

C004/2015



**Command Paper on
a draft Bill to make provision to allow for trusts for a
purpose or purposes otherwise than for charitable
purposes and matters related thereto.**

**Presented to Parliament by
the Minister with responsibility for financial services**

**by Command of Her Majesty
23rd April 2015**

1. Draft Bill

2. Draft Explanatory Memorandum

Comments on this Command Paper should be sent by email to

commandpapers@gibraltar.gov.gi or delivered to

Command Papers Consultation c/o Kevin Warwick, Ministry of Education,
Justice and International Exchange of Information, Suite 771, Europort,
Gibraltar, no later than 7 May 2015.

Any comments received later than 7 May 2015 may not be taken into account for the purposes of the relevant consultation.

Purpose Trusts Act 2015

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BILL

FOR

AN ACT to make provision to allow for trusts for a purpose or purposes otherwise than for charitable purposes and for matters related thereto.

ENACTED by the Legislature of Gibraltar.

Part 1 **PRELIMINARY**

Short title.

1. This Act may be cited as the Purpose Trusts Act.

Commencement.

2. This Act shall come into operation on the day appointed by the Minister by notice in the Gazette and different days may be appointed for different provisions.

Interpretation.

3. In this Act, unless the context otherwise requires—

“Authorised Person” means any person who is from time to time a person described in section 14(1);

“Court” means the Supreme Court of Gibraltar;

“Enforcer” has the meaning given in section 11;

“Licensed Trustees” means—

- (a) a barrister or solicitor admitted, enrolled and practising in Gibraltar;
- (b) a person whose name, address and qualifications are contained in Part III of the Financial Services (Auditors) Act 2009;

- (c) a licensee under the Financial Services (Investment and Fiduciary Services) Act;
- (d) a Licensee under the Financial Services (Banking) Act 1992;
or
- (e) such other person as the Minister may, by Order, designate;

“Minister” means the Minister with responsibility for financial services;

“Purpose Trust” means a trust established as permitted by and in accordance with this Act;

“Purpose” and “Purposes” has the meaning given in section 4;

“property” includes money, goods, things in action and every description of property, whether real or personal and shall include capital and income; also obligations, easements and every description of estate, interest and profit, vested or contingent, arising out of or incidental to property;

“Relevant Application” means any application made to the Court under any of sections 13, 16 and 24 of this Act;

“trust document” means any written document, inclusive of a will, settling or declaring a trust and evidencing its terms and shall include any written document executed before the commencement of this Act and which has been amended in writing after the commencement of this Act as may be permitted by the relevant instrument.

Part 2

PURPOSE TRUSTS

Establishment.

4.(1) Any person may establish a trust by trust document declaring that this Act is to apply to that trust and having as the objects of the trust or power any purpose not being a charitable purpose subject to the provision of subsections (2) and (3) below.

(2) A Purpose Trust must have a purpose or purposes that are—

- (a) capable of being carried out;

- (b) sufficiently certain to be capable of being carried out;
- (c) not contrary to public policy;
- (d) not unlawful;
- (e) capable, subject to the exercise of any power of accumulation, of consuming the property held upon the trusts of the Purpose Trust;
- (g) does not benefit its trustees beyond the payment of fees for so acting as may be expressly provided for in the trust document.

(3) The trust document establishing a Purpose Trust must provide for–

- (a) the events upon the occurrence of which will cause the relevant Purpose Trust to come to an end;
- (b) the disposal of all and any property capital and income held by the Relevant Purpose trust on it coming to an end.

(4) A Purpose Trust established under this Act shall not fail for want of a beneficiary or beneficiaries.

Trust of income or capital and permissibility of discretion.

5. A Purpose Trust may be established–

- (a) of any property; and
- (b) that is discretionary or includes discretionary powers of disposal of or over property,

and that requires or permits disposal of such property for different Purposes as may be specifically provided in the trust document.

Licensed Trustee.

6. At least one Licensed Trustee must be appointed and act as a trustee of a Purpose Trust.

Registered office etc.

7. The trustees of a Purpose Trust shall keep at their registered office in Gibraltar without any obligation on their part to make any of those documents public or available to inspection save as specifically provided under this Act–

- (a) the original trust document and each and every original document by which the relevant Purpose Trust is amended or supplemented and all or any other original trust document pertaining to the relevant Purpose Trust;
- (b) a register of each Purpose Trust of which the trustee is trustee which register shall contain–
 - (i) the name of each person who settled or created the relevant Purpose Trust;
 - (ii) a description of the Purpose or Purposes of the relevant Purpose Trust;
 - (iii) the name of each and every Authorised Person named (if any) in the relevant Purpose Trust.
- (c) the accounts and all supporting financial records of the relevant Purpose Trust, including all amounts of property capital and income applied by the trustees in accordance with the terms of the relevant Purpose Trust;

Discretionary powers in absence of contrary provision etc.

