Economy

Proposed amendments to the Trusts (Jersey) Law 1984

Consultation Response Paper

JULY 2025

Proposed Amendments to the Trusts (Jersey) Law 1984

SUMMARY OF CONSULTATION

In July 2024, the Department for the Economy published a Consultation Paper proposing amendments to the Trusts (Jersey) Law 1984 (the "**TJL**"). The Consultation was open from 8 July 2024 to 16 August 2024. The Consultation covered five areas:

- Confirmation as to the priority of claims between a former and current trustee on the one hand and a secured lender on the other given the recent case on 'insolvent trusts' (Re Z)
- The ability of beneficiaries to call for the termination or variation of a trust pursuant to either Article 43 of the TJL and/or the rule in Saunders v Vautier
- Clarifying the position where a sole trustee purports to resign
- Minor corrections in relation to Articles 24, 43, and 55
- The concept of a 'data trust'

Respondents were also invited to provide any further comments or suggestions for future review if they wished to do so.
This response paper should be read in conjunction with a copy of the Consultation Paper Amendments to the Trusts (Jersey) Law 1984 and the TJL Trusts (Jersey) Law 1984

OVERVIEW OF CONSULATION RESPONSES

Thirteen responses to the Consultation were received by the Government of Jersey and Jersey Finance Limited (**JFL**). These responses came from three law firms, two lawyers responding in their individual capacity, the Jersey Association of Trust Companies (JATCo), two trust companies, the JFL Working Group on Limited Liability Companies, Monoceros Law, an individual, and two other anonymous respondents via the website response system. The proposals had already been discussed by the Trusts Law Working Group (the "**Working Group**") which comprises representatives from a number of

Jersey law firms and trust companies before publication of the Consultation Paper.

There was broad agreement on a number of the proposals although reservations were expressed by some respondents on particular aspects of the questions raised. This is discussed in more detail below. The Government of Jersey has taken careful note of all responses together with the Working Group, and made amendments to the proposals as considered appropriate.

Sections and questions are described as in the original consultation. Some respondents did not comment on all the questions in the Consultation Paper and accordingly unless otherwise indicated the words *all respondents* or *half the respondents* or similar should be read to mean all those that responded on the particular point.

SUMMARY OF PROPOSALS

As noted in the Consultation Paper, Jersey is a leading trusts jurisdiction, offering flexibility in a well-regulated environment, and with a strong independent judiciary and a recognised body of case law relied upon around the world. The Government of Jersey keeps the TJL under review to ensure that it is able to provide solutions for those acting within its framework in an appropriate and legitimate manner. Various discussion points were raised in the Consultation and certain amendments proposed, in part due to certain developments in case law. Based on the preliminary work and the responses to the consultation, amendments will be proceeded with in relation to the first four areas under review. Work on the draft legislation to give effect to this is being finalised with the assistance of the Working Group.

In relation to the remaining subject area, data trusts, the potential for legislative amendment will be kept under consideration particularly in light of (i) the recommendations of the Jersey Law Commission in response to their consultation, which will be published in due course, and (ii) the Property (Digital Assets etc.) Bill making its way through the United Kingdom Parliament, which, if adopted, will confirm that certain digital assets can be recognised as property even if they do not fit into

traditional categories of personal property in English and Welsh law. This is part of a separate workstream being co-ordinated by colleagues in the Digital Economy team with input from the Financial Services team.

SECTION A

Confirmation as to the priority of claims between a former and current trustee and a secured lender given the recent case on 'insolvent trusts' (Re Z).

The proposed amendments sought to clarify that security taken by lenders to trustees, over trust assets, has priority over the lien of a current or former trustee that arises by way of operation of law, as the security will rank above such lien. Respondents were asked whether they agreed with the amendment, whether there were any disadvantages, and whether there were any other issues to be addressed.

Unsurprisingly, as this proposed amendment was prompted in response to concerns raised by banking lawyers, support for the amendment was more apparent from those respondents working in a lending or corporate environment who seek to ensure that there is no doubt that lenders with security over an asset have first ranking in relation to it (subject to the terms of the security). More than one respondent agreed that any risk can be mitigated when dealing with an existing trustee with a waiver in the finance documentation (although it was said that a statutory rule would mean this would not be necessary thus improving transactional efficiency), but this is not so when there is a former trustee who is not party to that documentation. Whilst this can, of course, be managed, it was said that this was not ideal for a finance centre. As one law firm commented: "*Making the proposed amendment would therefore be in the commercial interests of Jersey as a leading international finance centre*."

