

TCI Trusts Bill

Note and Clause-by-Clause Summary of Changes as Against the Current Ordinance and General Comments

General Approach

As noted, in the Preliminary Note provided in December, the current Ordinance was closely based on Jersey's Trust Law 1984 and the previous Guernsey Trusts Law. Since then, Guernsey has enacted a new Trusts Law, although it was closely modelled on the previous Law, and Jersey has passed a number of amending laws, the most recent being at the end of last year (December 2012).

Although practitioners in the TCI consider that new trusts legislation would be more attractive than amending the current Ordinance, there was a strong feeling that the new Ordinance should be an update of the existing Ordinance, rather than taking a completely new approach. There are obvious advantages to this approach, especially given that it should enable existing trusts to be governed by the new Ordinance with minimal transitional provisions.

As instructed, the draft Bill therefore starts from, and builds on, the current Ordinance.

Practitioners requested the following:

1. Provisions enabling the settlor of a trust to reserve powers.
2. Provisions enabling the creation of some form of purpose trust.
3. The exemption of a category of private trust companies, along the lines of the exemption introduced in the BVI (which was amended in May of this year).

4. The disapplication of the Statute of Elizabeth.

The proposed Bill for a new Trusts Ordinance provides for items 1 and 2. Private trust companies will be provided for in the regulatory legislation and the Statute of Elizabeth will be (fully) disappplied through separate legislation providing for voidable/fraudulent dispositions (as discussed in the TCI, this legislation goes beyond trusts). The two remaining Bills are being drafted.

The current Ordinance has been subjected to a thorough and detailed review, taking into account the legislation of a number of other jurisdictions, as well as the Guernsey Trusts Law 2007 and the various amendments to the Jersey Law.

This Note provides a clause-by-clause commentary on the new Bill, covering the changes made as against the current Ordinance and the rationale for those changes that are substantive in nature.

Jersey 2013 Proposed Amendments (Rule in Re Hastings-Bass)

At the meeting in the TCI, the Rule in Re Hastings-Bass was briefly discussed. The Rule states that where a trustee acts under a discretion given by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account.

The Rule in Re Hastings Bass has been the subject of much discussion in the trusts journals over the last few years, as its life may be limited.

Jersey has apparently taken a decision to give statutory effect to the Rule and just over a month ago, a draft Bill to amend the Jersey Trusts Law was published. The draft Bill is currently before the Jersey legislature.

It is claimed that the amendments were drafted following close cooperation with STEP as well as local practitioners.

Consideration needs to be given to whether this is an issue that is relevant to the TCI. Equivalent provisions to the Jersey amendments have not been incorporated into the Bill at this stage, but it would be relatively easy to do so, following a close review of the provisions.

Further consideration of this in the TCI would be welcome.

BVI VISTA Trusts

There was discussion in the TCI as to whether a special trusts regime along the lines of the BVI Vista Trust should be provided for in the Bill. The feedback from practitioners did not seem positive. In a follow-up e-mail, there was an indication that follow had been received indicating that BVI VISTA trusts do not add to what a trustee can do anyway.

In the circumstances, the Bill does not contain a special trusts regime.

Beddoes Orders

I note that there was some discussion in the TCI concerning section 52 and Beddoes Orders. Unfortunately, I do not appear to have a good note of the concern and I have not included provisions in the Bill. I will do so if this matter can be raised in the consultation.

The detailed clause-by-clause notes on the Bill are set out below:

Clause in Bill	Section in Ordinance (if applicable)	Comment (if any)
1	1	
2	2	Interpretation Note that definitions are only referenced to the extent that they are new or a substantive

		change has been made.
“breach of trust”	“breach of trust”	Clause 2(2) of the Bill provides, as the Trusts Ordinance (“the current Ordinance”), that the Ordinance, when enacted, is not intended to be a codification of the law of trusts. The definition has therefore been widened to include breaches of trust imposed by the general law.
“charitable purpose”	“charitable purpose”	In the current Ordinance, the definition of “charitable purpose” uses the phrase “law governing the validity of the trust”. For reasons discussed in relation to the definition of “proper law” below, the definition in the Bill links the purpose to the proper law of the trust rather than the law governing the validity of the trust.
“charitable purpose trust”		This is a new definition to distinguish from purpose trusts.
“commencement date”		New definition.
“disposition”		This is a new definition that draws on the definition in Guernsey.
“foreign judgment”		This is a new definition necessary to provide for the recognition and enforceability of foreign judgments. The phrase is given a meaning beyond its normal meaning by including decisions of a foreign tribunal, including arbitration.
“foreign trust”	“foreign trust”	See the issues discussed below in relation to the definition of “Turks and Caicos Trust”. This should be a clear-cut issue. A trust is either a Turks and Caicos Trust or a foreign trust. To achieve that certainty, it is preferable to define a foreign trust as any trust that is not a Turks and Caicos Trust.
“general law”		This is a new inclusive definition. The current Ordinance in a number of instances uses language such as “subject to this Ordinance”. As discussed above and during the meeting in TCI, the Ordinance is not a codification and in some instances this is too narrow, and in those instances a reference to the general law has been added. In other instances,

