

Proposed Amendments to the Trusts (Jersey) Law 1984: Response and Policy Paper

SUMMARY OF CONSULTATION

On 11 April 2016, the Chief Minister's Department published a Consultation Paper on proposed amendments to the Trusts (Jersey) Law 1984 (the "TJL84"). The Consultation was open from 11 April to 4 July 2016.

Topics covered included:

1. The need for a beneficiary at all times during the existence of a trust
2. The rights of beneficiaries to information
3. Reservation of powers by a Settlor
4. Arbitration provisions
5. Trustees self-contracting
6. Confirmation of the appointment of a corporate trustee post-merger
7. Extension of indemnity provisions
8. Retention and accumulation
9. Presumption of lifetime effect
10. Variation of trusts
11. L \acute{e} gitime
12. Other

OVERVIEW OF CONSULTATION RESPONSES

Responses were received by the Government of Jersey and Jersey Finance Ltd from a number of law firms, the Jersey Association of Trust Companies, a limited number of trust companies and individuals, and the Chancery Bar Association. In total there were 21 responses although certain of the respondents focussed their responses

only on specific sections of the Consultation Paper. Most respondents supported clarification of any uncertainty as to the provisions of the TJJ84 with a recognition that the reputation and integrity of the law relating to trusts in the island was key to the continued growth and stability of the finance industry. There was broad agreement on a number of the proposals (including that certain steps should not be taken) but in relation to certain other proposals there was a lack of sufficient consensus to support taking forward changes at this stage.

GOVERNMENT RESPONSE TO CONSULTATION

As noted in the Consultation Paper, the trusts industry in Jersey offers a sophisticated product and a high level of service to a worldwide body of clients, making Jersey the trusts jurisdiction of choice. The TJJ84 is not, and was not intended to be, a codification of the law. The Government is conscious of the need both to preserve the integrity and reputation of the TJJ84 and also to keep it under review in the context of evolving industry practice and developing jurisprudence to ensure that there is maximum flexibility for clients within an appropriate and legitimate framework. The various amendments discussed within the Consultation Paper drew on the work of the Jersey Finance Trusts Law Working Group (the "Working Group") made up of leading industry practitioners. The responses to the consultation and the wider policy considerations have also been discussed and developed with the Working Group and the Government is most grateful to the members of the Working Group for their input.

In summary, the Government intends to make the following changes to the TJJ84:

- reworking of Article 29 dealing with the provision of information to beneficiaries;
- a clarification of certain of the provisions relating to the reservation of powers by a settlor;
- extension of the indemnity provisions in Article 34 to cover lifetime distributions and also to enable individual officers and employees to benefit from the indemnities and to permit them to directly enforce them in certain circumstances;

- widening of the options as to accumulation and distribution of trust income with the default position being the retention of income in its character of income;
- introduction of wording to confirm a presumption that unless specified otherwise, a trust will take immediate effect on the property vesting in the trustee; and
- limited widening of the power of the court to vary a trust where it is not possible to find or consult all adult beneficiaries.

The Government will continue to review the issues arising as to the need for beneficiaries at all times during the existence of the trust and may decide to introduce further amendments in this regard in accordance with such review.

Respondents broadly agreed that changes to the TJL84 in respect of arbitration, trustees contracting with themselves in different capacities, and court variation (save as set out above) should not proceed.

Given the strength of the response to this particular section of the Consultation Paper, the Chief Minister's Department intends to liaise with the Legislative Advisory Panel to issue a Consultation Paper in respect of the current *légitime* (or forced heirship) provisions in order to gauge the appetite in the broader community of Jersey for change. It is not intended to make any stand alone change to the TJL84.

Changes pertaining to the confirmation of the appointment of a corporate trustee post-merger will be progressed by way of amendment to the CJL91.

Finally, certain of the responses to the Consultation Paper suggested that the Government should consider the development of an alternative trusts regime similar to the Cayman Islands STAR Trust. The Government intends to explore this option as a separate project for consideration through further consultation.

Summary of responses to the Consultation Paper on proposed amendments to the Trusts (Jersey) Law 1984

The Consultation Paper set out proposed amendments to the Trusts (Jersey) Law 1984. There was consensus around many of the proposals, but on some topics there was a divergence of views. This document summarises responses to each section of the Consultation Paper and confirms the changes that will be incorporated into the seventh amendment to the TjL84.

Sections and questions are numbered as per the original consultation which should be read alongside this document, together with a copy of the TjL84.

Section 1: The need for a beneficiary at all times during the existence of a trust

Question 1 Should the Government of Jersey take steps to place beyond doubt the position as to the need for a beneficiary at all times during the existence of a trust?

Question 2 If so, please comment on the above proposal. If you consider that there are alternatives, please state what they are.

Question 3 How should the Government of Jersey consider addressing the policy question in respect of the potential for there to be a trust with an indefinite trust period and class of beneficiaries without any existing or ascertained members at the time of creation and which class does not close for as long as the trust subsists?

The cases discussed in the Consultation Paper were generally seen as being correctly decided: the issue in each was that there was no way of knowing who the beneficiaries might be at any time at all as, by mistake, neither individuals nor classes were specified. This was not the same as having a situation where the beneficiaries are specified as members of a class albeit that no members of that class may yet be in existence and may not come into existence for a certain time period. The first situation arose as a result of negligence and at least one respondent considered that remedies were already in place to resolve this, namely to sue the person responsible for the error and/or to seek rectification of the trust deed.

The Government recognises the importance of reducing any perceived uncertainty and notes the point made by a respondent who highlighted the increasingly international/global and competitive environment in which Jersey's financial service providers are operating. Whilst the overall response was that amendment was not strictly necessary it being clear from the TJL84 as currently drafted that it is '*not necessary for the beneficiaries to be in existence at the time of the creation of the trust provided they become ascertainable during the trust period.*', it might, however, be prudent to confirm the situation to remove any such perceived uncertainty.

