

COMMERCE AND EMPLOYMENT DEPARTMENT**REVIEW OF TRUST LAW IN GUERNSEY**

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

27th October 2006

Dear Sir

1. Executive Summary

- 1.1 This report contains proposals for changes to Guernsey trust law designed to maintain the competitive position of the Island's financial services sector. The proposed reforms follow a thorough review of the current legislation – the Trusts (Guernsey) Law, 1989, as amended ("1989 Law") – and comprise amendments to the Law, including provisions to establish purpose trusts. The report also seeks an agreement 'in principle' to the introduction of Foundations into Guernsey law which will form the subject of a further detailed report to the States.

2. Background

- 2.1 The Department's role in monitoring legal developments worldwide is to ensure that Guernsey is proactive in relation to its legal framework in order to accommodate and encourage a wide range of commercial and financial services activities. The Department is responsible for developing initiatives to ensure that Guernsey's legislative framework is robust in a regulatory sense, but at the same time encourages new business flows.
- 2.2 The Department believes that Guernsey must develop its trust law, not only to serve the needs of the finance industry but all users of trusts. Importantly, the success of the fiduciary sector is dependent substantially on trusts; and so Guernsey's trust law must be appropriate for the needs of those using it, who also include individuals living in Guernsey. Whilst the financial services sector relies on trusts, it is essential that any revisions should strike a balance to ensure that, whilst being 'competitive', Guernsey has legislation that meets the highest standards of practices and procedures.

3. Introduction

- 3.1 The fiduciary sector remains one of the four pillars of Guernsey's financial services industry. Its development and ongoing success plays a significant part in the stability and growth of the local economy. Trusts are used extensively, both privately and for mutual funds, and a significant proportion of such funds managed in Guernsey are structured as trusts rather than companies.
- 3.2 The proposals arise from a thorough review by a Working Group established by the Department to review the 1989 Law. The Group was chaired by Advocate Rupert Evans and its remit and membership are set out in Appendix I. The Department wishes to place on record its appreciation of the work undertaken by the Group and all those who contributed to the process.
- 3.3 Part of this process involved considering revisions to the 1989 Law and, in addition, there are specific proposals to introduce 'purpose trusts'. Separately, new legislation will be promoted to introduce foundations into Guernsey law. All these follow an extensive process of consultation with industry, with the financial sector organisations, including GIBA, with the Guernsey Bar and, in particular, with local practitioners.
- 3.4 This Report will explain the function of a purpose trust and, in general terms, a foundation and the potential benefits they could offer. In the case of foundations, the Department would stress that, at this stage, the States is being asked to endorse the principle of their introduction and, if so, a further Report will be brought forward detailing legal and regulatory issues.

4. Proposed specific amendments to the 1989 Law

- 4.1 The Group proposed certain specific amendments to the 1989 Law, as follows. References to Sections are to those of the 1989 Law.

Section 11

- 4.2 The Group received representations to the effect that this provision should not be restricted to “any foreign rule of forced heirship” but should apply to any rule of forced heirship, so that persons resident or domiciled anywhere (including Guernsey) and of whatever nationality should be at liberty under Guernsey law to create a Guernsey settlement and transfer property to a Guernsey settlement without the necessity to have regard to any rules of forced heirship (and, possibly, to rules relating to community of property). The Group however concluded that this matter is more properly within the remit of the Inheritance Law Review Committee than this review. The Department concurs.
- 4.3 The Group has also considered whether the 1989 Law should be clarified in the light of decisions of courts in other jurisdictions seeking or purporting to vary trusts expressly governed by Guernsey law (particularly in relation to

matrimonial disputes). This issue has been addressed by some jurisdictions, such as Bermuda and the Cayman Islands. The Group received evidence that the current position in Guernsey makes the jurisdiction unattractive for some advisers and their clients, and therefore uncompetitive.

- 4.4 The Department therefore recommends the amendment of Section 11A of the 1989 Law along the lines set out in Part VII of the Cayman Trusts Law (2001 Reversion), attached as Appendix 2 to this Report. It is noted that this legislation covers rights emanating from “personal relationships” which would cover not only marriage but civil partnerships and other same sex unions which are being recognised by an increasing number of jurisdictions.

Section 12

- 4.5 The Group received representations to the effect (a) that there should be no time limit at all for the duration of a private trust; (b) that any time limit should be greater than 100 years and (c) if there is to be a time limit, the legislation should expressly state that resettlement for a further period is permissible (subject to being a *bona fide* exercise of the trustees’ power).
- 4.6 Accordingly, the Department recommends the removal of the 100 year limit in respect of trusts created after the coming into force of the amendment to the 1989 Law. However, there would be and is no reason why the express terms of a settlement should not impose a limit on its duration.

Section 14

- 4.7 The Group recommended that this Section should be amended to make it clear that the terms of the trust may contain an express power to remove trustees. The Department concurs.