On the other hand, the trusts practitioners at one law firm suggested that the trustee lien should not be '*unilaterally subordinated to that of a secured interest'*. This was on the basis that if there are trust liabilities properly incurred by a trustee, that trustee should be able to seek reimbursement from the trust fund for them. The proprietary lien was, they said, an important protection for trustees, and a concerned lender could '*seek a waiver on a case by case basis as a condition precedent*

to lending'. They did not want to see Jersey out of line with other jurisdictions especially where a structure reached across more than one jurisdiction.

Furthermore, they raised concerns as to whether negotiations, which take place on the retirement of a trustee, particularly in relation to the taking of security or negotiation of indemnities might be made '*difficult and protracted'*. An individual lawyer also questioned whether outgoing trustees would seek to prohibit successor trustees from granting security to third parties.

Other respondents however pointed out that most trustees do not see the lien as their key protection and any enforcement of it when they do not have possession of the trust assets is likely to be difficult and costly. Contractual indemnities or indemnities from the beneficiaries were said to be more common and more useful. Another law firm stated: "*in the vast majority of cases, a retiring trustee … will be satisfied with an indemnity … where there is or is intended to be third party finance a retiring trustee [might] typically seek to mitigate its liability on retirement via an unsecured indemnity provided by the new trustee. Security over assets of the trust to which a third party creditor would look to take security over in the future…. is not ordinarily granted to a retiring trustee as to do so would impair the ability of the trust… to obtain third party financing in the future."*

In addition, it was considered that most trustees would in fact expect a secured creditor to take priority.

Whilst the Re Z decision may not strictly be binding in another jurisdiction in the same way that it is in Jersey, if the legislation of the other jurisdiction does not deal with the point there could be similar issues.

These points have been considered with particular care by the Working Group (who had also identified most of these concerns and discussed them prior to the publication of the consultation), with a view to ensuring that the interests of both the lenders and the trustees (and the beneficiaries) are appropriately protected.

The comment of one of the trust company respondents reflects the view that has ultimately been taken: an outgoing trustee might '*pause for more thought when retiring but it is not our view that this will materially protract retirements. It has always been the case that trustees are entitled to reasonable security. The general principles applied in relation to reasonableness in these circumstances remain unchanged (ie a trustee will still have an ability to seek reasonable security for known liabilities in the usual way when it retires on the understanding that its lien will continue to apply to trust assets that have the ability to fluctuate in value/form from time to time."*

Significantly, JATCo agreed with the proposed amendment, citing the benefits of a clear position for both lenders and trustees.

One law firm suggested that not only should there be a clear priority rule but the lien should also not be able to be enforced whilst the security was in place.

The Working Group noted that it was entirely possible that the trust assets would be sufficient to pay both the lien and the security; in those circumstances why should a trustee be prevented from enforcing its lien? However, the counter view is that a secured party will usually seek contractual waivers from a current trustee (as discussed above) so that the trustee will not be able to enforce their lien when other formal security is in place. There can be significant penalties if assets are sold prior to the planned date or there is an event of default, which would be potentially detrimental for the beneficiaries and current trustee as well as the secured lender. It is considered that a trustee should be able to enforce as any normal creditor might but not by virtue of the proprietary nature of the lien. Should this be found to be being abused, consideration will be given to a further change.

Alternative suggestions

As direct lending to a trustee is not particularly common, it was suggested that any amendment could be restricted to commercial trust transactions such as those involving Jersey Property Unit Trusts (JPUTs). This had also been considered by the Working Group prior to the Consultation who, whilst noting this situation, felt it was not advisable to limit it in this way and were concerned that it would suggest that the opposite rule applied to non-unit trusts.

Two law firm respondents suggested that the position could be improved by the insertion into the TJL of provisions expressly dealing with the trustee's lien – perhaps akin to those in the Trusts (Guernsey) Law 2007. It was said by one that the nature of the lien had been defined in Re Z; but what was needed was a formal restatement of how the lien operates. One could draft provisions to "*preserve the proprietary nature of the lien, but only in the hands of the incumbent trustee which would automatically be subordinated, both for itself and for its predecessor trustees, where security is granted to a third party*."

The alternative – which was unlikely to be acceptable to trustees - was "*to abolish the concept of the lien entirely, leaving both incumbent and former trustees with only a contractual right of indemnity, unsecured on any part of the trust assets*."

