

**For information
on 6 July 2009**

**The Legislative Council
Panel on Financial Affairs**

Review of the Trustee Ordinance and Related Matters

PURPOSE

This information paper provides Members with an update on the latest progress regarding the review of the Trustee Ordinance (Cap. 29) (“TO”) and related matters.

BACKGROUND

2. The TO which supplements and amends the common law rules relating to trustees was first enacted in 1934, based on the UK Trustee Act 1925. Other than the range of authorised investments in Schedule 2, it has not been substantially reviewed since enactment. Some of its provisions, especially those regarding trustees’ powers, are outdated. Besides the TO, other related legislation like the Perpetuities and Accumulations Ordinance (Cap. 257) (“PAO”), which amends the common law rules regarding perpetuities and accumulations of income, has not been reviewed since its enactment in 1970. Some of its rules are complex and fail to meet market needs.

3. Other comparable common law jurisdictions, such as the United Kingdom (“UK”) and Singapore, have already reformed their trust law in 2000 and 2004 respectively. The Joint Committee on Trust Law Reform, formed by the Hong Kong Trustees’ Association and the Society of Trust and Estate Practitioners – Hong Kong Branch (“Joint Committee”), submitted a detailed proposal to the Government in August 2007 advocating a comprehensive review of the trust law regime in Hong Kong.

4. The review of the trust law regime, mainly to amend and modernise the TO to provide a better framework for the operation of trusts in Hong Kong and strengthen the competitiveness of our trust services industry, was included in the 2007-08 Policy Agenda. As part of the review exercise, we launched a three-month public consultation on the review of the TO and related matters on 22 June 2009.

THE REVIEW

5. We have benefited from the inputs of the Joint Committee in formulating our review proposals. We have also leveraged the reform experience in the UK and Singapore. Moreover, we have critically reviewed some of the reform proposals in the light of the experience learned from the global financial crisis (for example, instead of giving trustees a general power of investment as the UK and Singapore have done, we are inclined to retain the range of authorised investments in the Second Schedule (“Schedule 2”) to the TO as reasonable “safe harbour” limits that can be overridden by trust instruments or orders of the court; see paragraph 8 below). In the review process, we have sought inputs from lawyers, academics and practitioners specialised in the trust field.

Merits of the review

6. Reforming Hong Kong’s trust law is a key component in the Government’s strategy to enhance Hong Kong’s position as a major asset management centre in Asia. Our asset management business has huge potential notwithstanding the recent setback under the financial tsunami. Modernising our trust law will strengthen the competitiveness and attractiveness of our trust services industry. It will encourage more local and overseas high net worth individuals to choose Hong Kong law as the governing law of their trusts and to administer their trusts in Hong Kong.

7. A modern and user-friendly TO will benefit the key players of trusts including the settlors, trustees and beneficiaries by providing more clarity and certainty in law. It will provide trustees all modern powers necessary for the efficient management of trusts.

Key proposals

8. The key proposals and their associated benefits are summarised as follows -

Proposal	Benefits
(a) Introduce a statutory duty of care for trustees	<ul style="list-style-type: none">♦ Provide a clear and accessible statement of the standard of care to be expected from trustees♦ Provide more certainty for settlors and trustees and give better protection to beneficiaries
(b) Retain the range of authorised investments in Schedule 2 to the TO, subject to review from time to time to keep up with market needs and evolving market circumstances	<ul style="list-style-type: none">♦ Provide reasonable “safe harbour” limits for investments by trustees (in default of express powers in the trust instrument or orders of the court) to maintain the value of capital and returns on capital without taking undue risks
(c) Enhance the safeguard in temporary delegation of trustees’ powers so that the number of trustees will not be reduced to one which is against the will of the settlor	<ul style="list-style-type: none">♦ Respect the wish of a settlor to have more than one trustee and enhance the protection of beneficiaries
(d) Repeal section 8(3)(a) of the Enduring Powers of Attorney Ordinance so that the power of delegation by an individual trustee is entirely governed by the TO	<ul style="list-style-type: none">♦ Avoid inconsistent and overlapping provisions in different statutes and improve legal certainty

Proposal	Benefits
(e) Provide trustees with a general power to employ nominees and custodians with necessary safeguards	♦ Facilitate trustees to achieve effective trust administration
(f) Empower trustees to insure any trust property against risks of loss or damage by any event and pay premiums out of the trust funds	♦ To ensure that trustees have sufficient power to insure so as to deliver their duty to act in the best interests of the beneficiaries ♦ Provide better protection to trust property and ensure fairer treatment between capital and income beneficiaries
(g) Provide a default charging clause to enable the remuneration of professional trustees of non-charitable trusts	♦ Make settlors aware of the possibility of employing professional trustees and the need to provide for their remuneration ♦ Enable and encourage a trust to appoint professional trustees who have the necessary skills for the effective administration of the trust
(h) Subject trustee exemption clauses seeking to exempt professional trustees who receive remuneration for their services to some statutory control; and to promulgate a code of best practices regarding the use of trustee exemption clauses by relevant professional bodies	♦ Strike a balance between the rights and interests of settlors, trustees and beneficiaries

Proposal	Benefits
(i) Provide some basic rules for beneficiaries' rights to disclosure by trustees of information, accounts and documents relating to the trust	♦ Provide a degree of certainty and assist in the development of a principle-based approach without codifying all the common law principles in this area prematurely
(j) Provide an alternative court-free route for beneficiaries, who are of full age and capacity and are absolutely entitled to the trust property, to remove a trustee	♦ Provide a simple and time-saving process to remove the trustee and appoint a new one if there is unanimous consent among the beneficiaries
(k) Abolish the rule against perpetuities altogether or introduce a fixed perpetuity period	♦ Reform an outdated and complicated rule that is difficult to apply and creates uncertainty
(l) Abolish the rule against excessive accumulations of income (with possible exception regarding charitable trusts)	♦ Abolish an outdated and complicated rule that creates uncertainty

9. There are a few issues which we have not yet made definitive proposals. We would like to hear the views of various stakeholders (including those of charitable trusts) before forming a view on them. These include -

- (a) whether trustees should be given a wider default power to appoint agents who may exercise asset management functions, e.g. discretionary fund managers, and if so, whether some refinement should be made in respect of charitable trusts; and

- (b) regarding charitable trusts, whether professional trustees should be allowed to charge a reasonable amount for their services in the absence of a charging provision in the trust instruments and, if so, what constraints should be imposed.

10. Some of the proposals put forward by the Joint Committee involve concepts which are more commonly practised in off-shore jurisdictions. We would also like to hear the views of stakeholders before forming a final view on them. The issues are -

- (a) whether the role of “protectors” of trusts should be defined in statute;
- (b) whether the law should provide that a trust will not be invalidated by certain reserved powers of settlors;
- (c) whether the common law principles on the governing law of trusts should be codified;
- (d) whether the law should provide that forced heirship rules will not affect the validity of trusts; and
- (e) whether the creation of non-charitable purpose trusts should be allowed.

WAY FORWARD

11. The consultation will last for three months from 22 June to 21 September 2009. We aim to draw consultation conclusions by the end of 2009, with a view to introducing legislative amendments into the Legislative Council in 2010-11. We will keep this Panel posted of developments regarding the review.

**Financial Services Branch
Financial Services and the Treasury Bureau
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