Section 18

- 4.8 The Group’s view (and supported by representations received) was that the 1989 Law should be amended along the lines of Section 14 of the Cayman Trusts Law (2001 Revision) – see Appendix 2 – so as to make it plain that the express reservation of any specified matter will not invalidate a trust, and that any exercise of any reserved powers absolves the trustees from any liability as a result of such exercise. It also recommended that a consequential amendment be made to Section 53 to ensure that the Royal Court’s inherent jurisdiction granted by that Section is not impeded by a revised Section 18. The Department concurs.

Section 22

- 4.9 Concerns were expressed that the law relating to trustees’ duties or obligations to provide information in response to requests from beneficiaries is unsatisfactory in the light of the decision of the Privy Council in Schmidt -v-

Rosewood, and other recent decisions in the Guernsey courts. The Group recognised that there are often good reasons for some beneficiaries to be denied information; for example, children and grandchildren in a family discretionary trust for whom knowledge of the existence or size of a trust could be damaging; or co-workers in an employee benefit trust who would expect privacy to be preserved in relation to their own benefit or interest under the trust.

- 4.10 Accordingly, it recommended that Section 22 is redrafted to unequivocally provide that the terms of the trust may expressly exclude beneficiaries' rights to information, but without prejudice to the overriding right of any beneficiary to apply to the Royal Court for information. There should however be provision that on any application by a beneficiary seeking information to which, by the terms of the trust the beneficiary is not entitled, the burden of proof will rest with that beneficiary. The Department concurs.

Section 28

- 4.11 The Group recommended that Section 28(3) be amended to make it plain that a person consulted by the trustee in relation to the affairs of a trust need not be under any fiduciary duty or obligation if the terms of the trust so provide. The Department concurs.

Section 29

- 4.12 Representations were received by the Group that the limitation of the grant of a power of attorney by a trustee to a period of 12 months is too short. The Group considered it would not be appropriate for trustees to be able to grant powers of attorney which would be valid for an indefinite period (with the exception of situations where trustees are required to appoint attorneys under documentation giving security over trust property), but agree that it would be reasonable to extend the period to, say, 3 years. The notice requirements of subsections (5) and (6) should not change. The Department concurs.

Section 33

- 4.13 Following the decision of the Royal Court in Bathurst to the effect that a letter of wishes does not "reveal material on which a decision of trustees was or might have been based", the Group recommended that the section be amended to make it plain that letters of wishes or documents which reveal the intentions of the settlor or of any beneficiary are preserved from disclosure but subject to the terms of the trust or of any order of the Royal Court with the burden of proof in any application to the Court being on the beneficiary seeking disclosure. The Department concurs.

Section 34

- 4.14 It has been suggested that there may be some doubt in relation to trusts created

before the coming into force of the 1989 Law as to whether a provision in such a trust relieving trustees from liability in a form wider than that permitted by Section 34(7) would be (i) valid but subject to the limitations imposed by Section 34(7) or (ii) wholly invalid. The Group recommended that any provision relieving trustees from liability in a trust, whenever made, takes effect subject to Section 34(7). The Department concurs.

Section 38

- 4.15 The Group recommended that this section should be placed in Part IV of the Law (provisions of general application) rather than in Part II (provisions applicable only to a Guernsey trust). The Department concurs.

Section 39

- 4.16 Section 39(1)(b) enables a retiring trustee to require reasonable security before surrendering the trust property.
- 4.17 The Group's view was that the 1989 Law should be amended to provide that the retiring trustee is entitled to no greater indemnity (in extent or amount) than that to which it would be entitled had it remained as trustee. In addition there should be an automatic non possessory lien for trustees over trust property, so that when trustees incur liability on behalf of the trust this would be automatically coupled with a non possessory lien over the trust property. Unless expressly waived, this lien would continue when a retiring trustee transferred trust property to a new trustee or a beneficiary, but would not have effect against a bona fide purchaser for value of trust property. The Department concurs.

Section 43

- 4.18 This section is broadly modelled upon, but is not identical to, the provisions of Sections 31 and 32 of the Trustee Act 1925. While Section 31 of the Trustee Act 1925 provides that income is subject to a trust for accumulation with a power for distribution, Section 43 in effect provides the reverse. The Group recommended that Section 43(2) is amended to provide that income which is not distributed shall be accumulated and Section 43(3)(a)(i) is omitted. The Department concurs.

Section 57

- 4.19 The powers conferred by this Section to prescribe investments have never been exercised and in the view of the Group are unlikely to be exercised. The provisions of Section 57 are almost invariably excluded in Guernsey trusts in reliance on Section 57(2)(a). The Group recommended the repeal of this section. The Department concurs.

