CAYMAN ISLANDS
LAW REFORM COMMISSION

TRUSTS LAW REFORM

FINAL REPORT

1st May, 2018

The Cayman Islands Law Reform Commission

Chairman:	**Mr. Kenneth Farrow, QC**
Members:	**Mr. Vaughan Carter** **Mrs. Eileen Nervik, QC** **Ms. Cheryll Richards, QC** **Mr. Hector Robinson, QC** **Ms. Reshma Sharma**
Director:	**Mr. José Griffith**
Administrative Secretary:	**Mrs. Lourdes Pacheco**

TABLE OF CONTENTS

	Page
Acknowledgements	**3**
Introduction	**4**
Codification of Trustee's Duties	**4**
The Hastings Bass Rule	**5**
Judicial Variation of Trusts	**5**
Extra-Judicial Variation of Trusts	**6**
Dispute Resolution	**6**
The Law, Section 6(c)	**6**
The Law, Section 91(b)	**7**
Miscellaneous	**7**
Conclusion	**7**
Appendix 1: Trusts Law Reform Discussion Paper	**8**
Appendix 2: Trusts Law (Amendment) Bill 2018	**9**

ACKNOWLEDGEMENTS

The Law Reform Commission extends thanks to all stakeholders for the valued contribution leading up to the preparation of this Final Report on the issue of Trusts Law reform.

TRUSTS LAW REFORM

The Law Reform Commission submits for consideration of the Hon. Attorney General its Final Report on Trusts Law Reform.

Introduction

1. As stated in our Discussion Paper of 5th April, 2017 ("the Paper"), we have been asked[1] to consider to what extent the Trusts Law (2011 Revision) ("the Law") could benefit from amendment. We remain of the view that a wholesale revision of the Law is not required but that there are certain discrete areas where, having regard to developments in other jurisdictions and the need to remain competitive with those jurisdictions, improvements to our legislative framework could be made.

2. Following the publication of the Paper, we received representations from the Society of Trust and Estate Practitioners, Cayman ("STEP") which were largely in favour of the approach which we had adopted. On the basis of those representations, we drafted a Trusts (Amendment) Bill, 2017 ("the Bill") to give effect to what appeared to be common ground. Copies of the draft Bill were sent to a representative of STEP on 16th November, 2017 and to the Cayman Islands' Law Society, the Caymanian Bar Association, STEP and the Hon. Chief Justice on 8th December, 2017.

3. The Paper and the Bill are attached to this Report as Appendix 1 and Appendix 2 respectively. Definitions in the Paper are adopted in this Report.

4. We consider below each of the discrete areas referred to in the Paper and, in light of the representations received from STEP, our proposals for reform.

[1] Memo from the Hon. Chief Justice, 9th October, 2014.

Codification of Trustees' Duties

5. Having considered the relevant provisions of the United Kingdom Trustee Act, 2000 and the Jersey Trusts (Jersey) Law, 1984, we have concluded that there is no justification from departing from the incremental approach of the common law. Circumstances change and we believe that that approach, rather than codification, is best suited to serve the future development of this area of law in the Islands. STEP agreed. Accordingly, we make no proposals for codification of trustees' duties.

The Hastings Bass Rule

6. We are firmly of the view that the Islands should reflect the legislative changes in the Bermudian Trustee Act, 1975 and Bahamian Trustee Act, 1998. The Jersey Law goes somewhat further in that it applies not only to mistakes made by those exercising fiduciary powers, whether trustees or otherwise, but also to dispositions to trusts made by the settlor or others acting on the settlor's behalf, that is, those who are not acting in a fiduciary capacity. We see no need for this extended jurisdiction which is already covered by existing authority approved in Futter v HMRC; Pitt v HMRC [2013] UKSC 26. STEP agreed with this approach although they did state that they would wish to discuss the scope of the legislation giving effect to it. As stated above, the Bill was sent to STEP on 16th November, 2017. We have received no response to the provisions of the Bill. Accordingly, we recommend that our proposal be implemented in the form of clause 3 of the Bill which introduces section 64A, of the Law.

Judicial Variation of Trusts

7. The issue here relates to the condition that, pursuant to section 72 of the Law, a variation cannot be approved by the Court unless it is established by those proposing the variation that it is for the benefit of any minors or unborn who might be affected. The alternative is that it should be sufficient to establish that it is not to their detriment. The dividing line is somewhat thin and often depends on the ingenuity of counsel. We favour the "no detriment" approach. STEP agreed. Accordingly, our approach is reflected in clause 4 of the Bill which amends section 72 of the Law.

Extra-Judicial Variation of Trusts

8. In the Paper we referred to the innovative provisions contained in section 58A of the British Virgin Islands, Trustee Ordinance, 1961. We are opposed to the introduction of similar legislation in the Islands. It seems to us that such provisions are more likely to lead to litigation rather than the orderly administration of trusts. STEP agreed. Accordingly, we make no proposal for reform in relation to this topic.

Dispute Resolution

9. This topic should really be seen as an adjunct to Judicial Variation of Trusts: see paragraph 7 above. The jurisdiction of the Court to approve, on behalf of affected minors or unborn, compromises of genuine disputes is centuries older than the statutory jurisdiction to vary trusts pursuant to section 72 of the Law. If the "no benefit" test is to be introduced in respect of the latter, there can be no justification for not introducing it in respect of the former. STEP did not comment in terms on this topic but did express the view that nothing was to be gained by attempting to introduce arbitration into the resolution of trust disputes. We agree. Short of any specific response from STEP, we propose that the "no benefit" test be introduced as the touchstone for determining whether a compromise can be approved by the Court: clause 3 of the Bill, introducing section 64B of the Law, refers.

10. If section 64B is enacted, an amendment to the Grand Court Rules Order 15, 13(4) will be required substituting the "no detriment" test for the "benefit" test. Clause 6 of the Bill enables the Grand Court Rules Committee to make this amendment.

The Law, Section 6(c)

11. In the Paper, we raised the question whether, for the purposes of section 6(c) of the Law or generally, the definition of "trust corporation" in section 2 of the Law should be extended to include trust companies registered under the Bank and Trust Companies Law a controlled subsidiaries or private trust companies, that is, trust companies which do not satisfy that present definition because they are not required to be licensed. STEP indicated that it was content that

the definition be extended to controlled subsidiaries but not private trust companies. We are happy to adopt that approach: see clause 2(a) of the Bill.

The Law, Section 91(b)

12. In the Paper we proposed that, for the reasons there given, section 91(b) of the Law should be amended so as to provide that a Cayman trust cannot be impugned by reason that it defeats the rights, claims or interests conferred by foreign law upon any person by reason of a relationship to the settlor – which represents the present position – or by reason of a relationship to any beneficiary (whether discretionary or otherwise). Step supported this proposal and, accordingly, clause 5 of the Bill so provides.

Miscellaneous

13. We also raised the question whether any other amendments to the Law should be considered. We received no response to that question and therefore do not propose any amendments other than those considered above and reflected in the Bill.

Conclusion

14. The Commission believes that these proposed discrete amendments will assist the Cayman Islands in remaining competitive as an off-shore trusts jurisdiction.

Mr. Kenneth Farrow, QC
Chairman

1st May, 2018

Appendix 1

Trusts Law Reform Discussion Paper

Appendix 2

Trusts Law (Amendment) Bill, 2018