

GUIDE TO CHARITABLE STRUCTURES IN BERMUDA

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PREFACE

This Guide has been produced as an aid to those seeking general information on charitable structures in Bermuda.

It is recognised that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they should be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

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1. INTRODUCTION TO CHARITY AND PHILANTHROPY IN BERMUDA

Bermuda has become an increasingly attractive jurisdiction for the establishment of trusts and charitable structures. Charitable and philanthropic structures commonly found in Bermuda include charitable trusts, purpose trusts and companies limited by guarantee.

Unincorporated associations and charitable entities incorporated by way of private act of parliament are also possible, but for the purposes of this Guide we will focus on the use of trusts and companies limited by guarantee in charitable structures.

There are many registered charitable organisations in Bermuda, some large, some small, reflecting a wide diversity of purpose. Between them and their unregistered counterparts, they make a vital contribution to society in their efforts to respond to the many needs of the local and international community.

1.1 Meaning of Charity and Charitable Purpose

In a legal context, charity is usually referred to in relation to a trust or organisation established for charitable purposes. The Charities Act 2014 (**Charities Act**) defines "charitable purpose" to include any of the following provided it is for the public benefit:

- 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, rescue or ambulance services; and
- the provision of recreational and similar facilities in the interests of social welfare.

The "public benefit requirement" is broken down into three distinct aspects:

- There must be an actual benefit to the public;
- Charities must serve the public or a sufficient section of the public, and must not unduly restrict access to its benefits; and
- Private or personal benefits must be necessary or incidental to achieving charitable purposes.

1.2 Meaning of Philanthropy?

This is not a legal term. **Practical benevolence** is a good working definition. In a legal context, while what is charitable will be philanthropic, the reverse is not necessarily the case. A trust for a philanthropic cause which is not deemed charitable will, unless established as a non-charitable purpose trust, have to conform to the criteria applicable to a private trust. We refer you to our Guide to Trusts in Bermuda.

2. CHARITABLE TRUSTS

These are trusts established for exclusively charitable purposes, which may be designed to continue indefinitely. Generally the sole trustee, or one of the trustees, will be a Bermuda licensed trust company or private trust company.

2.1 **Are Charitable Trusts Specially Regulated?**

Not unless they fall under the Charities Act, which maintains a regime for the control of charitable organisations registered under the Charities Act. Charitable trusts set up by international clients who are non-residents of Bermuda will not normally be concerned to seek registration under the Charities Act or be affected by it if they are privately funded, do not solicit funds from the Bermuda public and are administered by a Bermuda regulated institution.

Trustees are regulated by the Bermuda Monetary Authority (**BMA**) under the Trusts (Regulation of Trust Business) Act 2001. Regulation of trustees is also achieved through Bermuda's anti-money laundering and anti-terrorist financing legislation. Professional trustees are required to have strong **Customer Due Diligence** procedures, which may be subject to regulatory inspection. Trustees will conduct extensive investigations to ensure that funds to be contributed to the charitable trust come from legitimate sources, that the purposes of the trust are genuinely charitable and that the funds are intended to be applied for those purposes.

2.2 **Do Charitable Trusts pay any Taxes or Governmental Charges in Bermuda?**

Bermuda has a stamp duty regime, but there is no duty on the document creating a trust, charitable or not, where the trustee is a Bermuda licensed trust company and the trust property is non-Bermuda property (which includes foreign securities and foreign currency bank balances) or where the trustee is an exempted company.

Furthermore, except in the case of a charity registered under the Charities Act (which is required to file its accounts on an annual basis with the Charity Commissioners and pay a fee each year based on annual income), there is no requirement to make any periodic or other filings with any governmental or regulatory authority.

2.3 **Is any Governmental Permission Required to set up a Charitable Trust?**

No, but this is true of trusts (other than unit trusts) generally. However, if the trustees want to incorporate a company in Bermuda (for the purpose of, for example, holding investments) it will be necessary to submit an application for consent to incorporate to the BMA in the case of a company with standard business objects, or to the Ministry of Finance in other cases. For further details of the process, please refer to our Guide to Companies in Bermuda.

2.4 **Who Enforces a Charitable Trust?**

The responsibility for enforcement rests with the Attorney General, acting in the public interest. In contrast to a private trust, there are no beneficiaries who can apply to the court for enforcement.

Regulation of charities registered under the Charities Act rests with the Registrar General and the Charity Commissioners.