Section 70

4.20 This provides that directors of a corporate trustee which is a trustee of a Guernsey trust, or is resident in Guernsey, or is carrying on business in or from an address in Guernsey will be deemed to be a guarantor of the trustee in respect of any damages or costs awarded against the corporate trustee for breach of trust.

4.21 The Group recommended the repeal of Section 70(1) for the following reasons:

- (a) there is evidence that advisers are recommending the use of other jurisdictions as locations for private trust companies because family members who wish and professional advisers who are invited to sit on the board are not prepared to accept the liability imposed by Section 70(1);
- (b) it is difficult to see how the provision can be enforced against the directors of foreign incorporated trustees;
- (c) the provision applies to a trust company administering a Guernsey proper law trust outside Guernsey thus placing such trusts at a disadvantage to other jurisdictions which do not have a similar provision in their trust legislation;
- (d) whilst it does not only apply to regulated trustees, it creates unjustified discrimination against directors of fiduciary businesses compared to all other regulated financial services businesses in Guernsey, or indeed any other professional who can conduct his practice through a limited company;
- (e) it acts as a deterrent to the establishment of new trust companies in Guernsey *vis-à-vis* other jurisdictions.

4.22 The Department concurs.

Section 71(2)

4.23 Representations were made that Section 71(2)(a) is unsatisfactory and ambiguous, because it is not clear whether the words “final accounts” refer to annual accounts, accounts prepared on the termination of the trust, or accounts prepared to reflect a beneficiary’s final entitlement under a trust which otherwise continues. Further, Section 71(2) deals only with the position of a beneficiary and not that of a successor trustee who discovers a breach of trust by his predecessor.

4.24 The Group regarded these criticisms as having merit and recommended amending Section 71(2) by omitting paragraph (a) and the final words of the sub-section, and making the subsection applicable to successor trustees as well

as beneficiaries. The Department concurs.

Section 71(3)

- 4.25 Representations were made that this subsection imposes an unfair burden on trustees where a trust may have a wide class of beneficiaries some of whom may not even have been born at the time of the breach of trust. It is pointed out that adult beneficiaries who are parents of minor beneficiaries may be fully aware of a breach of trust but may choose to delay seeking redress until a minor comes of age, long after the three year limitation period in Section 71(2) has expired.
- 4.26 The Group had considerable sympathy with these concerns and accordingly recommended:
- (a) the limitation period for a minor (including unborn beneficiaries) or a person under a legal disability should be 3 years from the actual knowledge of his parent or guardian;
 - (b) there should be an absolute long stop limitation period of 18 years from the date of the breach; and
 - (c) any judgement would bind all beneficiaries (current or future) – provided there has been an opportunity to make representations on their behalf.

4.27 The Department concurs.

Section 72

- 4.28 Section 72(2) provides that the law, apart from Section 52 to 56, does not apply to a trust insofar as there is vested in the trustees any interest in real property in the Bailiwick of Guernsey.
- 4.29 The Group suggested that Section 72(2) should be repealed and the definition of “property” in Section 73(1) should be amended to remove the limited exclusion of real property in the Bailiwick of Guernsey, or at least real property in the Island of Guernsey, (if the 1989 Law continues only to apply to Guernsey rather than the Bailiwick (see below)). The Department concurs.

Power to compromise:

- 4.30 During the preparation of this Report, the attention of the Department was drawn to an omission in the 1989 Law, being the power to trustees to compromise litigation without necessity of recourse to the Royal Court to sanction any such compromise.
- 4.31 The Department recommends that such a power be expressly incorporated in the legislation.

Trust applications

- 4.32 Representations have been received that applications to the Royal Court under the 1989 Law should be capable of being heard by the Bailiff sitting alone, as such applications are usually concerned with the application of the law to agreed facts. The Department accepts that this would simplify such applications, and recommends accordingly.

5. Purpose Trusts

- 5.1 At present, Guernsey law requires a trust to be either for the benefit of identifiable persons, including companies, or for the benefit of charitable purposes. A trust for the benefit of non-charitable purposes is expressly invalidated by virtue of the provisions of Section 11(2)(d) of the 1989 Law, drawn heavily from the equivalent Jersey legislation where a similar prohibition against non-charitable purpose trusts was originally to be found. This is a stricter application of the “beneficiary principle”¹ than one finds in England where certain non-charitable purpose trusts are accepted as valid². The English Common Law permitting certain purpose trusts applied in Guernsey prior to 1989.
- 5.2 Some academic authority now suggests that in fact the courts in England regularly enforced non-charitable purpose trusts for over 600 years and that the “beneficiary principle” is in fact a fairly recent misinterpretation of English case law.
- 5.3 In Jersey the decision was taken ten years ago to permit non-charitable purpose trusts and the Jersey legislation was later modified accordingly (“the 1996 Jersey Law”). Guernsey is now one of the few trust jurisdictions which does not expressly cater for non-charitable purpose trusts. Bermuda, the BVI, the Cayman Islands, Cyprus, the Isle of Man, Jersey, Liechtenstein, and Mauritius are among those whose governments have introduced legislation permitting the existence of non-charitable purpose trusts. Trust practitioners in Guernsey have frequently asserted that, as a result of Guernsey not having such legislation, business has been lost to competing jurisdictions. The Guernsey branch of the Society of Trust and Estate Practitioners unanimously support the introduction of legislation permitting Guernsey Law to recognise the validity of non-charitable purpose trusts.
- 5.4 It is recommended that the 1989 Law be amended so as to permit such purpose trusts.

