

CONYERS

Bermuda Charities

Preface

This Publication has been prepared for the assistance of those who are considering the formation of a charity in Bermuda. It deals in broad terms with the requirements of Bermuda law for the establishment and operation of such entities. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Before proceeding with the establishment of a charity in Bermuda, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Copies of the legislation referred to in this memorandum are available on request.

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TABLE OF CONTENTS

1.	CHARITIES IN BERMUDA	4
2.	FORMS OF CHARITABLE ORGANISATIONS	5
3.	REGISTERING A CHARITY	6
4.	CONTINUING OBLIGATIONS OF CHARITIES AND CHARITY TRUSTS	8
5.	INVESTIGATIVE POWERS OF THE REGISTRAR	12
6.	OFFENCES AND PENALTIES	12
7.	APPEALS	12
8.	TAXATION OF CHARITIES	13
9.	ACTIVITIES OF THE CHARITABLE ORGANISATION	13

1. CHARITIES IN BERMUDA

Bermuda has a substantial charitable, or not-for-profit, sector which provides assistance for the domestic community. As of November 2020, there are approximately 290 charities fully registered pursuant to the Charities Act 2014, as amended (the “Act”), but this does not take into account the large number of privately funded charitable organisations (both domestic and international) which are subject to the more limited registration requirements rather than the full registration regime. The Act focuses on regulating the charitable sector, the regulation of public solicitation, promoting transparency and enhancing Bermuda’s AML/ATF legislative framework relating to charities.

The oversight of charities under the Act is the purview of the Registrar General (the “Registrar”) and the Charities Commissioners (the “Commissioners”). Under the Act, in addition to maintaining the register of charities, the Registrar has the following general functions (any of which he or she may delegate to the Commissioners):

- (a) determining whether an entity is or is not a charity;
- (b) encouraging and facilitating better administration of charities (including providing advice or guidance in connection therewith);
- (c) identifying and investigating apparent misconduct or mismanagement in the administration of charities, and taking remedial or protective action in connection therewith;
- (d) obtaining, evaluating and disseminating information in connection with the performance of any of its functions or meeting any of its objectives under the Act;
- (e) implementing a money laundering/terrorist financing risk-based supervisory programme for charities;
- (f) establishing in consultation with the National Anti-Money Laundering Committee, the criteria to be used for determining the money laundering/terrorist financing risk profiles of charities, in order to facilitate risk-based supervision, and informing the charities sector of such criteria; and
- (g) giving information or advice, or making proposals, to the Minister on matters relating to any of its functions or meeting any of its objectives under the Act.

In exercising their functions under the Act, the Registrar and the Commissioners must have regard to their prescribed objectives to promote and enhance (i) public trust and confidence in charities, (ii) awareness and understanding of the public benefit requirement, (iii) compliance by charity trustees with their legal obligations, (iv) effective use of charitable resources and (v) accountability of charities to donors, beneficiaries and the general public.

The Act makes the functions and affairs of the Registrar and Commissioners subject to certain duties, including complying with the aforementioned objectives and having regard with using their resources in the most efficient, effective and economic way.

A “charity” for the purposes of the Act is any entity established in Bermuda for exclusively charitable purposes only. A charitable purpose is one for the public benefit falling within one or more of the following categories of charitable purposes specified by the Act:

- the prevention or relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health or the saving of lives;
- the advancement of citizenship or community development;
- the advancement of arts, culture, heritage or science;
- the advancement of sport;
- the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity;
- the advancement of environmental protection or improvement;
- the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- the advancement of animal welfare;
- the promotion of the efficiency of the armed forces of the Crown, police, fire and rescue or ambulance services;
- the provision of facilities for recreation or other leisure-time occupation if such facilities are in the interests of social welfare; or
- any other purpose that may reasonably be regarded as analogous to, or within the spirit of any of the above purposes.

Under the Act, the reference to public benefit is given the meaning used for the purposes of the law relating to charities in England and Wales. The Registrar has issued guidance pursuant to the Act as to the operation of the public benefit requirement and may revise such guidance from time to time. The common law of England and Wales and other commonwealth jurisdictions is used to determine issues relating to charities in Bermuda generally.