The Working Group discussed these points and noted that the insertion of provisions into the TJL dealing with a statutory lien had previously been discussed but agreement had not been reached. Further consideration was given to this suggestion in light of the Re Z case and the experience of colleagues in Guernsey as to the provisions in the Guernsey Trusts Law, Ultimately, the Group considered that the key issue that had been raised was in relation to the priority of the lien and third party security, and this was the issue that should be dealt with rather than anything else.

One other related point was put forward by JATCo: that trustees should consider implementing a schedule of subordinated debt as a 'living document', just like a company would keep a register of charges. '*In the*

event of a change of trustee, the priorities are known and considered by all relevant parties. There is a benefit to a schedule not just from the perspective of retiring as a trustee, but generally from a good administrative perspective.'

This would indeed appear to be a good suggestion but not one which requires legislative amendment at this stage.

Definition of security

One trust company respondent queried how 'security' would be defined within the law. It pointed out that it might be considered unfair for an unsecured creditor, who is able to obtain and perfect security by way of a court judgment, to be treated in the same way as a secured creditor who has security based on an arrangement voluntarily entered into by a party (acting as a trustee): security should be defined as only that into which the trustee has voluntarily entered into.

The Working Group and Government agreed with this point and the drafting will reflect this.

Whether or not the definition should include security created under Jersey or any other law was also broached. The Working Group and Government take the view that the provisions should not be limited to Jersey law security only.

OUTCOME

The amendments will be proposed.

SECTION B

The ability of beneficiaries to call for the termination or variation of a trust – Article 43 and the rule in *Saunders v Vautier*

The assumptions held by many in relation to the operation of the rule in *Saunders v Vautier [1841] EWHC J82* were called into question by the Guernsey case of *Rusnano Capital AG (in liquidation) v (1) Molard International (PTC) Limited and (2) Pullborough International Corp [2019] GRC011 ("Rusnano")* (decisions both at first instance and on appeal), as the relevant part of the Trusts (Guernsey) Law 2007 is in similar terms to Article 43 of the TJL.

The proposed amendments to Article 43 of the TJL were intended to give certainty to the position, to reflect the prevailing view, and to avoid any unnecessary costs and delays in potentially having to seek a court determination on this question. It was suggested that such amendments would assist in ensuring that the wishes and intentions of the settlor when establishing the trust are given due regard. Furthermore, if the beneficial class is truly closed, the beneficiaries would still be able to call for a termination, and in any event, the trustee of a discretionary trust would usually have discretion under the terms of the trust instrument to distribute the whole of the trust fund to one or more of the beneficiaries, although the beneficiaries would not have the right to demand this. A dissatisfied beneficiary also has the right to bring an application before the Royal Court.

Respondents were asked to comment on the following:

- Whether the presence in the trust instrument of a power to add to a beneficial class should prevent the beneficiaries from being able to call for the termination of the trust?
- Whether the presence, in the trust instrument, of a power of amendment or appointment generally which could be used to add beneficiaries should prevent the beneficiaries from being able to call for the termination of the trust?
- The effect of a default beneficiary or trust such as a charity or general charitable purposes clause;

- Whether the beneficiaries should be able to call for a variation of a trust (with or without the agreement of the trustee).

The responses to this section were not unanimous. The proposals were supported by one of the law firms, one of the individual lawyers, and two of the trust company respondents. Another respondent remarked that it seemed uncontroversial.

JATCo agreed that the amendment would clarity the position but emphasised the need for careful drafting and recognition of the original intentions when the trust was established. It should remain possible to terminate a trust when it is in the best interests of the beneficiaries or where, despite there being a power to add, there is no one else to add in the context of the original intentions at the time of establishment of the trust.

However, more than one Respondent noted that most modern trusts instruments included a power to add and, as one commented: "…*to introduce this prohibition would take away the ability to use this tool, which can be useful to trustees as well as beneficiaries*". As most trusts contain a power to add and/or a wide power of appointment or amendment, one Respondent considered that it was "*difficult to see how the statutory power would ever be capable of being exercised*." However, if, they went on, the amendment was to go ahead, it should capture both powers of addition and powers that can be used to amend the beneficial class to ensure consistency of approach.

