

2

“Getting it right legally”

- 2.1 Legal form, status and structure 17
- 2.2 Legal forms that may be suitable for childcare organisations 18
- 2.3 Legal responsibilities of a voluntary childcare committee 19
- 2.4 Relevant legislation 19
- 2.5 Getting it right legally health check 22

2 “Getting it right legally”



2.1 Legal form, status and structure

“Everyone involved with any organisation needs to understand how it relates to customers, supporters, regulators, other organisations and anyone else dealing with it.”

Getting it Right Legally, status and structure for play and childcare organisations
www.surestart.gov.uk_doc/P0001924.pdf

Legal form determines what sort of body an organisation is in the eyes of the law. The organisation could be ‘unincorporated’ or ‘incorporated’ (a company). Incorporation means creating a legal identity for an organisation, which is separate from its members: a corporate body. In an unincorporated organisation the law does not recognise a difference between the organisation and its members. Organisations might have other legally-defining characteristics, such as being not-for-profit or a charity. Becoming a charity allows an organisation a legal status on top of its legal form.

An unincorporated charity would also be an association or a trust, and an incorporated charity would be either a company limited by guarantee or an industrial and provident society. It is not possible to become a charity without a governing document or a separate legal form (see *Simply Legal – An introduction to legal structures for the social economy* www.cooperatives-uk.coop)

A common legal form for voluntary run childcare groups is ‘unincorporated’ where a group of people have come together for a common purpose and then go on to play a part in the administration or project management of the organisation. Commonly childcare groups will register as a charity. This brings many benefits as well as some requirements (see **Section 1.5: Becoming and operating as a charity** and **Section 3.3: The Charity Commission and the Charities Act 2006**).

The legal structure of an organisation is set out in its governing document. The main types of governing documents used by charities are: a constitution (unincorporated association), a trust deed (trust), and a memorandum and articles of association (company limited by guarantee). Once registered many charities, including childcare groups, enter into contracts with suppliers of services and goods. Childcare groups need to employ staff and enter into leases. If the charity is an incorporated charity (i.e. a charitable company), then the contract is between the charity as a legal entity in its own right and the supplier. This legal form means that the contract is with the charity and not with its individual trustees. In unincorporated associations *contractual liability rests with individual committee members*.

The ‘governing body’ is a general term used to describe individuals appointed or voted to manage the affairs of an organisation on a day-to-day basis, often called the board of directors or management committee.

Unincorporated association registered as a charity

- Has a constitution – rules for an unincorporated association or trust deed for a trust
- Charitable aims and objects are specified in the constitution and approved by the Charity Commission
- Board or committee members are charity trustees

Limited company registered as a charity (model type company limited by guarantee)

- Constitution is the company’s memorandum and articles of association
- Charitable objects are specified in the memorandum and approved by the Charity Commission
- Board members are both company directors and charity trustees

Unincorporated association NOT registered as a charity

- Has a constitution without exclusive charitable objects
- Has a management committee

Limited company NOT registered as a charity

- Constitution is the company’s memorandum and articles of association but objects within these are not exclusively charitable
- Board members are company directors

2.2 Legal forms that may be suitable for childcare organisations

- **Unincorporated association** – a group of members entrusting the holding and management of assets to a smaller governing group (the voluntary management committee). The relationship between the members of an association is contractual, with the terms of the governing document of the organisation providing 'the terms' of the contract. There are some 'default positions' or implied powers. If there is no implied power then it must be written down in the governing document, for example there is no implied power for a chair to have the casting vote, if required it must be written in the constitution. Also if the governing document does not state that the governing body will be the employer of any staff, whoever actually confirmed the appointment may be held liable for outstanding income tax, National Insurance and so on. There is no Act of Parliament defining or governing unincorporated associations, but there is a large amount of case law.
- **Unincorporated trust** – trustees, who collectively may be known as the voluntary management committee, that personally hold assets and manage them for constitutionally specified purposes. A charitable trust may only be created where there is a specific asset for the trustees to administer, although this can be a small sum of money. It is an appropriate legal form where there is a specific task to be achieved and a broader membership is not required.
- **Company limited by guarantee** – a conventional company in not-for-profit form. It will have a board of management and company members. This is the preferred form for voluntary and community organisations if charitable status is also required. There have been some charities that have been registered as companies limited by shares. This legal form must be registered by Companies House, requiring start up fees, and an annual subscription. A company limited by guarantee does not issue shares but guarantees a certain amount (usually £1) in the event of the company being wound up with outstanding debts. This legal form reduces the personal liability of charity trustees but does require annual reports and audits to be submitted to both Companies House and the Charity Commission.
- **Community interest company (CIC)** – This is a limited company with all the usual duties and obligations of a company (requiring registration with Companies House). There are two main differences: an asset lock which means that the assets of the company can only be distributed to a specific CIC or charity; and a community interest test which determines whether the company's activities are in the interest of the community. The company can be limited by guarantee or by shares and on top of company annual auditing a community interest statement must be made, with reports about payments to company directors. This legal structure may be able to attract funding but CICs cannot become charities and are separately regulated. See www.cicregulator.gov.uk.
- **Charitable incorporated organisation (CIO)** – this is a new legal framework which was set out partly in the Charities Act 2006 but which has not yet been finalised by the necessary secondary legislation. Draft regulations will be published and a consultation will take place before the final regulations are made. The CIO will combine the advantages of a corporate structure, such as the reduced risk of personal liability for trustees, without the burden of dual regulation. Some advantages to charities that choose the corporate structure are; a single registration (Charity Commission only, not Companies House as well), less onerous accounting, one annual return, reduced filing requirements, lower costs and a simpler constitutional form. There are issues with regard to the transfer of assets between one legal form and another, which may cause the CIO problems.



