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PROCEEDINGS

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(HANSARD)

Douglas, Tuesday, 8th February 2011

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BUSINESS TRANSACTED

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The Council adjourned at 11.46 a.m.

Present:

The President of the Council (The Hon. N Q Cringle, OBE)

The Attorney General (Mr W J H Corlett QC),
Mr R P Braidwood, Mr D M W Butt, Mr D A Callister, Mrs C M Christian,
Mr A F Downie, OBE, Mr E G Lowey and Mr J R Turner,
with Mr J King, Clerk of the Council.

Legislative Council

The Council met at 10.30 a.m.

[MR PRESIDENT *in the Chair*]

The President: Hon. Members, it is one of those mornings when I am without the Bishop and without the Chaplain, so Hon. Members, I will take prayers this morning.

PRAYERS
The President

Leave of absence granted

The President: I had omitted, Hon. Members, to put the Lord Bishop's absence on my diary page, but the Clerk does assure me that, in fact, he did seek leave of absence for this morning, as far back as last August! *(Laughter)* So in that regard that is my mistake, Hon. Members.

Similarly, Hon. Members, in relation to the Hon. Member, Mr Crowe, he also has permission to be absent today.

Orders of the Day

Foundations Bill 2010
Third Reading approved

1. Mr Braidwood to move:

That the Foundations Bill 2010 be read a third time.

The President: So, Hon. Members, we go on with our Order Paper. The first matter that we have to deal with, in Legislative Council today, is the Foundations Bill 2010, in the hands of Mr Braidwood, for the Third Reading, please.

Mr Braidwood: Thank you, Mr President.

Mr President, before I commence the Third Reading of the Foundations Bill 2010, I would like to expand on some of the answers I gave to the queries at the clauses stage of the Bill, which I hope will appease those Members who asked the questions.

Mr President, there appear to be a number of areas of concern surrounding foundations. Many of the points raised by Hon. Members can be addressed by clarification of what foundations actually are and how and why the Bill was drafted in its current form. There is no simple, accurate description of what a foundation is, although it can very loosely be considered to be a quasi trust-company structure, as it incorporates facets of both. In strict terms, though, it is neither and is a distinct form of legal person.

In order to understand the difference between trusts and foundations, it is important to recognise that there are differences between the domestic laws of a succession of countries. Countries that apply common law recognise the freedom of disposition of assets. Those subject to civil law apply forced heirship provisions. The degree of freedom that a person has to dispose of

assets at will varies from one country to another. Some civil law countries do already permit a portion of assets to be freely disposed of at will, with the remainder subject to forced heirship provisions.

Conflicts of law rules exist and determine which country has jurisdiction over assets and property. These are applied in the Isle of Man. It is an accepted principle that the laws of a jurisdiction in which a trust is settled apply to the exclusion of all others. This is not intended to defeat a claim in the event of theft, fraud or similar, of the assets and property in question.

While the Hague Convention on the law applicable to trusts and on their recognition ensures that trusts can be recognised in the countries that are signatories to the Convention, this does not mean that the principal concepts on which they rely are necessarily understood. There are two fundamental concepts that trusts rely on. The first of these is simply trust. This is trust that the assets will be dealt with according to the wishes of the settlor, for the benefit of the beneficiaries. The second is the distinction made between legal ownership of property and the right to enjoy the use of that property that comes with equitable or beneficial ownership. This is a concept readily understood by those familiar with common law. However, there is ample evidence that this division of ownership is not a concept that is, or can be, readily understood by those from civil law jurisdictions.

Foundations offer a recognisable alternative that achieve much the same outcome as trusts. They do not rely on the separation of legal and equitable – that is, beneficial – ownership. In companies, the assets are owned by the shareholders and managed by the directors for them. Trusts rely on the legal and contractual capacity of the trustees, who must manage the assets for the enjoyment of the beneficiaries. Foundations, by contrast, have their legal and contractual capacity and own their assets themselves. These assets must be managed by the foundation council for the beneficiaries to enjoy.

Foundations, like trusts, place a fiduciary duty on those charged with stewardship of the assets. In this case, it is the foundation council. There are no strict qualifications applied that allow a person to act either as a director or trustee, where this is not done by way of business. On this basis, no qualifications have been applied in respect of foundations, either.

In addition to this, it must be remembered that every foundation will have a licensed registered agent. The registered agent does have duties and responsibilities and must be satisfied that the foundation is being appropriately administered by the council. This is the primary level of oversight. The secondary level of oversight is that of the Financial Supervision Commission in respect of ensuring that the registered agent fulfils its obligations. Finally, the courts will have ultimate jurisdiction.

As foundations are a new concept in the Isle of Man, there is currently no local case law. It seems likely that the courts will look to existing Manx solutions as and when necessary.

Because of the quasi trust company nature of foundation, the Foundation Bill 2010 has drawn on concepts that are already known and understood in respect of trusts. It has also included provisions that mimic some of those found in the Companies Act 2006. The Foundations Bill 2010, while introducing a new concept, is designed to be easy to use, borrowing as it does from familiar concepts.

The Financial Supervision Commission will be responsible for oversight of those licence-holders permitted to act as registered agents. The Bill does not expressly set out what conditions must be met by registered agents. It did not intend to. The Financial Services Act 2008 gives the Financial Supervision Commission the power to determine what activities should be subject to regulation. These activities are set out in the Regulated Activities Order 2009. The licensing policy of the Financial Supervision Commission includes the vetting of individuals in key positions within the licence-holders for fitness and propriety. Guidance can also be found in the training and competence framework. The Regulated Activities Order currently only allows a licensed legal person's companies to undertake all the activities of a class 4 licence-holder. This is by way of contrast to trusts, where an individual can be appointed a trustee. There is, as with life generally, no means of mitigating and eliminating all risk. Ultimately, the honesty and integrity of the persons involved must be relied on. The courts provide the ultimate means of redress.