		<p>limiting to the Ordinance is considered appropriate, in which case no reference to the general law has been added.</p> <p>The new definition provides that the general law includes any rule of law or equity. Should this be an exhaustive definition?</p>
“heirship right”	“heirship right”	<p>A number of changes have been made to the existing definition including:</p> <ul style="list-style-type: none"> (i) to add existing rights; (ii) to add “anticipation” of death; (iii) change to wording of last part from “disposition of the property to such person” to “disposition of the person’s property”; (iv) some drafting changes. <p>In relation to item (iii), the current wording does not seem correct. The new wording is similar to the Jersey wording.</p>
“insolvent”	“insolvent”	See notes to clause 3 below.
“insurance”	“insurance”	Although included in the current Ordinance, this definition is not strictly needed. However, as it doesn’t cause any problems, it has been included.
“interest”, in relation to a beneficiary,	“interest” of a beneficiary”	<p>Although the phrase, as defined in the current Ordinance (i.e. “interest of a beneficiary”), is used in the Bill, there are other references to a beneficiary’s interest that are stated slightly differently. To make the definition more generic, the definition has been changed to simply “interest” in relation to a beneficiary.</p> <p>Some minor drafting changes have also been made.</p>
“minor”	“minor”	<p>The existing definition is problematic for a number of reasons:</p> <ul style="list-style-type: none"> (i) Reference to a person’s domicile could lead to significant uncertainty. It may not be easy, or even practicable, to determine a person’s domicile; (ii) Even where domicile can be ascertained, the law relating to who is a minor may be complex and not necessarily solely related to age and may be difficult for a TCI

		<p>trust company to discover;</p> <p>(iii) In the case of conflict between the law of the TCI and the law of a person’s domicile, it is not clear which prevails.</p> <p>(iv) The definition does not permit the terms of the trust to provide a different definition for “minor”.</p> <p>The proposed definition provides for a specific age (18 years) but makes this subject to the terms of the trust.</p>
“personal relationship”	“personal relationship”	See notes to clause 4 below.
“person without legal capacity”		This is a new definition. For the most part, any provision that applies to a minor should also apply to a person who does not have legal capacity.
“proper law”		<p>As discussed during the meeting, the current Ordinance defines “applicable law of a trust”, but then does not use the term again, other than in section 40.</p> <p>For the most part, the Law refers to the “law governing the validity of the trust”, sometimes also referencing the law governing its construction and administration.</p> <p>It is recommended that the same term is used consistently.</p> <p>Most jurisdictions use the concept of the “proper law of the trust”, rather than the “applicable law”, but the terminology is not crucial. The Hague Convention uses the term “applicable law”. The position in some other comparable jurisdictions is as follows:</p> <ol style="list-style-type: none"> 1. Jersey: proper law 2. Guernsey: proper law 3. BVI: proper law 4. Cayman: governing law 5. Bahamas: proper law <p>For the purposes of the draft Bill, the term “proper law” has been used in substitution for “applicable law”, but “applicable law” could be used instead.</p>

		The term “applicable law” is not included in the interpretation section of the current Ordinance but the draft Bill contains a “pointer definition” to “proper law”. See comments against clause 6 below.
“property”	“property”	This includes some specificity (and in the first part is aligned to the definition in POCO).
“purpose”		The term “purpose” is not currently defined. The term is defined in the Jersey and Guernsey Laws.
“settlor”	“settlor”	The current definition is too narrow. It makes no reference to a testamentary disposition although, in the case of a testamentary disposition, there is no immediate disposition of property. The BVI, Jersey and Guernsey definitions are closely aligned in relation to testamentary dispositions. The definition of “settlor” has been changed in the Bill accordingly.
“terms of a trust”	“terms of a trust”	Again, the current definition uses the terminology “laws governing its validity, construction or administration”. In line with the general recommendation above, this has been changed to the proper law of the trust.
“trust”	“trust”	The new definition is similar to the existing definition with the addition of “discretions” and “liabilities”.
“Turks and Caicos Trust”	“Turks and Caicos Trust”	<p>Again, “law governing validity” is too narrow. The definition has been changed to link to the proper law of the trust.</p> <p>Much more important is the ambiguity that arises when severable aspects of the trust are governed by different laws. This causes some difficulty for this definition, which presupposes just one proper law. See also the comments against clause 6 below.</p> <p>As indicated below, this issues requires further discussion.</p> <p>Finally, trusts created before the commencement date are included. This may not strictly be necessary given the Supplemental provisions, but removes any possible doubt.</p>
“unit trust”	“unit trust”	Some minor changes to drafting language. For example, the phrase “any property

		whatsoever” does not appear to be required. Simply stating “property” adequately covers the position.
3	2(1) definition of insolvent	The current definition of “insolvent” mixes up the cash flow and balance sheet tests. The new definition separates these and provides that a person is insolvent if either applies. This adds clarity and aligns the definition with the usual and generally accepted meaning of insolvency.
4	2(1) definition of personal relationship	<p>The definition in the current Ordinance contains some specific examples that can be dealt with in a more general way.</p> <p>An issue was raised in relation to the definition of “personal relationship” to the effect that how can an adoption not recognised by law be recognised by the Ordinance?</p> <p>The definition is needed solely for the forced heirship provisions. It is important that the definition is as wide as possible. Furthermore, it is possible that the legislation may of a foreign jurisdiction may recognise, for example, an adoption or marriage for the purposes of forced heirship, even though the formalities of adoption or marriage have not been completed and are not therefore recognised as valid under that same system of law.</p> <p>The definition has been redrafted to (hopefully) make it clearer, but even though it lacks legal certainty, it is probably better to retain relationships that are not recognised by law.</p>
5	3	<p>Existence of a trust</p> <p>The provision in the current Ordinance draws on equivalent provisions in both the Jersey and Guernsey Laws.</p> <p>No change is required.</p>
6	4	<p>Proper Law of a Trust</p> <p>As indicated above, the term “proper law” replaces the term “applicable law” which is defined in section 4 of the current Ordinance.</p> <p>The current Ordinance defines the applicable law as “the law chosen by the settlor”.</p>