CIO implementation will take place after the regulations are finalised. For further information, go to the Frequently Asked Questions section of the Charities Commission website www.charity-commission.gov.uk and type 'CIO'.

Profit-making legal structures that are appropriate for childcare organisations are Sole Trader, Partnerships, Limited Liability Partnerships, Company Limited by Guarantee or Shares. More information on all of these, along with lots of useful case studies, model constitutions and memorandum and articles, can be found in *Getting it Right Legally* from the SureStart web site (www.surestart.gov.uk), also see Further Reading.

Social enterprise is a term often used in relation to childcare organisations. This is because many of the key values of social enterprise such as social ownership, involving the community, meeting social need, enterprise activity and quality delivery are all important aspects of a voluntarily run preschool or nursery. A social enterprise business has social objectives, for example a community-run local shop where the profits are, in the main, reinvested in the business or the community. Social enterprise covers a wide range of social and environmental issues but is not a legal form.

2.3 Legal responsibilities of a voluntary childcare committee

Charitable trustees (voluntary management committee members) are elected to run the organisation and as such are required to act responsibly and sensibly in the interests of the charitable childcare setting they represent. The trustees hold the organisation 'in trust' for the beneficiaries, who are the children.

In principle, trustees can be personally liable if the charity/provision gets into difficulties as a result of the action or inaction of the trustees. *"Where a liability has been properly incurred by the trustees of an unincorporated charity, but the charity does not have sufficient assets to meet the liability, those trustees may have to meet the shortfall personally. How this deficit is to be shared between the trustees can depend on the terms of the agreement which gave rise to the liability, but normally the creditor will be able to sue any of the trustees for the whole liability. A trustee who has to pay more than his or her share may claim a fair contribution*

from the other trustees. This means in effect that any deficit will be shared equally between those of the trustees who can be found, and who have the means to pay, unless they agree otherwise among themselves."
From: *Managing Financial Difficulties and Insolvency in Charities*, Charity Commission Booklet CC12 www.charity-commission.gov.uk.

For more about trustee liability see **Section 3.4: Trustee/committee liability**.

The committee needs to be fully aware of its constitution and work within it, take appropriate advice where necessary and strike the right balance between financial probity and useful expenditure.

Trustees/committee members should:

- Keep to the law, both the law of the country and the constitution. Be aware of the laws that affect the running of a childcare setting, for example the Childcare Act 2006, Disability Discrimination Act 1995 and 2005, Health and Safety at Work Act 1974 and Equality Act 2006. See below for a further list of applicable legislation.
- Ensure that insurance is suitable and levels are high enough to cover any eventualities (see **Section 4.5**).
- Do not enter into a contract which the charity does not have enough money to meet – this includes, most importantly, contracts arising from the employment of staff.
- Remember that the committee retains overall collective responsibility.

2.4 Relevant legislation

The key legislative areas that affect childcare committees relate to the employment of staff (see **Section 5: Employing staff**) and the care of children (see **Section 3: Regulation and regulatory bodies**).

Probably the most important legislation is to be found in the *Statutory Framework for the Early Years Foundation Stage*. The criteria are described in two categories. The first is the statutory minimum:

- 1 Specific legal requirements
- 2 Statutory guidance to which the provider should have regard

You checking up
on today's
early years
legislation, Mum?

That's
right,
Sweetheart.



The Ofsted inspection criteria will take into consideration the level in which a setting covers both the legal requirements and the guidance. The rating that the setting will receive after an Ofsted inspection will relate to how successfully (and well-evidenced) the inspector judges the setting to have fulfilled all the criteria. The Early Years Foundation Stage (EYFS) is part of the Childcare Act 2006, which became law in September 2008. See **Section 3.1: Regulation and regulatory bodies** for a full summary of the EYFS statutory framework.

To order an Early Years Foundation Stage pack, contact the Department for Children, Schools and Families – for publications call 0845 6022260 or download a copy from www.standards.dcsf.gov.uk/eyfs.