The broader question of who should hold the trustee to account if there is no beneficiary at a particular point in the lifetime of a trust troubled certain of the respondents with one respondent considering that this concern was so fundamental, such a situation should not be permitted. Another respondent, however, acknowledged that such situation can arise in any event, for example, where there are only minor beneficiaries or, where beneficiaries are unaware that they are beneficiaries in certain situations. The Government notes the link between this section and the proposals discussed in Section 2 of the Consultation Paper (the rights of beneficiaries to information). A potential solution proposed by respondents and mentioned in the Consultation Paper is to have an enforcer or other third party with responsibility for overseeing the trustee. The option of adopting a regime akin to that of the STAR trust in the Cayman Islands (where, most pertinently for these purposes, an enforcer appointed pursuant to the trust deed or by court order rather than a beneficiary has the right to enforce the trust) was canvassed as an alternative by at least one respondent. The Government intends to consider this option further with the Working Group in light of considerations under Section 2 of the Consultation Paper.

In respect of question 3, one of the industry body respondents concluded that the amendments made to the TJL84 by the Trusts (Amendment No. 5) (Jersey) Law 2012, which made it clear that a non-charitable purpose trust, the purpose of which could simply be to hold or own property indefinitely, is permitted, paved the way for a trust with an indefinite trust period and a class of beneficiaries without any existing or ascertained members at the time of creation and which class does not close for

as long as the trust subsists. In any event, it was said that in reality, it was unlikely that settlors would wish to put assets of real value out of use or enjoyment for an indefinite period. Another respondent considered that the fact that trustee fees would have to be paid would be a disincentive to this situation in practice. Alternatively, there could be a limit on how long the period when there was no beneficiary (or any alternative person to enforce the trust) could continue, particularly given there is no perpetuity period in Jersey (unlike in England and Wales).

One of the industry associations suggested that a proposal to permit the only beneficiaries being defined as a class comprising those added in exercise of a power by the trustees (see para 1.12 of the Consultation Paper) was a step too far and that such a trust would be too uncertain. It was not aware of any demand for such a trust. The Government is not proposing to make any amendments to this end.

One respondent commented that any perception that Jersey was permitting the development of a 'money box structure' (where the trustee holds assets for an indefinite time without knowing for whom he is holding them) would be unattractive. The Government agrees that any amendment (and the TJJ generally) must not provide any scope for potential circumvention of the various monitoring and reporting requirements in connection with money laundering and other international regulatory standards.

Conclusion

The Government will consider the responses to the Consultation Paper further with the Working Group before confirming its proposals in this regard.

Section 2: The rights of beneficiaries to information

Question 4 Should there be a full iteration of the principles of disclosure or do you consider that Article 29 should be reworked so as to provide greater clarity and in particular to remove the double negative? The alternative is that, given the case law on the subject thus far, the provision should be left untouched.

Question 5 Should the rights of a beneficiary to obtain information about a trust be restricted in statute or by way of election in the trust deed if so required? What is the minimum level of information that must be given to beneficiaries to maintain trustee accountability?

Question 6 Alternatively, is there another approach that should be considered?

Question 7 Is it appropriate to offer an opportunity for a settlor to transfer the rights to information to a third party? If so, should there be a restriction on who that third party should be – for example, that they are a Protector, or an Enforcer or acting in some fiduciary capacity?

All but one of the respondents who commented on this section, clearly agreed with the proposal to rework Article 29 and in particular to remove the double negative which was seen as confusing. Many respondents also agreed that the Guernsey provisions (with some modifications) could be a convenient starting point for any amendment and it was noted by one respondent that they had not been able to locate any adverse market commentary in relation to these sections since their introduction. A full iteration of the principles of disclosure was not seen as either necessary or desirable with more than one respondent noting that the TJL84 was intended to be a framework and not a codification.

Respondents were, not unexpectedly, more cautious as to the appropriateness of restricting the rights of a beneficiary to information. Whilst '*Settlor autonomy should be respected and it may be legitimate to restrict access to information in particular cases...*', said one respondent, '*...there is clearly a tension with the need to hold a trustee accountable*'. Many respondents reiterated that the duty of trustees to account to beneficiaries is fundamental to the concept of the trust and part of the 'irreducible core' of obligations as per Armitage v Nurse [1997] EWCA Civ 1279. It was key to the recognition of trusts across jurisdictions and care must be taken that a trust is not later found to be invalid in Jersey – or elsewhere - due to it having such extensive restrictions on the information to be provided to beneficiaries.

However, there was a general acknowledgement that there might be valid reasons for limiting the information provided to beneficiaries as highlighted in the Consultation Paper. One industry group confirmed that it would be helpful in their view to clarify how far the terms of a trust can go in restricting rights of beneficiaries to information given that such limits are often requested by clients and their advisers when creating trusts for completely legitimate reasons (such as the age of beneficiaries). The three trust company respondents echoed this view. One respondent was aware of certain ultra-high net worth clients who, concerned how their children would behave knowing they were likely to benefit from very significant trust funds, were intending to move their Jersey trusts to another jurisdiction where it was permissible not to give information to the beneficiaries. Another respondent considered that there might be an age limit of say 35 years of age after which absent other factors (such as criminal activity or family security risks) disclosure must be made.

However, in terms of a minimum level of disclosure, the general view was that this should not be stipulated but might be put as '*disclosure of the state and amount of the trust property*' (following the Guernsey example) without further specification. Alternatively, the current definition of 'accounts' as set out in case law could remain as the relevant level of minimum disclosure. One respondent suggested that the relationship (for these purposes) was akin to that between a company and its shareholders and a beneficiary should be entitled to the same information as a company shareholder, with an obligation on a trustee to prepare annual accounts to be made available to the beneficiaries on request. Most respondents who considered it believed that a beneficiary must always have the right to apply to the court if the level of information provided was considered insufficient.

The response to the proposal that a third party should be appointed to exercise the rights of a beneficiary in this respect was mixed. The industry association was not supportive of this proposal being introduced in Amendment No. 7. Whilst the principle was seen as potentially helpful and some of their members were keen to see the introduction of a similar scheme to the STAR or VISTA product found in Cayman and the BVI respectively, this was seen as a significant project in its own

right which should be separately investigated, with it being imperative that the strength of the existing trust concept is not undermined. Another respondent warned that *'flexibility of drafting/structuring trusts is important ... but so too are the reputation and integrity of Jersey trusts'*. One respondent wondered how assiduous a third party might be in carrying out their functions especially if nominated by and linked to the settlor in some way. In addition what was the duty of the third party if a breach of trust on the part of the trustee was identified?

