

AGENDA ITEM: INCORPORATION OF SAGS

Currently SAGS is formed as an unincorporated association. An unincorporated association is established when two or more persons come together for a common purpose other than to make a profit. It will usually have a constitution or a set of rules and a management committee which will be elected to run the association on behalf of its members.

Unincorporated organisations do not have an independent legal identity/personality. Therefore, if the Committee enters into any contractual or other arrangements they must do so by contracting in their capacity as Committee members. As a result, they are "jointly and severally responsible" for the affairs of SAGS. It is therefore possible for them to be held personally responsible to settle any debts or other liabilities that may occur (e.g. fees for professional services, rent under a lease, or damages for breach of contract). However, if SAGS does not have sufficient assets, then the Committee members of this type of organisation may have to make good any shortfall.

From a risk point of view, an incorporated legal structure is the most advisable. 'Incorporation' means giving the organisation a legal personality in its own right. The advantage of this is that it offers increased protection to people sitting on the governing Committee, for example in the event of a legal action the organisation would be the target rather than individuals within it.

As SAGS has grown to the extent it has, it is now necessary to try to minimise the risk to the Committee. The Committee have taken separate legal advice and have investigated the possibility of incorporating SAGS as a Scottish Charitable Incorporated Organisation (SCIO).

The SCIO must first be eligible to be a charity first and foremost. Charitable status is a badge that an organisation can wear that brings with it some benefits, it is not a structure in itself, it is added as an extra layer on a limited company. The SCIO is however, a structure in its own right making it a novel addition to the choices available.

To acquire charitable or to incorporate as a SCIO status it is necessary to prove (in simplified terms) that the activities you carry out are purely charitable and are for public benefit, independent of government, non-party political and not for private gain. The activities must further a purpose and be for the public benefit with any private benefit arising from the activities being necessary or incidental.

The advantages of being a charity are numerous, and include corporation and capital gains tax relief, wider fundraising opportunities and potentially greater public trust. A charity may also claim for business rates relief on their premises and will receive at least 80% relief (20% is discretionary) on their rates.

A further advantage is that there is the ability to attract donations which will be eligible for gift aid. The flipside is similar to incorporation, with governing body members legally bound to act responsibly and obliged to report to the Office of the Scottish Charity Regulator (OSCR) and you are restricted in the type of trading you can do i.e. only for the advancement of a purpose.

Being incorporated as a SCIO also means that you get the benefits of a separate legal personality (similar to a limited company). It is incorporated but not a company. Members and the board have limited liability and are not personally liable for any debts of the organisation (as long as they are acting in legal way and not in breach of the duties). One of the benefits of being a SCIO is that you are only accountable to OSCR rather than Companies House. The Members of the SCIO are also accountable for their actions and have a duty of care towards the charity which does not exist within the CLG. The SCIO's existence depends entirely on its charitable status and once established it may

only be dissolved or amalgamate with another SCIO. As a SCIO you will have less onerous accounting procedures as you have to be earning over £250K before it is necessary to complete fully accrued accounts that require to be audited.

Therefore in order to ratify this decision it is necessary to hold an EGM to adopt the new structure and decide to incorporate the charity as a SCIO. The legal process means that the current constitution has to be wound up and the assets and liabilities transferred to the SCIO.

To incorporate as a SCIO, you must pass the charity test:

- You must meet the charity test to become and remain a charity
- The people in control and management of the charity (its charity trustees) must meet their general trustee duties – essentially to act in the interests of the charity at all times
- The charity trustees must comply with the other requirements of charity law, including the conditions on payments to trustees and people who are connected to them.

Public benefit is a fundamental part of the charity test. OSCR will look for us to demonstrate that public benefit will result from the proposed activities. OSCR will also look at whether the benefit is targeted at certain categories of individual or at the community as a whole and how they benefit.

Private benefit is a key factor when OSCR are looking at the public benefit aspects. They will assess from the information we provide if any individuals or connected businesses benefit from the charity's activities. If members of the organisation receive benefits over and above those available to the wider public then this will be assessed against the level of public benefit. Public benefit has to far outweigh the private benefit in order to be successful.

If charity is established wholly or mainly for the benefit of the people who set it up (for example to provide themselves with employment) then it is likely to fail the charity test and be refused charitable status. To pass the charity test, any private benefit must be either:

- necessary (that is, the public benefit can't be provided without it), or
- incidental (that is, the private benefit arises as by-product of the activity producing public benefit and is not an end in itself).

Yours faithfully,