



## Article

### Establishing an International Charity in Bermuda

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With its well-respected regulatory regime and highly regarded professional services industry, Bermuda is an ideal location for the creation of an international charitable structure. Companies and HNW families and individuals will find a range of tax efficient, flexible vehicles available for the establishment of charitable or philanthropic entities.

Bermuda has a substantial charitable, or not-for-profit, sector with approximately 290 charities currently registered pursuant to the Charities Act 2014, as amended (the “Act”). This figure does not take into account the many additional charitable organisations that qualify for more limited registration requirements under the Act. The jurisdiction has shown a consistent commitment to providing a robust legal framework that meets the diverse needs of both the local and international communities.

At present, an exclusively charitable organisation which is privately funded (i.e. does not solicit funds from the Bermuda public) is not subject to the full registration requirements under the Act; rather they are subject to a more limited form of registration, as described below.

#### Definition of a charity

A “charity” for the purposes of the Act is any entity established in Bermuda for exclusively charitable purposes. 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
  - religion
  - health or the saving of lives
  - citizenship or community development
  - arts, culture, heritage or science
  - sport
  - human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity
  - environmental protection or improvement
  - animal welfare
- the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage
- the promotion of the efficiency of the armed forces of the Crown, police, fire and rescue or ambulance services
- 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 General (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.

## Registering a charity

Under the Act, every charity must register with the Registrar, either under a full registration or a limited registration. A limited registration only applies where:

- (i) the charity is a trust which is privately funded and where at least one of the trustees is licensed under the Trust (Regulation of Trusts) Business Act 2001 or;
- (ii) the charity is a company or other legal entity which is privately funded and has its registered office with, and is subject to compliance by, a licensed Corporate Service Provider.

A privately funded charity is defined as a charity that does not solicit funds from the Bermuda public and does not receive funding from the Bermuda Government or from Bermuda public sources. The Act requires such charities to write to the Registrar, specifying the basis on which the charity qualifies for limited registration. The Registrar keeps a separate register for charities that meet the limited registration criteria set out above.

Charities which are not privately funded must fully register under the Act and comply with the ongoing reporting and filing requirements as set out in the Act, the Charities Regulations 2014 (the “Regulations”) and the Charities (Anti-Money Laundering, Anti-Terrorist Financing and Reporting) Regulations 2014 (the “AML Regulations”).

It is important to note that if an entity or structure is not exclusively charitable, it is not a charity for the purposes of the Act and there is no obligation to register under the Act, whether a full registration or a limited registration.

## Forms of charitable organisations

A Bermuda-based charity may take the form of:

- a trust
- an unincorporated association
- a company limited by guarantee or by shares
- a company established by way of a private act of the Bermuda legislature.

## Charitable Trusts

A trust for charitable purposes may be formed if its objects are exclusively charitable. Such trusts have several advantages that make them an attractive option for philanthropists. For instance, they are not subject to the rules against perpetuities, meaning they can continue indefinitely, and, where the trust instrument allows for variation, they can easily adapt to changing circumstances.

Pursuant to the Trusts (Special Provisions) Act 1989 (as amended), a non-charitable purpose trust can be created in the event that a party desires to establish a trust which is not exclusively charitable but fulfils some other philanthropic purpose. Bermuda was the first offshore jurisdiction to provide for these trusts by statute. A purpose trust is also not subject to the rule against perpetuities. 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.

## Unincorporated Association

An unincorporated association is a simple way to create a charitable body and can be established through the adoption of a charter or bye-laws. While this method of establishing a charity may be viewed as the easiest of these four options, it may not be suitable in all circumstances. Donors often prefer the trust or corporate structures and the certainty that the long history of legal jurisprudence provides.

## Companies Limited by Guarantee

Pursuant to the Companies Act 1981 (the “Companies Act”), a company, either limited by guarantee or 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.

Companies limited by guarantee have several beneficial characteristics. Where bye-laws allow for straightforward amendments to governance, the company structure allows for flexibility and growth that can be advantageous for many philanthropic endeavours. Further, a company limited by guarantee can be incorporated relatively swiftly. This entity is particularly useful when dealing with foreign jurisdictions where trust structures are not recognised.

### **Private Act**

In the event that it is desirable to establish a charitable entity that does not fit within the trust concept or the Companies Act, 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.

### **Activities of the charitable organisation**

There are no restrictions regarding the transfer of assets out of the jurisdiction for Bermuda charities. Where assets are transferred to a foreign conduit of a Bermuda registered charity there are no tax benefits in relation to Bermuda tax. Some Bermuda charities do establish charitable companies in the United States and Canada but are careful to avoid a conduit relationship so that tax deductions are not jeopardised in the non-Bermuda country.

Government regulation of international charities in Bermuda is minimal. Almost all regulation exists at the establishment or incorporation stage, however the Act, the Regulations and the AML Regulations impose various ongoing obligations on charities and charity trustees. These legislative steps fortified Bermuda's international reputation as a safe and responsible jurisdiction. Philanthropists and donors alike can feel secure in their decisions to either establish or support charitable structures created under Bermuda law.

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