However, a number of respondents considered that the proposal had merit if limited to specified persons such as an Enforcer or Protector who occupied a fiduciary role. One trust company respondent pointed out that there was already an issue of who holds the trustee to account if the beneficiaries are all minors, or indeed if the beneficiaries are not actually aware that they are beneficiaries of a trust. Two respondents in fact raised this latter point questioning whether or not there is any requirement on a trustee to inform a beneficiary of their status as a beneficiary or to provide information on the trust even if they are unaware of its existence and are in fact unlikely to benefit in the foreseeable future (for example if they are discretionary objects).

Conclusion

The Government intends to bring forward amendments to rework Article 29 to remove the double negative and to reflect the current case law. A beneficiary's right to information is always subject to the overarching discretion of the court. Furthermore, it can be restricted or enlarged by the terms of the trust (save that a complete restriction as to the provision of the documents referred to at the current sub-paragraph (d) – essentially the accounts – will not be valid). Any restriction must be considered against the principles of accountability. The trustee has a discretion to refuse disclosure if it is considered to be in the best interests of the beneficiaries as a whole with a beneficiary able to apply to the Royal Court for disclosure if he or she considers the level of information provided is insufficient. There is no intention to specify with precision the principles of disclosure or what must be disclosed even if that were possible.

For the time being the Government is not minded to pursue the proposal for a third party to have a duty to enforce the trust on behalf of the beneficiaries. However, as certain of the responses to the Consultation Paper indicated that the Government should look at the development of an alternative trusts regime similar to the Cayman Islands STAR Trust, the Government intends to further explore this option as a distinct project during 2017, for consideration through further consultation.

Section 3: Reservation of powers by a Settlor

Question 8 In respect of each of the above amendments, do you consider that the amendments enhance the TJL84 as currently drafted and should be made in the suggested or similar form?

Question 9 Do you agree with the suggestion that no amendments should be made to certain provisions as set out above? If not, what amendments should be made and why?

Question 10 Do you agree that the terms of the trust should be able to expressly specify that reserved powers are held on a personal rather than fiduciary basis?

Various amendments were proposed in the Consultation Paper in order to clarify and enhance Article 9A of the TJL84 which deals with powers reserved to the settlor of a trust. The proposed amendments were set out in ten sub-paragraphs some of which attracted more comment than others and so are taken separately below. Reference should be made to the Consultation Paper for the detail of the proposals.

Certain respondents commented that the settlor of a trust may provide for the equivalent of many of the provisions in the drafting of the trust deed. This point is accepted but is not a complete answer and other of the respondents considered that the proposals, in general, were a helpful clarification and should be pursued, thereby enhancing the TJL84.

(i) Article 9A(1)(a) insertion of the words '*the whole of the beneficial interest*' and (b) insertion of the words '*or all*'.

Many of the respondents pointed out that reservation of '*the whole of the beneficial interest in the trust property*' could potentially be seen as reserving near absolute ownership of the trust assets to the settlor. Such a trust could be seen as illusory in other jurisdictions. The Government is keenly aware of the need to balance the opportunity for a Settlor to reserve certain interests and powers with the need to preserve the effectiveness of a trust and its basic concepts. Accordingly, the Government will not proceed with the amendment to sub-paragraph (a).

The comments directed to the confirmatory amendment to sub-paragraph (b) were positive and the Government intends to proceed with this clarification. These amendments are designed to strengthen the position of a trustee who holds assets outside Jersey but the amendments themselves obviously cannot prevent a challenge in that foreign jurisdiction.

(ii) Widening of the definition of 'corporation' as referred to in Article 9A(2)(c).

Few respondents dealt specifically with this amendment but those who did supported it. One industry body suggested the addition of the words '*or directly or indirectly*' after '*wholly or partly*' to allow for a trust structure with multiple layers. The Government accepts this additional point and, subject to the comments of the Law Draftsman, will proceed with an amendment to reflect this position.

(iii) Article 9A(2)(f) - relating to the power to appoint or remove an investment manager or investment adviser - insertion of the words '*including any person acting in relation to the affairs of the trust or holding any trust property*'.

The general principle was agreed, but two respondents cautioned against use of the word 'including' which might lead to the unintended effect of expanding the range of persons who should be treated as an investment manager. Furthermore, a person 'holding any trust property' could impinge upon the definition of trustee in Article 2 of the TJL84 and accordingly requires consideration. An industry group recommended the addition of wording to reflect the multi-layered structuring of many trusts. Subject

to the comments of the Law Draftsman and adjustment in the wording, the Government will proceed with this amendment.

(iv) Article 9A(2)(g) - insertion of power to change the forum for the administration of the trust or to determine the exclusive jurisdiction of the court.

Respondents were troubled by this proposal noting the Privy Council's observation in Crociani & Ors v Crociani & Ors [2014] UKPC 40 that 'forum for administration' was an opaque term without a well-established technical significance; its introduction into the TJL84 would, therefore, (they said) lead to ambiguity rather than clarity.

A further observation was that the practical and unwanted effect of introducing a power for the Settlor to change the exclusive jurisdiction clause was that the Royal Court of Jersey might end up deciding a case on the basis of affidavit evidence of the law of another jurisdiction and a foreign court might have to conduct a similar exercise. It was also not advisable to imply in any way that the Royal Court was bound to give effect to an exclusive jurisdiction clause which position would be inconsistent with that adopted in Crociani [ibid]. Two respondents were concerned that the effect of an exclusive jurisdiction clause in a trust was often not sufficiently understood by advisors and/or settlors and any amendment would create rather than resolve uncertainty. Furthermore, such a power could lead to forum shopping which might be seen as aggressive.

In light of the responses received, the Government does not intend to proceed with this proposal.

(v) Article 9A(3) – confirmation that a trustee complying with the exercise of a power by another power holder is not liable.

There was a limited response to this particular proposal. Whilst certain of the respondents considered that this should be in the law, others thought it was unnecessary given the current wording already protecting a trustee against a breach of trust. Two law firm respondents noted the link and potential contradiction between the proposed confirmation of no liability and the retention of residual duties owed by the trustee in relation to reserved powers (see below at subsection viii). One

questioned whether it was right that there should be no liability if the trustee was complicit in a breach or a fraud on a power; surely, the trustee had residual duties and could be liable for breaching these. However, the other law firm considered it at least arguable that there is already no obligation on the trustee to monitor the exercise of reserved powers or supervise the actions of a powerholder.