8. In the absence of an express contrary provision or intention in the trust document and subject to the express terms of that trust document the trustees of any Purpose Trust shall have full discretion to–

- (a) appoint property among any of the different Purposes of that Purpose Trust if there is more than one Purpose;
- (b) formulate, devise, develop, decide and determine the means and strategies by which to give effect to and achieve the Purpose or Purposes of the relevant Purpose Trust.

Power to allocate property in absence of appointment etc.

9.(1) In the absence of an appointment of property in the trust document and the trustees failing to make any such appointment in a Purpose Trust having

more than one Purpose then the Court shall have power to allocate property as between the Purposes of the Purpose Trust in manner that, in the opinion of the Court applying the matters and consideration identified in subsection (2), gives effect to the intent of the relevant Purpose Trust.

- (2) In coming to its opinion the Court shall have regard to—
- (a) the provisions of the trust document;
 - (b) the evidence of the trustees;
 - (c) the evidence of any settlor of the relevant Purpose Trust, of any person involved in the creation of the Purpose Trust which shall include the persons who have funded it and any of any professional engaged in its creation;
 - (d) the evidence of any person who on application is declared by the Court to have any interest in advancing the Purpose or Purposes or trust of the relevant Purpose Trust subject to the Court being satisfied that it is appropriate for such person to give evidence that is relevant; and
 - (e) any other relevant evidence in the discretion of the Court.

Applications to court by trustees.

10. The trustees of a Purpose Trust in connection with any Purpose Trust of which they are trustees shall have power and authority to make an application to the Court:

- (a) under section 13, section 16 and section 23; or
- (b) for any opinion, advice or directions or declaration in connection with a Purpose Trust and the property held by it;

and the Court shall have full power, authority and jurisdiction to deal with consider and determine all and any such applications.

Enforcer.

11.(1) The trust document establishing a Purpose Trust—

- (a) shall contain provision appointing a person or persons, who must be independent of the trustee in that such person shall not be—
 - (i) a trustee of the relevant Purpose Trust;
 - (ii) a person connected with a trustee of the relevant Purpose Trust and a person shall be considered as connected if one of them directly or indirectly controls the other, both of them are directly or indirectly controlled by a third party or one of them is employed by the other or by a person directly or indirectly controlling or controlled by that person.

to be known as Enforcer whose duty shall be to enforce the purpose or purposes of the Purpose Trust;

- (b) shall include provision by which a person or persons may be appointed as soon as practicable as Enforcer and by whom such appointment shall be made in any of the following events:
 - (i) a vacancy arising in the office of Enforcer;
 - (ii) the Enforcer being found by the Court on the application of an Authorised Person to have cease to be independent of the trustees; or
 - (iii) the Court on the application of an Authorised Person finds that the Enforcer is incapable, unable or unwilling to act as such.
- (c) Shall include provision that the Enforcer shall have an unfettered and absolute right to access all and any information and documents connected with or relating to the relevant Purpose Trust and to its property and administration.

(2) Subject to subsection (3) an Enforcer may resign his office by notice in writing delivered to the trustees, any such resignation shall take effect on the delivery of the written notice to the trustees.

(3) Any resignation for the purpose of facilitating a breach of trust shall be of no effect.

(4) An Enforcer shall cease his office immediately upon–

- (a) his removal from office by the Court;
- (b) his removal or cessation under the terms of the relevant Purpose Trust or otherwise under the provisions of this Act.

Exclusion of perpetuities and accumulations rule.

12. The rules, principles of law and equity and any enactment against perpetuities and accumulations shall not apply to a Purpose Trust.

Not void for want of certainty.

13.(1) A Purpose Trust shall not be void for want of certainty or for uncertainty.

(2) The trust document may contain provision for the resolution by the trustee or any other person specified in the trust document of any uncertainty or want of certainty.

(3) In the event that–

- (a) a want of certainty or uncertainty should arise in any Purpose Trust;
- (b) the trust document does not authorise the trustees or any other person to resolve such want of certainty or uncertainty; or
- (c) if the trust document does authorise the trustees or any other person to resolve such want of certainty or uncertainty and that trustee or person fails or refuses to resolve it;

Then the Court on the application of an Authorised Person may–

- (d) take such steps including amending the trust document as in the exercise of its discretion it considers appropriate to give effect to the intent of the Purpose Trust having regard to–
 - (i) the provisions of the trust document;
 - (ii) the evidence of the trustees;

- (iii) the evidence of any settlor of the relevant Purpose Trust, of any person involved in the creation of the Purpose Trust which shall include the persons who have funded it and of any professional engaged in its creation;
- (iv) the evidence any person who may benefit from the Purpose Trust;
- (v) any other relevant evidence in the discretion of the Court; or

in the event that the Court is unable to take any steps under subsection 3 the Court shall declare the Purpose Trust void and it shall end.