One law firm noted that whilst a trustee may consider a request from the beneficiaries to terminate a trust, they will have to consider this as a fiduciary; unlike when there is an Article 43(3) request which *requires* them to terminate the trust. Another law firm indicated that with a power to add, one might consider its exercise might be for the benefit of the objects of the power; with a power to appoint/amend, it must be exercised for the benefit of the current beneficiaries, so the potential to benefit such persons who are not yet beneficiaries is not the purpose of the trust, and so powers to amend or appoint should not prevent the beneficiaries seeking to terminate the trust.

One of the individual lawyers helpfully pointed out that "*English trusts deeds traditionally only allowed administration powers to be amended as opposed to Jersey trusts which typically permit the trusts, powers and provisions to be amended. Therefore, in English law cases, the power of amendment was unlikely to be used to add beneficiaries whereas, most likely in Jersey cases, the power of amendment could be used to insert additional beneficiaries or a power to add beneficiaries*." The lawyer, on balance, thought perhaps termination should be possible with a wide power of amendment.

One law firm respondent thought that a settlor might establish a trust with the intention that it would be terminated if it no longer served its purpose or became too expensive: 'beneficiaries should not be '*trapped by a structure that no longer suits their collective purposes.*' The costs of bringing an application to court if a trustee refused to co-operate were mentioned; rather, said the respondent, it should be incumbent on the trustee to make any application to court if the trustee wishes to '*thwart the wishes of the beneficiaries'*. The law should in fact be amended to make it clear that the existence of a power to add does *not* prevent the right of the beneficiaries to call for termination.

Another respondent noted that Article 43 is in reality rarely used to terminate a trust and also that powers can be released if necessary.

Default beneficiary or trust

Comments in relation to whether an amended Article 43(3) should specifically reference what the effect is when there is a default beneficiary or default trust, such as a charity or general charitable purposes clause, varied. JATCo wanted to ensure that any amendments did not lead to unintended inflexibility for trustees. Another respondent said if there was an amendment it should state what the effect is where there is a default beneficiary of trust. They were of the view that the existence of either should not prohibit the exercise of power where the class of beneficiaries is closed. One individual lawyer wondered if a distinction could be made between commercial and family trusts. A law firm respondent suggested expressly excluding default beneficiaries or trusts so that they would not be able to block the exercise of the Article

43(3) power. Alternatively the provision could refer to existing interests as opposed to future interests. One of the individual lawyers noted that it would be helpful to be able to ignore default beneficiaries when they were not likely to benefit being long-stop provisions; but this might not be possible. Other Respondents supported the suggested amendment.

Variation

The question of whether or not the potential for all beneficiaries of full age and capacity to vary a trust should be enshrined in statute was also posed in the consultation paper. Whilst there was some support for change, overall it was not seen as necessary.
For example, JATCo, considered that trustees have an open dialogue with the beneficiaries and if a variation was in the best interests of the beneficiaries after the taking of legal and tax advice, and considering all relevant factors, the trustees might well accede to a request for variation. If they considered that it was not, the fact that the beneficiaries could call for it, could lead to complications, potential litigation, and costs.

One law firm respondent pointed out that a proposed variation might conflict with the trustee's duty or impact adversely upon the administration of the trust and so were opposed to any statutory change. Another considered it was sufficiently clear in case law, and that it would be rarely used, particularly as the agreement of the trustee was required as matters stood.

Other respondents thought that it would add useful flexibility and add to the trustee's 'toolkit'. Another that it reflected the existing case law.

The question of trustee consent and the trustee's position was also raised in the context of potential legal and tax consequences or requests which departed so far from the original wishes of the settlor that termination would be better. A respondent also raised the question of whether or not such a variation would be a resettlement or not.

It was pointed out that this amendment should not be proposed if the first did not go ahead as that would lead to inconsistency and potentially

permit the beneficiaries who could not terminate the trust from seeking to vary the trust to achieve termination.

Consideration

The Trusts Law Working Group has considered these comments carefully with the particular benefit of competing arguments from those with differing viewpoints within the Group (including from some of the respondent law firms). The concern that the amendments would mean that the option to terminate would not realistically be available at all was aired and discussed. Regard was had to the rights of the beneficiaries as well as the intentions of the Settlor and the position of the Trustee(s). It was considered important that the intentions of the Settlor when establishing the trust continue to be recognised during the lifetime of the trust. Whilst some Settlors might want flexibility, others certainly did not. Those that did want flexibility could specifically include a clear power for the beneficiaries to terminate the trust in the instrument of trust if they so wished.

