questions asking whether this application is intended to replace an existing charity. It is important that you answer these fully.

It can take up to three months (or longer for more complex applications) for charitable status to be granted.

The new charity must have a different name from the old charity. This is because OSCR must not enter a body in the Scottish Charity Register if its name is the same as another charity. If you don't want to change the name significantly we would recommend that you add the year, SCIO or limited to the end of the old charity name.

For example: 'Save the Porpoise' becomes 'Save the Porpoise SCIO'.

Step 3: On being granted charitable status the new charity will be given a new charity number. On the Register there will be a cross-reference identifying the relationship between the old and new charities.

Step 4: Complete and submit an [application to wind up](#) for the old charity. OSCR will consider the application and notify you of the decision within 28 days.

In the application there will be a questions asking why you are winding up. Please state your decision to incorporate and provide the name and number of the new charity.

Step 5: If OSCR grants consent to wind up the old charity we will tell you in writing, and set out the requirement to notify us once the wind up is complete. The transfer of assets can only begin once the new charity has been granted charitable status.

Step 6: Transfer process. Now the new charity is registered and consent has been granted to wind up the old charity the transfer of assets can start. As both charities are on the Register, this gives the old charity time to deliver its activities as normal, and make sure the full transfer takes place effectively.

Until the old charity has fully wound up and is removed from the Scottish Charity Register, both charities will have to fulfil the [annual reporting requirements](#) and other regulatory requirements.

Step 7: [Notify OSCR that the old charity has wound up](#). This must be done within three months of the wind up being completed. You will have to complete the declaration sent out when we gave our consent, along with any evidence we requested.

Step 8: OSCR will remove the old charity from the Register and the process is complete.

3. Further issues to consider

Before making the decision to incorporate charity trustees must consider the full implications of doing so. The attached [checklist](#) highlights some of the issues to consider before reaching a decision. We encourage charities to work through these and list what is applicable to your charity before making any application to OSCR. Some charities may experience other issues, which are discussed below.

- **Where can we get advice and guidance?**

You may decide to seek professional advice to inform your decision on incorporation or more generally to support the charity during the process. You may also need professional advice about the transfer of property or leases.

Advice bodies include:

- Your local [Third Sector Interface](#) - these are organisations that offer support to voluntary organisations.
- [Scottish Council for Voluntary Organisations](#)
- [The Law Society of Scotland](#)
- [Institute of Chartered Accountants of Scotland \(ICAS\)](#)

- **We have no powers in the existing governing document to wind up**

Before you apply to wind up the old charity, you need to check what the governing document says about how you need to go about it. You will usually find this in the 'dissolution clause'.

If the governing document does not say anything about winding up you may still be able to do this, or you may need to change your governing document or [re-organise](#) the old charity to allow it to be wound up. If the governing document does not say anything about winding up please [contact us](#) or your advisor first for advice.

- **We want to become a company**

If your charity wants to incorporate to become a company, you will need to provide us with draft articles of association when applying for charitable status for the new charity. We can only issue an 'in principle' decision on the application at first. The next step is to incorporate the company at [Companies House](#). After the new company has been registered at Companies House, you will need to tell us and send copies of the Certificate of Incorporation and the final articles of association. Then we can confirm charitable status and issue a new charity number.

- **We are a Village Hall**

Many of the village halls OSCR currently has on the Register are trusts, and we are aware that a lot are considering incorporation. For some of these, their trust deeds won't give charity trustees the power to wind up and transfer the assets. For others where there is the power we have found that it does not permit the transfer of the hall to another charity. In these cases they will have to [apply to reorganise](#) under section 39 of the 2005 Act, however the new SCIO would have to be created before an application for reorganisation is made. See our [technical guidance on Village Halls for charity advisers](#) for more information.

- **What if we change our mind?**

There may be a range of reasons why a charity may change its mind and decide to withdraw from the incorporation process. If this happens, you should inform OSCR immediately and we can either cancel any application for charitable status or advise you how to wind up the new charity.

- **We are regulated by the Care Inspectorate**

Charities also regulated by the Care Inspectorate will have to apply for a new registration for the new charity and cancel the registration of the old charity with the Care Inspectorate. This can take between 3-6 months to complete and a registration fee applies. It is important to note that the regulatory history of the former service will be deleted. Full application details can be found on the [Care Inspectorate](#) website. In the case of SCIO's, the Care Inspectorate registration can only be completed once the new charity has been registered by OSCR.

Both charities will stay on the OSCR Register allowing the service to remain operational, while registration with the Care Inspectorate is ongoing. Once the new charity is registered with the Care Inspectorate, an application to wind up the old charity can be made to OSCR and an application to cancel the registration with the Care Inspectorate.

- **We want to leave the existing charity on the Register**

Some charities may wish to keep the old charity on the Register as a shell body, for example to make sure any legacies can be collected (we call these anticipatory charities). When the old charity is ready to be removed, it should apply for consent to wind up as detailed above.

We would ask charities intending to do this to consider the implications carefully. Both the old and new charity will need charity trustees and will be subject to OSCR's [annual monitoring programme](#), which includes the submission of annual accounts.

