

TRUST AND TRUSTEES BILL 2022

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, the Minister for the Treasury, Hon. Dr. Alex Allinson M.H.K.

INTRODUCTION

1. These explanatory notes relate to the Trust and Trustees Bill 2022 (the "Bill"). They have been prepared by the Treasury in order to assist readers of the Bill. They do not form part of the Bill, and have not been endorsed by the House of Keys.
2. These notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.
3. The Bill has been subject to public consultation, and has been updated to take account of comments raised.
4. An Impact Assessment of the Bill has been prepared.
5. In the opinion of the Member moving the Bill, the provisions of the Bill are compatible with the Convention rights within the meaning of the Human Rights Act 2001.
6. If approved, the Act is not expected to have any, or any significant, financial or human resource implications.

SUMMARY AND BACKGROUND

7. The modern trust, being a historically English creation with its roots dating back to the Crusades, is a regular feature across common-law jurisdictions. In addition to its traditional testamentary usage in wills and family wealth planning, the trust also plays an integral role in the finance sector.
8. Trusts law in the Isle of Man has, for well over a century, remained close to that of England and Wales. This stands in contrast with Jersey, Guernsey and various other International Finance Centres further afield, which have witnessed, and ultimately benefited from, regular and proactive developments in their own trusts legislation to accommodate for the modern demands made of a trust.
9. Whilst the persuasive application of England's voluminous, and well-respected, precedent has been of benefit to Manx practitioners, there is a growing consensus that the Island's

trust legislation needs updating to provide a landscape which is clearer, more competitive and more reflective of common practice in the sector.

10. It is worth noting that Manx practitioners are not alone in calling for an update to the English model of the trust; with the Law Commission of England and Wales set to examine the modernisation of English trusts law as part of its 13th Programme of Law Reform¹. It is understood that this review will focus partly on measures to make the English trust model more competitive in the global market.
11. The Bill comprises of a set of seven key proposals, the majority of which were originally put forward in 2015 by the Society of Trust and Estate Practitioners (“STEP”) to the Regulatory and Legislative Innovation Working Group.
12. The Treasury has engaged extensively with stakeholders in the preparation of the draft Bill, which was subject to public consultation in 2022.
13. The public consultation on the draft Bill raised little in the way of concerns or objections regarding the proposals in the Bill, which has enabled the proposed piece of legislation to be finalised promptly.

STRUCTURE OF THE BILL

14. The Bill is divided into 4 parts as follows:
15. **Part 1** of the Bill (clauses 1 and 2) comprises the introductory provisions on short title and commencement.
16. **Part 2** of the Bill (clauses 3 to 9) provides for the amendment of the Trustee Act 2001.
17. **Part 3** of the Bill (clauses 10 to 13) provides for the amendment of the Trustee Act 1961.
18. **Part 4** of the Bill (clauses 14 and 15) provides for the amendment of the Limitation Act 1984 and the Apportionment Act 1982.

COMMENTARY ON CLAUSES

Clause 1 – short title

19. This clause gives the short title to the Act which will, if enacted, result from the Bill.

¹ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2017/12/13th-Programme-of-Law-Reform.pdf>. Paragraphs 2.23 to 2.26 refer.

Clause 2 - commencement

20. This clause enables the making of one or more appointed day orders to bring the resulting Act into operation, and to make transitional provisions in connection with the Act's commencement.

Clause 3 – General

21. Clause 3 provides that Part 2 of the Bill (clauses 4 to 9) amends the Trustee Act 2001.

Clause 4 – Insertion of new Part 1A to the Trustee Act 2001

22. Clause 4 inserts new Part 1A (Duty to disclose trust information) to the Trustee Act 2001. Part 1A comprises of new section 2A (Disclosure of trust information).
23. New section 2A defines "trust information" for the purposes of the section and concerns arrangements for the provision of such information to parties specified under subsections (2) or (3) by a trustee and the limitations or restrictions in relation to such disclosure.
24. Subsection (4) enables a trustee to refuse to disclose information in response to a request referred to in subsection (3) where the trustee is satisfied that it is in the interests of one or more specific beneficiaries, or the beneficiaries as a whole, to do so. As with subsections (2) and (3), this is subject to such order as may be made by a court.
25. Subsection (5) provides that a trustee shall not be required to disclose trust information in respect of the deliberations of the trustee, or the reasons for any decision of the trustee, in respect of the exercise, or non-exercise, of any power, discretion or duty.
26. Subsection (6) provides that the court retains ultimate power regarding disclosure and, in the exercise of that power, the court can overrule a trustee's decision on disclosure and can override the terms of the trust on disclosure.
27. Under the overall duty to disclose trust information set out in the inserted Part 1A, subsection (7) confirms a trustee is required, subject to any order of the court, to disclose trust information to a person undertaking any supervisory, regulatory or enforcement function, for the purposes of that function.