This was seen as fundamental to the attractiveness of the jurisdiction for new business and continues to feature as a factor in choosing where to locate a structure. Certainty was also key, avoiding any unnecessary costs and delays for a party in having to seek a court determination on this question.

This is not to say that the trust terms are set in aspic such that changes cannot be made but these can be addressed by way of the open dialogue between trustee and beneficiaries referred to by JATCo and adjustments made to facilitate the needs of the beneficiaries in line with the fiduciary duty of the trustee to act in the best interests of the beneficiaries.

Some members of the Working Group were not supporters initially but on balance, it was considered that the preferred course of action was to proceed with an amendment in the wider terms, to provide certainty and stability in terms of the structure.

However, the Working Group concluded that a change should not be made at this time in relation to variation as such was possible already within the current framework and it was not necessary to adjust the principles already in place.

OUTCOME

It is proposed that Article 43 be amended so that where there are other persons who could become beneficiaries in accordance with the terms of, or pursuant to the exercise of any power under the trust, or if there is an existing charitable or non-charitable purpose, the trust cannot be terminated by the beneficiaries.

No change will be made in relation to variation.

SECTION C

Clarifying the position where a sole trustee purports to resign

The Consultation Paper noted that Article 16(1) of the TJL requires that a trust must have at least one trustee, although Article 16(2) confirms that the trust will not fail on the ground that it has fewer trustees than required by the TJL or the terms of the trust. If there are fewer than the minimum required, appointments must be made as soon as is practicable. The issue for discussion was that the Article does not specifically refer to what happens should a sole trustee seek to resign without appointing a successor. In the normal course of events, a sole trustee would appoint a new trustee before retiring (or ensure that the person given the power to appoint new trustees exercises it). However, it is possible that a sole trustee may purport to resign under powers set out in the particular trust instrument. It was therefore proposed that this should be remedied by way of a minor clarificatory amendment to reflect what is considered to be the current position: that a sole trustee cannot resign unless a new trustee has been appointed in his or her place regardless of the terms of the trust instrument, and any such purported resignation will have no effect (as per Article 19(3)). This clarification will avoid any confusion, particularly for lay trustees.

One respondent indicated that the proposition was trite law and obvious. With one exception, there was no objection to this change. The one exception was based on a concern that where a power to appoint a new trustee was vested in a third party, a trustee should not be prohibited from resigning by a failure of such a third party to use its power. The difficulties for trustees in this situation was reflected in two other comments. In these cases it is likely that the trustee would seek the assistance of the Court.

There was also a suggestion that the "*Art. 51 jurisdiction should include the ability to release a sole trustee from the trusteeship if for example the remaining assets are minimal and no beneficiary can be found.*"

OUTCOME

The amendment will be proposed. The additional points will be considered by the Working Group when developing future recommendations.

SECTION D

Other: minor corrections to Articles 24, 43, and 55

(i) Article 24

The Consultation asked whether or not a change should be made to Article 24(2) to include reference to the *purposes* of a trust in the context of a trust for charitable or non-charitable purposes, in relation to a trustee's exercise of their powers.

All Respondents either agreed that the amendment should be made or were ambivalent. One Respondent thought it was '*very important that it be made. This appears to be an obvious oversight*'.
However, it was identified in further discussions of the Working Group that there may be similar references within the TJL. It would be preferable to conduct a full review to identify these and propose further amendments in due course.

OUTCOME

The amendment will be postponed pending the conclusion of the work mentioned above.

(ii) Article 43

(a) The Consultation asked whether or not a change should be made to Article 42(2) to confirm that the right of a trustee to be provided with reasonable security for its liabilities – as set out in Article 43A and as then referred to in Article 43(2) - applies notwithstanding either of paragraphs (1) or (3), and thus regardless of the circumstances of the termination of the trust; that is whether the termination is under the terms of the trust, or by all of the beneficiaries acting together to terminate the trust.

All Respondents agreed save for two law firm respondents who considered that the amendment was not necessary as Article 43A '*already provides that "a trustee who ...distributes*

trusts property" or "a trustee... of a trust that is terminated..." is entitled to invoke Art 43A before parting with the trust property.' and '*Article 42(1) applies where a trust terminates (without being specific as to the circumstance in which it terminates) and Article 43(3) is a circumstance where a trust can be terminated.*'

This has been further discussed within the Working Group who have concluded that in light of the responses, and having aired the point, there appears to be no drive to amend the provision. Accordingly, no recommendation for amendment will be made.