An entity that is not exclusively for charitable purposes will not be considered a charity.

2. FORMS OF CHARITABLE ORGANISATIONS

A Bermuda charity may take the form of a trust, an unincorporated association, a company limited by guarantee or by shares, or a company established by way of a private act of the Bermuda legislature.

A trust for charitable purposes may be formed if its objects are exclusively charitable and such a trust would not be subject to the rules against perpetuities. In the event that it is desirable to establish a trust that is not exclusively charitable but fulfils some other philanthropic purpose, then pursuant to the Trusts (Special Provisions) Act 1989 (as amended), a non-charitable purpose trust could be established. A purpose trust is not subject to the rule against perpetual trusts or the rule against remoteness of vesting. The objects of a purpose trust must be (i) sufficiently certain to allow the trust to be carried out; (ii) lawful; and (iii) not contrary to public policy. In addition, a purpose trust may only be created by writing.

All charitable trusts registered under the Act shall contain a dissolution clause that is consistent with the declared purposes of the charity and provides for how the charity's assets and donations will be applied in the event the charity ceases to exist.

Pursuant to the Companies Act 1981 (the "Companies Act"), a company, either limited by guarantee or by shares, may be established with charitable objects. It has been common practice in recent years to establish most charitable entities as companies limited by guarantee as many people are more familiar with the corporate concept (e.g. directors, board meetings, annual general meetings). Section 5 of the Companies Act provides that a company limited by guarantee may only be formed if, "...its purpose is to promote art, science, religion, charity, sport, education or any other social or useful purpose and its profits, if any, and other income is to be used in promoting its purposes and no dividends are to be paid to its members." The memorandum of association of such a company would specify the charitable or philanthropic objects of the entity and any action outside the scope of such objects would be an ultra vires act by the company.

In the event that it is desirable to establish a charitable entity that does not fit within the trust concept or the Companies Act or for any other reason it is desirable to establish some form of "hybrid" entity, it is possible to "incorporate" an entity by what is known as a private act of the Bermuda legislature. A charitable company established by way of private act of Parliament must obtain the assent of the House of Assembly and the Senate of the Bermuda Legislature.

The easiest method of creating or establishing a charitable organisation is by way of an unincorporated association. While the adoption of a charter or bye-laws (and consequently the establishment of such an unincorporated association) may be perceived as an easier method to establish a charity, in practice most donors (at least in the Bermuda perspective) appear to prefer the trust or corporate structure and the certainty that the long history of legal jurisprudence provides.

3. REGISTERING A CHARITY

Under the Act, every charity must apply to register with the Registrar. Charities which fall within the criteria listed below can apply for limited registration rather than full registration.

3.1. Limited Registration

Certain privately funded charities are exempt from the requirement to be fully registered under the Act and may instead submit a limited registration. .

In order to fall within the scope of this limited registration, the privately funded charity must be either:

- (a) a trust where at least one of the trustees is licensed under the Trust (Regulation of Trusts) Business Act or;
- (b) a company or other legal entity which has a registered office with, and is subject to compliance by, a licensed Corporate Service Provider.

Newly established charities that fall within the above criteria must within one month of establishment:

- (a) notify the Registrar of such establishment; and
- (b) provide the name, date of establishment, and statement of whether or not the charity trustees believe that the charity is an exempted charity.

The Registrar is now required to keep a separate part in the register for charities that fall within the above criteria. Under this limited registration charities will not need to file accounts or other pertinent or sensitive information as is required for fully registered charities.

3.2. Full Registration

All charities that do not qualify for limited registration must apply to become a registered Bermuda charity. The form and content of applications for registration are prescribed by the Charities Regulations 2014 (the “Charities Regulations”). In connection with an initial request for registration under the Act and the Charities Regulations, the applicant charity must submit to the Registrar:

- (a) an application substantially in the form set out in the Schedule to the Charities Regulations, signed by at least two authorised charity trustees, providing various information;
- (b) an up-to-date copy of the applicant charity’s memorandum of association or trusts, as applicable;
- (c) a signed and dated statement by each charity trustee consenting to act; and
- (d) such other documents or information as the Registrar may reasonably require.

