

## **Legal Update for Voluntary and Charity Sector Companies and the Important Role of the Company Secretary**

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### **The Company – A Brief Overview**

#### ***What is a Company?***

A Company is a separate legal entity established under the Companies Acts owned or formed by its Members and run by Directors appointed by the Members. The Memorandum of Association sets out the purpose for which the Company was formed and the nature of its Members' liability. The Articles of Association regulate the relationship between the Members and the Directors and how the company conducts its business.

In the Voluntary and Charity Sectors the Members and Directors are very often the same people. As such, the volunteers in the company are wearing two very distinct "caps". Understanding the distinction between your obligations as a Member and as a Director is of fundamental importance.

#### ***What is the difference between a Member and a Director?***

##### **Member**

- Have the right to attend and vote at General Meetings.
- Liability is limited to the amount of their guarantee to contribute to the company's assets in a winding up.
- Less responsibilities, obligations and duties than Directors.

##### **Director**

- Elected by the Members.
- Look after the day-to-day management of the business of the company.
- There must be a minimum of two Directors.
- A Director can be a member. However, there is no requirement for a Director to be a member.
- Numerous legal responsibilities and obligations attach to the post of Director.
- Directors owe duties to the company and to the employees, Members and creditors of the company.

### **Member Meeting**

- A meeting of the Members of the company.
- With the exception of the AGM, the holding of members' meetings is at the discretion of the company.
- Can take the form of an AGM or EGM (see next table).
- Members voice their opinions and wishes.
- Members formally provided with certain company information.

### **Board Meeting**

- A meeting of the Directors of the company.
- Usually more frequent than Members' meetings.
- Must take place in order to make particular decisions.
- The Directors make the day-to-day management decisions of the company at board meetings.

### **Annual General Meeting (AGM) of Members**

- All Members of the company are entitled to attend.
- Required to be held in each calendar year (with no more than 15 months elapsing between AGM's).
- At an AGM, a company will generally consider ordinary business, such as:
  - the financial statements;
  - the Directors' report and the Auditor's report;
  - the election of persons as Directors in the place of those retiring;
  - the re-appointment of the outgoing Auditors or the appointment of new Auditors and the fixing of Auditors' remuneration;
- Other business, such as the amendment of the Memorandum or Articles of Association of the company, is known as *Special Business*.

### **Extraordinary General Meeting (EGM) of Members**

- Any meeting of the company which is not an AGM is known as an EGM.
- Directors may generally call an EGM where they see fit.
- Directors are obliged to convene an EGM in certain circumstances.

## ***Are there different types of Companies?***

There are various types of companies. Depending on the number of Members, it may be a Private Company or a Public Company. The liability of its Member may be limited or unlimited. In the case of limited liability, the limit of a Member's liability may be limited by reference to your shareholding; i.e., a *Company Limited by Share Capital*; or, the Member's liability may be limited by reference to a guarantee for a nominal amount given by you when joining the Company; i.e., a *Company Limited by Guarantee*. In the voluntary and charity sectors, Companies Limited by Guarantee are the overwhelming choice. For this reason, the matters dealt with below are focused on Companies Limited by Guarantee.

## ***How has the new Companies Act, 2014 impacted on Companies Limited by Guarantee?***

"Companies Limited by Guarantee" are least impacted by the new Act. You are not obliged to take any steps to comply with the new Act, save for the obligation to register a Change of Name. By the end of 2016 you will need to have changed your name to "<<insert name>> Company Limited By Guarantee", which can be shortened to "<<insert name>> CLG" on your headed paper etc.; much the same way that the word "*Limited*" is frequently shorted to "*Ltd*").

In summary, the implications of the Act as they apply to Companies Limited by Guarantee are summarised as follows:

1. The Act continues to provide for Companies Limited by Guarantee not having a share capital, now described as CLG's and these companies are provided for in Part 18 of the Act. The CLG is a company most properly used for charities, social clubs and property management.
2. The CLG will continue to have a Constitution, which will be in the form of a Memorandum of Association and Articles of Association. It will continue to have an *Objects Clause*.
3. The Memorandum and Articles of Association of a CLG registered before the commencement of the relevant provisions of the Act shall continue in force, save to the extent that they are inconsistent with the mandatory provisions of the Act.
4. A CLG does not have to convert or register under the Act but shall continue in existence on and from the commencement of the Act.
5. A CLG will have to change its name to include the words 'Company Limited by Guarantee' or 'CLG' for 'Ltd' at the end of its name.
6. The new Act does introduce an Audit Exemption for CLG's, which did not previously exist – i.e. subject to certain thresholds, you would not be obliged to submit Audited Accounts to the Companies Office on an annual basis. Please discuss with your auditor. Grant funding agencies may well seek audited accounts in any event.