(b) In addition it was proposed that Article 43(5) should be deleted as it it provides a definition of 'liabilities' which term is no longer mentioned in Article 43. No specific comments were made on this.

OUTCOME

No change to Article 43(2) will be proposed.
Deletion of Article 43(5) will be proposed.

(iii) Article 55

The Consultation proposed that the word 'actual' should be deleted in Article 55 to achieve consistency throughout the TJL where notice is mentioned.

All those who responded considered that the drafting should be standardised by the deletion of the word 'actual'. One Respondent commented that actual notice as formulated by the English High Court was too generous to a purchaser, as you might expect that an honest and reasonable purchaser should be expected to make inquiries if there is something to put him or her on inquiry (ie constructive notice). One law firm was of the view that *"…whilst it should be possible to recover trust property paid away in breach of trust, on the other hand a bona fide purchaser for value should not be overly vulnerable to such property being recovered*'.

One respondent suggested an attempt to determine the intention of the different drafting. Unfortunately, as noted in the Consultation Paper, the reason for the differentiation is not clear despite reference to papers available to the Working Group from the date these provisions of the TJL were drafted.

Ultimately, the Working Group were of the view that removing the word ‘actual’ would give the advantage of consistency whilst still providing protection for a bona fide purchaser for value; expecting an honest and reasonable man to make inquiry if circumstances suggested that was necessary was not overly onerous.

For the sake of completeness, since the issuing of the Consultation Paper, the case of *Adams v FS Capital Limited* has been heard on appeal to the English Court of Appeal. No further comments were made on aspects relevant to ‘actual notice’.

OUTCOME

Deletion of ‘actual’ in Article 55 will be proposed.

SECTION E

Data Trusts

The Consultation Paper highlighted the ongoing work being carried out by Digital Jersey and various partners relating to data trusts. As one respondent (Monoceros Law) commented, this work has seen enquiries coming from all over the world from the data governance industry in relation to numerous uses such as for health data, supply chain management data in manufacturing, IP rights and royalties management, carbon footprint data, and digital places. It might also be of particular interest to collate segregated health data and to developers of generative AI products. More than one respondent was supportive of Jersey's work on this and one suggested benefits in being at the forefront of this field. Government will continue to work with and support Digital Jersey in these efforts.

The Consultation Paper posed the particular question of whether any changes were required in the TJL. The general view was that the inherent flexibility of the TJL meant that data trusts were already possible, by using contractual and other forms of rights as property to validly create a trust, and the concept had indeed been proven in practice by the LifeCycle Project. Whilst some respondents were keen to enshrine the principles in the TJL, overall the respondents considered that any potential changes should await the outcomes of the Jersey Law Commission Consultation Paper "Digital Assets Reform Project: Smart Contracts, Data Assets and DAO", together with the work of the Law Commission of England and Wales on property rights with questions therein as to the nature of data as property.

The respondents tended to fall into two camps: those with a particular interest in data trusts who were naturally more keen to see action and suggested a new category of property could be introduced into the TJL, or, as suggested by another respondent, more widely in Jersey legislation; and those, like one trust company, who observed that this was a question being considered internationally and there was a need for consistency across jurisdictions on this.

The Working Group and Government incline to this latter view and accordingly, the passage of the Property (Digital Assets etc) Bill through Parliament is being followed and discussions will be held within government and with appropriate stakeholders to consider the conclusions of the Law Commission of England & Wales and of the Jersey Law Commission, once issued.

No suggestions were made in relation to Q15 (whether any other amendments to the TJL were required to keep it fit for purpose in relation to digital developments) but matters will be kept under periodic consideration by the Working Group. Interested parties are invited to provide any suggestions on this to the Government or Jersey Finance from time to time.

OUTCOME

No changes will be proposed at this stage. Instead discussions will be held within government and with appropriate stakeholders to consider the conclusions of the respective Law Commissions.

OTHER

The final question in the Consultation Paper (Q16) invited respondents to raise any other points they might wish to make or suggestions for improving the TJL or topics that should be considered for discussion.

Most Respondents did not provide further comments. The comments received covered the following-:

(a) One respondent suggested looking at the fiduciary duty of trustees in the context of ESG investments, more particularly as to (i) 'impact investing' (where the investment does not provide the financial return that might otherwise be obtained; the intention being to generate measurable social and/or environmental impact); (ii) property enhancements for environmental impact where they may be more expensive than standard improvements; (iii) payments for moral reasons e.g. choosing a less tax-advantageous route when structuring on the basis that one should pay tax to benefit the wider public.