The Foundation Bill makes provision for the Company Officers (Disqualification) Act 2009 to apply to foundations. The Financial Supervision Commission has an express power under this Bill to make regulations to ensure that the Company Officers (Disqualification) Act will apply in the event that the existing provisions are found to be wanting in respect of their application to foundations. Disqualification orders in other jurisdictions will be applied, as they are in the case of companies.

Enforcers on foundations, Mr President, were the subject of much discussion at the clauses stage. The role of enforcer of a foundation mirrors that of the protector in a trust. Protectors of

trusts are primarily charged with ensuring that the wishes of the settlor are carried out by the trustees for the benefit of the beneficiaries. Protectors may be given other powers under the trust instrument. Unless it is a purpose trust, there is no obligation for trusts to have a protector.

There are, subject to this exception, no qualifications for this role. The protector can be anyone: a trusted friend of the settlor, the settlor's lawyer or accountant, or even a licensed service provider.

The Foundations Bill, while not specifically naming the Attorney General as the enforcer of charitable foundations, does bring foundations within the scope of the charities legislation. This legislation does make provision for the Attorney General to act as protector. The Foundations Bill applies this to charitable foundations by extension.

The amendment passed in another place corrected an anomaly that came to light in clause 14. The original clause was worded so that the appointment of an enforcer was optional. It then continued by requiring all foundations which were not charitable foundations to have an enforcer. The amendment brings this Bill into line with what is accepted convention under trust law – that is, charities rely on the Attorney General. In situations similar to those found under purpose trusts, there must be an enforcer, but in all other situations, it is at the discretion of the founder, whether or not an enforcer should be appointed. The founder is, after all, the client. That said, it would be, as it is in the case of trusts, not only good practice, but also prudent behaviour, to appoint an enforcer in all cases.

While the Foundations Bill permits the registered agent to be both a council member and the enforcer, it is unlikely that the founder would wish the same person to be the only appointee to the foundation in any and all capacities. Under trusts, it is possible for the settlor to fulfil all roles. However, were he to do so, this would undermine the integrity of the trust, as he would effectively be regarded as still owning the assets. While a foundation has separate legal personality, a similar scenario might be open to legal challenge, which could also undermine the integrity of the foundation.

In the unlikely event that the class 4 licence-holder acts in all capacities, it must be remembered that the licence-holder is subject to the oversight and regulation of the Financial Supervision Commission. This is effective regulation and not, as in some jurisdictions, light touch. Trustees cannot simply abrogate their duties and walk away from a trust.

While not being good practice, it is impossible for the directors and registered agents of appointed companies to walk away from the companies and wait until they are struck off the register. Because of the similarities that foundations bear to trusts, in that there are beneficiaries involved, the Foundations Bill does not permit a registered agent to walk away from a foundation. In circumstances where the registered agent is unwilling, or unable, to continue as registered agent, the Bill makes express provision for the courts to give direction and, where necessary, to remove or appoint a registered agent. These provisions seek to protect the beneficiaries.

The position of beneficiaries under the Foundations Bill derives from their treatment under trust law. Again, it is being assumed that the Manx courts will apply principles that already exist in the jurisdiction. The provision in clause 30 that states that a beneficiary does not have an absolute interest in the foundation reflects this case. Not having an absolute interest in property can actually work in favour of beneficiaries, as this ensures that the hope or expectation of a future interest does not give rise to current tax liability. The general principle applied to beneficiaries is much the same as those in respect of trusts. Trusts, for the most part, are well run and do operate in favour of the beneficiaries, perhaps with notable exceptions, such as the case most recently before the courts.

Under the Foundations Bill, beneficiaries have a statutory right to enforce rights due to them. There is a provision that ensures that they have three years to take action in respect of a breach of these rights. The three-year time period begins on the date on which they become aware of the problem. One assumes that if beneficiaries fail to act within three years of becoming aware of the problem, they are not unduly concerned by it.

At the last reading, it was asked if the Isle of Man had learned from the mistakes made in other jurisdictions. I am pleased to be able to inform Hon. Members that we have been made aware of the following informal endorsement by a leading Queen's Counsel, and I quote:

> 'The $64,000 question is what rights beneficiaries have. This is not, so far as I am aware, adequately dealt with in the foundations law of other jurisdictions. Clause 30 scores nine out of 10 and easily makes the Isle of Man foundation the top scorer.'

Foundations are not intended to be used as trading vehicles and this is stated in clause 36(3).

Clause 24 imposes a fiduciary duty on the foundation council to act in accordance with the provisions of, amongst other things, the Foundations Bill itself. To act in contravention of an express provision under the Foundations Bill would be a breach of fiduciary duty.

Clause 26 ensures there can be no relief from acts which include wilful misconduct.

This will cover circumstances where the foundation council has involved itself in active trading. The Company Officers (Disqualification) Act 2009 will ensure that action can be taken against the council of a foundation. In addition to this, as in the case with all business relationships of the Financial Supervision Commission's licence-holders, the licence-holder must know and understand the nature of that relationship. The regulatory framework of the Financial Supervision Commission ensures that the business of licence-holders is properly conducted.

Accounting provisions in the Foundations Bill also raised some questions. The Bill's provisions are substantially similar to sections 80 and 80A of the Companies Act 2006. This means that the accounting provisions in the Bill exceed those in respect of trusts. In a trust, the duty to keep accurate accounts is what is considered to be one of the irreducible core of obligations owed by a trustee to the beneficiaries. As already stated, in foundations the accounting obligations are enshrined in statue.

Clause 64 will bring foundations within the scope of the existing charities legislation. Charities with an income that exceeds £100,000 are required to audit their accounts. It is intended that the provision would apply in respect of foundations that are charities. At the outset, charitable foundations would be the only foundations to require an audit of their accounts. During the clauses, I made the point that to require all foundations to submit to an audit would make them uncompetitive and unlikely to be used. To paraphrase what Mr Attorney said in the previous reading of the Bill, it is unlikely that all parties appointed to the foundation will have fraudulent intentions. I come back to the point that there must be some element of trust involved that persons appointed to a foundation will comply with their fiduciary obligations. The accounting provisions in the Bill have been drafted so they satisfy the current standards applied by the OECD and the IMF.