A charity may be registered for a period of one, three or five years at a time or indefinitely. Applications for re-registration do not generally require such signed consents but do require the submission of copies of the most recent (i) statement of accounts, (ii) report of an audit of such statement of accounts (if any has been required) and (iii) an annual report. A charity that submits an application to re-register at least one month before the expiry of its existing registration would be deemed to be registered until the application is decided by the Registrar notwithstanding the fact that the registration period might actually expire before such decision is made.

As indicated above, one of the intents of the Act was to regulate the solicitation of charitable gifts from the public. The Act provides:

“42 (1) Subject to subsection (2) and to section 43, it is an offence for a person, other than a charity registered under section 17 (or a person acting on behalf of such a charity), to —

- (a) solicit members of the public for; or*
- (b) receive from any member of the public in any public place,*

a donation for any charitable purpose or for any professed purpose which is otherwise benevolent.”

A person guilty of an offence under section 42 is liable on summary conviction to a fine not exceeding \$5,000, to imprisonment for a term not exceeding two years, or to both such fine and imprisonment. Section 42(2) of the Act provides that section 42(1) will not render unlawful the collection of donations from members of the congregation attending a religious service or prohibit or restrict the money-raising activities of an association of parents and teachers, or of pupils or former pupils, of any school in Bermuda conducted upon the premises of that school or upon other premises specifically approved for that purpose by the Registrar. Section 43 of the Act provides that the Registrar may grant a temporary licence to solicit and collect donations from members of the public on application from a person that is not a registered charity. The Registrar may only grant such a licence if satisfied that the applicant will solicit and collect donations for a charitable purpose, as defined in the Act, except the purpose need not satisfy the public benefit test. A temporary licence may be granted for a term not exceeding three months but may, on further application, be extended for a further period not exceeding three months. A charitable organisation will need to register as a charity pursuant to the Act in order to fundraise publicly otherwise than as prescribed by section 42(2) or pursuant to a temporary licence granted pursuant to section 43.

4. CONTINUING OBLIGATIONS OF CHARITIES AND CHARITY TRUSTS

Once a charitable organisation is registered as a charity, the Act, the Charities Regulations and the Charities (Anti-Money Laundering, and the Anti-Terrorist Financing and Reporting) Regulations 2014 (the “AML Regulations”) impose various obligations on the charity and its charity trustees. It should be noted that the definition of “charity trustees” in the Act refers to persons having the general control and management of the administration of a charity. Their obligations therefore apply to both the trustees of a charitable trust and other persons fitting such description (including the directors of a charitable company). Any references to charity trustees in this memorandum shall be given the same meaning (unless the context indicates otherwise). Similarly, references to “trusts” shall be given the meaning attributed thereto by the Act (that is, the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not).

4.1. Notifications to Registrar

The Act requires the registered charity’s secretary (or other person responsible for its records) to notify the Registrar of any change to its registered particulars within 30 days of such change coming to his or her attention. Additionally, the charity trustees or last remaining thereof must notify the Registrar as soon as practicable of a change in the charity’s trusts or if the charity ceases to exist.

Under the Charities Regulations, where the change pertains to the composition of the charity trustees or the objects or dissolution clause of the charity's trusts, the effectiveness of the alteration will be subject to the Registrar's consent. A notification to the Registrar in respect of such a change must be accompanied by a duly-executed written resolution or certified copy of the minutes of a meeting of the charity trustees approving the alteration or such other evidence as to the alteration sought in accordance with the charity's internal controls. Where an individual is becoming a new charity trustee, he or she must submit to the Registrar a signed statement consenting to the same in such form and containing such particulars as the Registrar may determine. Similarly, when ceasing to be a charity trustee, he or she must submit a signed statement to the Registrar to that effect, explaining why he or she is ceasing to act.