Given the protections already in place and the differences of opinion, the Government has decided not to pursue this amendment at this point in time.

(vi) New Article 9A(2A) – confirmation that the holding of a reserved power or interest does not of itself constitute the holder a trustee

The five responses that dealt with this proposal all agreed with it. The Government therefore proposes to pursue the amendment.

(vii) Personal or fiduciary nature of reserved powers

There was some difference of opinion between respondents over whether or not it should be permissible for it to be specified in the trust deed whether a reserved power is personal or fiduciary in nature, with the trust company respondents and their industry group in particular considering that the trust deed should be able to specify that powers were held on a personal basis. The further observation was made that this could be done in a trust deed already so that change was not necessary. One respondent considered that there could be inconsistency in the current position where, for example, a power to appoint a trustee in the hands of a trustee is a fiduciary power but in the hands of a power holder is a personal power and another suggested that it might be appropriate to limit the powers which could be prescribed as personal powers in a trust instrument to exclude those which the courts have found to be fiduciary in nature. One respondent was concerned that the unpredictable exercise by a power holder of what would ordinarily be fiduciary powers would be detrimental to the standing of Jersey as a leading trust jurisdiction. Overall, the view was that it should be possible to specify the nature of the power in the trust deed but that any such specification should be subject to ultimate determination by the court on the facts in a particular case and that it was undesirable

to provide a legislative presumption one way or another. As it was already permitted, there was no need to amend the legislation.

The observations of one industry group respondent are noted namely that it is not entirely clear what is meant by describing a power as fiduciary in nature. In Centre Trustees Ltd v Pabst [2009] JRC109, the court said that it meant only that the powerholder was '*not under any obligation to consider from time to time whether or not to exercise the power*'. They argued that it would actually be necessary to recognise three classes of powers – beneficial, limited and fiduciary [see Lewin paras 29-015 – 018].

The Government does not propose to introduce a presumption that powers are held personally (despite the position in Guernsey). The Government takes the view that it is for the court to determine whether a power is held on a personal or fiduciary basis based on the express wording in the trust deed and all other relevant circumstances on a case by case basis. The nature of the power can be specified in the trust deed but it is to be noted that any such specification will always be subject to the order of the court and it is considered highly unlikely that the court would find a power to be personal if such a power is typically considered to be fiduciary in nature (such as the power to appoint a new trustee), despite any assertion in the trust deed. The Government is conscious that it may well be considered detrimental to the proper protection of the beneficiaries and efficient operation of the trust as well as the reputation of Jersey more generally if powers normally considered to be held on a fiduciary basis are held otherwise (subject to any other determination of the court).

Accordingly the Government will not be making any amendment in this regard.

(viii) Nature of duty of trustee in connection with exercise of reserved powers

Most of the respondents were of the firm view that, under accepted principles of trust law, there probably were limited residual duties on the trustee and that it was not appropriate to remove the residual duties of the trustee as a matter of course, albeit that a Settlor might choose to limit them within a trust deed. However, one particular law firm (as mentioned above) submitted that it is arguable that there is already no obligation on the trustee to monitor the exercise of reserved powers or to supervise

the actions of a powerholder. They believed that when inserting Article 9A(3) into the TJL84, the legislature intended to create a special regime for reserved powers pursuant to which the trustee has the duty to check that the correct person was exercising the power and that the direction was within the ambit of the given power, but no duty to undertake the ongoing monitoring of events following the implementation of a valid direction. They noted that Article 9A has never been construed by the court. They argued that the law should be amended to confirm that no residual duty exists, thereby clarifying the position and avoiding any chance that a trustee adopts a defensive position which might be reflected in the level of fees charged.

It is noted that this is not simply a question for Jersey but a question for all jurisdictions with reserved powers regimes. Article 9A(3) assists and of course if the trustee is in doubt the trustee can apply for directions from the Court under Article 51.

Given the majority of respondents did not favour legislating to remove any residual duties which under accepted principles of trusts law probably exist, the Government does not intend to make any amendment in this area. The Government is cognisant of the fact that the TJL84 is not a codification of the law and the option for the trustee to apply to the court for directions means that the law is effective in this area.

(ix) Property in trust subject to a reserved power or grant of power is not part of settlor's estate.

Only a few of the responses dealt with this issue and save for one comment that it might be beneficial on a 'belt and braces' basis, all agreed that clarification on this issue was unnecessary. Therefore, in view of the consultation responses, the Government does not propose to proceed with an amendment.

(x) Cessation of power on death, incapacity or bankruptcy of powerholder

Again, not all respondents commented on this proposal. Of those that did, the majority supported the proposed insertion of a presumptive provision (rebuttable by express language to the contrary) that reserved powers cease to have effect in the above circumstances. One industry body expressed the concern that separate

considerations arise on the death of a power holder and on his or her bankruptcy. Whilst creditors might wish to retain any power to revoke the trust, the Government is of the view that any attempt by creditors to revoke a trust should be made through an application to the court which can consider the circumstances on a case by case basis. The Government intends to make the change as proposed.

Section 4: Arbitration

Question 11 Are you aware of a demand for arbitration of trust disputes to be introduced into the Jersey legislation?

Question 12 Do you support the conclusion reached by the Working Group that, on balance, provisions should not be inserted into the TJL84 at this time so as to render an arbitration clause in a trust instrument binding on a beneficiary?

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. One respondent (a trade association) reported infrequent requests for the inclusion of arbitration provisions within trust deeds most typically from jurisdictions such as Switzerland where arbitration is commonly used. Another respondent noted possible interest from some UK lawyers potentially due to a perception of an opportunity for greater involvement in the process by UK lawyers as opposed to Jersey lawyers. Feedback from other jurisdictions (albeit limited in scope) seemed to suggest that the demand for arbitration in those jurisdictions was in reality limited.