Mr President, the fee-making powers given to the Registrar under clause 62 were noted as being unusual, in that they did not require the concurrence of the Treasury and nor did they need to be laid before Tynwald. Remedying this situation will provide a practical example of the wide-ranging regulation-making powers given to the Treasury under clause 61.

The Treasury will be making regulations that address these matters as soon as the Bill is enacted. The regulations will require all fees to be set with the concurrence of the Treasury and, further, that these will have to be laid before Tynwald. The regulations under clause 61 itself must be approved by Tynwald, so Hon. Members will see them in due course.

Clause 49 deals with the keeping of records by the Registrar. This clause also gives the Registrar the power to destroy records. This provision is consistent with current policy in respect of company records held by the Registrar. It should also be noted that this provision applies only to the records held by the Registrar and will not affect those that the foundation itself and its registered agent must retain.

Mr President, I will now clarify the current document retention policy. All records that are submitted to the Companies Registry are scanned and held electronically. As the costs of storing and maintaining records electronically are modest, it is unlikely that these records will ever be deleted or removed, even where the paper copy of the record held by the Registrar has been destroyed. This will allow records to be reproduced, as long as the technology to do so exists.

An additional safeguard already exists in respect of the retention of records. The Public Records Office must be consulted and must consent to the destruction of any records. The Public Records Office also has the power to take any record into its custody that it deems necessary or desirable.

Finally, it was noted at the clauses stage that there are already some charitable companies that style themselves as foundations. The immediate differentiating feature between these companies and foundations, which I explained, will be the series of numbers that are allocated to foundations. In the unlikely event that confusion does occur, the Treasury does have sufficiently wide regulation-making powers to ensure that a solution could be found. Any proposed solution would obviously be subject to consultation. However, it is hoped that a possible future problem that could be easily addressed will not be viewed as a barrier to progress for what is a new opportunity for the Isle of Man.

Mr President, I am sorry that I have gone on for quite a long time, but there were a lot of queries during the clauses stage. It is brand new legislation which we have never seen in the Isle of Man before. I hope that I have covered all the points that were raised. We have had copies of

Hansard and gone through it, from the Second Reading and clauses, and I hope that I have clarified all the queries that were raised and hopefully appeased those Members who asked them.

The President: You are moving the Third Reading, sir.
Mr Lowey.

Mr Lowey: I beg to second, sir, and reserve my remarks.

The President: Mrs Christian.

Mrs Christian: Yes, Mr President. I think that, whilst it was a full explanation of what went on, it was very helpful. It is interesting to note, and I think if you had not said it I might have been asking whether or not a protector in a trustee situation could act in all roles, and I think you said that the settlor could act in all roles. It parallels, then, with the situation where it is possible here for the agent to be a member of the council as well, which is a weakness, I feel, but again it is down to the integrity of all the participants and the people who are appointed in these roles. I think you have satisfied me that the FSC will extend its supervisory view over all these situations to make sure that they are properly run.

I think the Hon. Member commented, Mr President, that the fees structure was unusual and, whilst he did say that the fees would come before us in a form covered by regulations, I just wonder why it is deemed necessary to move from the standard form, where it says in the primary legislation that Tynwald will approve the fees, even if they do eventually come forward by order or regulations.

The President: Yes, Mr Braidwood.

Mr Braidwood: Thank you, Mr President.

As I said, under clause 61, the regulations are there and, in actual fact, once the Bill is enacted, regulation will come forward to show that the fees are made by Treasury, but they will be laid before Tynwald and must be approved by Tynwald. I think that was a point which was raised by my hon. colleague in Council, Mr Turner, so I hope I have satisfied him. as well.

The President: In that case, Hon. Members, the motion that I put to Council is that the Foundations Bill be read for a third time, Hon. Members.

Those in favour, please aye; against, no. The ayes have it. The ayes have it, Hon. Members.

We will move on to Item 2, which is the Income Tax Bill and, again, Third Reading, this time, Mr Lowey, please.

Mr Braidwood: Mr President, before I commit… That was leading – I think I covered everything – I was going to make a brief statement on the Third Reading as well, but if you want to incorporate what I have already said, that is fine, sir.

The President: I think you stopped and I asked if you were moving the Third Reading, and then Mr Lowey seconded.

Mr Braidwood: I know. That is why I was wondering why Mr Lowey had actually… Because all I was trying to do was to answer all the queries, but I think, in actual fact, what was said in the First Reading, Second Reading and the clauses stage, I am quite happy to just move officially –

The President: Mr Braidwood, I am perfectly in your hands. If you want to fire on again and open up any wounds in the Foundations Bill, that is entirely up to you, sir.

Mr Braidwood: No. I think what I will do, sir, is I would just like to move –

The President: I would stop when you are winning, if I was you! *(Laughter)*

Mr Braidwood: – that the Third Reading of the Foundations Bill be read.

The President: I have already approved that, sir.

Mr Braidwood: I know that.

The President: Right.

Income Tax Bill 2010
Third Reading approved

2. Mr Lowey to move:

That the Income Tax Bill 2010 be read a third time.

The President: Right, we go on to Item 2, Hon. Members – Mr Lowey, Income Tax Bill.

Mr Lowey: Thank you, Mr President.

I beg to move the Third Reading of the Income Tax Bill.

Income Tax Bills are annual beasts that appear every year, encapsulating a variety of subjects dealing with financial matters. The first three clauses of this Bill are the short title, the commencement, and the interpretation – non-contentious.

Clause 4 confirms the five Temporary Taxation Orders: two measures introduced as part of the 2010 Budget; the move to automatic exchange of information under the European Union Savings Directive; the introduction of a record-keeping requirement for companies; and a number of pension provisions.

Clause 5 amends section 57 of the Income Tax Act, concerning double taxation relief.

Clause 6 repeals section 105B of the Income Tax Act 1970, which provides for the appointment of an Inspector of Income Tax – that post now being redundant.

