

BAR COUNCIL MALAYSIA

KERTAS-KERTAS CADANGAN REFORMASI INSTITUSI DAN UNDANG-UNDANG

BAR COUNCIL MALAYSIA

PART H

Other Legislative Reforms.

Index: Part H – Other Legislative Reforms.

No	Items	Pages
1	**National Legal Aid System** Executive Summary on National Legal Aid Scheme.	1 - 6
2	**Peninsular Malaysia Orang Asli Land Rights** Executive Summary on Peninsular Malaysia Orang Asli Land Rights.	7- 12
3	**Employees' Social Security Act: Ensuring Better Pay-Outs of the Survivors' Pension and Funeral Benefits under the Invalidity Pension Scheme** Executive Summary on Employees' Social Security Act: Ensuring Better Pay-Outs of the Survivors' Pension and Funeral Benefits under the Invalidity Pension Scheme.	13 - 16
4	**National Harmony Bills** Executive Summary on National Harmony Bills. Annexure(s) - A draft Racial and Religious Hate Crimes Bill - A draft National Harmony and Reconciliation Bill - A draft National Harmony and Reconciliation Commission Bill	17 - 20 21 - 23 24 - 28 29 - 43
5	**Proposal for Anti-Discrimination Laws** Executive Summary on Proposal for Anti-Discrimination Laws.	44 - 47
6	**International Instruments / Conventions** Executive Summary on International Conventions.	48 - 50
7	**Accede to the Rome Statute of the International Criminal Court** Executive Summary on Accede to the Rome Statute of the International Criminal Court.	51 - 55
8	**Amendment of the Persons With Disabilities Act 2008** Executive Summary on Proposed Amendments to the Persons with Disabilities Act 2008 Annexure(s) - Amendments to the Persons with Disabilities Act 2008	56 - 57 58 - 68
9	**Protection of the Rights of Migrant** Executive Summary on Protection of the Rights of Migrants.	69 - 74

	Annexure(s) - Comprehensive policy on Migrant	75 - 85
10	**Submission On Refugees & Asylum Seekers** Executive Summary on Refugees & Asylum Seekers Annexure(s) - Bar Council Memorandum on Developing a Comprehensive Policy Framework for Refugees and Asylum Seekers in Malaysia	86 - 89 90 - 106
11	**Stateless Persons In Malaysia** Executive Summary on Stateless Persons in Malaysia	107 - 108
12	**The Universities and University Colleges Act 1971 (Act 30)** Executive Summary on The Universities and University Colleges Act 1971.	109 - 115
13	**Setting up a Freedom of Information Regime in Malaysia** Executive Summary on Setting up a Freedom of Information Regime in Malaysia	116 - 120
14	**Development of a Policy for Environmental Justice** Executive Summary on Legal and Institutional Reforms for Strengthening Environmental Governance and Upholding Environmental Justice.	121 - 127
15	**Legal Profession Act 1976** Executive Summary on Amendments to the Legal Profession Act 1976. Annexure(s): - Draft Bill: An Act to amend the Legal Profession Act 1976.	128 - 133 134 - 228
16	**Sedition Act 1948** Executive Summary on Sedition Act 1948.	229 - 231
17	**Death Penalty** Executive Summary on Death Penalty.	232 - 233
18	**Security Offences (Special Measures) Act 2012** Executive Summary on Security Offences (Special Measures) Act 2012.	234 - 239
19	**Prevention of Crime Act 1959** Executive Summary on Prevention of Crime Act 1959.	240 - 243

20	**Prevention of Terrorism Act 2015** Executive Summary on Prevention of Terrorism Act 2015.	 244 - 246
21	**Trustee Act 1949** Executive Summary on Trustee Act 1949 Annexure(s): Relevant extracts of legislation regarding: I. Statutory Duty of Care; II. Power of Investment; III. Power to Insure Assets; IV. Power to Appoint Agents etc; V. Remuneration of Trustees; VI. Removal of Trustees; VII. Perpetuity and Accumulations; VIII. Variation of Trusts	 247 - 264 265 - 281 282 - 288 289 - 298 299 - 331 332 - 347 348 – 357 358 – 386 387 - 444
22	**Amendments To The Federal Constitution Of Malaysia (*In Relation To The Citizenship Being Conferred On Children Born Overseas To Malaysian Mothers)*** Executive Summary on Amendments To The Federal Constitution Of Malaysia. (*In Relation To The Citizenship Being Conferred On Children Born Overseas To Malaysian Mothers)*	 445 - 448
23	**Contract Law Reform** Executive Summary on Reform of Malaysian Contracts Law.	 449 - 451
24	**Decriminalisation of Suicide** Executive Summary on Decriminalisation of Suicide	 452 – 453
25	**Proposed Amendment To Regulation 7 Of The Employees' Provident Fund Regulation 2001** Executive Summary on Proposed Amendment To Regulation 7 Of The Employees' Provident Fund Regulation 2001.	 454 - 457
26	**Proposed Mental Capacity Act** Executive Summary on Proposed Mental Capacity Act Annexure(s) Preliminary List of Issues and Stakeholders	 458 - 463 464 - 465

National Legal Aid Scheme

Executive Summary

Position of the Bar: To have a comprehensive national legal aid scheme.