28. Subsection (8) defines "P" as used in subsection (6).
29. Subsection (9) clarifies that new Section 2A applies to all trusts regardless of when created.

Clause 5 – Insertion of new Part 3A to the Trustee Act 2001

30. Clause 5 inserts new Part 3A (contracts) to the Trustee Act 2001. Part 3A comprises of new sections 10A (power of trustee to contract with himself) and 10B (restriction, exclusion and application of this Part).
31. In respect of new section 10A, subsection (1) declares that this Part applies where a person is a trustee of more than one trust and subsection (2) empowers a person who is trustee of more than one trust to enter into a contract with him or herself in his or her capacity as trustee of another trust. Subsection (3) provides that the trustee of the first trust is not affected by any instrument, matter, fact or thing in relation to the second trust of which the person is a trustee. This applies where the matter comes to the trustee's attention in that person's capacity as trustee of the second trust. Subsection (4) provides that where the trustee of a trust (the first trust) has an interest as trustee of a second trust, and a transaction in relation to the first trust is to be entered into with a trustee of the second trust, the trustee of the first trust has no obligation do so, but nevertheless may disclose to a co-trustee of the first trust any interest which the trustee has as trustee of the second trust.
32. New section 10B clarifies that the powers conferred by inserted Part 3A (contracts) are in addition to powers conferred on a trustee otherwise than by this Part. These powers remain subject to any restriction or exclusion imposed by the trust instrument or by any other statutory provision. The powers conferred by new Part 3A apply to all trusts regardless of when created.

Clause 6 – Insertion of new Part 4A to the Trustee Act 2001

33. Clause 6 inserts new Part 4A (third parties) to the Trustee Act 2001. Part 4A comprises of new section 27A (liability of trustees to third parties).
34. New section 27A provides that in circumstances where a trustee is party to a transaction or other matter affecting the trust which involves a third party, the trustee is not personally liable in respect of that transaction or matter and any claim against the trustee

is limited to the assets of the trust, provided the third party is made aware that the trustee is acting as a trustee.

35. Subsections (4) to (6) set out circumstances where the limitation of liability does not apply, for example, where the trustee acts in breach of trust or does not inform the third party that they are acting in a transaction as a trustee.
36. Subsection (7) clarifies that "matter affecting the trust" includes court proceedings brought or defended by a trustee when acting on behalf of the trust. Subsection (8) states a "Third party" includes a settlor, beneficiary, enforcer or protector where such person does not contract with the trustee in such a capacity. Subsection (9) states the section applies to trusts created before or after its commencement in relation to matters or transactions where a trustee is party to a transaction or other matter affecting the trust, which involves a third party.

Clause 7 – Insertion of new section 37A to the Trustee Act 2001

37. Clause 7 inserts new section 37A (validation of appointments where objects are excluded or take illusory shares) to the Trustee Act 2001. This new section consists of subsections (1) to (4), which deal with the validity of appointments made in the exercise of any power to appoint any property among two or more objects of that power.
38. Subsection (1) sets out the grounds on which an appointment among two or more objects of a power to appoint trust property is not to be regarded as invalid.
39. Subsection (2) clarifies that an appointment made in subsection (1) may be regarded as valid even though one or more of the objects of the power of appointment do not take a share in the property that has been appointed.
40. Subsection (3) clarifies that this section does not override any provision in the trust instrument creating the power of appointment which declares the amount of any share from which any object of that power should not be excluded.
41. Subsection (4) confirms that this section applies to appointments made on or before this section comes into operation.

Clause 8 – Amendment of section 39 of the Trustee Act 2001

42. Clause 8 amends section 39(1) of the Trustee Act 2001 by introducing a meaning for the term “protector”. The effect is to ensure the meaning of “protector” in the Trustee Act 2001 is aligned with the same meaning for the term that is given in section 6 of the Trusts Act 1995.

Clause 9 – Amendment of Schedule 1 to the Trustee Act 2001

43. Clause 9 amends Schedule 1 to the Trustee Act 2001 by inserting new paragraphs 2A (Contracts) and 2B (Third Parties). New paragraph 2A of Schedule 1 imposes on a trustee a duty of care when entering into contracts (including contracts made with himself – see clause 5 inserting new section 10A). New paragraph 2B inserts a duty of care requirement on trustees entering into a transaction or other matter affecting the trust which involves a third party.