Clauses 7 and 8 amend sections 105D and 105E in respect of the Income Tax Act, to assist the Assessor in inquiring into a taxpayer's affairs in case of suspected fraud.

Mr President rightly raised the point about the Assessor, where the Assessor could, in theory, ask two Commissioners, fail on the first two and then leapfrog to another two, to see if he could get another result. Clause 7 provides for the Assessor, as I said, to make an application to two members of the Income Tax Commissioners in certain circumstances. The Income Tax Commissioners consist of a Chairman and eight other Commissioners. For the purposes of clause 7, the Assessor can apply to any two members of the Commissioners and, if they both agree with his application, then section 105D will apply. In practice, the Assessor would contact the secretary of the Income Tax Commissioners who would request two members to attend. If those two members do not agree, the Assessor could not apply to any further members of the Commissioners regarding the same matter. So it is a one-off two: you either have them both agreeing or he then is not allowed to proceed.

Clause 9 applies the amendments introduced at clauses 7 and 8, to each of the Double Taxation and Tax Information Exchange Agreements which the Isle of Man has ratified to date. Again, Mr President raised at the previous Reading the issue of the Canada Tax Information Exchange Agreement, which had been signed by the Treasury Minister on 17th January this year, not being included. That Agreement, together with those signed only last week – for example, last Thursday, the Minister of the Treasury signed a TIEA with Bahrain and on Friday, she signed another with India, which is again showing that the Isle of Man is dealing with world powers and world trading partners – will be updated with the changes brought in by clauses 7 and 8, once this legislation has received Royal Assent, as will any other agreements that may also be signed in the meantime. These will be done by amending orders placed before Tynwald, with Tynwald approval.

Lastly, clause 10 inserts a new section into the Income Tax Act, which will allow subordinate legislation under the Income Tax Act to include civil partners and civil partnerships.

Mr President, the Income Tax Bill makes Orders that have been introduced throughout the year legal. If they are not approved within the 12 months, they lapse. This Bill does that and, as with other Income Tax Bills, the opportunity has been taken to amend other bits of legislation dealing with tax matters.

I beg to move that the Third Reading be read.

Mr Braidwood: I beg to second, Mr President, and reserve my remarks.

The President: Mr Callister.

Mr Callister: Just purely, Mr President, as a matter of interest, as these exchange of information orders have taken place for several years now, to what extent is exchange of information happening. I wonder if the Member has any information on that.

Mr Lowey: They are very, very useful pieces of information. They are not, if you like, window dressing; they are real instruments that assist.

They assist on two fronts. First of all, it epitomises that the Isle of Man is playing by international rules and agreements. They are open and transparent: the charge has always been, for offshore jurisdictions, that they have been used surreptitiously by individuals. When we have tax agreements, they are limited in scope but they are the minimum that the international countries believe should be in place. As I have said before on many occasions, not through my efforts because I am only a recent bird of passage in the Treasury, but the work has been going on for over seven years and we have been in the vanguard of these agreements for small jurisdictions. In fact, we are used still as a template for small jurisdictions to get their acts in order to the approval of the international community and I think that is a credit to the Isle of Man.

So the answer to the question by Mr Callister – are they meaningful and do they work? – is a resounding 'yes' on both counts.

The President: Mr Attorney.

The Attorney General: Mr President, could I just support what the Hon. Member, Mr Lowey, has said in response to that question. The Assessor of Income Tax is the central authority for the purposes of the Tax Information Exchange Agreements and my Chambers has two lawyers who are dedicated to the process of assisting countries which make requests for information in relation to, amongst other things, tax enquiries. So I can confirm that there is a strong liaison between my Chambers and the Assessor and there is a lot of activity in relation to several of those Tax Information Exchange Agreements.

The President: Mrs Christian.

Mrs Christian: No, I think the learned Attorney has helpfully answered the question, that it is not just useful in terms of the perception which it creates but it is actually being used in many cases. I think we had no idea whether they were actually being used to any extent.

Mr Lowey: The other point I would finally put, Mr President, is that it is a two-way street. We can ask and they can ask, so it is of equal benefit.

The President: Well, it is not quite finally, Mr Lowey. In your opening brief, you rather gave the indication in relation to clause 7 that the two people called upon by the Assessor when seeking delivery of documents would be effectively… You rather gave the indication, I think, that they might be called to a meeting to decide and then… I just wonder, in fact, if that is the right way of dealing with it when two members of the Income Tax Commissioners give their written consent that it is to apply. I am rather looking at it as, maybe, it is on a similar basis as the Police seeking a warrant signed by JPs or whatever. Does the Assessor actually have to meet with them, or does he just seek each individually to agree to the delivery of a document?

Mr Lowey: Well, without elaborating, I can only give you the brief that I have been given on that particular point. It says here, quite clearly, in practice, the Assessor would contact the secretary of the Income Tax Commissioners, who would request two members to attend. If those two members do not agree, the Assessor would not apply to any further members of the Commissioners regarding the same matter.

The President: I gathered that. It rather gives the indication that the Assessor will call a meeting of the two, and I am not sure that is the right way.

Mr Attorney.

The Attorney General: Mr President, thank you.

It is only very rare, I think, that this circumstance would arise but, as luck would have it, if I could put it that way, it is within my knowledge that even this week, the Assessor has had cause to utilise very similar powers under another piece of the legislation which requires the participation of two Income Tax Commissioners, and there is actually a meeting. There is a meeting and I think

that the Commissioners will very seriously consider the application, because it is such, many might say, an invasion of privacy, so the Commissioners take it very seriously.

The President: Thank you. Mrs Christian.

Mrs Christian: Mr President, may I finish by noting there are quite a considerable number of Exchange Agreements, there are fewer Double Taxation Agreements, but they are slowly developing. (**Mr Lowey:** They are.) I think that they are the harder nut to crack, (**Mr Lowey:** Last week.) but perhaps are going to be more valuable to us in terms of economic development. I hope that, in next year's Income Tax Bill, we might see a few more Double Taxation Agreements.