		<p>Although this phraseology is used in Guernsey, and the Hague Convention, other countries reviewed refer simply to the terms of the trust. Although there may be no problem in practice, referring back to the law chosen by the trustee seems superfluous and superfluous wording is better avoided in case it poses unforeseen issues in the future. The definition in the Bill, therefore, simply refers to the terms of the trust.</p> <p>Other than this, express provision of governing law has been separated from that which is implied to ensure a proper sequential consideration of proper law.</p> <p>Section 4 of the current Ordinance permits a severable aspect of a trust to be governed by a law that is different from that applicable to another aspect. This has been carried into the Bill. However, it raises an important issue when considering the definition of a “Turks and Caicos Islands trust” which presupposes that there is only one proper law of the trust.</p> <p>It is not clear how this can be resolved without creating complexity and further difficulties. This needs further discussion.</p>
7	5	<p>Jurisdiction of Court</p> <p>Apart from sub-paragraphing the criteria relating to foreign trusts that bring them within the jurisdiction of the Court, the following substantive changes have been made:</p> <ol style="list-style-type: none"> 1. In sub-paragraph (iii), referring simply to the administration of the trust property of a foreign trust seems too limiting. The criterion has been expanded to include administration of the trust (this is the position in the BVI). 2. Two new sub-paragraphs have been added (drawn for the BVI). These are useful additions. 3. Subclause (2) makes it clear that a TCI company is resident in the TCI to avoid any possible doubt.
8	6	<p>Application of Part II</p> <p>Subclause (1) - No change.</p> <p>Subclause (2) is new. In the current Ordinance, there are a number of references in Part</p>

		<p>II to a “Turks and Caicos Trust”, but for the most part the only references in that Part are to a “trust”. Given the clear wording of section 6 of the current Ordinance, this should not cause a problem. However, to remove any possible inconsistency, subclause (2) provides that “trust” means a Turks and Caicos Trust in Part II and all references to a Turks and Caicos Trust have been changed to a “trust”.</p>
9	7	<p>Creation of a trust Subsection (1) of the Current Ordinance paragraphed, but no substantive changes made.</p>
10.	8	<p>Property which may be held on trust The marginal note has been changed to reflect the wording in the clause. Paragraph (b) does not use the phrase “added to the trust property” but the more direct “to be held on trust”.</p>
11.		<p>Reservation of certain powers The legislation of the following jurisdictions has been reviewed for the purposes of taking a view on appropriate provisions for settlor reserved powers: Jersey Guernsey British Virgin Islands Cayman Islands Bahamas Note that the Trusts (Jersey) Law was amended in relation to settlor reserved powers in December 2012 and the Bahamas Trustee Act in December 2011. These amendments have been taken into account. As discussed during the meeting in the TCI and in the preliminary Note, two different approaches have been taken. Section 2(4) of the BVI provides simply that: <i>“The reservation by the settlor of certain rights and powers, and the fact that the</i></p>

		<p><i>trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust”.</i></p> <p>The legislation of every other jurisdiction considered list a series of specific powers that may be reserved by the settlor. Practitioners in the TCI prefer the more specific approach.</p> <ol style="list-style-type: none"> 1. The language providing for effect of the settlor reserved powers section/article is similar in the various jurisdictions. Generally, it is that the reservation or grant “<i>does not invalidate/affect the validity of the trust</i>”. Most also attempt to ensure that the reservation of powers does not prevent the trust being an immediate inter vivos trust as opposed to a testamentary disposition¹. The Jersey Law does this very simply, and it recommended that the Jersey language is used as the basis for the TCI provision. 2. The list of reserved powers is also similar, with almost identical wording used in many instances. However, there are some subtle differences. In particular: <ol style="list-style-type: none"> (a) the Bahamas provision enables the settlor to withdraw property from the trust, which could be considered as moving too far in the direction of undermining the essential requirements for a trust. This has not been included in the Bill. (b) Jersey and Guernsey enable the reservation or grant of “any beneficial interest”. The Cayman Islands uses the phrase “a limited beneficial interest”. This may not be a significant difference, but the Cayman language has been used in the Bill in preference to the Jersey/Guernsey language. (c) The Jersey/Guernsey legislation enable the reservation of a power to act as or give (binding) directions as to the appointment or removal of a director or other officer of any corporation wholly or partly owned by the trust. The equivalent Cayman provision is limited to acting as director. The Bahamas
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¹ See The International Trust, para 10.34

		<p>legislation does not include an equivalent provision. The more cautious approach taken by Cayman has been adopted in the Bill.</p> <p>(d) In relation to trust property, the Jersey/Guernsey Laws enable the reservation of the power to give (binding) directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights (functions) arising from the trust property. The Cayman Law is restricted to the power to the trustee in connection with the purchase, holding or sale of the trust property. This is obviously much more limited. The Bahamas Act deals with this more generally. A middle line has been taken in the Bill. Directions as to “management” have been omitted as well as the general wording covering the exercise of any powers or rights arising from the trust property. Again, “management” may be considered as too aggressive.</p> <p>(e) The equivalent provisions to paragraph (e) are broadly similar in Jersey, Guernsey and Cayman Islands. The principal difference is that the 2012 Jersey amendments inserted the additional wording: “or any other person who holds a power, discretion or right in connection with the trust or in relation to trust property”. This wording has been included in the Bill.</p> <p>(f) The Cayman and Bahamas legislation do not contain an equivalent to paragraph (f) of the Bill.</p> <p>(g) Paragraph (g) of the Bill adds wording in relation to the forum for the administration of the trust, found in Guernsey and Cayman, but not Jersey.</p> <p>(h) Equivalent language to paragraph (h) is contained in the Jersey, Guernsey and Cayman legislation.</p> <p>3. As indicated in the written Note, Jersey [section 9(3)] appears to excuse a trustee from acting in breach of his core duties as trustee. The more limited approach taken by the Guernsey Law has been used instead.</p>
12	9	Beneficiaries of a trust