Clause 10 – General

44. Clause 10 introduces Part 3 of the Bill (clauses 11 to 13), which amends the Trustee Act 1961.

Clause 11 – Amendment of section 55 of the Trustee Act 1961

45. Clause 11 amends subsection (1) of section 55 (power of court to authorise dealings with trust property) of the Trustee Act 1961 by substituting “Where any transaction affecting or concerning” for “Where in the management or administration of”.

Clause 12 – Insertion of new section 55A to the Trustee Act 1961

46. Clause 12 inserts new section 55A (power to declare exercise of a power voidable) to the Trustee Act 1961.
47. New section 55A of the 1961 legislation will enable a person listed under subsection (6) to make an application to the court to seek to set aside the exercise of a power by a trustee or group of trustees.
48. The circumstances within which the court may set aside the exercise of these powers are listed under subsection (3). In accordance with subsection (4), the power for the court to set aside is to be applied whether the circumstances set out in subsection (3) occurred as a result of the lack of care or other fault on the part of the trustee or any other person advising on the exercise of that power.

49. Subsection (5) provides that the operability of the equitable remedy of rectification of mistakes will continue to be available to practitioners irrespective of the proposed new legislation.
50. Subsection (6) defines the person, "A", mentioned in subsection (2) who may apply to the court for a declaration that a transfer or other disposition is voidable, or void. "A" may be the trustee of the trust, a beneficiary of the trust, a protector, or, with leave of the court, any other person.
51. Subsection (7) applies the section to the transfer or other disposition of property to a trust, any transaction affecting or concerning trust property, or the exercise of any power over or in relation to a trust or trust property that occurs before or after this section is brought into operation.

Clause 13 – Amendment of section 61 of the Trustee Act 1961

52. Clause 13 amends section 61 of the Trustee Act 1961 so as to substitute "or advice" for ", advice, or direction".

Clause 14 – Amendment of the Limitation Act 1984

53. Clause 14 provides for the amendment of sections 18(1) (land held in trust) by omitting "and (2)" and 21 (time limits for actions in respect of trust property) of the Limitation Act 1984 (the "1984 Act").
54. Subsection (3) of clause 14 substitutes section 21 of the 1984 Act.
55. Substituted section 21 of the 1984 Act will reduce the current 6 year limitation prescribed for the taking of action in respect of trust property from 6 years to 3 years.
56. Subsection (1) of substituted section 21 provides that there is no limitation period in respect of an action against a trustee based on fraud or to recover trust property from a trustee.
57. Subsections (2) and (4) of substituted section 21 provide that the 3 year period runs from the moment the final trust accounts are delivered to the beneficiaries or the moment that the beneficiaries first had knowledge of the breach, whichever is earlier. This change

should ensure that – despite the shortening of the limitation period – beneficiaries have sufficient time to identify and bring a claim where there is a breach of trust.

58. Subsection (3) of substituted section 21 includes specific safeguards for situations involving beneficiaries who are minors or are under any legal disability. Subsection (6) of substituted section 21 of the 1984 Act provides that where subsection (1) does not apply, an action for breach of trust shall not be brought against a trustee by any person after the expiry of 21 years following the occurrence of the breach.
59. Subsection (7) of substituted section 21 defines an “enforcer” for the purposes of the section.
60. In light of the changes that will be made to section 21 of the 1984 Act under this clause; subsections (2) and (4) of clause 14 make consequential amendments to section 18(1) and 22 of the 1984 Act.

Clause 15 – Amendment of the Apportionment Act 1982

61. Clause 15 provides for the amendment of the Apportionment Act 1982 in so far as it inserts new section 2A (New Trusts) to the legislation. This effect of this new section is that the Isle of Man mirrors the position in England and Wales, by abolishing the apportionment rules for new trusts.
62. Subsection (1) of new Section 2A defines a “new trust” for the purposes of the section.
63. Subsection (2) of new Section 2A provides that entitlement to income under a “new trust” is to income as it arises and clarifies that section 1 of the Apportionment Act 1982 does not apply to any “new trust”.
64. Subsection (3) of new Section 2A declares that three established rules of trust law are not applicable to any “new trust”.
65. Subsection (4) of new Section 2A gives trustees the power to sell property that they would otherwise have been under a duty to sell.

66. Subsection (5) of new Section 2A clarifies that subsections (2) to (4) are subject to any contrary intention contained in any instrument of the trust and to any power under which the trust is created.