The President: Mr Braidwood.

Mr Braidwood: I think, at the present time, Mr President, there are four Double Taxation Agreements. The last one which was signed, as Mr Lowey said, was Bahrain.

Mr Lowey: That was one of them.

Mr Braidwood: That was last Tuesday and, hopefully, following on from the TIEAs, eventually those with some countries will develop into Double Taxation Agreements.

The President: Now, Mr Lowey, wind up, sir.

Mr Lowey: I just thank Hon. Members for the attention that they have given to the Bill and the support that they have given to the Bill. As I said, we have taken the opportunity, as we normally do, to include not just taxation matters, but related matters.

I thank the Council for their support of the Treasury's Income Tax Bill, and I beg that it be read a third time and the Bill do pass.

The President: Mr Braidwood, second, sir?

Mr Braidwood: I beg to second, sir.

The President: In that case, Hon. Members, the motion that I put to Council is that the Income Tax Bill 2010 be read for a third time.

Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Children and Young Persons (Amendment) Bill 2010
First Reading approved

3. Mr Butt to move:

That the Children and Young Persons (Amendment) Bill 2010 be now read a first time.

The President: We move on to Item 3 on the Order Paper, Children and Young Persons (Amendment) Bill, First Reading this time.

Mr Butt, please.

Mr Butt: Thank you, Mr President.

The Children and Young Persons (Amendment) Bill 2010 was originally a Private Member's Bill, promoted by Mr David Quirk, MHK, and taken through the other place by him, with the full support of the Department of Social Care, who have sent a legal officer, Maureen Bool, to assist us, if necessary, sir.

It actually is a Bill which provides five extra clauses in clause 17 of the Children and Young Persons Act 2001, which make special guardianship orders. Those orders have been in existence in the United Kingdom since 2005, through the Adoption Act 2002.

Mr President, the Social Services Division of the Department of Social Care has a duty to promote the welfare of children and young people. The majority of difficulties experienced by children and young people and their families can be resolved with support and counselling. Even

where children and young people need to come into care, this is generally for a short period, following which they can be returned to their families. For those children and young people who cannot live with their parents, placement with extended family is always considered first and this is part of the reason for these orders, sir. If placement with families is not suitable, then the remaining options are foster care, residential care or finally adoption. The best outcomes for children and young people are generally for those who are placed with family, relatives or, later, in a substitute family, such as foster carer or adoption, and that is on a permanent basis so the child has a sense of security and belonging in a family setting.

In order to ensure that appropriate arrangements can be made, where the natural parent is not prepared to agree to the appropriate care plan, or where there are significant concerns about living with parents, a legal order is required to minimise risk, and this will typically be a care order, which can sometimes be followed by an adoption order.

There are, however, Mr President, a number of children and young people, usually of an older age, who while they accept they cannot live with their natural parents, do not wish to be adopted or break with their family ties. They may be placed with foster carers long-term or may be placed with extended family, often with grandparents. In these situations, the child will be subject to a care order and, importantly, all major decisions need to be made by the Social Services Division, until the young person is 18 years of age. This can undermine the child's sense of security and belonging and be frustrating for the carers, who do not have full responsibility for day-to-day decisions.

The special guardianship orders in this Bill, Mr President, are intended to provide an alternative legal option for this group of children and their carers, which better meets their needs than the current legal options allow. Special guardianship orders were introduced in England and Wales as part of the Adoption and Children Act 2002, and they came into action in 2005. Their provision has been seen as effective, and in the best interests of all parties, including the care authorities.

Mr President, this Bill contains provision for making special guardianship orders and complements the current legal provisions for children and young people. The effect of the order is to give the special guardian legal responsibility for the child in their care, which will last until the child is 18 years old. Unlike adoption orders, these orders do not remove parental responsibility from the birth parents, although their ability to exercise responsibility is limited by the orders.

The Bill will provide another option for legal permanence for children who cannot grow up with their birth families. The Bill will improve the lives of children and young people and their carers, by increasing the sense of belonging and security of the children and young people, whilst also clarifying and strengthening the position of their carers.

Mr President, this Bill will, I believe, enhance the lives of children and young people and their carers, and I trust that Members of the Council will give this their support.

I beg to move the First Reading, sir.

Mrs Christian: I beg to second and reserve my remarks.

The President: Mr Callister.

Mr Callister: Could I just ask, Mr President… I assume – and I do not have the benefit of the original Bill that it is amending – that this special guardianship could take place any time from birth to the age of 18. If a child is thought to need special guardianship in their early teens – 13, 14, 15 and so on – does the child have any ability to object to that in any way? If under special guardianship, a child is being mistreated, which was unforeseen, is there any remedy for the child in such a case?

Finally, is it quite clear that there is a clear difference between special guardianship and foster parenting? I am not sure if that was made clear, in fact.

The President: Mr Lowey.

Mr Lowey: The only point I want to make is that I take it that the special guardianship puts at the very heart, the first priority is the child. I noted the hon. mover when he said the… maybe not adoptive parents, but the people who are fostering a child will have, under this special guardianship, more legal rights of dealing with it. But paramount in all of this is the welfare of the child, so it becomes the first priority, not the blood parents – the birth parents, as we call them.

I seek an assurance that it is the child's interests that are always paramount.

The President: Mr Turner.

Mr Turner: Thank you, Mr President.

In support of the broad principles of the Bill, I fully support the view of the mover that the extended family are those that should be considered first. I think that is very important. Certainly, as a parent of a four-year-old child, if a problem arose in the future, I would much rather the grandparents and the close family were considered before looking outside. I think, again, it is in the interests of the child, that familiarity.

I just wonder – and I suppose there is no real answer to this, but I was going to ask – how problems arise and how generally the Department become aware of them, and how then a plan of action, a pathway is assessed, how the Department then assesses which route they are going to go down, how they are going to apply the criteria. Am I right in assuming that an actual care order would be a last resort, if the other special guardianship orders are not appropriate?