I. Introduction

1. The rule of law is the principle that every person - regardless of their rank, status or office - is subject to the same law and the same legal and judicial processes. The fourth tenet of the Rukun Negara, recognises the principle of upholding the rule of law.

2. One of the important aspects of the rule of law is the protection of individual liberties. An individual requires free access to the courts of justice; this free access guarantees civil liberties and ensures that any form of injustice is curtailed. Every person, no matter what their social status, must be allowed equal opportunity to have access to the institutions that have been set up to serve justice. However free access in itself is insufficient if those who are produced before court are unrepresented. The rule of law is meaningless if there is no access to justice – which is fundamental and a necessity in any democratic society.

3. An important element of access to justice is the right to legal representation. This is a fundamental right of all ordinary citizens and not a privilege. Poor and needy citizens should not be deprived of their right to meaningful legal representation merely because they cannot afford to pay legal services. It is not right that for the same offence the Malaysian with financial means gets off lightly because he is represented by a lawyer of his choice while the Malaysian who has no financial means is unrepresented, pleads guilty and receives a heavy punishment.

4. Legal Aid concerns itself on matters pertaining to access to justice. In every society the poor are generally stripped off their legal protections accorded by

the law. This is not merely because the law itself is inadequate, though in some cases they are, but because the poor person has no access to justice. A poor person's rights may be trampled upon and he/she has no means to seek legal redress. Therefore the provision of legal aid services is not merely to assist the poor. It is more fundamental than that – it is to preserve human values. Legal Aid is a fundamental human right.

5. Article 8(1) of the Federal Constitution states that all persons are equal before the law and entitled to the equal protection of the law. Article 5 Clause 3 of the Federal Constitution states that every person arrested is entitled to legal representation. Section 28A(2) Criminal Procedure Code ("CPC") states that before the police commence any form of questioning or recording of a statement from the person arrested, he/she should be informed of the right to communicate or consult a legal practitioner.

6. It is a constitutional right of all arrested person to have legal representation and be allowed to consult a lawyer. However the rights guaranteed by Article 5(3) and the provisions of the CPC become meaningless and illusory if the arrested person has financial constraints and cannot afford a lawyer. Access to justice cannot be a luxury item. It must be made available to all persons regardless of means. The lack of financial resources to engage a lawyer makes the Constitutional Provision of equality before the law problematic since some persons will be represented and others not.

7. Since the Malaysian Bar holds the view that access to justice is a fundamental right, we have lobbied for many years for the establishment for a comprehensive legal aid system.

8. Legal aid should also be provided for migrants, refugees, asylum seekers and stateless persons under the comprehensive scheme.

9. <u>Existing Providers of Legal Aid</u>

9.1 The table below provides a brief overview of the two different systems that are presently being funded by the Government.

Legal Aid Organizations	**Jabatan Bantuan Guaman (JBG)**	**Yayasan Bantuan Guaman Kebangsaan (YBGK)**
History	Commenced their services in 1970.	Lobbied for by the Bar Council. Launched by Prime Minister on 25 February 2011
Nature of Organization and Registration	Government Department administered by PM's Department and governed by the Legal Aid Act 1971.	Registered as a company limited by guarantee under the Company's Act 1965. Run by an 11-person Board of Directors Chaired by the AG with the President of the Bar serving as the Deputy Chair
Funding	The JBG gets its funding from the Government	Funded largely by the Government. The Bar Council has also provided funding to this scheme both at the inception of YBGK and via the paying of the salaries of Bar Council/YBGK staff and the provision of administrative services and office premises for free
Offices	JBG has offices in all states including Sabah and Sarawak	YBGK has a back- end office in Kuala Lumpur. The Bar Council allows the use of its Legal Aid Centres to be used as the front-end office for YBGK where clients need to go to access YBGK services. In Sabah & Sarawak, the Sabah Law Society and the Advocates' Association of Sarawak assist in the provision of YBGK services

What They Do	The JBG deals with Syariah family matters Civil family matters, Hire purchase / inheritance Consumer claim, mediation Mitigation for criminal cases Cases under Minor Offences Act and the Child Act	The YBGK deals only with Criminal Matters – both Civil and Syariah; providing advice and representation at Arrest, Remand, Bail and Mitigation stage and representation at all stages of a criminal trial
What They Don't Do	Represent Non-Citizens Criminal Defence Work Syariah Criminal Cases	Non-Citizens who are not under 18 years of age Capital Punishment Cases Preventive Detention Cases Traffic Summons
Means Test	Means Test applied for all legal representation. Depending on the earning of the client a small fee may be charged	No Means Test is applied at arrest, remand, bail and mitigation stage. Means Test applied for criminal trial representation Persons who earn below RM36,000/- per year pass the means test.