4.2. Annual Reporting and Accounting Obligations

Charity trustees may determine the first financial year's end date, which must be within 18 months of the charity's registration. Subsequent financial years shall end on the date 12 months after the previous financial year end. The charity trustees may determine a different financial year end that is not less than 6 months and not more than 18 months after the previous financial year end, provided there are exceptional reasons to do so and the Registrar consents to such change. References herein to financial year refer to the financial year of the charity as so determined.

Registered charities are required to prepare and submit to the Registrar annual reports and statements of accounts within six months of the end of each financial year. Annual reports shall contain details of the charity's activity during the relevant financial year, indicate any changes during that year to its trusts, confirm the current composition of the charity trustees and officers, inform as to the charity's anti-money laundering ("AML") and anti-terrorist financing ("ATF") systems and controls, as well as provide details of planned activities for the following financial year and such other information relating to the charity, charity trustees or officers as may be prescribed by regulations. The AML Regulations require that the annual report include (i) the identity of each of its charity trustees that served in the past year, specifying the period of the year in which he or she served and in what designation, (ii) such information on the charity's systems, policies, processes and procedures required under the AML Regulations as the Registrar may reasonably require to assess the adequacy and effectiveness thereof and (iii) such other information (including, but not limited to, a list and analysis of the charity's international transactions) and be in such form as the Registrar may reasonably require in accordance with such guidance as the Registrar may issue.

The Charities Regulations prescribe the form and content of statements of accounts and outline procedures regarding the provision of notes thereto. The Charities Regulations require:

- from a charity with an annual income of no more than \$35,000, financial reports including a statement of income and expenditure and a balance sheet;
- from a charity with an annual income of more than \$35,000 but less than \$450,000, unaudited management accounts including a statement of income and expenditure, a balance sheet, a cash flow statement and explanatory notes; and

- from a charity with an annual income of at least \$450,000 or assets of at least \$1,000,000 (before liabilities), irrespective of annual income, audited financial statements including a statement of income and expenditure, balance sheet, cash flow statement and explanatory notes.

The charity trustees must preserve any such statement of accounts and any such annual report for at least seven years from the end of the financial year to which it relates.

The charity trustees must also keep accounting records in respect of the charity and preserve the same for at least seven years from the end of the financial year in which they were prepared. The accounting records must be sufficient to show and explain all the charity's transactions, disclose the charity's financial position at any time with reasonable accuracy and enable the charity trustees to ensure that the aforementioned statements of accounts satisfy the requirements of the Charities Regulations. In particular, they must show day-to-day intake and expenditures of money, the matters in respect of which such receipts and expenditures take place and a record of all of the charity's assets and liabilities.

Failure to comply with any of the above accounting and reporting requirements is an offence, in respect of which a guilty person is liable on summary conviction to a fine of up to \$5,000 or, on conviction on indictment, to a fine of up to \$10,000 or to imprisonment of up to two years or to both such fine and imprisonment. Additionally, such failure is grounds for cancellation of the charity's registration.

Charity trustees should be mindful of the fact that the Registrar has the power to require an audit of any charity in respect of the accounts of the preceding financial year or a number of preceding years with which the charity trustees must comply.

In respect of their accounting practices, charities must have regard to the Accounting Standards for Not-for-Profit Organizations of the Canadian Institute of Chartered Accountants as applied to charities by the Institute of Chartered Accountants of Bermuda.

4.3. Publications

The Act requires charity trustees to ensure that all published printed materials or electronic communications of their charity clearly state the charity's name, the fact that it is a registered charity and its registration number. This applies to brochures, flyers, emails, websites and other communications or documents made available to members of the public.

4.4. Annual Fees

Annual fees are payable to the Registrar for registered charities as prescribed in the Government Fees Regulations 1976. As of the date hereof, the annual fee for a charity is:

- \$110, where its annual income is \$35,000 or less;
- \$275, where its annual income is greater than \$35,000 but less than \$450,000; and
- \$445, where its annual income is greater than \$450,000.

Non-payment in spite of demand is a ground for the suspension or cancellation of registration.