So it is more of the mechanics on how the process is going to follow, what path it is going to follow.

The President: Just for my own particular interest, Mr Lowey, in relation to the court giving leave for a child to be known by a new surname, I can very well understand, say, a young child under the age of 10, shall we say… courts giving a new surname to a child for whatever reason – special guardianship it has to be, but to give a new name – and the child will be 'known as'. On page 4:

> '17B(2) On making a special guardianship order, the court may also –
> (a) give leave for the child to be known by a new surname;'

is that a formal documentation, 'known as', or is it just, 'Well, we accept that you are going to be known by a different name from this day on'? If it is not a formal change, should we not make it a formal change so that, in fact, it is properly done?

Mr Braidwood.

Mr Braidwood: Mr President, just one little query. On this special guardianship, the parents could be killed in an accident, and generally it is the grandparents who would take over. Would this special guardianship apply there with the grandparents, and what would happen if the grandparents were dead as well?

The President: Mr Butt, I think it is over to you now, sir.

Mr Butt: Thank you, sir.

I will start with Mr Callister: he asked about the ability of the child to change matters, if they need to. I think 17D, the new clause, actually gives the child the right to apply to the court to vary the order in any way they wish to do so. So the Department can change the order, so can the child and so can the actual guardians who have been appointed. They can, at any time, change the order if they wish to do so, so their rights are protected in that way.

Mr Lowey: I agree this is for the child's interests, and again, as I said, the child themselves can make application, as can the Department. Foster carers, at the moment, are appointed by the Department to look after children. They are not the legal guardians as such. Whilst they are in foster care, decisions can still be made by the Department. This gives the actual carer the ability to make the decisions themselves in the interest of the child.

For Mr Turner: the families are always considered as the first option for the children when there are problems. They do not immediately go into care or into residential care or to fostering. The parents are always considered first, and often that is the case. It is very often the case. But, again, the point about that is, once they are in that care, the Department still has the right to make decisions about the lives of the children and this gives the new guardians the power to make their own decisions for the children without having to refer to the guardian, which is going to be better for the children.

I have a note here about orders made by the court. Yes. The progression of how orders are made is if there could not be a special guardianship order, there will then be a court order to put the child in care, in effect, so the child is in the care of the Department again. This actually comes before that and is the preferred method of doing so.

As regards the surname, Mr President, I might need some advice on that, but I am assuming, because the court makes the order that the child shall be known as, that will be –

The President: That is why I asked.

Mr Butt: – the final authority. But again, of course, the order can be varied at any time by any of the parties, if they need to do so, with the permission of the court.

I think Mr Attorney is nodding on that matter.

The President: I do not know, Mr Attorney. That is why I asked the question!

The Attorney General: Mr President, I would respectfully concur with the Hon. Member.

If the court makes a special guardianship order which includes provisions for a change of name, a change of surname, then that court order must be obeyed. It has the effect for this child of changing the name.

Mr Braidwood: Mr President, if the court makes a change of the surname, when the child gets to 18, he could then revert back to his original surname, I presume.

The Attorney General: Mr President, yes, the position is that any adult with full capacity can register a deed poll in the General Registry and that would have the effect of changing the name.

Mr Braidwood: So you would have to make a deed poll, then.

The Attorney General: Yes.

Mr Lowey: I just find that the age of 18 is being used… We allow people at 16 to vote, join up in the Army – (**Mr Braidwood:** Marry.) Why is 18 being…? I am asking a simple question.

The next one is the court – we have heard mention today of the court – I presume the court is the children's court, the family court. In other words, it is not an open court, as we would recognise it; it is the special court where it is in private, usually… I use the word 'private'; in 'closed' session, that is a better word, again, to protect the child and the family.

Okay, that is clarity for that.

The President: You go back to the original Act to find it.

Mr Butt.

Mr Butt: Yes, sir. On that point, the original Act is the Children and Young Persons Act, which does define people of 18. Even if they are 16, they are still a young person. (**Mr Lowey:** Are they?) *(Laughter)* Yes, even though they fight in the Army!

Finally, to Mr Braidwood's point, he makes an interesting point, actually, because under section 17A, the new clause, it defines the people who can become special guardians, and it does say they should reside with the person for a year preceding the application. Now, supposing – I am surmising here – if, say, the parents were killed and the grandparents took over, there may be something in the parents' will to say they will become the guardians, as part of the family. That may be a separate sort of guardianship, and then, after a year has occurred, they can officially apply for the special guardianship order.

Mr Braidwood: It could be in civil law. Jurisdictions where there is no…

Mr Butt: I hope I have covered the points of the Members who have responded.

The President: In that case, Hon. Members, the motion I put to Council is that the Children and Young Persons (Amendment) Bill be read for a first time.

Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Anti-Terrorism and Crime (Amendment) Bill 2010
For First Reading
Motion not moved

4. Mr Crowe to move:

That the Anti-Terrorism and Crime (Amendment) Bill 2010 be now read a first time.

The President: Hon. Members, I apologise again for Mr Crowe's Bill being put on. He had indicated to the Clerk and myself that he would be missing this week, so that is an error on our behalf.

Social Services Bill 2010
First Reading approved

5. Mr Butt to move:

That the Social Services Bill 2010 be now read a first time.

The President: We turn to the Social Services Bill for the First Reading, Hon. Members, and again, Mr Butt, I think this is in your hands, sir.

Mr Butt: Yes, sir. Thank you.

Mr President, the Social Services Bill 2010 is quite a major Bill in terms of the welfare of people who have needs, whether they are children or adults, and the overall aim of the Government, sir, under their Strategic Plan, is to protect and promote the well-being of the family and provide for economic and social inclusion in our community. The Island's Social Services are key contributors to this aim. This Bill is intended to ensure social services are provided in a clear, consistent, effective manner, with suitable safeguards in place for those using or seeking to access those services.