¹ The idea that for a trust to exist there must be a beneficiary able to enforce the trust. *“There can be no trust over the exercise of which this court will not assume control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust but for uncertain objects the property, that is the subject of the trust, is undisposed of.... But this doctrine does not hold good with regard to trusts for charity.”* Morice -v- Bishop of Durham (1804)

² For example, trusts for the construction and repair of graves and monuments, gifts for masses, gifts for the benefit of animals.

A. Use of Purpose Trusts

- 5.5 Purpose trusts have a number of useful applications both in a commercial context and for the more traditional private client business conducted in Guernsey. It is commonplace for large multi-national companies to seek commercial or other advantages by entering into contractual relations with special purpose vehicles (“SPVs”) not owned by the companies concerned. This is often the case in securitisation and finance transactions, for which Jersey has a more established reputation as a jurisdiction than Guernsey. The existence of non-charitable purpose trusts in Jersey is suggested as being one reason why that jurisdiction attracts more securitisation business than Guernsey. Securitisation business typically involves an SPV which issues loan notes or bonds, the sale proceeds of which are invested to provide the cash flow necessary to meet the interest obligations on the notes or bonds.
- 5.6 Trusts with beneficiaries pose a number of problems in such a structure where the company concerned cannot have any equitable interest in the SPV if the desired benefits are to be secured, and if the SPV is not part of the corporate group as far as accounting standards are concerned. The identification of suitable beneficiaries is a major issue. Beneficiaries can, in certain circumstances, also wind up trusts in their favour. This is an unacceptable risk in many commercial transactions. As a result, it has been the practice in Guernsey, and elsewhere, when it has been necessary to establish these structures, to establish a charitable trust to hold the shares in the SPV. Charitable trusts do not necessarily provide the ideal solution. It is often the case in transactions with a commercial motivation that the principals establishing the structure wish to minimise the flow of benefit to the charities concerned. If the benefits are too limited, the structure is vulnerable as being set aside as a 'sham' and a resulting trust may arise in favour of the company transacting with the SPV, possibly destroying the advantages in setting up the structure in the first place. If the benefits are too generous then the structure becomes uneconomic. If the charity concerned is named in the trust, it may seek to interfere in the structure increasing the costs of running the structure or in an extreme case compelling the winding up the charitable trust, and hence the whole structure.
- 5.7 Entrepreneurial individuals seeking to provide for the welfare of future generations may be concerned to ensure that, after their death, their businesses are not fragmented or sold. One intention may be to divorce the benefit of a business from its control. Where beneficiaries are named in the trust they can, if all adult and *sui juris*, act together to set aside the trust, and where substantial sums of money are concerned the motivation to disregard the expressed wishes of one's forbears may be strong. In such a case a trust with beneficiaries may not be the complete solution. Frequently private trust companies are incorporated with the sole function of acting as trustees of family trusts for a specific wealthy family. The management of these trust companies is usually

undertaken by licensed trust services providers, but the ownership of the private trust company itself can be problematic. Purpose Trusts are frequently established to own the shares in such companies. The introduction of Guernsey law purpose trusts will facilitate the growth of this type of business locally.

- 5.8 The foregoing examples are not comprehensive. Purpose trusts are an established and flexible trust solution to a number of problems regularly encountered in trust and commercial practice.
- 5.9 The Department recommends that Guernsey law be modified to accommodate non-charitable purpose trusts, whilst also making it clear that a trust for both non-charitable purpose trusts and beneficiaries is also valid.