3. **PURPOSE TRUSTS**

The concept of the non-charitable purpose trust (commonly referred to simply as a purpose trust) satisfies two quite different needs: one, where the purposes of the trust or some of them do not meet the criteria for what is charitable under Bermuda law (for example, to further the cause of a political party or to promote a non-charitable ideology); the other, for use in commercial situations where one is looking to achieve insulation or bankruptcy remoteness and the trust performs the role of owner. Such a trust has no beneficiaries, only purposes, and has been successfully used (in the present context) in the formation and

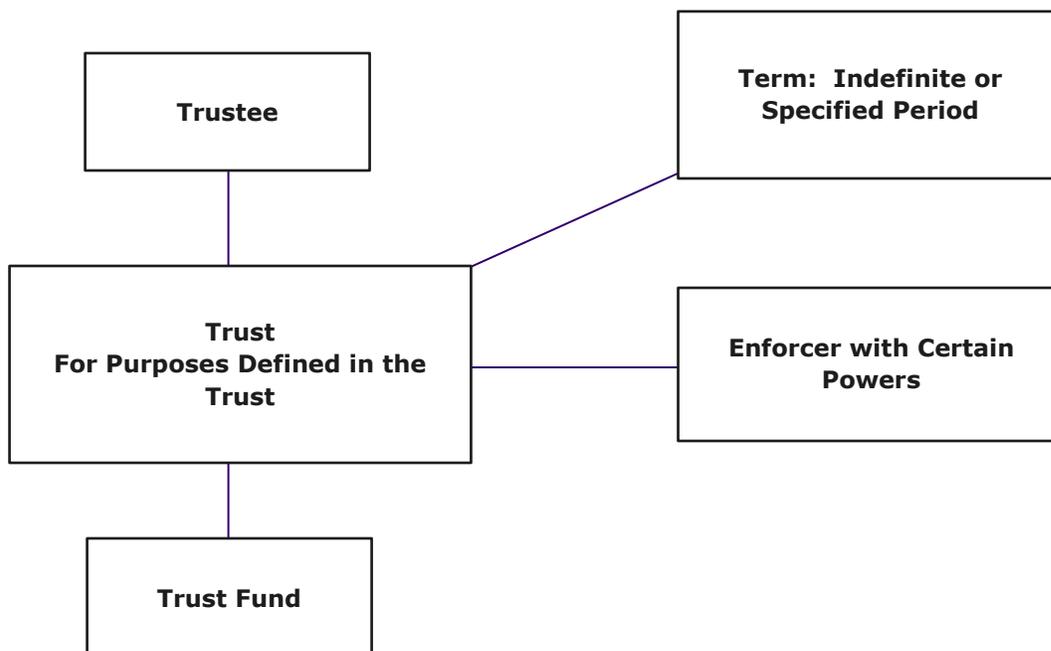
ownership of private trust companies. For more on this subject, please refer to our Guide to Trusts in Bermuda and our Brief on The Private Trust Company.

3.1 Characteristics of a Bermuda Purpose Trust

Here is a summary of the principal characteristics of a Bermuda purpose trust:

- Creation:** in writing, usually by way of declaration made by the trustee.
- Duration:** may last indefinitely or for a specified term of years.
- Purpose:** any purpose which is sufficiently certain to allow the trust to be carried out, lawful and not contrary to public policy.
- Trustee:** usually a licensed trust company, but there are no special requirements or qualifications.
- Enforcement:** any of the following persons has the right to apply to the court to enforce the trust:
- (a) the settler or grantor, unless the trust document says otherwise;
 - (b) the person, if any, appointed in the trust document (the so-called enforcer);
 - (c) a trustee; and
 - (d) any other person who the court considers has sufficient interest in the trust.
- If none of the above is able and willing to do so, the Attorney General may apply.

3.2 Typical Purpose Trust Structure:



Note:

- (a) the Trust Fund may, for example, comprise the share capital of a special purpose vehicle;
- (b) the appointment of an enforcer is optional. Sometimes the enforcer is given additional powers e.g. the powers to appoint and remove trustees.