At some time in our lives, most of us will need social care services either for ourselves or for a friend or a family member. Families may need help in parenting their children. Children may require protection, fostering or adoption services. People with learning disabilities, physically disabled people, people with mental health problems and people with drug and alcohol problems may need support in their care and treatment. In particular, older people are living longer and so often require help with complex care needs. The important part of this Bill, Mr President, is concerning carers because carers also need recognition and support in their vital role. As a result, it is essential that, in a caring society, people get the care and support which will enable them to live their lives as independently and fulfilled as possible.

Mr President, the National Assistance Act 1951 was the last piece of over-arching legislation that covered social care services and social care has changed beyond recognition within the last 60 years. Hence this new legislation is now required and actually repeals the 1951 Act. The recent comments by the English Law Commission on the law relating to adult social care in England and Wales are, in this case, relevant. The Commission stated that the UK's present legislative framework for adults in residential care and community care, adult protection and support for carers, was inadequate, incomprehensible and outdated, and it was a confusing patchwork of conflicting statutes enacted over a period of 60 years. There was no single modern statute to which service providers and service users could look to understand whether services can, or must, be provided. The Commission in the UK is currently working on providing a clearer, modern and more cohesive framework for social care.

The Social Services Bill before us today, Mr President, achieves the aim of a clear, modern and cohesive framework for social care services, as a whole, here in the Isle of Man. It is a modern statute that gives a clear, full and accurate statement of the duties and powers of the Department in relation to providing information and advice, assessment and service provision to the service users and to carers. It is a social care statute that can work in any level of resources. It is a statute for the present and the future. Unlike some previous Acts, it ensures that people are assessed and services are provided according to an assessed need for those services, as opposed to providing services based on a defined age, or a disability or illness.

The statute includes several key elements which, together, give more choice and rights to service users, as well as better value for money for the taxpayer. It gives more choice to service users by allowing them to upgrade to more expensive care accommodation and retain assistance with funding from Social Security, if they cover the additional cost. It enables individuals to defer payments of accommodation costs, so they do not have to immediately sell their property on entering care accommodation. It sanctions arrangements for the provision of care accommodation off the Island, when appropriate.

The Bill gives more rights to service users, including a comprehensive complaints system, incorporating an independent joint review body for both health and social care. It gives legal status for the provision of services by the public, private and third sectors. It includes relevant financial and general provisions that enable the Department to obtain the best value for money within a fair and equitable system, by introducing clear eligibility criteria for services. It includes powers to charge for services provided. It includes, in particular, strategies to prevent people unfairly disposing of assets to avoid paying for services. It is compatible with the Convention rights within the meaning of the Human Rights Act 2001.

I trust that the Council will see this as an important piece of legislation and support its passage.

I beg to move the First Reading.

Mrs Christian: I beg to second, Mr President, and support the Bill.

When you consider that it is nearly 60 years since the current framework was established, it is time to set a new framework for the next half century. Assessment of need will be a fairer use of resources. It will always be challenging, depending on what resources are available, and it will always be challenging in determining those assessment parameters, but I do think that this represents an appropriate change in the framework through which Social Services will deliver their support and care programmes.

The President: Mr Lowey.

Mr Lowey: Yes, it is a testament to the people who wrote the 1951 Act, with the amendments that have been made over the years: for it to have lasted over 60 years is quite a remarkable achievement. But, again, anything that is 60 years old needs a revamp or be re-looked at, and I do not object to that at all.

Like Mrs Christian, I do not have the total confidence on the assessed need, and I had that down. I do not think it is right, at the moment, that we look after – and I will use the words 'handicapped children', those are not the right words, I know, but – children in need of specialist treatment, and when they arrive at 18 years of age, they become an adult and suddenly we turn the taps off for whatever reasons.

Now, you say we do not – I am sure there will be a case made that no, we do not. Our own experience has shown that we do, in effect, make a difference up to 18. These people do need continuing care. We do give continuing care, but not to the same degree, and that worries me. It really does. So, I suppose assessed need, not the age, must be reasonable.

My big concern is, who assesses the need, whether it is the family, whether it is the individual, whether they are capable of doing it or whether it is the officers that do it. Who assesses that need? That is very tricky and I do not sit here and pretend it is easy. It is not.

However, I support the Bill. I look forward to the later stages, clauses maybe, to tease out a bit on the assessed need, but I think the Bill is necessary. I support the aims of the Bill, what it is attempting to do, but I still have those concerns. I still have those concerns.

The President: Mr Turner.

Mr Turner: Thank you, Mr President.

Again, I support the principles of the Bill.

I notice there is, in the Bill, a section on the disposal of assets. This has been quite an emotive and controversial subject over the years, where people have had properties. In fact, I remember seeing an ITV programme – I think it was 'World in Action' – about the subject, where some people were concerned that they would have to sell their properties to pay for their care.

There are two ways of looking at that, of course, and that is if relatives of elderly people are wanting to have the inheritance, then, surely, they do have a duty to look after their relatives who are going to leave them that legacy, so there are two sides to that argument. I think now it is not always possible for people to altogether do that but, of course, what this is obviously aimed to do is to ensure that people do not deliberately avoid paying by disposing of assets and then getting

free care when, quite simply, there are people in society who simply cannot afford any care and, of course, they will be taking the place and funding that should be going to people who really cannot afford it.

I think it will probably always be a controversial subject and it will be interesting to see how cases are dealt with, then, and hopefully they are dealt with appropriately, but the broad principles of the Bill… There are other things which I will go to as we go through the clauses, but again in broad support of the First Reading.

The President: Mr Braidwood.

Mr Braidwood: Thank you, Mr President.

In a similar vein to Mr Turner on disposal of assets, here it says five years. Previously, the Department has looked if any assets have been transferred within 10 years. They have actually taken that into consideration when allowing for charging.

I can always remember, going back to about 1995 or 1996, Mr Lowey and myself asking Questions of the then Minister for Health, Mrs Christian, on the disposal of assets because, at that time, you had to sell a house if your spouse was not living in it. You had to dispose of that house within one year.

Mrs Christian: Point of order, sir.

You did not!