### ***What if we don't register our Change of Name?***

If you don't register your change of name during the 18 month transition period ending 30<sup>th</sup> November 2016, the Registrar of Companies will automatically convert it, regardless on that date. If you do wish to register the name change at a time chosen by you, it requires a Special Resolution of the Members of the Company and the completion of a Form N3, available at [www.cro.ie](http://www.cro.ie)

### ***What does the 2014 Act say about Director's Duties?***

The 2014 Act is the first time, Director's duties are set out in legislation. The eight principal fiduciary duties of directors are set out at section 228 of the Companies Act, 2014:

#### **(i) Act in good faith**

Each director is obliged to act in good faith in what the director considers to be the best interests of the company. This is a subjective test and recognises that two directors can have two different but equally legitimate opinions as to what constitutes the best interests of the company.

#### **(ii) Act honestly and responsibly**

Directors must act honestly and responsibly in relation to the conduct of the affairs of the company. While this was not a common law duty, it was deliberated on by the courts on numerous occasions in the context of imposing restrictions on directors.

#### **(iii) Act within powers**

Directors must act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law.

#### **(iv) Use of company property**

A director is not permitted to use the company's property, information or opportunities for his or her own or anyone else's benefit, unless this is expressly permitted by the company's Constitution or the use has been approved by a resolution of the company in general meeting.

#### **(v) Independent judgment**

A director shall not agree to restrict his or her power to exercise independent judgment, unless this is expressly permitted by the company's Constitution; or the director believes, in good faith, that to fetter his or her discretion is in the best interests of the company.

#### **(vi) Avoid conflicting interests**

A director is obliged to avoid any conflict which may arise between the duties the director owes to the company and the director's other (including personal) interests, unless the director is released from his or her personal duty to the company in relation to the matter concerned by virtue of either the provisions of the company's Constitution or by a resolution in a general meeting.

**(vii) Due care, skill and diligence**

A director must exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having the knowledge and experience that may reasonably be expected of a person in the same position as the director; and who also possesses the equivalent level of knowledge and experience which the director has. This sets a quasi-objective standard by which a director should be judged. While it does use the ‘reasonable man’ test, that man is taken to be a person with the director’s knowledge and experience.

**(viii) Regard to shareholders’ interests**

In addition to the general duty as referred to above, directors have a fiduciary duty to have regard to the interests of the shareholders of the company.

**What about the Company Secretary?**

The Act imposes new duties on directors when appointing the company secretary in that they must ensure that the *“person appointed as secretary has the skills or resources necessary to discharge his or her statutory and other duties”*. For *Companies Limited by Guarantee* it is the discretion of the board to determine the appropriate skill set of the secretary.

For small companies in the voluntary sector, having a good Company Secretary is probably more than half the battle because most of the company law compliance matters will fall at the doorstep of the Company Secretary. It is really important, in my view, that the Company Secretary has a close working relationship with the Company Accountant/Auditor in respect of such compliance matters. While, the Company Secretary cannot be expected to know everything, it is important that they are cautious and aware of their limitations. Knowing when to seek external assistance might be the most useful characteristic of a Company Secretary.

If you are appointed a Company Secretary the first thing you should do is print off, read and keep for reference the Roles and Duties of a Company Secretary publications on [www.cro.ie](http://www.cro.ie) and [www.odce.ie](http://www.odce.ie)

**The Company Secretary – An Overview**

***What are the duties of a company secretary?***

The Companies Act imposes a number of tasks on the secretary, but few are his/her exclusive responsibility. Frequently, the task may be performed by the secretary and a director (one such duty is the secretary’s duty to sign the *Annual Return*, which also requires the signature of one of the directors) or by either a secretary or a director. Many of the provisions of the Companies Act, which criminalise default by a company, further provide that any officer of the company who is in default shall also be liable to a fine or a penalty. An officer in default is defined as any officer who “authorises, or who, in breach of his duty as such officer, permits the default” in question. An officer will be presumed to have permitted a default by a company if in relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default, it shall be presumed that the defendant permitted the

default unless the defendant shows that he/she took all reasonable steps to prevent it, or by reasons of circumstances beyond the defendant's control, was unable to do so.

The functions of a secretary are essentially administrative and not managerial. For instance, a secretary commonly:

- provides administrative support and guidance to the board of directors, to include liaising with professional advisers such as solicitors and accountants.
- ensures that the board's decisions and instructions are properly carried out and communicated
- has responsibility to ensure that the company complies with all relevant statutory and regulatory requirements
- has responsibility for communication with the Members when required
- executes important documentation on behalf of the company, together with a director

It is also common for the secretary to undertake the following specific duties:

**(a) Maintaining the Statutory Registers and Minute Books**

The secretary keeps up to date the various Statutory Registers which are required to be maintained by the company under the Companies Act 2014. These are the:

- Register of members\*
- Register of directors and secretaries
- Register of directors' and secretaries' interests in shares and debentures
- Register of the instruments which create charges

\*Keeping track of members in a *Company Limited by Guarantee* requires care.