B. The approach adopted elsewhere

- 5.10 As most of our competitor jurisdictions have already introduced legislation which validates non-charitable purpose trusts, the Group had the advantage of considering the approaches adopted elsewhere to see which best suits Guernsey's needs, and how those approaches may be improved upon. Without expanding this Report unnecessarily by conducting a detailed comparative analysis there is merit in summarising the apparent three distinct approaches to resolving this issue adopted elsewhere.
- 5.11 **Bermuda** introduced the Trusts (Special Provisions) Act in 1989 which modified their law by defining a trust as being either for the benefit of a beneficiary or a charitable purpose or a non-charitable purpose or for the benefit of a beneficiary and a purpose. Bermuda also originally imposed a duty that someone be appointed as an "enforcer" to be able to cause the trustee to account for his trusteeship. This model has also been widely adopted in the Caribbean. In 1998 Bermuda revisited its purpose trust legislation to remove references to there having to be "benefit". The legislation simply provides that "A trust may be created for a non-charitable purpose or purposes". All that is required is for the purposes to be certain, lawful and not contrary to public policy.
- 5.12 A different model was adopted in **the Cayman Islands** where, rather than amending their trust law so as to expressly permit purpose trusts, a wholly separate trust regime was established separate from the pre-existing trust law which applies to trusts with beneficiaries. The Special Trusts (Alternative Regime) Law, 1997 ("STAR") is a "law to permit the creation of non-charitable purpose trusts; and for incidental and connected purposes". It is open for the settlor of the trust to specifically provide that STAR will apply to a trust. Under STAR the objects of the trust may be persons, purposes or both. The purposes may be of any number or kind, charitable or non-charitable, provided that they are lawful and not contrary to public policy. Unlike English Common Law, or legislation based on the Bermudan model, STAR expressly provides that a STAR trust is not rendered void by uncertainty as to its objects or mode of execution. STAR also requires there to be an enforcer a person who has

"standing to enforce" a STAR trust. If there are beneficiaries of a STAR trust they are unable to enforce the trust unless they are also enforcers. The Cayman legislation requires the trustee of a STAR trust to be resident in the Cayman Islands. But the STAR regime has not been without its critics, and the Group did not recommend it providing the model.

- 5.13 Reference has already been made to the 1996 **Jersey** Law. This expressly permitted non-charitable purpose trusts under Jersey Law. Article 10(2)(a)(iv) of the original (1984) Jersey legislation provided that a trust would be invalid if it is created for a purpose in relation to which there is no beneficiary not being a charitable purpose. The 1996 Jersey Law amendment subordinated this section to a new Article 10A which provides:

“A trust shall not be invalid to any extent by reason of clause (iv) of subparagraph (a) of paragraph 2 of Article 10 if the terms of the trust provides for the appointment of any enforcer in relation to its non-charitable purposes, and for the appointment of a new enforcer at any time when there is none.”

- 5.14 Article 10B provides for the appointment of an enforcer, who must be someone other than the trustee, whose duty it is to enforce the trust in relation to its non-charitable purposes. Article 10C provides for the resignation and removal of an enforcer. Jersey law was also modified to provide that a trustee of a trust for non-charitable purposes should be obliged to appoint an enforcer if at any time there is no enforcer in office and also provides for the Royal Court to remove an enforcer who is unwilling or refuses to act or is unfit to act or incapable of acting. The 1996 Jersey Law expressly conferred upon enforcers the right to be provided with the accounts of the trust.
- 5.15 The States of Jersey Finance and Economics Committee when lodging the draft 1996 Jersey Law considered the appointment of an enforcer to be necessary. Its report emphasised that one of the reasons why trusts for non-charitable purposes were historically considered inappropriate was the belief that, for a trust to exist, there must be a person who can enforce the obligations of the trustee to administer it in accordance with its terms. Beneficiaries fulfil this function in a trust established for their benefit. In the case of charitable trusts, this requirement in Jersey is satisfied as H.M. Attorney General there has a role to enforce charitable trusts. The introduction of the office of an enforcer is intended to overcome the historic objection to non-charitable purpose trusts.
- 5.16 In the period since the 1996 Jersey Law came into force several uncertainties concerning Jersey law non-charitable purpose trusts have arisen and the States of Jersey Economic Development Committee has recently proposed amendments to the Jersey legislation to deal with these uncertainties, as follows:
- (a) To clarify the meaning of “purpose” by confirming that holding a particular asset is, in itself, a valid purpose. This change will enable

purpose trusts to be used in a wide range of transactions, including holding shares in private trust companies or in an SPV as part of a securitisation structure with greater transparency and certainty than has previously been possible.

- (b) To enable Jersey's Attorney General to have the power to apply to the Royal Court for guidance where it appears that neither the trustee nor the enforcer are willing to enforce a purpose trust.
- (c) Finally, and importantly, to enable purpose trusts to be perpetual rather than to be limited to the 100 year maximum trust period. This last change will enable Jersey to compete, as a jurisdiction, with those other jurisdictions that permit perpetual purpose trusts.

C. Purpose Trust recommendations

5.17 Guernsey and Jersey trust laws are, in substance, very similar. The Courts of Appeal in both Islands are comprised of the same panel of judges. There seems no sensible reason for Guernsey to prefer the model adopted in Bermuda or the Cayman Islands, in preference to introducing Guernsey law purpose trusts by following the Jersey model.