		<p>Subclause (2) changed to enable the terms of the trust to remove a beneficiary and to provide that exclusion from benefit may be revocable or irrevocable.</p> <p>Otherwise, minor drafting changes.</p>
13	10	<p>Disclaimer of beneficial interest</p> <p>Section 10(1) of the current Ordinance provides that disclaimer is “<u>subject to the terms of the trust</u>”, which mirrors the language in the Guernsey Law. This would enable the terms of the trust to exclude disclaimer.</p> <p>It seems harsh and unfair to enable disclaimer to be excluded by the terms of the trust when a person can be included as a beneficiary without his or her knowledge or consent. The Jersey Law provides that a beneficiary can disclaim “<u>despite the terms of the trust</u>”. This gives a beneficiary an absolute right to disclaim which, it is arguable, is appropriate. The language of clause 13(1) reflects this.</p> <p>Minor language change to subclause (2).</p> <p>The BVI, Cayman and the Bahamas do not provide for disclaimer at all.</p>
14	11	<p>Nature of beneficial interest</p> <p>Minor language changes made and “transferred” added.</p>
15	12	<p>Validity of a Turks and Caicos Islands Trust</p> <p>Subclause (2) contains the following substantive differences when compared to section 12(2) of the current Ordinance:</p> <ol style="list-style-type: none"> 1. Paragraph (c) permits non-charitable purpose trusts, as purpose trusts are introduced in the Bill. 2. Paragraph (d)(iii) and (iv) have been added. Both seem appropriate. Note that equivalent provisions are contained in both the Jersey and Guernsey Laws.
16	13	<p>Application of the law of the Islands to trusts</p> <ol style="list-style-type: none"> 1. Note that the marginal note has been changed to application of TCI law rather

		<p>than foreign law.</p> <ol style="list-style-type: none"> 2. A number of minor drafting changes have been made and the following more significant changes. 3. Section 13 of the current Ordinance is in the Part of the Ordinance that applies solely to Turks and Caicos Islands trusts. However, the language used in the section is rather different, referring to a trust “for the time being governed by the laws of the Islands”. There appears no sound reason for this distinction and the Bill therefore refers simply to Turks and Caicos Islands trusts. 4. Paragraph (1)(b) of the current Ordinance has been split and “distribution of trust property” added to paragraph (1)(c). 5. Enforcers added to paragraph (1)(d). 6. Paragraphs (1)(f) and (g) are new and draw on the Jersey amendments of December 2012 (which in Jersey covered issues central to the judgment of the Royal Court of Jersey in the Mubarak v. Mubarak case, a matter concerning an application to enforce an English High Court Order to vary a Jersey trust. 7. The final words of subsection (1) of the current Ordinance, before the proviso, read “<i>without reference to the laws of any other jurisdictions with which the trust or disposition may be connected</i>”. <p>Although it is difficult to envisage any circumstances in which the limitation specifying the connection of the trust or disposition with the other jurisdiction, these words do not appear necessary and could have the unintended consequence of excluding this section if it could be established that the limitation does not apply. In the circumstances, these words have been deleted.</p> <ol style="list-style-type: none"> 8. The linkage between subsections (1) and (2) in the current Ordinance is ambiguous. The ambiguity is easily cured by putting the proviso into a separate subclause. Then, the “without limiting the generality” wording properly applies to subclause (1) only. 9. The proviso to subsection (1) in the current Ordinance is a separate subclause in
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		<p>the Bill.</p> <p>10. Some minor drafting changes made in subclause (2).</p> <p>11. Providing a specific list of matters at the start of subsection (2) of the current Ordinance seems unnecessary, as all are appear to be encompassed with subsection (1) anyway. This wording has therefore been replaced by more general wording referring back to subclause (1) in the Bill.</p> <p>12. In subclause (3)(b), the words “to the settlor” after “personal relationship” have been omitted. This extends the provision to any personal relationship.</p>
17		<p>Recognition and enforceability of foreign judgment</p> <p>As discussed at the meeting in the TCI, section 13 of the current Ordinance does not cover the enforceability of foreign judgments. This is a matter that is not without difficulties.</p> <p>The Jersey and Guernsey Laws take a very wide approach that has been subject to some criticism, whilst the Laws of the BVI and Cayman take a more targeted approach.</p> <p><i>Jersey/Guernsey</i></p> <p>Both the Jersey and Guernsey Laws, provide (in substance) that no judgment of a foreign court is enforceable to the extent that it is inconsistent with, in Guernsey the Law and in Jersey the equivalent article to section 13 of the current Ordinance.</p> <p>However, the Guernsey provision is wider and “tighter” than the equivalent Jersey provision.</p> <p><i>BVI/Cayman</i></p> <p>Both the BVI and Cayman laws provide that no judgment of a foreign court is enforceable to the extent that it is inconsistent with the equivalent to section 13(2) of the current Ordinance, clause 16(3) of the Bill. This is the subsection that deals with the prohibition or non-recognition of the concept of a trust and the forced heirship provisions. This is considerably narrower.</p>