Part 3 APPLICATIONS TO COURT – GENERAL

Authorised persons.

14. The following persons are authorised to make a Relevant Application–

- (a) the Enforcer;
- (b) the trustees of the relevant Purpose Trust;
- (b) any person appointed for the purposes of making a Relevant Application under the provisions of this Act;
- (c) unless the trust document provides otherwise, the settlor of the relevant Purpose Trust;
- (d) any person who on application is declared by the Court to have any interest in advancing the Purpose or Purposes or trusts of the relevant Purpose Trust subject to the court being satisfied that it is appropriate for such person to make a Relevant Application and take proceedings concerning the relevant Purpose Trust.

Attorney General.

15. The Attorney General may certify in writing that a Relevant Application relating to a Purpose Trust is necessary and that he is satisfied that there is no Authorised Person who is either able or willing to commence and prosecute such an application and thereafter the Attorney General—

- (a) shall have full standing, authority and jurisdiction to make a Relevant Application; or
- (b) may commence and prosecute an application for the appointment by the Court of an Authorised Person for any relevant Purpose Trust.

Applications to terminate and dispose.

16. In the event that in any application the Court is satisfied that—

- (a) there is no Authorised Person able and willing to make a Relevant Application involving any relevant Purpose Trust; and
- (b) it is impossible or impractical for the Court to appoint under any power to do so contained in this Act an Authorised Person who is able and willing to make a Relevant Application involving any relevant Purpose Trust;

then the Court may make an order on an application made by any of the Attorney General or any trustees of the relevant Purpose Trust or of an Authorised Person of the relevant Purpose Trust:

- (c) terminating the relevant Purpose Trust; and
- (d) disposing of all the property of the relevant Purpose Trust in the manner that is provided in the trust document or if no provision is made in the trust document in such manner as it considers fair, just and equitable.

Right to documentation.

17. The Attorney General shall have full right and authority for the purposes of sections 15 and 16 to require the copies of the documents listed in section 7 to be made and delivered to him.

Prohibition on certain appointments.

18. The Court may not appoint as an Authorised Person any person or class of persons including any trustee of the relevant Purpose Trust which the trust document governing that relevant Purpose Trust expressly prohibits from acting as an Authorised Person.

Power, authority and jurisdiction of the Court.

19. The Court shall have full power, authority and jurisdiction to–

- (a) appoint an Authorised Person upon an application being made by The Attorney General under section 15;
- (b) consider any application made under section 16 and make any appropriate order;
- (c) make an order that any costs of any application incurred by any person be paid out of the assets of the relevant Purpose Trust and further that any reasonable fees, charges, disbursements and remuneration charged or incurred by any such person also be paid out of the assets of the relevant Purpose Trust.

Standing, rights, powers and authority of Authorised Person.

20. An Authorised Person shall have the standing, right, power and authority–

- (a) to make any application to the Court under sections 13, 16 and 23;
- (b) to make any application to the Court that any beneficiary of any other type of trust may make to include, administration proceedings, proceedings for breach of trust or for the recovery of trust property or any other proceedings against trustees or other persons;
- (c) to make any application to the Court or within any other Relevant Proceedings for such accounts, inquiries and other personal remedies and relief as could be obtained by any

beneficiary of any other type of trust not being a Purpose Trust;

- (d) to make an application to the Court for an opinion, advice or directions or otherwise as could be obtained by any beneficiary of any other type of trust not being a Purpose Trust;
- (e) to make an application to the Court for relief against personal liability and to protect and indemnify an Authorised Person to include an indemnity against costs and expenses that an Authorised Person may incur in making a Relevant Application;
- (f) to make an application to the Court within any litigation or in contemplation of any litigation or absent litigation or contemplation of litigation for an order permitting the inspection of and the making of copies of all and any trust documents, other documents, instruments, registers, records and legal opinions or advices obtained or received by the trustees of the relevant Purpose Trust but in the latter case excluding any such legal opinions or advices obtained or received by the trustees in contemplation of any litigation against all or any of the trustees personally;

and the Court shall have full power, authority and jurisdiction to deal with consider and determine such applications.

Orders under a Relevant Application.

21. In any Relevant Application the Court may make an order—

- (a) to protect and indemnify out of the property of the trust an Authorised Person in the same manner as for any other type of trust not being a Purpose Trust and for relief against personal liability to include an indemnity against costs and expenses that an Authorised Person may incur in making a Relevant Application;
- (b) to permit the inspection of and the making of copies of all and any trust documents, other documents, instruments, registers, records and legal opinions or advices obtained or received by the trustees of the relevant Purpose Trust but in the latter case excluding any such legal opinions or advices obtained or

received by the trustees in contemplation of any litigation against all or any of the trustees personally.