5.18 The Department recommends that the 1989 Law be amended following Jersey Law, incorporating certain changes as set out below:

- (a) In practice purpose trusts are most often used to hold specified property. If there is any doubt that the holding of an asset may not amount to a “purpose” that doubt must be put to rest. It is essential that there be certainty that the holding of an asset is, of itself, a valid purpose.
- (b) It is essential that there be someone who can enforce the terms of a purpose trust. The Department does not advocate the Bermudan approach of enforcers being optional. If both the trustee and the enforcer contrived to ignore the express terms of a purpose trust, there is merit in enabling H.M. Procureur to bring the matter to the Royal Court for directions. However, changes to the 1989 Law are not required in order to effect this; by virtue of Section 62(2) H M Procureur is already given power to apply to the Court in respect of **any** Guernsey trust.
- (c) The rule against perpetuities is not part of Guernsey law. There does not appear to be any good reason to limit trusts, of any description, under Guernsey Law to 100 years. The public policy concerns that led, in the seventeenth century, to the rule against perpetuities in England do not necessarily apply here. Charitable trusts are readily accepted as being capable of perpetual existence. To distinguish between charitable and non-charitable trusts appears arbitrary in principle. Many jurisdictions attract business by having trust periods in excess of 100 years. Many

permit perpetual non-charitable purpose trusts. Given that Jersey is also proposing to permit perpetual purpose trusts, the Department recommends that purpose trusts not be limited to any trust period. There is no clear public policy rationale for limiting the duration of purpose trusts and to do so would be to put Guernsey at a commercial disadvantage to our competitors.

6. Foundations

Background

- 6.1 It has been possible for foundations to be created under the laws of Liechtenstein since 1926, Panama since 1995, the Netherlands Antilles since 1998 and the Bahamas since 2004. Jersey is currently proposing to supplement its laws to permit the establishment of Jersey foundations.
- 6.2 There is no single definition of a foundation but some common features are as follows:
- Foundations have legal personality and are inscribed on a public register.
 - A foundation is formed by founder(s) who provide assets to it. Powers may be reserved to the founder(s), for example to revoke the foundation or add or remove beneficiaries.
 - A foundation holds assets for the purposes set out in its constitutive documents, and is administered according to contractual, rather than fiduciary, principles making it acceptable to people uneasy with trusts.
 - The constitutive document is a public document, but rules setting out the detailed internal operation of a foundation are contained in a private document.
 - A foundation is run by a council (or board) which is its executive arm and is responsible for fulfilling the foundation's purpose.
 - A foundation has no shareholders and may or may not have beneficiaries depending on its purpose. For example, foundations may have a charitable purpose and no beneficiaries.
 - Beneficiaries have **contractual** rights to enforce a foundation's operation in accordance with its constitutive document, rather than proprietary rights in its assets, or equitable rights such as are available to beneficiaries of trusts.
 - A foundation may have an adviser or protector if its rules so provide. If so, its rules will set out his role and powers, which may include the appointment or removal of council members, or beneficiaries, or the alteration of the foundation's constitution.

Recommendations

6.3 In order to provide choice and flexibility to the fiduciary sector, and therefore its clients, whilst allowing Guernsey to continue to meet international standards, the Department recommends that the States agree in principle to the introduction of foundations which will form the subject of a further detailed report. Such foundations to be introduced on the following lines:

- A foundation would come into existence on being entered on a public register. The essential elements of an application to enter would be copies of the foundation's charter, an application form and the prescribed fee. The register, which would be public, would show the names and addresses of the council members, the address of the registered office, and the purpose of the foundation.
- A foundation must have a registered office in Guernsey at which documents can be served.
- The mode of operation of a foundation's council would be governed by its rules and, in running the foundation, the council members should be subject to duties equivalent to those applicable to company directors. Council members who comply with those duties should not be liable for losses suffered by the foundation or third parties.
- Acting by way of business in connection with foundations should be a regulated fiduciary activity requiring licensing. This should include effecting or advising on the formation, management or administration of foundations, the provision of, or acting as, a council member, a founder, and providing a registered office.
- Foundations need to be brought within Guernsey's existing anti-money laundering regime so that obligations to verify identity are in line with those relating to trusts and companies. This would place obligations on the service provider.
- It should be possible for a Guernsey foundation to migrate to another jurisdiction where it will be recognised, and for a foundation formed elsewhere to become a Guernsey foundation (subject to meeting the requirements applicable to Guernsey foundations).
- A Foundation's terms should be enforceable by its beneficiaries or, if there are none, by H.M. Procureur. It may be necessary for the legislation to give the Royal Court a specific power to order specific performance of the foundation's terms, as the usual remedy in contractual situations is an award of damages.
- The demand for foundations appears to arise primarily from a need for structures which can be used in similar circumstances to traditional family trusts, but are familiar to clients and intermediaries with a civil law

background.

