
Reply Form for the Consultation on Review of the Trustee Ordinance and Related Matters

1. The purpose of this reply form is to facilitate the giving of views and comments on the Consultation Paper entitled Review of the Trustee Ordinance and Related Matters (“Consultation Paper”) published by the Financial Services and the Treasury Bureau (“FSTB”) in June 2009.
2. The Consultation Paper can be downloaded from the FSTB’s website at <http://www.fstb.gov.hk/fsb>
3. If you have any views or comments on the Consultation Paper, you are welcome to complete this reply form and return it to us on or before **21 September 2009** by one of the following means:

By mail or
hand delivery to: Division 6
 Financial Services and the Treasury Bureau
 15/F, Queensway Government Offices
 66 Queensway
 Hong Kong

Re: **Consultation Paper on
Review of the Trustee Ordinance and Related
Matters**

By fax to: (852) 2869 4195

By e-mail to: to_review@fstb.gov.hk

4. Any questions about this reply form may be addressed to Miss Grace KWOK, Principal Assistant Secretary for Financial Services and the Treasury (Financial Services), who can be reached at (852) 2528 6384 (phone), (852) 2869 4195 (fax) or gracekwok@fstb.gov.hk (email).
5. Submissions will be received on the basis that we may freely reproduce and publish them, in whole or in part, in any form, and use, adapt or develop any proposal put forward without seeking permission or providing acknowledgment of the party making the proposal.

6. Please note that the names of respondents, their affiliations(s) and comments may be posted on FSTB's website or referred to in other documents we publish. If you do not wish your name or affiliation to be disclosed, please state so in Part A of the reply form. Any personal data submitted will only be used for purposes which are directly related to consultation purposes under this consultation paper. Such data may be transferred to other Government departments/agencies for the same purposes. For access to or correction of personal data contained in your submission, please contact Miss Grace KWOK (see paragraph 4 above for contact details).

PART A: GENERAL INFORMATION OF THE RESPONDENT

Name	:	_____
Name and Title of Contact Person	:	_____
		<i>(Please fill in if the respondent is a company or organization)</i>
Phone Number	:	_____
E-mail Address	:	_____

If you do not wish to disclose the above information to the public, please check the box here:

I do not wish to disclose the information above.

PART B: DETAILED QUESTIONS FOR RESPONSE

You may provide your views or comments on all or any of the questions. If the provided space is insufficient, please attach additional pages.

Question 1

- (a) Do you agree that a statutory duty of care for trustees should be introduced, unless it is excluded by or inconsistent with the trust instrument?
- (b) If your answer to (a) is in the affirmative, do you agree that:
- (i) the standard of care should be along the lines of the TA 2000 and the STA?
 - (ii) the statutory duty of care should apply to the performance of those powers and duties set out in paragraph 2.14?
 - (iii) the statutory duty of care should replace the existing common law duty of care which might otherwise have applied; and the statutory duty should be additional to, and not affect, the other fundamental common law duties of trustees and the exercise of trustees' discretion?
- (c) Further to (b), do you think that the statutory duty of care should apply in other circumstances (other than those mentioned in paragraph 2.14 above); and if so, which circumstances?

Question 2

- (a) Do you agree that the Schedule 2 range of authorised investments should be retained? If your answer is no, please give reasons.
- (b) If you agree that Schedule 2 should be retained, please let us have your views on whether Schedule 2 should be amended in respect of one or more authorised investments. For example, should any of the following qualification criteria for authorised investments (which are set out in Schedule 2 and explained in paragraphs 2.21 - 2.23 above) be amended:
- the minimum market capitalization of HK\$10 billion for companies;
 - the minimum 5 year dividend record for companies;
 - the definition and credit ratings for debentures;
 - the safeguards for permissible derivatives (for hedging purposes only, traded on a recognized or specified stock or futures exchange, supported by specific written advice from a corporation licensed to give the advice with regard to suitability and potential risks and losses)?

Question 3

- (a) Do you agree that the power of delegation under section 27 of the TO should be retained, subject to an amendment that if a trust has more than 1 trustee, the exercise of the power of delegation should not result in the trust having only 1 attorney or 1 trustee administering the trust, unless that trustee is a trust corporation?

- (b) Do you have any views regarding the different conditions upon which an individual trustee may delegate his powers under section 27 of the TO and section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)? Do you agree that the latter should be repealed?

Question 4

- (a) Do you agree that the TO should be amended to provide trustees with a general power of appointing agents along the lines of the TA 2000, subject to any express contrary intention in the trust instruments?
- (b) If your answer to (a) is in the affirmative, do you agree that the safeguards set out in the TA 2000 (as discussed in paragraph 2.41 above) are sufficient to protect the interests of the beneficiaries?
- (c) What other safeguards (if any) would you suggest?
- (d) If your answer to (a) is in the negative, do you agree that section 25(1) of the TO should be retained and that section 25(2) of the TO be standardised with the approach to section 25(1)?

- (e) Do you agree that trustees of charitable trusts should be given wider powers to appoint agents along the lines of the TA 2000 (as discussed in paragraph 2.40 above); and if so, what safeguards would you suggest?