4.5. AML/ATF Reporting Obligations

The AML Regulations impose a number of additional obligations on charities and charity trustees. Pursuant to the AML Regulations, every registered charity shall:

- (a) designate a compliance officer to oversee compliance with the AML Regulations;
- (b) ensure that such AML and ATF training as may be required by the Registrar is provided to its compliance officer and any other 'relevant officer';
- (c) require its officers and employees to disclose any previous convictions for AML or ATF offences;
- (d) notify the Financial Intelligence Agency ("FIA") of any suspicious transaction relating to money laundering or terrorist financing;
- (e) maintain a record of any such suspicious transaction;
- (f) monitor relationships with beneficiaries, donors and partners on an ongoing basis in accordance with such guidance as may be issued by the Registrar;
- (g) take reasonable measures to establish the identity of any donor, beneficiary or partner where there is a reasonable risk of money laundering or terrorist financing, in accordance with such guidance as may be issued by the Registrar;
- (h) ensure proper monitoring of any payments to beneficiaries and partners;
- (i) establish and maintain AML and ATF systems and controls (as elaborated therein);
- (j) take measures, where there is reasonable risk of money laundering or terrorist financing, to confirm and appropriately record information on the identity, credentials and good standing of its beneficiaries, donors, associate charities and partners;
- (k) maintain internal reporting procedures via the compliance officer regarding information giving rise to a knowledge or suspicion of money laundering or terrorist financing; and
- (l) maintain for a period of at least seven years records of (A) transactions that are sufficiently detailed to (i) identify and separately keep a record of domestic and international transactions respectively, (ii) provide an analysis of those international transactions and (iii) verify that expenditures have been consistent with the purpose and objectives of the charity and (B) information obtained pursuant to the charity's due diligence obligations under the AML Regulations and make such records available on reasonable request to the Registrar, the FIA or a police officer.

Failure to comply with any of the above items (a) to (l) is an offence punishable on summary conviction by a fine not exceeding \$50,000 or, on conviction on indictment, by a fine not exceeding \$750,000 or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

4.6. Reporting Matters of Serious Concern

The Charities Regulations require a registered charity to report matters of serious concern regarding its finances or good governance to the Registrar in line with guidance issued by the same.

5. INVESTIGATIVE POWERS OF THE REGISTRAR

Pursuant to the Act, the Registrar may require a person by written order to submit information or a document in that person's possession which relates to any charity and is relevant to the discharge of the Registrar's functions under the Act. The Registrar may also institute investigations into registered charities (and exempted charities where he or she reasonably suspects such exempted charities are engaging in illegal activities) and has powers to obtain evidence and obtain and execute search warrants in connection therewith. It is an offence to intentionally obstruct the exercise of any rights conferred by such a warrant, punishable on summary conviction by a fine of up to \$10,000, to imprisonment for a term not exceeding one year, or to both such fine and imprisonment. It is also an offence to fail to provide information to the Registrar when required under the Act to do so, punishable on summary conviction by a fine of up to \$5,000 or, on conviction on indictment, by a fine of up to \$10,000 or by imprisonment of up to two years or by both such fine and imprisonment.

6. OFFENCES AND PENALTIES

The Act creates a variety of offences to ensure compliance in addition to those discussed above. Most offences under the Act and the Charities Regulations are punishable on summary conviction by a fine not exceeding \$5,000 or, on conviction by indictment, by a fine not exceeding \$10,000 or imprisonment of up to 2 years or both such fine and imprisonment. As noted above, offences in contravention of the AML Regulations may entail greater liability.