OSCR is considering its approach to anticipatory charities more widely, but it is important that the intention to retain the old charity as a shell body is stated in the application to register the new charity, along with an outline of the reasons for doing so. OSCR keeps a list of these shell bodies and we intend to identify them on the Register so the public are aware why these bodies are registered.

Charities wanting to remain as shell bodies will also need to consider whether a change is needed to their governing document. If so, they may require [OSCR's consent](#).

4. Further guidance

It is OSCR's intention to work with partners to develop comprehensive guidance on incorporation. Work on this is under way, and it is intended this will be ready for use in early 2017.

The [OSCR website](#) contains a wide range of guidance and information more generally on charity regulation that may be helpful, and further guidance and support is available from [Third Sector Interfaces](#).

Incorporation is a significant decision for any charity to take. Charity trustees should review this guidance and the checklist. Together they should assist you in both making the decision and working through the process.

5. Checklist for incorporation

Before making the decision to incorporate charity trustees must consider the full implications for the charity. In this checklist we highlight some of the issues you may need to consider before a decision to incorporate is reached. Please note this list is not comprehensive.

Making the decision

Issue	Notes	Tick Box
What type of legal form do you want to change to? A Company or a SCIO ? It is important that		

<p>you choose the right legal form for your charity.</p>		
<p>Does your charity have the power to dissolve and/or transfer its assets and property to the new body?</p>		
<p>Decide if you need any advice to inform your decision or support the charity throughout the process. You may want to seek advice from a professional advisor or one of the Third Sector Interfaces. If you're part of an umbrella organisation, contact them and see if they can help.</p>		
<p>If you have heritable:</p> <ul style="list-style-type: none"> ✓ property ✓ investments ✓ leases ✓ contractual agreements <p>you will require professional advice on how to transfer these to the new charity. Leases of equipment may not be transferable and there may be penalties for early termination.</p>		
<p>Are you regulated by or registered with any other regulators or bodies. As you are creating a new legal entity you may need to re-register with them and there may be costs involved. This is a specific issue for bodies registered with the Care Inspectorate.</p>		
<p>Other bodies to consider include Disclosure Scotland, Information Commissioner, membership bodies, local authority and HMRC.</p>		
<p>Speak to your bank. You will need to set up a new bank account for the new charity so it is ready to receive the assets from the old charity. It may be that you need to run both bank accounts for a short time until the</p>		

assets are all transferred across. Many banks have accounts suited to specific legal forms; make sure you have the correct one set up.		
Tell your funders. The organisation will remain charitable, so it should not put this at risk. However, you may need their consent if you are transferring grants to a new body and they may require you to sign/update a new funding agreement.		
If you have insurance you should contact your insurers and find out what they require. Remember you are establishing a new body, so it may be that new certificates are required.		
Do you employ staff? If yes then you should consider possible responsibilities under the TUPE regulations.		
Pensions – do you operate a pension scheme? There will be issues here you must consider. Dissolution of the old charity may trigger crystallisation of the pension deficit which could be a major financial problem. Where a body is a member of a multi employer scheme there may significant implications. Professional advice will be needed.		
Gift aid – if you operate gift aid you will need to register the new charity for gift aid and cancel your previous registration – HMRC will be able to assist with this.		

Application to OSCR

Issue	Notes	Tick Box
Make sure your most recent annual return and accounts have been submitted to OSCR. This can be checked by going on to the charities OSCR Online account or by checking your charity's Register entry .		

Read the application forms and guidance carefully, make sure you complete both application forms. For OSCR to make a decision we need complete information, or the application may be sent back or the decision delayed.		
A new governing document will be required. Examples of model governing documents can be found on the SCVO website .		
The new charity will need a new name. Charity trustees should consider this and it may be you simply add SCIO, the year or limited to the old charity name.		
Follow the decision making procedures contained in the charity's governing document in relation to the wind up and transfer of assets.		
Store all the application information together so you have it to hand when required.		

Considering the transfer

Issue	Notes	Tick Box
Having reviewed the 'making the decision' part of the checklist you should have recorded what needs to be transferred and how. Having a written action plan will help you work through all the actions and complete the transfer effectively.		
It is important that the transfer of assets follows the rules set out in the old charity's governing document, and the transfer follows what was stated and agreed to by OSCR in your consent to wind up.		

<p>Evidence: Have you got the appropriate evidence that the transfer has taken place? We recommend that a new bank account is opened; this is a new legal entity with new name and charity number. In this instance closing and opening bank statements can be sent as evidence.</p>		
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The new charity

Issue	Notes	Tick Box
<p>Publicising your charitable status: all charities have to provide certain charity details in certain external documents (hard copy and electronic). Read our guidance that outlines the specific requirements you must meet.</p> <p>The details of the new charity (for example the new name and charity number) must be stated on the external documents.</p> <p>If the new charity is a SCIO, it must state it is a SCIO on its external documents.</p> <p>OSCR will be proportionate in this area as charities use up old batches of stationary.</p>		
<p>If the new charity wants to change its name back to that of the old charity, it can do so by applying for consent to OSCR. This application could be sent in as the notification to wind up is submitted and a decision would be made within 28 days.</p>		

Published: November 2016

Updated: March 2017