Question 5

- (a) Do you agree that the TO should be amended to provide trustees with a general power to employ nominees and custodians along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?
- (b) Do you agree that the safeguards set out in paragraph 2.48 are sufficient to protect the interests of the beneficiaries?
- (c) What other safeguards (if any) would you suggest?

Question 6

Do you agree that section 21 of the TO should be amended to provide trustees with wider powers to insure along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?

Question 7

- (a) Do you agree that the TO should be amended to provide for a statutory charging clause for professional trustees of non-charitable trusts, subject to any express contrary intention in the trust instruments, along the lines of the TA 2000 and the STA?

- (b) Further to (a), if a trust instrument contains provisions entitling trustees to receive remuneration, do you agree that the TO should be amended to enable a professional trustee of the trust to charge for services that could be provided by lay trustees?

- (c) Do you think that professional trustees acting for charitable trusts should be allowed to charge for their services in the absence of a charging provision in the relevant trust instrument; and if the answer is yes, what constraints (if any) should be imposed?

- (d) Further to (c) above, if the trust instrument of a charitable trust contains provisions entitling trustees to receive remuneration, do you think that the TO should be amended to enable a professional trustee of the charitable trust to charge for services that could be provided by lay trustees?

Question 8

Do you have any other suggestions in relation to the default administrative powers of trustees provided in Parts II and III of the TO?

Question 9

- (a) Do you think that trustee exemption clauses should be regulated statutorily and whether the regulation should apply to all trustees or only professional trustees who receive remuneration for their services?
- (b) If the answer to the first part of question (a) is yes, which of the following options do you prefer for regulating trustee exemption clauses:
- (i) prohibiting trustees to exclude liability for breach of trust for dishonesty or intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee along the lines of section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);
 - (ii) prohibiting trustees to exclude liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee along the lines of section 75B of the Companies Ordinance (Cap. 32);
 - (iii) imposing procedural safeguards to ensure that the settlor is aware of the trustee exemption clause;
 - (iv) subject trustee exemption clauses to a reasonableness test similar to the one imposed under the Control of Exemption Clauses Ordinance (Cap. 71)?

- (c) Do you have additional or alternative options for regulating trustee exemption clauses?

Question 10

- (a) Do you agree that the TO should provide certain basic rules regarding beneficiaries' right to information?
- (b) If your answer to (a) is in the affirmative, do you prefer the first option (which is set out in paragraph 4.9) or the second option (which is set out in paragraph 4.10)?
- (c) If you do not agree with those two options but still believe that the TO should provide for beneficiaries' right to information, please set out what you believe the TO should provide, for example, what information should trustees provide to beneficiaries and what class of beneficiaries (e.g. beneficiaries with interests in possession (such as life tenants), beneficiaries vested in interest only (such as reversionary or future entitlements) or beneficiaries with a right to be considered only (such as discretionary objects)) should be entitled to the information?

Question 11

Do you agree that the beneficiaries of a trust, who are of full age and capacity and are absolutely entitled to the trust property, should be empowered to remove a trustee, along the lines of the TLATA of the UK?

Question 12

- (a) Do you agree that RAP should be abolished, without retrospective effect?
- (b) If your answer to (a) is negative, do you agree that RAP should be modified by introducing one fixed perpetuity period, similar to that adopted by Singapore? How long do you think the new fixed perpetuity period should be (80 years, 100 years, 125 years, 150 years or any other period)?

Question 13

- (a) Do you agree that REA should be abolished? Please give reasons.
- (b) If your answer to (a) is yes, will your answer be different if RAP is also abolished so that there will be no control over the period of accumulation?

(c) Do you think that REA should be retained in some form with regard to charitable trusts; and if so, how long should a charitable trust be allowed to accumulate its income?

Question 14

Do you think that “protectors” should be statutorily defined in the TO and if so, how should the functions and duties of protectors be defined?

Question 15

(a) Do you agree that a statutory provision should be introduced to the effect that a trust will not be invalidated by reason only of certain reserved powers of settlors?

(b) If the answer to (a) is yes, in your opinion, what kind of reserved powers of settlors should not affect the validity of trusts? Do you agree that we should permit the reservation of those powers stated in paragraph 6.15?

Question 16

Do you agree that there is no need to codify the common law principles in relation to the governing law of trusts? If you do not agree, please explain the reasons.

Question 17

- (a) Do you agree that there should be statutory provisions to the effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law?
- (b) If your answer to (a) is yes, should the provisions follow the Singapore model (i.e. section 90 of the STA), the BVI model (i.e. section 83A of the BVITO) or any other model? Please specify and explain.

Question 18

- (a) Having balanced the reasons for and against, do you think that the law should be amended to allow the creation of non-charitable purpose trusts? Please give your reasons.

[Please answer (b), (c) and (d) if your answer to (a) is in the affirmative.]

- (b) Should any limitations and safeguards be imposed on the use of non-charitable purpose trusts and what should they be?
- (c) What measures should be introduced to facilitate the enforcement of non-charitable purpose trusts? For example, do you agree to provide for the role of “enforcers” in Hong Kong law?
- (d) If you consider that the concept of “enforcers” should be introduced in Hong Kong, how should the role of “enforcers” be defined? Would you support the approach in Dubai, Cayman Islands or BVI?

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