		<p>The Jersey approach has been criticised on a number of grounds, including:</p> <ul style="list-style-type: none"> • The approach is contrary to Jersey’s obligations under separate legislation governing the reciprocal enforcement of foreign judgments • It is contrary to the spirit of comity (both of the above could result in foreign courts being less willing to enforce judgments of the Jersey Court) • It does not allow for the possibility that the parties are happy to submit to the jurisdiction of the foreign court • The judgment could not be recognised or enforced even if the law in the other jurisdiction is identical to that in Jersey, leading to possibly costly duplicated litigation. <p>It may be that the first bullet does not apply to the TCI on the basis that there is, apparently (as advised by private practitioners), no such legislation in the TCI. However, the English common law rules may well apply.</p> <p>Given that the Court has a discretion as to whether or not to recognise and enforce a foreign judgment, it is questionable that the provision needs to take the wide approach of Jersey and Guernsey. The critical issue is the recognition of the concept of a trust and forced heirship.</p> <p>As indicated, the BVI amended its Trustee Act in May of this year, but the provisions relating to the recognition and enforcement of foreign judgments were not amended. It can be assumed, therefore, that the more limited provision has not caused any issues or raised any concerns.</p> <p><i>Bahamas</i></p> <p>The Bahamas Trusts (Choice of Governing Law) Act 1989 takes a wide approach, somewhat similar to the Jersey approach.</p> <p>The Bill adopts the more targeted approach of the BVI and Cayman, rather than the Jersey/Guernsey approach in order to “firewall” the essential provisions whilst retaining some flexibility by leaving the TCI Court with some discretion. However, this should be subject to further discussion and consideration with practitioners. In the TCI.</p>
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		<p>Note that the Bill covers estoppel, as BVI - this is not included in the Jersey Law.</p> <p>The BVI Law, uniquely, provides that the recognition and enforcement of a foreign judgment shall be regarded as “contrary to the public policy of the BVI”. The rationale for this is that this is an English common law defence to the recognition and enforcement of a foreign judgment. The inclusion of this provision therefore very neatly ties the statutory provision in with a standard common law defence, ensuring compatibility between the statute and common law. This provision has been included in the Bill.</p> <p>Given that there are no provisions in the current Ordinance relating to recognition and enforcement</p>
18	14	<p>Duration of a trust</p> <p>No changes made.</p>
19	15	<p>Number of Trustees</p> <p>Although the language of section 15 of the current Ordinance has been redrafted, the changes are mainly stylistic and minor. The only substantive changes are as follows:</p> <ol style="list-style-type: none"> 1. Subject to the terms of the trust, the sole trustee must, under subclause (1)(b), be a licensed trust company, rather than just a corporation as at present. 2. Subclauses (3) and (4) are section 19 of the existing Ordinance. It seems more logical to group these provisions together with the provisions concerning the number of trustees.
20	16	<p>Appointment of new or additional trustees</p> <p>Section 16 of the current Ordinance has been redrafted, primarily:</p> <ol style="list-style-type: none"> 1. to add to the circumstances in which a new or additional trustee can be appointed; 2. to provide for appointment by the Court. <p>Some of the language has also been changed.</p>

		These changes are drawn from the Jersey and Guernsey Laws.
21	17	Prohibition of renunciation after acceptance Minor drafting changes only. Substance unchanged.
22	18	Resignation or removal of a trustee In addition to some drafting and minor changes, the following substantive changes have been made to section 18 of the current Ordinance: <ol style="list-style-type: none"> 1. The provision in subsection (1) of the current Ordinance which provides that resignation shall not take effect until the resigning trustee has executed documents and performed acts necessary to vest trust property in the new or continuing trustees could lead to significant uncertainty. For example, the resigning trustee and the continuing trustees may believe that the resigning trustee has done so, but it may later transpire that this is not the case. Presumably, this would result in the resignation never having become effective. It is unclear how a clear legal opinion can ever be given. This seems highly unsatisfactory. It is recommended that resignation is effective on delivery of the notice, but that a retiring trustee is obliged to do everything necessary to vest the property in the continuing trustees [see subclause (5)]. The Guernsey Law (but not the Jersey Law) provides that resignation takes effect either on delivery of the notice or on such later date or later event as may be specified. There does not appear to be a good reason for enabling the retiring trustee to elect to dictate timing in this way. 2. Subsection (4)(c) of the current Ordinance has been changed to include “the exercise of a power”. Although the exercise of a power is arguably covered by “the operation of a provision”, this additional language puts the matter beyond doubt.
	19	As indicated, section 19 of the current Ordinance has been incorporated in clause 19 of the Bill.

23	20	<p>Duties of a trustee</p> <p>Section 20 of the current Ordinance states in subsections (2) and (4)(b) that the provision concerned is “subject to this Ordinance”. Given that the new Ordinance, when enacted, will not codify the law of trusts, this has been broadened to include the general law.</p> <p>The obligations to keep trust accounts have been “beefed up” as this will, I am sure, be something that has been brought up, or would otherwise be brought up, by the OECD peer review process. Contravention of the provision, without reasonable excuse, is an offence.</p>
24	21	<p>Duty of co-trustees to act together</p> <p>Minor drafting changes. Clause 24 is substantively identical to section 21 of the current Ordinance.</p>
25	22	<p>Impartiality of trustees</p> <ol style="list-style-type: none"> 1. The clause has been broadened to include non-charitable purpose trusts. 2. Whilst the trustee must obviously act impartially, “act fairly” is probably not the best phrase to use. The Jersey Law provides that the trustee must not execute the trust for the advantage of one beneficiary or purpose at the expense of the other. This is a preferable phrasing which has been included in the Bill. 3. Although subclause (1) is expressed to be subject to the terms of the trust, for the avoidance of doubt, subclause (2) provides that the subclause does not prejudice the exercise of a discretion.
26	23	<p>Powers of trustees</p> <ol style="list-style-type: none"> 1. A number of minor drafting changes have been made. 2. Subclause (1) includes a reference to the general law, for the reasons discussed earlier. The proviso has also been widened. It seems too narrow to reference just the trustee’s duties.