4. TRUST CONSIDERATIONS

There are many advantages and considerations of using a charitable or purpose trust structure. The following list is by no means exhaustive:

- **Regulation:** trusts are unregulated unless registered in Bermuda and therefore have fewer regulatory requirements than charitable companies limited by guarantee which are subject to the additional requirements of the Bermuda Companies Act 1981 (as amended and hereinafter the **Companies Act**). Where a trust is registered as a charity under the Charities Act, the trustees must keep proper accounts and submit them with a report to the Charity Commissioners on an annual basis.
- **Formation Time:** with the correct legal assistance a trust can generally be established very quickly (this assumes that the provision of compliance related information is delivered in a timely manner).
- **Flexibility:** where trust instruments provide for variation, trusts can be very flexible vehicles that can adapt to changing circumstances and stay current.
- **Costs:** no annual government or licence fees make trusts relatively inexpensive options. The costs to administer may vary and there is a nominal annual fee for registered charities.
- **Beneficiaries:** trustees of a discretionary trust have full discretion as to which beneficiaries receive which capital or income, if any.
- **Liability:** to avoid personal liability issues trustees should ensure that the trust instrument provides for trustee indemnification for breach of trust.
- **Privacy:** generally Bermuda does not require registration of privately funded trusts which are administered by a Bermuda regulated institution, and parties to a trust are not listed in any register of trusts in Bermuda.
- **Duration:** generally speaking a Bermuda trust which does not hold Bermuda property can last in perpetuity or for some specified period.

5. COMPANIES LIMITED BY GUARANTEE

5.1 What is a Guarantee Company?

A company limited by guarantee (**guarantee company**) is formed by one or more persons (**members**) who subscribe their names to the memorandum of association and fulfil the other related requirements under the Companies Act. The Companies Act stipulates that the guarantee company shall only be formed if its purpose is to promote art, science, religion, charity, sport, education or any other social or useful purpose; it is a mutual company or a private trust company. A pre-condition of incorporation is that the profits, if any, and other income must only be used in promoting its purposes, and no dividends are to be paid to its members.

5.2 How is a Guarantee Company Formed?

The procedure for incorporating a guarantee company begins with the reservation of a name with the Bermuda Registrar of Companies (**RoC**). The reservation of a name is free. It is then necessary to advertise the intention to incorporate through a local newspaper. Once the memorandum of association is agreed by the members Ministerial approval is sought. Once approved the organisational meetings are held, at such time the bye-laws of the guarantee company are formally approved and the officers are appointed. Companies limited by guarantee are exempt from all annual taxes.

The memorandum of association for a guarantee company must state, amongst other things, that:

- the liability of its members is limited; and
- each member undertakes to contribute to the assets of the guarantee company in the event of it being wound up while he is a member or within one year after he ceases to be a member, for the payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs charges and expenses of winding up, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

The amount specified to be contributed by the members is referred to as the **guarantee fund**. The Act does not specify a minimum or maximum amount for the guarantee fund and, in fact, we have seen a guarantee fund set as low as US\$100. However, it is recommended that consideration be given to an appropriate amount at which to set the guarantee fund.

The following are also provided for in the memorandum of association:

- The objects of the guarantee company which may include any objects that are already contained in any existing organisational documents or mission statement of the associated foundation (if any) and, to the extent they are not provided for already, other standard objects for a company of this nature.
- All income of and property of the guarantee company must be applied solely towards the promotion of its objects as set out in the memorandum of association and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members of the guarantee company.
- If upon winding up there remains, after the satisfaction of all debts and liabilities of the guarantee company, any property, it shall not be paid to or distributed to or among the members of the guarantee company but shall be given to or transferred to some other charitable body or bodies having objects similar to those of the guarantee company.

5.3 Who are the Members?

Those persons who subscribe their names to the memorandum of association will be members of the guarantee company for the purposes of the Companies Act and subject to liability to contribute to the assets of the guarantee company, but only to the extent of the guarantee fund.

In addition, the bye-laws of the guarantee company will provide that such other persons, who are approved by the board of directors, may be admitted to membership of the guarantee company. Such members will also be subject to liability to contribute to the assets of the guarantee company, but again only to the extent of the guarantee fund.

Admittance to membership of the guarantee company will necessarily involve the notification of the members' liability under the Companies Act to contribute to the assets of the company to the extent of the guarantee fund. Alternatively, the foundation could have a separate category of membership, which does not attract liability under the Companies Act. Persons falling into this separate category would be called something other than **members** (such as "friends of the foundation") and could continue to be associated with and contribute funds to the guarantee company, without attracting liability. Any differentiation in membership would be provided for in the bye-laws of the guarantee company.