Given the response, and for the reasons set out in more detail in the Consultation Paper, including crucially the very able local judiciary and practitioners in this area

and also the importance of the continued development of an already widely recognised body of case law on trusts, the Government maintains its view that the introduction of provisions making an arbitration clause binding on a beneficiary is not necessary at this time.

Only one respondent (a trade association) specifically commented on the privacy point raised in the Consultation Paper being firmly supportive of any move to enable greater protection of confidential matters for parties making applications before the court. The Government considers that the reporting of cases is properly a matter for the courts. The Government is confident that the judiciary is cognisant of the importance of this issue to the parties and that the court will make orders for a case to be heard in private or for a judgment to be anonymised on application of counsel in an appropriate case. If it is still felt that further steps need to be taken to enable greater protection of confidential material before the court, then the Government will consider opening a dialogue with the relevant authorities to discuss matters further.

Section 5: Trustees self-contracting

Question 13 Do you consider that Article 31 should be amended as proposed?

The proposals are set out in more detail in the Consultation Paper but in essence what was proposed was (i) to remove any ambiguity over the retrospective nature of Article 31 (ie whether Article 31 as it is currently drafted applies to contracts which were entered into before as well as after Amendment No. 5 came into effect); and (ii) to expressly permit a trustee to contract with itself in different capacities (ie as an individual/company and as a trustee).

It is noted that earlier amendments already confirm that a trustee may contract with him/herself where the trustee is contracting in their capacity as trustee of different trusts.

Many of the respondents, such as the Chancery Bar Association, highlighted the crucial importance of the common law prohibition on self-dealing, as recognised both in England and Wales, and as part of Jersey law by the Royal Court. The rule against

self-dealing prevents a trustee from purchasing trust property or entering into other transactions under which the trustee obtains a benefit. Any such transaction can be set aside as of right on the application of a beneficiary. Concern was expressed if there was any intention to abolish this and the Government can confirm that it has no intention to undermine or to abolish this fundamental principle.

Whilst more than half of the respondents in fact agreed with the proposed amendment (on the basis that there was no abolition of the self-dealing rule), other respondents expressed strong concerns and queried whether there was a need for amendment at all due to the limited number of circumstances in which it might legitimately come into play as against concerns over how the provision might be misused and the potential for conflicts of interest. They were concerned that the provisions of Articles 21 and 23 would not be sufficient to prevent a trustee intent on profiting themselves from so doing and one respondent pointed to the case of Stock v Pantrust Intl [2016] JRC 021.

Taking into account these concerns, the Government is of the view that there are not enough situations where the new provision would be useful to justify an amendment which might lead to potential difficulty.

Nor does the Government intend to make any alteration to the current position in respect of the retrospective effect of Article 31. There is no clear evidence that this is something that is causing widespread difficulty and therefore an amendment is not merited.

Section 6: Confirmation of appointment of a corporate trustee post-merger

Question 14 Do you consider that the TJL84 and CJL91 should be amended to introduce confirmatory wording to put beyond doubt the point that the newly merged corporate body continues as the validly appointed trustee of a particular trust without further action?

The general perception of respondents was that amendment was not strictly necessary but as certainty and clarity were welcome all those respondents who

made comment on this section, supported putting the matter beyond doubt by way of the amendments.

One respondent (a trade association) considered it desirable if the amendment could cover both Jersey and foreign law trusts.

The same respondent suggested it might be preferable for any clarifications to, in fact, be placed within the CJL91 rather than the TJL84, relying on Dicey & Morris (15th Ed. Vol 2 para 30-011) which indicates that the question of whether a corporation has been amalgamated with another corporation is determined by the law of its place of incorporation. In this circumstance, the provision could also usefully confirm that other fiduciary offices held by trust companies, such as executorships, would also transfer in accordance with the merger provisions. A second respondent (trust company) considered that (wherever the provision was) it should be wide enough to include other fiduciary arrangements such as escrow arrangements and nomineehips.

Question 15 Do you consider that the CJL91 should be amended to resolve any potential doubt as to (i) the need to give notice to creditors who have dealt with the merging entity solely in that entity's capacity as trustee? and (ii) the need for the corporate trustee planning to undertake a merger to give notice to itself?

All respondents agreed that it should not be necessary for notice to be given to creditors who dealt with the merging entity solely in that entity's capacity as trustee nor for a corporate trustee to give notice to itself. It was also suggested that it should be made clear that it is not necessary to give notice to beneficiaries or to any other person who is owed duties under trusts of which the corporate trustee is trustee..

Question 16 Are there any other points that need clarification related to the merger of a corporate trustee with another corporate body?

No other points were raised.

Given the support for the amendments and the comments set out above, the Government is minded to make the amendments as proposed (subject to drafting amendments of the Law Draftsman) at paragraphs 6.3 and 6.4 of the Consultation

Paper but to make these amendments to the CJL91. Furthermore, this will give the opportunity to add in to the CJL91, wording to the effect that any licence held by either of the merging companies shall not pass to any merged company unless the permission of the relevant licensing or regulatory authority is granted.

Section 7: Extension of indemnity

Question 17 Should Article 34(2A) of the Law be extended to permit a former trustee's officers and employees to enforce an indemnity in their own right?

Many respondents pointed out that it was standard practice in a deed of retirement and appointment to extend a retiring trustee's indemnity to the trustee's officers and employees. Most supported the proposal that Article 34(2A) should be extended to permit direct enforcement by those individuals as long as any amendment did not inadvertently create liabilities where there were none before, and did not make it compulsory to include them.

One respondent (law firm) was firmly against the proposal believing that careful thought and negotiation followed by appropriate drafting into the terms of an instrument of appointment, retirement and indemnity was sufficient.

Several of the respondents raised the point that some of the individuals involved in the day to day administration of a trust may in fact be employed by a service company rather than the trustee directly. They were of the view that these individuals should also be covered by the extension of the indemnity.

In addition, it seemed to be accepted that it was not practical to name all of the individuals who might be covered by the indemnity so that the adoption of a similar provision to Section 1(3) of the English Contracts (Rights of Third Parties) Act 1999 was advisable (providing for a third party who is '*expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.*').

Question 18 If so, should the trustee who employed them be appointed to act as trustee of the indemnity for those individuals?