		<ol style="list-style-type: none"> 3. In subsection (3) “consult” has been added as this is different to obtaining consent and the appropriate changes made to subsection (4). 4. It is unclear why subsection (4)(a) of the current Ordinance should be subject to the terms of the trust. The person is either a trustee or not. It is not considered appropriate for the terms of the trust to provide that a person is deemed to be a trustee by reason of giving or withholding consent. This has been removed as a general proviso to subclause (4). However, subclause (4)(b) should be subject to the terms of the trust.
27	24	<p>Delegation by trustee</p> <ol style="list-style-type: none"> 1. Subclauses (1) and (2) are substantively unchanged. 2. Subclause (3) has been redrafted. Surely the critical issue when considering delegation is whether the trustee has acted in breach of trust. It is not clear why the language of “good faith and without neglect” is used (although it is also used in the Jersey Law). The Guernsey Law speaks of breach of the equivalent of clause 23. However, that also seems too narrow. 3. Subsection (5) of the current Ordinance has been split into two subclauses.
28	25	<p>Remuneration and expenses of trustee</p> <ol style="list-style-type: none"> 1. Subclauses (1) and (3) are substantively identical to section 25 of the current Ordinance. 2. Section 25 of the current Ordinance is based on article 26 of the Jersey Law, which was amended in 2012 to provide that where a trust instrument is silent as to remuneration, professional trustees (i.e. licensed trustees) are entitled to reasonable remuneration for their services. The rationale for this change was that, if the trust instrument is silent as to remuneration and it is not practicable to obtain the consent of all beneficiaries, the trustee will have to apply to Court for a variation of the trust instrument, which would be costly. Given that its is unrealistic to expect professional trustees to act without remuneration, this recognises what the Court would order anyway.

		3. The rationale for this amendment is sound and it is therefore recommended that the 2012 Jersey amendment should be incorporated in the Bill .
29	26	Power to appropriate In this case, a reference to the General Law does not seem appropriate. No changes have been made to section 26 of the current Ordinance.
30	27	Corporate trustees No changes have been made to section 27 of the current Ordinance.
31	28	Trustee may refuse to make a disclosure 1. It is important that this clause is not considered to over-ride the provisions of other legislation, including the FSC Act, which permit the Commission to require disclosure in specified circumstances and the Proceeds of Crime Ordinance. (both of which require disclosure without the need for a Court order). In the circumstances, this clause is subject to any other Ordinance. 2. Reference to enforcer of non-charitable purpose trust added.
32	29(1), (2), (7) & (10)	Liability for breach of trust 1. Section 29 is a long section, which can be split into more than one section. Opportunity has been taken to rearrange section 29 to group the subject matter. Clause 32 provides for liability for breach of trust. It incorporates provisions equivalent to section 29(1), (2), (7) and (10), with the changes outlined below. 2. Subclause (3) is new. It is important to ensure that a trustee cannot escape the consequences of a breach of trust by resigning. 3. Subclause (4) [which is the equivalent of subsection (2)], prohibits set off. The current provision enables set off where the gain and loss arise in the same transaction or result from the same unauthorised policy. However, it is unclear why a trustee should enjoy any right of set off in relation to a breach of trust as this is not consistent with the trustee’s fiduciary duty. The latter part of subsection (2) of the current Ordinance has therefore been deleted. Neither Jersey nor Guernsey allow

		<p>set off in any circumstances. This is a matter that can be discussed further.</p> <p>4. Section 29(1) of the current Ordinance provides that a term of a trust shall be invalid if it purports to relieve a trustee from liability arising from his own fraud, wilful misconduct or <u>negligence</u>. This is considered too restrictive. Both Guernsey and Jersey provide only that the terms of the trust cannot relieve a trustee from liability arising from his own fraud, wilful misconduct or <u>gross negligence</u>. In my view this is appropriate. The provision has been changed accordingly.</p> <p>5. A trustee should not be granted an indemnity out of trust property in respect of a breach for which he cannot be relieved. Subclause (5)(b) provides for this. The Guernsey Law contains an equivalent provision.</p>
33	29(3), (4) & (8)	<p>Circumstances in which trustee not liable for breach of trust</p> <p>1. This clause includes some drafting changes as against the equivalent provisions in the current Ordinance.</p> <p>2. The intention of subsection (9) of the current Ordinance is rather unclear:</p> <p>(i) First is refers to the “default” of a co-trustee. It is unclear how a default is distinguished from a breach of trust. Is it possible for a trustee to default but not also be in breach of trust? Are all breaches of trust also defaults?</p> <p>(ii) To the extent that “default” and “breach of trust” are synonymous, paragraph (a)(i) appears to state the same as section 29(1) (concurr in breach of trust) and paragraph (a)(ii) overlaps with subsection (4).</p> <p>(iii) Paragraph (b) appears to undermine the provisions that set out the liability of a trustee.</p> <p>In the circumstances, an equivalent provision has not been included in the Bill.</p>
34	29(6) & (7)	<p>Beneficiary may relieve or indemnify trustee</p> <p>This clause is identical to section 29(6) and (7) of the current Ordinance.</p>
35	30	<p>Trustee acting in respect of more than one trust</p>