Part 4
MISCELLANEOUS

Extension of the cy-près doctrine.

22. Any trust document establishing or declaring a Purpose Trust may include provision by which its trustees or any other person named and authorised in it so to do may alter the relevant Purpose Trust inclusive of its Purpose or Purposes in the event that in the opinion of the trustees of the relevant Purpose Trust its Purpose or Purposes in whole or in part becomes—

- (a) impossible or impracticable;
- (b) unlawful or contrary to public policy; or
- (c) obsolete because its Purpose or Purposes can no longer be met by reason of a change in circumstances;

and the trustees or any such other person in these circumstances shall have unfettered discretion and full right power, authority by an instrument in writing to amend the trust document applying the cy-près doctrine to the Relevant Trust to allow relevant Purpose Trust to continue in existence which existence shall be deemed to be uninterrupted.

Amendment of cy-près doctrine.

23. In the event that a trust document establishing or declaring a Purpose Trust does not include a provision by which an alteration can be made as permitted by section 22 or does include such provision but it is not amended for any reason and the fulfilment of its Purpose or Purposes in whole or in part becomes—

- (a) impossible or impracticable;
- (b) unlawful or contrary to public policy; or

- (c) obsolete because its Purpose or Purposes can no longer be met by reason of a change in circumstances;

the trustees shall or any Authorised Person may apply to the Court to amend the relevant Purpose Trust applying the cy-près doctrine.

Amendment of cy-près doctrine: failure of section 23 application

24. In the event that on an application made under section 23 the Court finds that on an application of the cy-près doctrine the Purpose or Purposes of the relevant Purpose Trust cannot be altered then it shall declare that the relevant Purpose Trust has come to an end and it shall order that the property of the relevant Purpose Trust shall be disposed of as expressly provided for in the relevant trust documents upon termination of the relevant Purpose Trust or in the absence of any such provision as the Court shall direct.

Court's powers: applications under sections 23 and 24.

25. The Court shall have full power, authority and jurisdiction to deal with, consider and determine all and any applications made under sections 23 and 24.

End of a purpose trust.

26. If the Court orders under sections 13 or 16 that a Purpose Trust has come to an end the Court shall order that the property capital and income of the relevant Purpose Trust should be dealt with in accordance with the provisions of the trust document

Criminal offences: section 6.

27. Any person who knowingly acts as a trustee of a Purpose Trust in breach of section 6 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

Criminal offences: section 7.

28. Any person who breaches section 7 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

Criminal offences: section 7 (untrue statements).

29. Any person who makes or authorises the making of any statement that is untrue in any register, document or instrument described in section 7 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

Criminal offences: section 7 (inspection and making of copies).

30. Any person who refuses to permit any inspection of or the making of any copies of any documents listed in section 7 as required or permitted by this Act is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale for each and every day that the refusal shall continue.

Criminal offences: directors and managers.

31. Any director or manager of any body corporate who consents to or connives in or whose recklessness causes that body corporate to commit any offence under this Act shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding the fine for which the body corporate is liable under this Act for that same offence.

Defences.

32. It shall be a defence to any person in proceedings against him under sections 28 to 30 if that person satisfies the court that he took reasonable steps and exercised due diligence to avoid committing the offence save that no such person may rely on this defence by reason of relying on information given to him by any other person unless he satisfies the court that it was reasonable in the circumstances for him to have relied on that information having particular regard–

- (a) to the steps actually taken by that person at any relevant time and those that might or should reasonably have been taken for the purpose of verifying the information in question; and
- (b) to any reason existing by which that person should have disbelieved the information in question.

Real property in Gibraltar.

33. No real property situate in Gibraltar or interest in real property that is situate in Gibraltar shall be owned or held directly or indirectly by trustees as part of the property of any Purpose Trust.

Preservation of general law.

34. (1) Nothing in this Act shall affect the law applying or relating to trusts established for charitable purposes.

(2) Subject to the provisions of this Act all principles of law and equity for the time being and from time to time relating to trusts shall apply to a Purpose Trust, to the trustees of a Purpose Trust, to any persons in any way connected to or having dealings with a Purpose Trust or whomsoever or howsoever else.

Power to make regulations.

35. The Minister may make regulations prescribing all matters which by this Act may be required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act.

EXPLANATORY MEMORANDUM

This Bill provides for the creation of trusts for a purpose or purposes otherwise than for charitable purposes. The Bill sets out the powers as well as the duties of trustee(s), at least one of whom must be a Licensed Trustee as defined in the Bill. The Bill also: provides for applications to court by the trustees (and by other authorised parties) in defined circumstances; disapplies the rule against perpetuities; extends the cy-près doctrine and creates various summary offences for the breach of certain provisions, in particular regarding trust records and documentation.

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