



Responses to the Consultation on the Trusts (Amendment) Bill 2013

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Introduction

Three areas of the Island's trust law were identified by STEP Isle of Man as being in urgent need of an update. The Trusts (Amendment) Bill 2013 was drafted with the support of STEP. The consultation on the Trusts (Amendment) Bill 2013 sought views on the proposed amendment to, and update of, the trusts legislation to consider the:

- **Abolition of the "Two Trustees Rule"**
- **Abolition of the Perpetuity Period going forward**
- **Matters determined by governing law under the Trusts Act 1995**

The Trusts (Amendment) Bill 2013 ("the Bill") addresses only these three points, all of which were identified as matters that required urgent attention to ensure that the Island's legislation remained competitive.

Eight responses were received to the consultation on the Trusts (Amendment) Bill 2013. This document provides a summary of the comments received and the Treasury's response.

Treasury wishes to thank those who took part in the consultation.

Further comments and queries should be directed to:

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1. Abolition of the "Two Trustees Rule"

The "two trustees rule" has its roots in the Settled Land Act 1892 ("the Act"). Section 2(3) of the Act defines settled land as "land, any estate or interest therein, which is the subject of a settlement, is for the purposes of this Act settled land".

1.1 Do you agree that the "Two Trustee Rule" should be abolished?

1.2 If you think that this requirement should be retained, please clearly set out the risks that you think the abolition of the "Two Trustee Rule" might pose.

Five respondents either supported the outright abolition of the two trustee rule or confirmed that they had no comment to make in respect of this proposal.

One respondent requested that the current restriction on the maximum number of trustees in respect of a settlement of land, or land held on trust for sale should be increased. The maximum number of trustees that can be appointed in these circumstances is four. This restriction does not apply in the case of settlements and dispositions on trust for sale of land vested or held for charitable, ecclesiastical or public purposes.

It is currently not known how much land in the Island is held as settled land. It is considered that it would be imprudent to make further amendments without further investigation into the matter.

Three respondents considered that the two trustee rule might be relaxed in certain circumstances but not in others. In particular, it was felt that it might be appropriate to disapply the rule where trustees were licensed and regulated. The rationale for this being that "professional" trustees might reasonably be expected to perform to a higher standard than "lay" trustees.

While this position is noted, it must also be noted that the current law already makes provision for one individual trustee to act— provided the trust instrument permits this. A sole trustee can therefore, already act to give valid receipt for land. This applies whether or not the trustee is a "professional" or a "lay" trustee. The problem comes where the trust instrument does not envisage that a trustee will act alone. In some circumstances, the sale of property may need to take place before an additional trustee can be found. A restriction of this type may prevent the trustee from obtaining the best deal for the beneficiaries.

New clauses 3 and 4 of the Trusts (Amendment) Bill 2014 appear as drafted.

2. Abolition of the Perpetuity Period

The rule against perpetuity provides that beneficiaries' interests in a trust must vest (i.e. become certain) within a set time (known as the perpetuity period) in order to ensure that property (settled land) cannot be held in a trust indefinitely.

The rule against perpetuities came into effect as a result of a decision of the House of Lords. It was intended to prevent large estates from being tied up in trust indefinitely.

The current position in the Isle of Man, under section 1(1A) of the Perpetuity and Accumulations Act 1968 ("the Act") sets the perpetuity period as either 80 years in the case of a testamentary trust or in all other cases 150 years.

2.1 Do you agree that the perpetuity period should be abolished?

2.2 If you think that the perpetuity period should either be retained at the current level or retained but increased, please give reasons for this.

2.3 Do you foresee any difficulty with the differential treatment of dispositions within the same settlement, arising from the lack of retrospective application of the abolition of the perpetuity period? If difficulties are foreseen, please give reasons for your answer.

Three respondents had no comment on the abolition of the perpetuity period beyond broad support for the amendments. A further two respondents were fully supportive of the proposal to abolish the perpetuity period for trusts other than purpose trusts.

Two respondents were broadly supportive of the proposal, acknowledging that there might be sound commercial reasons for reviewing the position. Both of these respondents raised the possibility that the failure to disapply the perpetuity period retroactively in respect of all dispositions of property and settlements could indeed give rise to a two tier treatment of assets within a single trust.

The abolition of the perpetuity period will not fetter the discretion of a settlor by preventing appointments to a trust being made for a defined period of time. The changes that are proposed will mean that those wishing to settle a trust in perpetuity will be able to do so. Those not wishing to do so may settle a trust for any defined period that is less than this.

To provide certainty on this point, Clause 5 of the Trusts (Amendment) Bill 2014 which inserts new section 1A into the Perpetuities and Accumulations Act 1968 has been amended. A new subsection 1A (7) has been inserted. This reads:

"Nothing in this section precludes the creation of a trust for a specified or ascertainable period".

3. Matters determined by governing law under the Trusts Act 1995

The Trusts Act 1995 contains provisions that are referred to as the “Firewall” provisions. “Firewall” provisions are designed to shield trust structures established under those laws from the impact of foreign laws and judgments.

3.1 *Do you foresee any problems with extending the protections currently afforded to settlor to the trustees, beneficiaries and protectors?*

3.2 *Do you think that the Isle of Man should be strengthening its firewall provisions to mirror those of Guernsey?*

3.3 *If you support this course of action, please consider how you think this might interact with the Isle of Man’s obligations under the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968, and provide comments where possible.*

3.4 *Do you have any comments on the possibility that the proposed changes may engage Article 1 of the First Protocol of the European Convention on Human Rights?*

While there was no clear consensus on these questions, the principle of extending the firewall provisions was supported.

It was noted that in practice it was already unlikely that Manx trustees would recognise the order of a foreign court without application having been made to the High Court to have the order recognised in the Isle of Man.

Opinion was divided on whether there was a real possibility that the strengthening of the firewall provisions might have a negative impact on the Island’s reputation. One respondent noted that “there is a distinction between protecting against forced heirship claims and other types of foreign claims against trust assets e.g. under matrimonial proceedings. Forced heirship is not part of Isle of Man law but matrimonial orders and ensuring appropriate treatment for spouses is rightly part of Isle of Man law.extending barriers within trust law seems to be inconsistent with the current trend towards improving transparency and joining in international initiatives to share information”.

It is precisely because there is a drive towards improved transparency and information sharing that the firewall provisions should, where appropriate, be strengthened. The potential for reputational risk is considered to be sufficiently mitigated by the fact that the Island’s Courts will afford cooperation with foreign courts where this is just and equitable.

This will ensure that there is sufficient latitude to ensure that trusts which are settled subject to the governing law of the IOM will be protected in appropriate circumstances. It seems unlikely that the Courts will significantly alter the position that they currently take in respect of ensuring that the Isle of Man is not used for the promotion of abusive practices.

4. Are there any other more general points that you would like to raise about the Trusts (Amendment) Bill 2013?

No respondents had any further comments to make.