Mr Braidwood: In actual fact, what was brought in, afterwards, is that you could have either the rental value you would receive for the property or there was an interest charge, and it was 5% up to a certain amount and then it was 10%. I know, at the present time, that the Department is still working on the 5% and 10% because that is a lot more money than the rental value of the house, which I will leave to the conscience of the Department to look at that.

But I was just wondering why we have now gone to five years.

The President: Mr Callister.

Mr Callister: Thank you, Mr President.

I just am drawn to the explanatory memorandum, and item 9 there says:

'The Bill is expected to result in an increase in annual expenditure of approximately £25,000.'

I wonder what that represents. I am assuming that this will bring about charges for services that have been free up to the point when this Bill becomes law, subject to means testing.

Other than that, I will be supporting the principle behind the Bill.

The President: Mr Downie.

Mr Downie: Yes, basically, I agree with the main content of the Bill. I think it moves us forward. It makes the situation regarding people's property much clearer, provides for other options to take place which are much more acceptable than what we have had in the past.

Just seeking some information about clause 13, excluded carers, the clause states that carers who are employed or who work as a volunteer for a voluntary organisation are excluded from having a carer's assessment. Do we have a list of the voluntary organisations or are they all primarily related to those around social…? For example, if you help out with the St John's Ambulance Brigade or the Red Cross or Help the Aged, are you in that category?

The President: Mr Butt, reply, sir.

Mr Butt: Thank you, sir.

Yes, Mr Lowey's point there is… He is right. If you happen to work in, say, a Hospice shop or something, it does not mean, because you work in the caring voluntary sector, you have to be assessed for this Act. It does not preclude you from being included.

Just to go back to the beginning, Mr President, and Mrs Christian, I welcome her support because I know she has probably battled with this many times in the past, these issues, in her previous roles, and she can understand, I think, the need for bringing this up to date and modernising it because a lot of the procedures at the moment are done on an administrative basis,

really, without any legal backing as to how they are actually done, in terms of assessment and providing services. I welcome her support.

Again, Mr Lowey mentions the 1951 Act as being the basis and it has lasted well, but it does not actually specify in detail what the Department should do and should be doing and how they assess carers etc.

Mr Lowey: If it was good enough in 1951, it should be good enough in 2011! However, I know what you mean!

Mr Butt: I have the 1951 Act here: it does use some very unfortunate terms, which would no longer be acceptable these days!

He makes a point about who does the assessing? There is expertise in assessment of needs within the Department, obviously. Some of the assessment, in terms of assets, is done by Social Security, who have their own regulations as to how they assess need, in terms of Social Security procedures.

He does make a good point that Children and Young People do get, I think, a good service and often, when they become 18, there is a grey area where the service can be reduced or turned off. I think the point of this legislation is that it does not define their needs by their age or by their illness or disability; it defines them by their overall needs, so this should, in effect, I think, make it a better assessment. I think that will be teased out in the clauses.

Mr Turner raises a point about the disposal of assets. It was a question I asked, as well, and I have some notes here: I think, if I let Members know now what the situation is, it might actually inform the debate later on, as to what the actual… how things will work.

The current situation with assets, about how much a person should pay towards their accommodation costs, comes under Social Security rules, and they determine how much a person should pay towards the full cost of care. Social Security have a list of resources they take into account, which includes income, capital, savings, premium bonds, stocks and shares, trust funds, the home, the property and land. People normally use their liquid assets before they sell their home. Other people rent out the property and use the rent, combined with their liquid assets, to pay for the costs of their care. Many people sell their homes straight away, due to the keep costs and the worry of having an empty property. This is currently what happens.

Basically, if people have capital of more than a stated amount, which at the moment is about £23,000, they have to pay the full costs of the home. Between £14,000 and £23,000, they pay a sliding scale, and then capital below £14,000 is disregarded.

If people have very little money, then the law requires that they are left with a stated weekly personal allowance which, at the moment, is £22 a week. If Social Security – and this still applies – believe a person has disposed of the home within the last 10 years, to avoid paying for care accommodation, they will assess the person as if they still have the asset. That still applies. This Bill actually brings in the ability to claim from persons to whom the asset has since been transferred, within the last five years, to claim any funds from them. That is what the difference is of this Bill.

With this Bill, what I have just described as happens at the moment will still carry on. The Social Services will still use those rules to determine the amount of fee, or what should be paid for accommodation. The only difference with the Bill is about the disposal of assets. It actually allows the Department to recuperate moneys from people to whom the asset has been transferred within the last five years. So I think that will be useful for the debate, looking over what those rules are at the moment.

Mr Braidwood's point, I think, has been covered there that, in effect, the 10-year rule still does apply, but this applies only to the recovery of assets from relatives or people the assets have been passed to. That can be done within the five-years period.

Mr Callister's point about the £25,000 increased fees, I do not know what they are for, Mr Callister, and I will endeavour to find out. I am presuming it may be to do with court proceedings that may be slightly more expensive than they would be at the moment because there would be additional orders taken out through the courts.

I think I covered Mr Downie's point at the beginning of my reply.

Mr President, I think that covers most of the points raised and I beg to move the First Reading of the Social Services Bill 2010.

The President: Hon. Members, the motion that I put to Council is that the Social Services Bill 2010 be read for a first time.

Those in favour, please say aye; and against, no. The ayes have it. The ayes have it.

Procedural

The President: Hon. Members, that brings to a conclusion the business before Council this morning with the readings of those Bills.

Can I remind Hon. Members that I think you have all had a slip round in relation to a short presentation by the St John Ambulance in the Barrool Suite, Hon. Members. That is entirely up to you, but the invitation is there for Members to attend.

I think, Hon. Members, you have also been circulated with a list of the Legislative Council's forward work plan, which gives us some indication of where we are going in relation to our legislation which is in front of us.

With that, Hon. Members, I think that draws to a conclusion the business before Council this morning. We will meet next Tuesday in Tynwald.

Thank you very much.

The Council adjourned at 11.46 a.m.