The respondent noted that STEP's Responsible Stewardship of Wealth Committee is setting 'advocating for amendments to trusts laws' as one of their main pillars of focus, and also the intention of STEP Worldwide 'to make this a key initiative over the next 12 months'. The respondent stated that '*The approach taken [by STEP] is to suggest amendment to clarify that trustees may integrate the personal views or values of the settlor or beneficiaries into the trust investment decisions. It is permissive rather than obligatory and it must reflect the wish of the settlor or beneficiaries to ensure that trustees cannot impose their values on the trust structures. It should also encourage a focus on long-term financial performance rather than looking for 'quick win' financial returns.*"

OUTCOME

The prevailing view of the Working Group is that the TJL already provides flexibility for a trustee to consider various factors when making investments, which would include sustainable finance factors. Furthermore, "benefit" has been given a broad interpretation by the courts in Jersey such that it does not just signify financial benefit. Therefore, there is no requirement to amend the TJL and trustees, when considering a particular investment, would need to consider the purposes of the trust and the interests of and benefit for the beneficiaries. It is also noted that given the changing investment climate, trustees would naturally consider sustainability factors when making investments and there is no longer a necessary trade off between sustainability and investment return.

The Working Group will continue to monitor this area in the context of the government's sustainable finance action plan.

(b) Jersey Finance indicated that the position of Jersey Limited Liability Companies (LLCs) acting as trustees had been under consideration by one of their Working Groups. The JFSC guidance on the matter referred to the TJL not permitting LLCs to act as corporate trustees, but it was suggested that the TJL was ambiguous on this.

It having been confirmed with the JFSC that they had no objection as a matter of principle to an LLC acting as a trustee on the basis that the entity would be supervised at entity level in the usual way, it was agreed that there was no reason from a trusts law perspective that an LLC should not be a trustee and so amendments should be made to the TJL to ensure that any ambiguity was removed.

OUTCOME

Proposals will be brought forward to amend the TJL to remove any ambiguity in the TJL suggesting that an LLC cannot be a trustee.

(c) One respondent (the Director- General of the International Trust Arbitration Organisation (IATO)) responded only to this part of the Consultation. The ITAO is "an independent body promoting ADR for fiduciary arrangements in Commonwealth jurisdictions". He suggested that the TJL should be amended to permit the arbitration of trust disputes and pointed to developments in the Bahamas and certain other jurisdictions.

It is noted that the subject of arbitration in a trusts context was discussed in the previous Consultation Paper on amendments to the TJL at Section 4. The particular question under consideration was whether or not legislation should be enacted so as to render an arbitration clause in a trust instrument binding on a beneficiary by statutory force and without the consent of the beneficiary. However, arbitration more generally was discussed with it being noted that if parties to a dispute which involves a trust wish to refer that dispute to arbitration, there is nothing to prevent them agreeing to do this. Nor is there anything to prevent a settlor and/or trustee including arbitration provisions within a trust deed to which they are party, and which could be enforced as between them in the normal way. One of the key advantages of arbitration is seen as the ability to resolve trust disputes away from the glare of publicity and to maintain the privacy of the trust arrangements which are often family arrangements which would otherwise not be revealed to the world. The Response Paper stated that "*The clear majority of respondents was unaware of any demand for arbitration and was not supportive of the introduction into statute of any provision directed at making an arbitration clause in a trust instrument binding on a beneficiary who was not*

involved in the decision (save as may be directed by the court). It was considered that the option to agree to arbitration was already available to anyone involved in a dispute. So also was the option of mediation. Whilst the argument that a beneficiary of a trust is essentially benefitting from a gift and thus should abide by any conditions attached to the gift is acknowledged, statutory intervention to make a clause binding upon beneficiaries without their input was generally considered a step too far."

OUTCOME

The Working Group was not aware of any reason to change this approach. Therefore, it is not proposed to make any changes to the TJL at this time.

CONCLUSION

The Government thanks all respondents to the Consultation Paper for their responses and comments which have all been considered carefully when deciding on the amendments to be proposed. Government will be lodging the proposed amendments to the TJL shortly.

The Government is also most grateful to the members of the Trusts Law Working Group and Sally Edwards, at Jersey Finance, for their considerable input into this work.