**(b) Convening meetings of members**

The Companies Act lays down minimum statutory periods of notice of company meetings required to be given to shareholders and the company's auditor. At least 21 clear days' written notice of an Annual General Meeting (AGM) is required or for an Extraordinary General Meeting (EGM) required for the passing of a *Special Resolution*. In the case of an EGM of a private company or an unlimited company, at least seven clear days' written notice must be given in writing. Where it is proposed to pass a *Special Resolution* at a meeting, the notice is required to specify the wording of the proposed *Special Resolution*. Where all the members of a company who are entitled to attend and to vote at a meeting unanimously agree to call a meeting, then, notwithstanding a shorter notice period, the meeting shall be validly called, provided the auditors of the company agree.

**(c) Ensuring that statutory forms are completed and filed on time in the CRO**

Changes in the situation of the company's registered office or changes amongst the company's officers or in their particulars ought to be notified to the CRO on the relevant statutory forms, which must be properly completed and signed by a current officer of the company per CRO records.

A change of registered office is notified to the CRO on *Form B2*. A change of director or secretary or of details of their particulars, such as a change of name or address, must be notified on *Form B10*. These details are required by statute to be notified to

the CRO within 14 days of the change occurring. Forms B2 and B10 may be filed electronically free of charge at [www.core.ie](http://www.core.ie)

**(d) Delivering to the CRO copies of Resolutions passed by the company**

*Special Resolutions* and certain other *Resolutions* must, within 15 days of their passing by the company, be delivered to the CRO. Failure to file a *Resolution* does not invalidate the *Resolution*, but a fine may be imposed on the company and any officers in default.

The *Resolutions* that must be filed in the CRO, in addition to *Special Resolutions*, are:

- *Unanimous Resolutions* which, had they not been unanimous, would have had to be passed by a *Special Resolution*
- *Resolutions* agreed by all the members but which, if not agreed unanimously, were required to be passed by some particular majority or manner
- all *Resolutions* which bind all the members of a particular class of shareholders
- *Resolutions* increasing or decreasing the authorised share capital of the company
- *Resolutions* conferring authority for the allotment of shares
- *Resolutions* attaching rights or restrictions to any share
- *Resolutions* varying any such right or restriction to any share
- *Resolutions* classifying any unclassified share
- *Resolutions* converting shares of one class into shares of another class
- *Resolutions* converting share capital into stock and resolutions converting stock into share capital
- *Resolutions* that a company be wound up voluntarily

**(e) Supplying a copy of the company's financial statements to every member of the company and every person who is entitled to receive notice of general meetings**

The *Financial Statements* are required to be sent at least 21 clear days before a meeting of the company at which they are to be laid.

**(f) Keeping or arranging for the keeping of Minutes of directors' meeting and general meetings**

There is a statutory obligation on a company as soon as may be possible to enter the Minutes of all proceedings of general meetings in books kept for that purpose

**(g) Ensuring that those entitled to do so may inspect company records**

Those who are entitled to inspect the records are the members of the company, the officers of the company and the general public.

**(h) Custody and use of the company seal**

Every company is required to have a seal, with its name engraved in legible characters. The secretary is frequently given responsibility for the safekeeping of the company's seal. Other than section 43 of the Companies Act 2014, the constitution of the company generally makes provision for the affixing and attestation of the company seal. Section 43 provides that: "*If a company has appointed a registered person the company's seal may be used by such person and any instrument to which the company's seal shall be affixed when it is used by the registered person*

*shall be signed by that person and countersigned by the secretary or a director of the company or by some other person appointed by its directors for the purpose”.*

**(i) Ensuring that company complies with its obligation to publish its name**

A company is required to paint or affix its name in a conspicuous place, in legible letters, on the outside of every office or place in which its business is carried on. A company is further required to have its name recorded in legible characters in all business letters of the company and in all cheques, invoices and receipts of the company. A fine may be imposed on the company and on any officer in default for breach of the foregoing. If a company officer issues or authorises the issue of any business letter of the company or signs a cheque or order for goods, and the name of the company is not recorded in legible characters, that officer is liable to be fined and will also be personally liable unless the amount due on foot of the cheque or order for goods is paid by the company.

**(j) Ensuring that particulars relating to directors are shown on all business letters of the company**

A company is required to state in all business letters on or in which the company’s name appears and which are sent by the company to any person, in legible characters in relation to every director, the following particulars:

- (i) present forename, or initials, and present surname;
- (ii) any former forenames and surnames; and
- (iii) nationality, if not Irish.

**3.2 What rights does a company secretary have?**

No specific rights are accorded to a secretary under the Companies Act. Any rights which a secretary may have are dependent on his/her Contract of Employment with the company (if any) or under general employment law.

Conclusion

The new Companies Act does not provide for any radical changes for Companies in the Voluntary and Charity Sectors but does provide a timely reminder on the importance of the role of the Company Secretary in keeping such Companies on the right track. If in doubt, any check with your professional advisers.

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