Whilst one respondent (trade association) did not consider this to be necessary if an individual could enforce the indemnity, most respondents thought it was appropriate for the former trustee to have the primary responsibility for enforcement of any indemnity not least as many individuals might not have the financial resources to bring a former trustee to account, or a trustee might not be located in Jersey. This would also avoid the concern expressed by one respondent that the current trustee would have to check that any individual was indeed a former employee (or other entitled individual) and thus entitled to rely on the indemnity. However, should a trustee fail to act or no longer exist, an individual should be able to enforce an indemnity directly against a former trustee.

A second trade association respondent was reluctant for the trustee to be 'trustee' of the indemnity as it could prevent the winding up of a trustee company with the consequent costs of keeping it in existence. The Government is of the view that the trustee should usually be appointed to act as the trustee or representative of all individuals in respect of the benefit of the indemnity save that where the trustee no longer exists or refuses to act, direct enforcement should be available. In that latter case, one respondent suggested it would be preferable if a representative was appointed to represent the interests of all the individuals in any court proceedings (akin to the current Rule 4/4 of the Royal Court Rules 2002).

Question 19 It may be that there are others, in addition to a trustee's officers and employees, in respect of whom this same issue of direct enforcement might arise. Are there others to whom you think this direct enforcement provision should be extended?

The predominant view of respondents was for the adoption of the phrase 'Indemnified Persons' as defined in the STEP Precedent (namely '*the Retiring Trustee and its successors, its directors, officers and employees and each of them and the respective heirs, personal representatives and estates of such directors, officers and employees and each of them.*')

One respondent suggested that any indemnity should also be extended to others holding fiduciary powers including enforcers and protectors.

Question 20 Should the provisions be extended to include indemnities provided in respect of distributions made during the lifetime of a trust?

Although it was not so clear cut, the majority of respondents agreed that the extension should be applicable to indemnities provided in respect of distributions made during the lifetime of the trust, which was said by more than one respondent to, in any event, reflect industry practice.

Conclusion

Given the general support for the proposals, the Government will proceed to make the amendments required in order to make it possible for individual officers and employees (and all those encapsulated by the STEP definition of 'Indemnified Persons' together with service company employees) to benefit from indemnities from a new trustee (including where an indemnity has been extended or renewed by subsequent trustees) and to have direct access to the court to enforce such indemnities as necessary. In most cases it will be appropriate for the trustee to act as representative of the Indemnified Persons.

Furthermore, the Government is minded to extend the indemnity provisions to cover distributions made during the lifetime of the trust (and on termination).

Section 8: Retention & Accumulation

Question 21 Do you agree that it is desirable for Article 38 to be amended to widen the options for the trustee in relation to accumulation and distribution of income?

Question 22 Do you agree that the default position should be the retention of income in its character as income?

Question 23 Do you agree that the amendments (if adopted) should have retrospective effect?

Question 24 Do you agree that Article 38(5) should be amended to clarify that the power of advancement may be exercised for all of the trust property rather than only part of it?

All respondents who responded to this section agreed with the suggestion that the options for the trustee in relation to accumulation and distribution of income should be widened. Also, given the importance for tax purposes that income can remain characterised as income, that the default position (ie where the trust deed is silent) should be the retention of income in its character as income.

There was a difference of opinion as to whether or not any amendments should have retrospective effect. The Government is cognisant of the usual concerns in bringing in an amendment with retrospective effect and notes the concern of two respondents that there might be unwelcome tax issues or unexpected non-Jersey tax effects for certain existing trusts if this change was applied to trusts already in existence at the time of amendment.

All respondents who responded to this section agreed with the proposed amendment to Article 38(5).

Accordingly, the Government will make the proposed amendments but does not propose to give them retrospective effect.

Section 9: Presumption of lifetime effect

Question 25 Are respondents in favour of introducing wording similar to that found in the Cayman statute in order to put the matter beyond doubt?

The clear majority of respondents supported the introduction of wording to confirm the presumption of lifetime effect, welcoming the greater certainty this would bring. One respondent saw no need for such confirmation and another did not support the proposal believing it was a matter of fact in each case whether a trust was validly established or not.

Given the overall support for this clarification, the Government intends to proceed as set out in the Consultation Paper.

Section 10: Power of the court to vary a trust

Question 26 Do respondents consider that it would be beneficial to provide the court with wider powers to vary a trust?

All but one of the law firm respondents were of the view that it was not desirable to provide the court with wider powers to vary a trust as outlined in the Consultation Paper. Although this might, in theory, be useful in situations of employee benefit trusts, lost beneficiaries or where there are multiple charitable default beneficiaries, for example, the concern was expressed by more than one respondent that any perceived benefit was outweighed by the risk of undermining the Article 9A firewall provisions particularly in matrimonial cases. The legitimate expectations of the settlor were also raised: he or she expected the trust to be administered according to the terms of the trust which he had settled. Is it right that the Court could enforce a variation that the settlor had never contemplated? More generally, the views of the beneficiaries are useful for the court when coming to any decision and it would be unhelpful to alter this position.

Only one law firm considered that it was a positive step to give the court greater powers of variation in order to provide the court with wider options and to come to the most equitable solution in difficult circumstances. The responses from the trust company providers were mixed with at best only muted support for a widening of powers. One of the industry associations commented that the Bermuda provisions discussed in the Consultation Paper might not be a satisfactory model and, indeed, the Government takes the view that their long term efficacy is debatable, all cases having been decided at first instance without contrary argument.