Where the Registrar is satisfied that there is reasonable evidence of misconduct or mismanagement in the administration of a charity, he or she may give notice to that charity that specified action will be taken against the charity unless it shows cause to the satisfaction of the Registrar within 15 days of receipt or such longer period as the Registrar may specify. The Registrar may restrict the transactions the charity may enter into, appoint a receiver or manager to administer it, freeze payments to and from the charity, direct it to implement the recommendations of an auditor's report, require the election of new charity trustees or suspend the registration of the charity and impose specified conditions that must be complied with during the period of suspension and for the restoration of the charity's registration. Where (i) the Registrar is satisfied that a registered charity has refused, neglected or otherwise failed to take such actions within the period specified, (ii) a charity trustee has been convicted of an offence under the Act, or (iii) the registered charity has refused or otherwise failed to meet any of its accounting and reporting obligations under Part 5 of the Act, the Registrar may give notice to that charity that its registration will be cancelled within 15 days (or longer specified period) of receipt unless the charity shows cause to the satisfaction of the Registrar why its registration should not be cancelled.

7. APPEALS

Where the Registrar has refused to register a charity, directed by notice a specific action to be taken or directed the cancellation of the charity's registration, the charity may appeal to the Minister within 21 days of the notification of the Registrar's decision. The Minister must then give the charity and the

Registrar his or her decision on the appeal with written reasons and such decision shall be final. However, a party dissatisfied with the Minister's decision may appeal to the Supreme Court, which may allow or dismiss the appeal or make an order remitting the matter for further consideration by the Minister or the Registrar.

8. TAXATION OF CHARITIES

There are no income taxes or taxes on earnings or capital gains levied by the Bermuda Government whether in respect of charitable or non-charitable entities. The only taxation of any real relevance to charitable entities is stamp duty under the Stamp Duties Act 1976 (the "SDA"). In general, stamp duty under the SDA only applies to instruments relating to Bermuda Property¹ and executed by domestic organisations (as compared to an International Business²). However, the SDA provides, *inter alia*, that a gift to a charity registered under the Act will be exempt from stamp duty. There are also a number of specific exemptions from stamp duty, i.e. there are a number of provisions where the Accountant General may be asked to express a view as to whether a transaction in question is for the benefit of Bermuda, as such may warrant an exemption from stamp duty.

Given the above, while registration under the Act can provide for the exemption (or reduction) of certain Bermuda taxes (in addition to stamp duty, certain other taxes including payroll taxes and could be exempt or reduced), such registration is generally limited to domestic organisations. A non-domestic organisation would not normally be allowed to register under the Act, but such an organisation would not normally be subject to taxation in Bermuda anyway.

As there are no income taxes or taxes on earnings or capital gains levied in Bermuda, whether on a corporate, trust or individual level, there is very little framework for obtaining tax deductions under Bermuda law. As stamp duty under the SDA is, by convention, split between the two sides of a transaction, if a charity registered under the Act is a party to such a transaction (other than a conveyance on sale), then the transaction will be exempt from stamp duty as a result of being so registered.

9. ACTIVITIES OF THE CHARITABLE ORGANISATION

Whether an organisation is established pursuant to a trust deed, incorporated under the Companies Act or established by way of a private act, it will generally only be allowed to conduct such activities as are authorised by its trust deed, memorandum of association or private act, as the case may be.

The distinction must be made between (a) domestic or local organisations and (b) international or exempt organisations. Bermuda has strict rules and policies in place to protect the local business (and charitable) community. As indicated above, a person is generally prohibited from soliciting funds from the public in Bermuda unless it is registered under the Act. Accordingly, as it is not generally possible

¹ Bermuda Property can broadly defined as real or personal property situate or being in Bermuda. Such definition is, however, subject to various exemptions provided for in the SDA. The most common exemptions are shares in exempted companies and non-Bermuda currency.

² An International Business can broadly be defined as any exempted company, permit company, exempted unit trust or exempted partnership (section 2(3) of the Relief Act).

for a non-domestic entity to be so registered, a non-local organisation should not be able to solicit for funds in Bermuda. On the other hand, should a non-local charity wish to conduct certain charitable activities in Bermuda, then in principle there should be nothing to prevent such an organisation from obtaining a permit to carry on these activities, with the recognition that such activities are generally for the benefit of Bermuda and Bermudians.

A local charitable organisation, on the other hand, is not restricted in the activities it can undertake, so long as it complies with its constitutional documents and, if registered under the Act, the Act and regulations thereunder.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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