		<p>No changes as against section 30 of the current Ordinance.</p> <p>Note that in December 2012, the Jersey Law was amended to provide that a trustee acting in separate capacities as trustee of more than one trust can contract with itself. This is intended to enable licensed trustees to transact with themselves in relation to separate trusts.</p>
36	31	<p>Dealing by trustee with third party</p> <ol style="list-style-type: none"> 1. As discussed in the Preliminary Note provided, there are a number of problems with section 31 of the current Ordinance. These problems were carried over from the then current Jersey Law, which was amended in 2006. Please refer to the Note for details of the issues. 2. This clause draws on the current Jersey provisions. Note that there is no equivalent to section 31(4) of the current Ordinance in the Jersey Law. This is a useful clarifying provision and it has been adapted as subclause (4) of the Bill.
	32	<p>This section has been moved. See clause 70 below.</p>
37	33	<p>Position of outgoing trustee</p> <ol style="list-style-type: none"> 1. Subclauses (1) – (3) do not change the equivalent provisions in the current Ordinance. 2. Subclauses (4) and (5) are new and drawn from the Jersey Act, which was amended in December 2012. In essence, subclause (4) enables a trustee to require reasonable security for existing, future or contingent liabilities before surrendering trust property. This would normally be in the form of an indemnity. Subclause (5) [the provision that was inserted in 2012] enables the trustee to enforce a contract that extends or renews the security, even though he is not a party to the contract, if the contract provides for him to do that. From a briefing note on the 2012 amendments issued by the Bedell Group (a law firm with offices in Jersey), this is intended to enable the STEP model precedents for the retirement and appointment of trustees incorporating the “10/10” provisions, which STEP members in the TCI will be

		familiar with. The Guernsey Law contains equivalent provisions.
38	34	<p>Protective trusts</p> <ol style="list-style-type: none"> 1. The only changes made to this clause as against section 34 of the current Ordinance are set out below. 2. In subclause (2)(a), the word “dealing” is used instead of “disposal” to broaden the effect of the provision. 3. Subclause (2)(b) extends the scope of a protective trust to “sequestration” of the beneficiary’s property. As this is a term that not used in all jurisdictions, words having been added to cover any “similar legal process”.
39	35	<p>Class interests</p> <p>No substantive changes have been made. However, some drafting changes have been made and the former Rules are now paragraphs.</p>
40	36	<p>Power of variation</p> <p>Apart from shorting the marginal note, no changes made.</p>
41	37	<p>Power of accumulation and advancement</p> <p>Minor drafting changes only.</p>
42	38	<p>Power of revocation</p> <p>Minor changes only;</p> <ol style="list-style-type: none"> 1. Some drafting changes. 2. In subclause (3), language has been added which makes it clear that id the settlor is dead, the trust property is held for his personal representative.
43	39	<p>Power of revocation</p> <p>No substantive changes made.</p>
44	40	<p>Change of proper law</p> <p>New subclause (3) added which preserves the legality and validity of anything done</p>

		before the change.
45		<p>Non-charitable purpose trusts</p> <p>This clause provides for the creation of non-charitable purpose trusts, which in the Bill are called simply “purpose trusts”.</p> <p>The provisions draw primarily on the legislation of the BVI, Jersey and Guernsey.</p> <p>Subclause (2) sets out certain core conditions which must be satisfied for a trust to be a valid purpose trust. In relation to the enforcer, the only requirement is that the terms of the trust provide for an enforcer (replacement enforcer). That there is in fact no enforcer would not invalidate the trust.</p> <p>One of the conditions is that one of the trustees is a licensed trust company. One other consideration. Under the BVI Act, there are a number of possible “designated persons” who can be trustees of a purpose trust. These include:</p> <ul style="list-style-type: none"> • A BVI barrister or solicitor • An BVI accountant • A licensed trust company. <p>The BVI Act was amended two months ago to add to that list, a private trust company. A decision was taken in the TCI that the category of permitted trustees of a purpose trust should be restricted to licensed trust companies, and this is reflected in the Bill. However, private trust companies will be provided for in the licensing and regulatory legislation and consideration could be given to extending to private trust companies, as the BVI.</p> <p>The BVI PTC regime does not require a licensed trust company as the trustee of a PTC, but it does require a licensed trust company to act as registered agent.</p> <p>As discussed in the preliminary Note, subclause (4) expressly provides that holding or investing in shares in a company is a valid purpose.</p>
46		<p>Restrictions on appointment of enforcer</p> <p>It is, of course, fundamental that the enforcer is a different person to the trustee and the</p>

		trusts legislation of all jurisdictions require this. See also clause 48(4)(d).
47		<p>Duties of and in relation to enforcer</p> <p>Subclause (1): The Guernsey Law provides that the duty of the enforcer is a fiduciary one. The Jersey Law and the BVI Act both provide, as the Bill, that the enforcer has the duty to enforce the trust but do not specify that the duty is fiduciary in nature.</p> <p>Subclause (2) is drawn from the BVI Act.</p>
48		<p>Resignation and removal of enforcer</p> <p>This clause is similar to those in both the Jersey and Guernsey Laws.</p>
49		<p>No enforcer in office or enforcer unwilling or unable to act</p> <p>The BVI makes failure of a professional trustee to comply a criminal offence. This is not considered appropriate. However, this should be a regulatory requirement, non-compliance with which, could result in enforcement action. This would be covered in the regulatory legislation.</p>
50		<p>No professional trustee in office</p> <p>The Attorney General is given the power to make an application under this clause to provide a default position should no application be made by the settlor, existing (non-professional) trustee or enforcer.</p>
51	41	<p>Failure or lapse of interest</p> <p>Section 41(1) of the current Ordinance has been split into two subsections. Otherwise no changes made.</p>
	42	Section 42 has been moved. See clause 57 below.
52	43	<p>Termination of a trust</p> <p>1. Subsection (2) of the current Ordinance permits the trustee to “retain” trust property.</p> <p>The Laws of both Jersey and Guernsey provide that the trustee can require</p>