Since the publication of the Consultation Paper, the Government has become aware of a paper presented by Elspeth Talbot Rice QC, Robert Avis and Timothy Sherwin of XXIV Old Buildings, London, specialist barristers in trusts law including in relation to offshore work, at the annual XXIV International Trust Litigation conference in Geneva in September 2016. The paper looked at the English court's jurisdiction to

vary a trust and developments in Bermuda and also mentioned the recent Jersey Consultation Paper. The conclusion reached was that extending the power of the court generally to vary a trust is not a prudent course to follow. However, there might be an argument for a limited extension of the court's current power by enabling the court to provide a consent where '*it is unfeasible to find and contact all the relevant beneficiaries for their consent; or the beneficiaries' consent has been sought and is being unreasonably withheld*' and the court finds that the proposed variation is in the relevant beneficiary's best interests. The paper from Ms Talbot Rice QC highlights a recent decision of the English Court [A v B [2016] EQHC 340 (Ch); [2016] WTLR 745] on a variation application which appears to suggest that 'the interests of certain beneficiaries [could be] ignored or minimised for the sake of practicality and proportionality'. Alongside a narrow class of beneficiaries comprising members of the settlor's immediate family – who had given consent - there was a wider class of potential beneficiaries who were to be deprived of their rights to benefit as a result of the arrangement of which the variation was part. The latter were 'very remote' and highly unlikely ever to benefit. The court was prepared to assist. Whether or not this approach will be followed is not clear. As with the suggested introduction of a wider power of variation, there are, of course, similar counter arguments against introducing this limited power. Primarily, that the beneficiary's right to the peaceful enjoyment of his possessions may be infringed, that there may be an effect on the firewall (as discussed above and in the Consultation Paper) and that the legitimate expectations of the settlor may be infringed.

In light of the strong opposition to the proposal set out in the Consultation Paper from the majority of respondents, the fact that one of the respondents was in fact the Chancery Bar Association (membership of which is restricted to specialist Chancery barristers (ie specialists in trust law) in England and Wales and overseas), and following the publication of the paper from Ms Talbot Rice QC and others, the Government does not intend to obtain the advice of Counsel on the proposals.

The Government is not minded to make amendments to enhance the powers of the Court more generally to vary a trust. However, it is seen as helpful to permit the Court to provide consent to a variation on behalf of beneficiaries who the court is

satisfied cannot be found despite proper attempts to locate them or who, due to their number, it is practically unfeasible to contact, and then only if the Court determines that such variation is in their best interests. Accordingly, the Government will put forward amendments to this end.

Section 11: Légitime

Question 27 Do respondents agree with the proposed limited amendment to the TJL84 as set out above?

Question 28 Do the respondents agree in principle that the Government of Jersey should now look to reform the law relating to légitime more widely?

This section attracted some of the lengthier responses with many of the respondents seemingly seizing the opportunity to set out with some strength their belief that légitime should be abolished altogether. The significant majority of respondents who dealt with this question were firmly supportive of the immediate abolition of légitime generally. It was seen as *'not in keeping with the complexity of modern life'* and *'an anachronism in a modern society where the nuclear family is no longer the norm.'* Of the remainder one was neutral and one considered that a decision should be taken as to whether or not testamentary freedom should continue to be restricted or not and if not, the wider changes required to deal with that should be dealt with, rather than to make a piecemeal change to the TJL84 which nonetheless undermined the principle of légitime. Another considered that the approach taken in England and Wales could lead to unfairness and pointed to certain criticism of the English statute and its operation. This respondent was of the view that in this age of various family relationships, some certainty was to be welcomed and whilst some jurisdictions had done away with forced heirship regimes others had not. Another, one of only two members of the wider public to respond to the Consultation (as opposed to lawyers and trust companies) felt that on the basis of her experience, *'the freedom to behave unfairly and divisively [which would be the position she said if légitime did not exist] is not worth promoting'* and was accordingly strongly supportive of légitime continuing. On the other hand, the second individual, considered that the légitime *'provisions can have a damaging effect on family life and, more widely, on Jersey society'* and were not *'suitable for modern family life.'*

It is appreciated that many families of all types exist in harmony but some of the law firm respondents provided detailed accounts of situations they had encountered in practice which were said to illuminate the current difficulties with the *légitime* regime. For example, where a person dies leaving adult children from a first marriage and a spouse from a second marriage, the deceased cannot currently be sure of leaving the entirety of their movable estate to their second spouse as the adult children can claim their *légitime* even if they are financially comfortable or have inherited from another part of the family, and even if this causes difficulty for the second spouse.

One law firm respondent indicated that it was often the case that a testator would prepare their will(s) ignoring *légitime* and requesting that their wishes be respected.

Another difficulty cited is that children who have been estranged from their parent may still claim *légitime*, perhaps at the expense of a sibling who has spent many years caring for the parent. Nor can a parent specifically exclude a child who may be adversely affected by having a monetary legacy due to personal issues such as alcohol or drug addiction.

It was submitted that the anomaly whereby the *légitime* regime applies only to moveable property as opposed to all the property owned by a person is illogical, particularly given the fact that the value of the immovable estate in Jersey can be a significant proportion of the whole estate. It can also lead to unfairness. One example was given of a testator who had two properties – one freehold and one share transfer. The testator left one property (freehold and thus immovable estate – and not subject to the *légitime* rules) to one child ('A') and one property (share transfer and thus movable estate) to the other child ('B'). A decided to exercise their rights of *légitime* over the share transfer property and therefore ended up with the entirety of the freehold property and one third of the share transfer property.

The notable exception to the rule that a testator can leave his immovable property to whomsoever he wishes, is the concept of dower whereby a surviving spouse (or civil partner) has the right to claim life enjoyment over one third of all immovable property of the deceased at the date of death. However, one law firm respondent noted that it was extremely rare for any surviving spouse to bring a claim for dower now as most

couples tend to hold their property jointly for the survivor of each other, so there is therefore no need for a right to occupy.

One respondent also mentioned the connected Jersey law concepts of '*avances de succession*' and '*rapporter à la masse*' where an heir at law can call for any inter vivos gifts made to others (including a spouse) - call them A - to be counted as part of A's entitlement in the estate, if A wishes to take in the estate. In a situation where, for example, a husband had given substantial gifts of jewellery or valuable paintings to his second wife, a child from a first marriage claiming *légitime* could therefore make a second wife, who wished to participate in the estate, account for those lifetime gifts when her share of the movable estate was calculated.

In addition to the difficulties experienced by local residents, examples were given of potential high net worth residents either being referred to other jurisdictions which do not have forced heirship regimes (particularly Guernsey) or simply deciding not to relocate to Jersey due to this issue. Equally, feedback was received that a large proportion of current high net worth residents in Jersey were particularly concerned about the existence of *légitime* and would support a move to abolish the principle.

Most of those who responded either expressly or implicitly noted that some alternative provision was necessary to ensure that dependants were not left in need. More than one respondent referred favourably to the provisions currently in place in England and Wales, namely the Inheritance (Provision for Family and Dependants) Act 1975 (the "Act").