5.4 **Guarantee Company Considerations**

- **Participation:** involves officers, committee members and members appointed democratically.
- **Flexibility:** company structure provides for flexibility and growth. Where provided in the company bye-laws, amendments to governance can be straight-forward and relatively inexpensive.
- **Formation time:** a company limited by guarantee can be incorporated in a matter of days (providing compliance information is forthcoming on a timely basis).
- **Legal powers:** a company has its own legal personality and undertakes all activities in its own name.
- **Privacy:** incorporated companies must submit relevant incorporation information to the RoC along with an annual updated register of members. While these are unlikely to be overly revealing of any confidential information, this represents (marginally) less privacy than the Bermuda trust.
- **Liability:** the members of a company limited by guarantee are only liable for the amount contributed in the guarantee fund (usually a nominal sum such as \$100), providing robust protection from personal liability for the members and governing board.
- **Duration:** companies limited by guarantee can exist into perpetuity and must only dissolve by a legal process known as winding up.

6. **REGISTRATION AS A BERMUDA CHARITY**

To be a Bermuda charity, an organisation must be (a) subject to the jurisdiction of the Bermuda Supreme Court and, (b) have only "charitable purposes" which must satisfy 'the public benefit requirement' (see Section 1.1 of this Guide above).

6.1 **The Charities Act**

The Charities Act requires every Bermuda charity to be registered unless it is:

- (a) Exempt by regulations made by the Minister; or
- (b) Privately funded and does not solicit funds from the Bermuda public, or receive funding from the Bermuda Government or Bermuda public sources; and
 - (i) in the case of a trust, has a licensed trustee or private trust company as trustee, or
 - (ii) has a registered office with and is subject to compliance by a Bermuda regulated institution.

Registration may be indefinite or for a definite period of one, three or five years at a time. The Charities Act also allows for temporary three month licenses to solicit and collect donations in limited circumstances.

Charities must notify the Registrar of any changes to its registered details and any change in the charity's trusts or if the charity ceases to exist.

Furthermore, all registered charities are required to prepare statements of accounts and annual reports to be submitted to the Registrar General within six months of the end of the financial year, and to preserve accounting records and annual reports for at least seven years.

The Charities Act sets out several offences including supplying false or misleading information to the Registrar and failing to keep, preserve or submit accounts.

In the case of a registered charitable trust, the Charities Act requires that the charitable trust have an express dissolution clause providing that the trust assets will be applied for the purposes of the charity on termination of the trust.

All published printed materials and published electronic communications of the charity must clearly state the following:

- the name of the charity;
- that it is a registered charity; and
- its registration number.

6.2 Procedure to Register as a Bermuda Charity

An "Application to Register as a Charity", together with the Charity Trustee Declaration are both vetted by the Charity Commissioners who are guided by the Charities Act, the Charities Regulations 2014 (**Regulations**) and the Charities (Anti-Money Laundering, Anti-Terrorist Financing and Reporting) Regulations 2014 (**AML/ATF Regulations**).

The Application to Register as a Charity must set out the following:

- the primary objectives of the charity;
- the nature of any fundraising activities, projects or programmes that the charity intends to engage in;
- the purposes for which the proceeds of any fundraising activities are intended to be applied; and
- explain how the charity's objectives and aims are of benefit to the public.

In order to comply with the AML/ATF Regulations, a compliance officer will need to be designated who shall (a) have received AML/ATF training through the Centre on Philanthropy and (b) be responsible for overseeing the charity's compliance with the AML/ATF Regulations.

If the charity intends to benefit children (those under 18 years of age), the charity will also need to provide information about the policies and procedures that are in place to keep vulnerable individuals safe.

6.3 Fees and Costs

There is an annual fee payable by a registered charity, pursuant to section 15 of the Charities Act as follows:

- \$105 – where the annual income of the charity is \$35,000 or less;
- \$260 – where the annual income of the charity exceeds \$35,000 but is less than \$450,000;
- \$420 – where the annual income of the charity exceeds \$450,000.

7. CONCLUSION

Bermuda enjoys a first-class reputation as an offshore centre for international business, and is increasingly becoming a location known for international charitable and philanthropic endeavours. Registration of a charitable structure is optional in Bermuda if the charity is privately funded, funds are not solicited from the public in Bermuda, and if the charity is administered by a Bermuda regulated institution, which can be a great advantage and provides some flexibility for international structures.

Bermuda has a favourable but well-respected regulatory regime and robust professional services industry. Some of the most well-known legal, accounting and trust administration service providers can be found in Bermuda. Each are highly capable with the set-up, management and administration of trusts and limited companies, all of which combine to make a jurisdiction that is highly professional and able to meet the requirements of even the most demanding philanthropist.

For more specific advice on charitable structures in Bermuda, we invite you to contact:

Bermuda

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).