		<p>reasonable security before distributing trust property. This would appear to provide the trustee with adequate protection. Retaining trust property could be problematic.</p> <p>2. Subclauses (4) and (5), which provide for orders of the Court in relation to the termination of a trust, are new. They are based on equivalent provisions in both the Jersey and Guernsey Laws.</p>
53	44	<p>Appointment of resident trustee No changes made.</p>
54	45	<p>Power to relieve trustee from personal liability As the equivalent section in the current Ordinance, it is important to ensure that the clause covers breaches of trust before the commencement date.</p>
55	46	<p>Power to make beneficiary indemnify for breach of trust No change to the current provision.</p>
56	47	<p>Variation of trust by Court and approval of particular transactions The only substantive change made is the omission of a provision equivalent to subsection (4) of the current Ordinance which provides:</p> <p style="text-align: center;"><i>“(4) This section applies to a trust whose law governing administration is the law of the Islands.”</i></p> <p>This Part applies to Turks and Caicos Trusts. It is unclear whether subsection (4) has the effect of excluding TC Trusts from this section and substituting the criterion is subsection (4) or adding a sub-class of other trusts where the proper law of the contract is not TCI Law but the law governing just the administration of the trust is TCI law.</p> <p>It is presumably intended to apply to a trust which, although not a TC Trust, is subject to two or more different laws, the administration of the trust being subject to TCI Law. This illustrates the point made earlier concerning the difficulty of defining a TC Trust if the law of different jurisdictions applies to different severable parts of the trust. Without resolving this issue, it is considered that this subsection creates ambiguity and also leads</p>

		to difficult conflict of law issues and should be deleted. This should be considered further in the TCI.
57	42	Application of property <i>cy-près</i> The current provision is broadly similar to equivalent provisions in the BVI Act and the legislation of other jurisdictions. Very few changes have been made to this clause. However, subclause (2) is a new provision.
58	48	Application of Part III No changes made.
59	49	Enforceability of a foreign trust Subclause (1) refers specifically to the “proper law” of the trust, which has necessitated some redrafting of the original section 49(1). Subclause (2) has been paragraphed. Furthermore, paragraph (b), which is new, enables the Court to declare a trust “immoral or contrary to public policy”.
60	50	Application of Part IV No changes made.
61	51	Vesting of trust property in new or continuing trustee No changes are considered necessary to section 51 of the current Ordinance.
62	52	Application to, and certain powers of, the Court Some changes made as follows: <ul style="list-style-type: none"> • Subclause (2)(a)(iv) is new. • Subclause (2)(a)(v) is new. Although the Court has powers in relation to enforcers under the purpose trust provisions, including a provision here would also enable an order to be made in relation to a foreign purpose trust, if appropriate. The powers are also somewhat wider. This should be discussed

		<p>further.</p> <ul style="list-style-type: none"> • In subclause (2)(b), reference is made to the validity or enforceability of <u>a trust</u> or any aspect of a trust (the underlined words have been added to ensure that the trust itself is covered). • In subclause (3), the enforcer has been added as a person who can make an application under subclause (2). • In subclause (4), the an order for the removal of a trustee as been added. This is important as conditions and vesting of property may also be an issue, even if there is no new appointment.
63	53	<p>Powers of the Court in the event of default</p> <p>Section 53 of the current Ordinance is limited to execution of instruments etc. in the event of default. This is not sufficiently wide as the default could relate to the doing of something else. A new subsection (2) has therefore been added covering this.</p>
64	54	<p>Payment of costs</p> <p>No change made.</p>
65	55(1) & (2)	<p>Nature of trustee's interest</p> <p>Section 55 of the current Ordinance deals with three separate matters which may be better placed in separate sections.</p> <p>Clause 65 covers section 55(1) and (2) of the Ordinance.</p> <p>Only very minor changes to the drafting language have been made.</p>
66	55(3)	<p>Following trust property</p> <p>The only change made is that specific reference is made to a bona fide purchaser for value or a person deriving title through a bona fide purchaser is specifically referred to rather than by reference to the section on constructive trusts.</p>
67	55(4)	<p>Insolvency of trustee</p> <p>No changes made.</p>

68	56	<p>Protection from personal liability of persons dealing with trustee</p> <p>Subclause (1) amends subsection (1), by adding the words “without notice of a breach of trust” before the paragraphs. Although subsection (1) is subject to subsection (3), the two subsections do not cover precisely the same ground.</p>
	57	<p>Liability of directors of a corporate trustee</p> <p>As flagged in the Preliminary Note and as discussed during the meeting in the TCI, this section has been omitted from the Bill.</p>
69	58	<p>Limitation of actions or prescription</p> <ol style="list-style-type: none"> 1. Subclause (1)(b) has been extended to add the “proceeds of trust property”. Although subparagraph (iii) partially covers this, the trustee could be in possession of the proceeds of trust property that have not yet been converted to his use. 2. Subclause (3) is extended to include a person without legal capacity and also to provide that the period begins to run if the person dies. 3. The existing provisions are clearly not sufficiently comprehensive as persons other than beneficiaries can take action against a trustee for breach of trust. New subclause (4) covers this. 4. The December 2012 Jersey amendments added a provision equivalent to subclause (5). However, although it is 21 years in the Jersey Law, it has been reduced to 18 years in the Bill.
70	32	<p>Constructive trusts</p> <p>It is considered that this section should apply generally rather than solely to Turks and Caicos Trusts. It has therefore been moved from Part II of the current Ordinance (which is in Part II) to Part IV.</p>
71	59	<p>Application of Ordinance</p> <p>It is necessary to also apply this Ordinance to trusts created before the commencement</p>

		date.
72	62	Rules of Court Minor drafting change.
73		Repeal Repeals the current Ordinance
74		Disapplication
74	60	Savings This is essentially taken from the current Ordinance. I am not sure that subclause (1)(a) is necessary, but I have included it for further discussion. The rest of the provisions are straight forward.
	61	Section 61 of the current Ordinance (asset protection trusts) has been omitted. A Bill for a Fraudulent Dispositions Ordinance is being drafted. As discussed during the meeting, this must be dealt with separately rather than just in relation to trusts.