- The tax treatment of foundations would clearly be important and the Department recommends that they are, as far as possible, treated in the same way as trusts with Guernsey trustees.
- Legislation on foundations would need to state what are beneficiaries' rights to information.
- It is important that Guernsey foundations should not be attractive to potential founders whose aim in forming a foundation is to defraud their creditors and persons transferring assets to foundations should be in the same position, vis-à-vis creditors, as those transferring assets to a Guernsey trust.
- The Department recommends that foundations have 'open-ended' existence, subject to the ability to fix either a period or a mechanism for a foundation to come to an end. Given the separate legal personality of a foundation, it would need to be possible for it to be wound up and struck off the register, and insolvency aspects would involve consideration of whether it should be possible for a foundation to enter into administration.
- As foundations, unlike trusts, are legal entities and therefore should be entered on a public register, the costs of maintaining that register should be recovered through fees charged to the foundations.

7. Alderney and Sark

- 7.1 The 1989 Law applies only to Guernsey. The opportunity has been taken to consult the authorities in Alderney and Sark, inviting them to extend the legislation to their respective jurisdictions. The Department has received confirmation from the General Purposes and Finance Committee of Chief Pleas in Sark that they do not wish the law to apply to Sark. A response is awaited from the Policy and Finance Committee in Alderney.

8. Staffing and financial implications

- 8.1 There will be no adverse impact on staffing levels needed following enactment of the amendments, or the legislation enabling purpose trusts. The Department will be giving consideration to the charges required for the registration of foundations as and when they are enabled, which will be outlined when the further report is brought to the States.

9. Conclusions and recommendations

- 9.1 The specific proposals set out in this Report are supported by industry and the Department believes that they represent a necessary step in the evolution of the island's legislative framework. H.M. Procureur has been involved throughout and supports the Group's recommendations.

9.2 The Department recommends to the States to:

1. Approve the proposals for the general revision of the 1989 Law, as set out above in section 4 of this report.
2. Approve the amendment to the law to introduce purpose trusts, as set out in section 5 of this report.
3. Endorse the principle that foundations should be enabled by Guernsey legislation, in accordance with the broad principles in section 6 of this report, as an alternative or additional legal structure. Thereafter the Department would produce a further States Report to outline in detail how the foundation will operate within the new legislative framework.

Yours faithfully

Stuart Falla
Minister

APPENDIX 1**Trust Working Group**

The working group was established in 2005 to consider how to improve the law to facilitate business in the trusts sector. It published its report in July 2006.

The group consisted of various persons with expertise in this particular field namely

- Advocate Rupert Evans, Consultant, Ozannes, Guernsey
- Ian Burns, Chairman, Guernsey Association of Trustees
- Advocate Russell Clark, Partner, Carey Olsen, Guernsey
- Gavin St Pier, Managing Director, Walbrook Trustees (Guernsey) Limited
- Stephen Trevor, Director of Fiduciary and Intelligence Services, The Guernsey Financial Services Commission

The remit of the group was to respond and report on the following mandate,

“To investigate by consultation with trust professionals, lawyers, accountants and regulators, the requirement for changes to enable new trust ‘products’ and services to be available to the Fiduciary Sector in Guernsey. To consider the availability of competitor trust products and services from other jurisdictions. To consider the marketing requirement for the Fiduciary Sector. To make recommendations for the desired changes.”

APPENDIX 2

Cayman Trusts Law (2001 Revision)

14. (1) The reservation or grant by a settlor of a trust of:
- (a) any power to revoke, vary or amend the trust instrument or any trusts or powers arising thereunder in whole or in part;
 - (b) a general or special power to appoint either income or capital of the trust property;
 - (c) any limited beneficial interest in the trust property;
 - (d) a power to act a director or officer of any company wholly or partly owned by the trust;
 - (e) a power to give binding directions to the trustee in connection with the purchase, holding or sale of the trust property;
 - (f) a power to appoint, add or remove any trustee, protector or beneficiary;
 - (g) a power to change the governing law and the forum for administration of the trust; or
 - (h) a power to restrict the exercise of any powers or discretions of the trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the trust instrument,

shall not invalidate the trust or affect the presumption under section 13(1).

Part VII Trusts – Foreign Element

87 In this Part:

“dispose” and “disposition”, in relation to property, connote every form of conveyance, transfer, assignment, lease, mortgage, pledge or other transaction by which any legal or equitable interest in property is created, transferred or extinguished;

“formalities”, in relation to a disposition of property, means the documentary and other actions required generally by the laws of a relevant jurisdiction for all dispositions of like form concerning property of like nature, without regard to:-

- (a) the fact that the particular disposition is made in trust;
- (b) the terms of the trust;
- (c) the circumstances of the parties to the disposition; or
- (d) any other particular circumstances,

but include any special formalities required by reason that the party effecting the disposition is not of full age, is subject to a mental or bodily infirmity or is a corporation.