Below you will find a list of Acts and Statutory Instruments (SIs) that have a bearing on your work as a voluntary run childcare group, some much more than others. Details of these statutory materials can be found from the following web addresses or you could simply put the name of the Act/Statutory Instrument into an internet search engine. There are usually summaries or guides to the Acts/SIs available from the related government department websites. The most obvious of these is the Department for Children, Schools and Families. **Many of these Acts/SIs and how they affect your childcare setting are detailed in the following sections of this publication.**

www.opsi.gov.uk/acts
(Office of the Public Sector Information)

www.hmsso.gov.uk
(Her Majesty's Stationery Office)

www.berr.gov.uk
(Department for Business, Enterprise and Regulatory Reform)

www.acas.org.uk
(Advisory Conciliation and Arbitration Service)

www.hse.gov.uk
(Health and Safety Executive)

www.ico.gov.uk
(Information Commissioners Office)

www.direct.gov.uk
(Public Services information website)

Acts related to childcare and children

- Childcare Act 2006
- Safeguarding Vulnerable Groups Act 2006
- Children Act 2004
- Children Act 1989
- Protection of Children Act 1999
- Education Act 2002
- Care Standards Act 2000
- Children and Young Persons (Protection from Tobacco) Act 1991
- Disability Discrimination Act 1995
- Disability Discrimination Act 2005

See below for other anti discrimination and equalities Acts:

Acts/SIs related to employment

- Employment Acts 1988, 2002 and 2008
- Employment Rights (Dispute Resolution) Act 1998
- Employment Rights Act 1996
- Employment Relations Act 1999 and 2004
- Disability Discrimination Acts 1995 and 2005
- Protection of Children Act 1999
- Welfare Reform and Pensions Act 1999
- Work and Families Act 2006
- National Minimum Wage Act 1998
- Learning and Skills Act 2000
- Data Protection Act 1998
- Working Time Regulations 1998
- Income Tax (Earnings and Pensions) Act 2003
- Health and Safety at Work Act 1974
- Statutory Maternity Pay (General) Regulations 1986
- Statutory Sick Pay (General) Regulations 1982

Acts/SIs related to antidiscrimination and equal opportunities

- Equality Act 2006
- Special Education Needs and Disability Act 2001
- Human Rights Act 1998
- Disability Discrimination Acts 1995 and 2005
- Sex Discrimination Acts 1975 and 1986
- Sex Discrimination (Gender Reassignment) Regulations 1999
- Equal Pay Act 1970
- Equal Pay Act 1970 (Amendment) Regulations 2003
- Race Relations Act 1976
- Race Relations (Amendment) Act 2000
- Race Relations 1976 (Amendment) Regulations 2003
- Gender Recognition Act 2004
- Employment Equality (Religion or Belief) Regulations 2003
- Employment Equality (Sex Discrimination) Regulations 2005
- Employment Equality (Age) Regulations 2006
- Employment Equality (Age) (Amendment N° 2) Regulations 2006
- Employment Equality (Age) (Consequential Amendments) Regulations 2007
- Communications Act 2003

Acts related to charitable status

- Charities Act 1992, 1993, and 2006
- Trustees Act 2000
- Education and Inspection Act 2006

It is necessary in childcare to process personal information (recorded information about a living identifiable individual), so it is useful to know the eight principles set out in the Data Protection Act 1998 which must be complied with.

The eight principles of the Data Protection Act are:

Personal data shall be:

- 1 accurate and kept up to date
- 2 kept secure
- 3 processed fairly and lawfully
- 4 obtained only for lawful purposes
- 5 adequate, relevant and not excessive
- 6 processed in accordance with the data subject's rights

Personal data shall not be:

- 7 kept longer than necessary
- 8 transferred outside the EC unless adequate protection is available in that country in relation to personal data.

Data protection is a legal requirement for all providers as they are expected to hold copies of children's personal details to meet audit and monitoring requirements. Data processing occurs when any operation or set of operations is carried out on personal data, for example the photocopying of birth certificates or the completing of the headcount forms (see **Section 4.3: Free entitlement**).

For further information please refer to www.ico.gov.uk.

2.5 Health check

Yes / No Action to take

2
Does your group have a constitution or a deed of trust? (If you have become a company limited by guarantee you will have a memorandum and articles – commonly known as ‘mem and arts’.)

You need to refer to the Charity Commission if you are a registered charity and do not have a copy of your constitution or deed of trust – they will send you a copy.

Have you read and understood your constitution? Does your constitution allow for the employment of staff in its ‘powers’? Do you understand the legal form your childcare group has?

Please refer to **Section 1.3: The constitution – what is it?**
Also refer to the Charity Commission website
www.charity-commission.gov.uk

How many committee members are needed to run the group legally?

Refer to your constitution.

If you need to make any employment changes in the group how can you know if you are breaking the law?

Contact Acas (the Advisory Conciliation and Arbitration Service) on their helpline 08457 474747 or go to www.acas.org.uk.

What is the key legal framework that childcare organisations work from?

The Statutory Framework for the Early Years Foundation Stage (setting the standards for learning, development and care of children from birth to five). Look on the Department for Children, Family and Schools’ website www.dcsf.gov.uk to download or order this document.