According to one respondent, the answer to any concern that a change to the regime would lead to a flood of cases was to look at Guernsey where since the Inheritance (Guernsey) Law 2011 law had been introduced, no cases had yet been brought.

The common view from the responses was that to abolish *légitime* in the context of the TjL84 alone might lead to unfairness as there would not be any alternative redress for an aggrieved spouse or child to pursue should a settlor place all his assets in trust thus disinheriting them. It could also be seen as discriminatory being accessible only to those with assets in a trust. Having said that at least two of the respondents considered the current position whereby *légitime* does not apply to

Jersey trusts established by non-Jersey resident settlors as unfair on Jersey resident settlors.

Conclusion

The Government welcomed the detailed comments of the respondents. Whilst the significant preponderance of responses was for the abolition of *légitime*, the Government has given consideration to the counter arguments expressed by the two respondents against the abolition, and the position more generally. The Government agrees that it would be inappropriate to make a change to the TJL84 without there being in place protective legislation to ensure that there is an alternative process in place to protect those who have been inappropriately left without adequate provision following the death of a testator.

However, given the significant response to the consultation in this area the Chief Minister's Department takes the view that the time is right to focus on this further and has therefore agreed to liaise with the Legislative Advisory Panel to issue a Consultation Paper specifically on *légitime* in order to provide an opportunity for the whole community of Jersey to comment on its retention or abolition. Should abolition be recommended thereafter, it is to be hoped that appropriate legislative amendments can be proposed without too much further delay.

Section 12: Other

Question 29 Do any Respondents to the Consultation Paper believe that any of these topics should be considered further at this time?

Respondents generally agreed that these topics should not be considered further at this time. Particular responses are given below.

(a) removal of the restriction on the direct holding of Jersey immovable property by trustees

Two of the respondents were keen for this to be explored in early course, one commenting that they were strongly in favour especially given the ability to circumvent the provision by interposing a company owned by the trustee.

The Government will consider this further but notes that to implement a change in respect of trusts alone might lead to unforeseen and unwanted consequences. Ideally this would be a part of a comprehensive review of property law.

(b) implementation of a specific 'non-charitable purpose trusts regime' (akin to the Cayman STAR regime and the BVI VISTA regime)

One of the industry associations was keen to see this pursued but equally warned that it must not undermine the strength of the existing trust concept and if adopted, should be enacted as a separate chapter in the TJL84 or as a separate law altogether. As mentioned in respect of Section 2 of this Response Paper, the Government intends to further explore this option as a distinct project during 2017, for consideration through further consultation.

(c) introduction of an express power to ratify conduct of an improperly appointed trustee

Most respondents did not comment on this proposal. One of the industry associations viewed it as worthy of consideration noting the serious problems that can be caused particularly where the power of appointment is vested in the trustee so that an entire chain of trusteeships is invalidated. The basis for the court's jurisdiction to ratify is not certain and so a general legislative treatment might be desirable.

The Government will not take further steps in this regard at this time but will review the recent case law and associated issues with the Working Group with a view to further consideration if considered necessary.

(d) Reconsideration of the language of Article 9 (in light of critiques published in peer journals)

All respondents who commented on this agreed that there should be no further change to this Article at this point in time.

(e) Insolvency and trusts

The majority of respondents did not support statutory intervention in this area preferring that the courts be left to determine the best approach in an individual case. However, one response from a Jersey advocate, strongly pressed for a statutory regime and noted the existence of winding up provisions for foundations. One of the principal questions related to the priority which should be given to claims by former trustees and as to which there are competing policy considerations. In the absence of statutory provision, this would fall for decision by the Royal Court with potentially significant impact upon the industry generally. The local industry association expressed a concern that any statutory regime might discourage the use of Jersey trusts or Jersey trustees if for any reason such provisions were perceived to be 'off market'. On the other hand, argued the advocate, the introduction of a statutory regime would be 'breaking new ground' such that Jersey would be at the vanguard of developments in this area.

The Government takes the view that it is not appropriate at this time to pursue a change in the context of the TJL84 alone. Any statutory regime might be better placed in the insolvency legislation. The Government intends to set up a Working Group to consist of the Viscount, representatives from Community and Constitutional Affairs, and other interested parties, to consider this further.

(f) Statutory lien

Although not consulted upon on this occasion, the Government has noted the conclusions of a previous consultation on the introduction of a statutory lien to cover the properly incurred expenses and liabilities of a trustee. At that time, although there was a predominantly positive response, the introduction of a statutory lien was postponed pending the coming into force of the Security Interests (Jersey) Law 2012. That law has now come into force and the Government has

also noted the two relatively recent cases of In Re Z [2015] JRC031 and Investec Trust (Guernsey) Limited v Glenalla Properties Limited & Ors [2014] 29 October 2014 (Gsy CA) in which the existence of an equitable lien in Jersey law has been confirmed.

A statutory lien has been introduced in Guernsey.

Accordingly, the Government considers it is appropriate to reflect this position in legislation and intends to instruct the Law Draftsman as follows:-

- Lien to be non-possessory and accordingly to continue to apply even after the trustee has left office and surrendered the trust property to a new trustee;
- Lien to secure the payment of authorised remuneration to the trustee and reimbursement of all expenses and liabilities reasonably incurred by the trustee;
- Lien to arise at the time the remuneration falls due or the expense or liability is incurred;
- Lien to take priority over the interests of the beneficiaries but be subsequent to other charges on the trust property;
- Lien to survive a distribution unless expressly waived;
- Lien to be defeated by a bona fide purchaser for value in which case it should attach to the sale proceeds.

It is considered that the lien should continue to attach to property that is distributed to a beneficiary as although a trustee could expressly state this when a distribution takes place, this does not necessarily protect a retired trustee as the distribution will be handled by a new trustee who may not make the requisite express statement. In terms of policy, it is considered inequitable that a retired trustee might, in this way, lose any right to be reimbursed for expenses incurred properly in the course of their trusteeship.

Questions as to the priority of the trustee's lien against other creditors and indeed between a former and current trustee remain to be determined. It is considered more appropriate for these questions to be determined in due course by the court rather

than by attempting to legislate to cover the multitude of complex and varying situations that could arise.

END OF PAPER