“heirship right” means any right, claim or interest in, against or to property of a person arising, accruing or existing in consequence of, or in anticipation of, that person’s death, other than any such right, claim or interest created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of the property to such person;

“personal relationship” includes every form of relationship by blood or marriage, including former marriage, and in particular a personal relationship between two persons exists if:-

- (a) one is the child of the other, natural or adopted (whether or not the adoption is recognised by law), legitimate or illegitimate;
- (b) one is married to the other (whether or not the marriage is recognised by law);
- (c) one cohabits with the other or so conducts himself or herself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife ; or
- (d) personal relationships exist between each of them and a third person, but no change in circumstances causes a personal relationship, once established, to terminate; and

“settlor”, in relation to a trust, means and includes each and every person, who directly or indirectly, on behalf of himself or on behalf of any other or others, as owner or as the holder of a power in that behalf, disposes of property to be held in such trust or declares or otherwise creates such trust.

88. This Part applies to every trust and every disposition of property in trust made before, on or after the 31st May 1987, whether such property is situate in the Islands or elsewhere.
89. (1) In determining the governing law of a trust, regard is first to be had to the terms of the trust and to any evidence therein as to the intention of the parties; and the other circumstances of the trust are to be taken into account only if the terms of the trust fail to provide such evidence.
- (2) A term of the trust expressly selecting the laws of the Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances.
- (3) A term of the trust that the laws of the Islands are to govern a particular aspect of the trust or that the Islands or the courts of the Islands are the forum for the administration of the trust or any like provision is conclusive evidence, subject to any contrary term of the trust, that the parties intended the laws of the Islands to be the governing law of the trust and is valid and effective accordingly.
- (4) If the terms of a trust so provide, the governing law of the trust may be changed to or from the laws of the Islands provided that:-
- (a) in the case of a change to the laws of the Islands, such change is recognised by the governing law of the trust previously in effect; or
- (b) in the case of a change from the laws of the Islands, the new governing law would recognise the validity of the trust and the respective interests of the beneficiaries.
- (5) A change in governing law shall not affect the legality or validity of, or render any person liable for, any thing done before the change.
90. All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including questions as to:-
- (a) the capacity of any settlor;
- (b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof;
- (c) The administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal; or

- (d) The existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined accordingly to the laws of the Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected.

Provided that this section:-

- (i) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this section affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power;
 - (ii) takes effect subject to any express contrary term of the trust or disposition;
 - (iii) does not, as regards the capacity of a corporation, affect the recognition of the laws of its place of incorporation;
 - (iv) does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;
 - (v) does not validate any trust or disposition of immovable property situate in a jurisdiction other than the Islands which is invalid according to the laws of such jurisdiction; and
 - (vi) does not validate any testamentary trust or disposition which is invalid according to the laws of the testator's domicile.
91. Subject to the same provisos as are set out in paragraphs (i) to (vi) of section 90, it is expressly declared that no trust governed by the laws of the Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned, nor is the trustee, any beneficiary or any other person to be subjected to any liability or deprived of any right, by reason that:-
- (a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or
 - (b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or

action to recognise, protect, enforce or give effect to any such rights, claims or interests.

92. An heirship right conferred by foreign law in relation to the property of a living person shall not be recognised as:
- (a) affecting the ownership of immovable property in the Islands or movable property wherever situate for the purposes of paragraph (i) of section 90 or for any other purpose; or
 - (b) constituting an obligation or liability for the purposes of the Fraudulent Dispositions Law (1996 Revision) or for any other purpose.
93. A foreign judgment shall not be recognised, enforced or give rise to any estoppel insofar as it is inconsistent with section 91 or 92.
94. (1) This Part does not render any person liable for any thing done before 31st May, 1987.
- (2) Sections 91, 92 and 93 apply to every trust and every disposition of property in trust made before, on or after the 7th August, 1995, whether such property is situate in the Islands or elsewhere.

(NB The Policy Council supports the proposals.)

(NB The Treasury and Resources Department supports the proposals.)

The States are asked to decide:-

VIII.- Whether, after consideration of the Report dated 27th October, 2006, of the Commerce and Employment Department, they are of the opinion:-

1. To approve the proposals for the general revision of the Trusts (Guernsey) Law, 1989, as amended, as set out above in section 4 of that Report.
2. To approve the amendment to the law to introduce purpose trusts, as set out in section 5 of that report.
3. To endorse the principle that foundations should be enabled by Guernsey legislation, in accordance with the broad principles in section 6 of that Report, as an alternative or additional legal structure and to direct the Commerce and Employment Department to produce a further States Report to outline in detail how the foundation will operate within the new legislative framework.
4. To direct the preparation of such legislation as may be necessary to give effect to their above decisions.