II. Problems with the Existing System

10. Using government funds to support 2 different schemes is inefficient and ineffective. Government funds need to be placed into a unified system. Having a unified system will also make it much more systematic when it comes to promoting legal aid in the country.

11. JBG has evolved into a bureaucracy and reviews have to be done in relation to its administrative services and tasks.

12. In respect of YBGK the Government has not established sufficient oversight of the scheme – the YBGK Board only meets on rare occasions and exercises little supervision over the YBGK manager. The lack of proper oversight and political will has resulted in the failure of various SOPs including the one

requiring all enforcement agencies to inform the YBGK whenever an arrest takes place. The Scheme in the last few years has been plagued with complaints that payments to panel lawyers are not prompt and many lawyers have done work for which they have not been paid.

13. The Government when it set up YBGK did not give enough thought to providing the scheme proper administrative support. A sizable amount of the background work that is being done to allow the YBGK to function at the existing level is due not to the YBGK Head Quarters but to volunteer members and staff of the Bar Council.

III. Solution

14. To have a single provider of legal aid which is fully Government funded

15. Such a scheme should be set up as a statutory body set up by an Act of Parliament. Such a statutory body should have a Board which is accountable to either a standalone Ministry of Law/Justice.

16. Such a statutory body would be tasked to:

16.1 determine the matters or classes of matters in respect of which legal aid may be given – including civil, criminal, syariah and administrative matters subject to certain carve outs. The scheme should cover all persons including migrants, refugees, asylum seekers and stateless persons. A means and merits test should be put in place;

16.2 determine the policy, rules and/or guidelines for the administration of the legal aid scheme and for the allocation of work and funds taking into consideration the need for legal assistance to be readily available and easily accessible to deserving persons;

16.3 determine, having regard to the funds available and taking into account all relevant recommendations, policy rules and/or guidelines to be observed in respect of payment to lawyers providing legal aid. The

provision of legal aid should be a combination of full-time employees of the Statutory Body as well as Panel Lawyers. A proper accreditation system needs to be put in place before members are appointed onto the Panel. Measures need to be put in place in order that there is accountability of those doing legal aid work and standards are maintained;

16.4 to consult with Government, local authorities, educational institutions, local community, professional, social and other groups having an interest in the provision of legal aid;

16.5 to conduct research in respect of legal aid;

16.6 initiate and carry out educational programmes designed to promote the understanding by members of the public of their rights and duties under the Law of Malaysia;

16.7 to establish, administer, develop and co-operate in operating law clinics and projects in respect of the provision of legal aid and for such purposes to employ staff necessary to initiate, develop and operate the law clinics and projects; and

16.8 to receive and encourage proposals on law reforms, new programmes and projects in respect of legal aid; and to provide information to the public about legal aid.

IV. Conclusion

17. To establish a comprehensive National Legal Aid Scheme covering both the civil and criminal justice system. The comprehensive National Legal Aid Scheme should cover all nationals and migrants, refugees, asylum seekers and stateless persons.

Peninsular Malaysia Orang Asli Land Rights

Executive Summary

Position of the Bar:

To legally recognise and protect the customary lands, territories and resources inhabited, occupied, used or enjoyed by the Orang Asli of the Malay peninsula and to respect their self-determination in respect of these areas ("collectively, Orang Asli land rights").

I. Introduction

1. The Bar Council has acted on Peninsular Malaysia Orang Asli issues since 1993. Acutely aware of the increasing problems involving Orang Asli customary lands and resources through numerous complaints from the Orang Asli, the Bar Council has undertaken, amongst other matters, the following initiatives:

   1.1 1993-present: Management of and assistance for pro bono legal teams on behalf of Orang Asli in customary land rights cases;

   1.2 2009-present: Numerous media statements by the Malaysian Bar President and Bar General Meeting resolutions on the violation of Orang Asli land rights (including land encroachments) and calls for governmental action to recognise these land rights;

   1.3 2010-present: The existence of the Bar Council Committee on Orang Asli Rights that specifically focuses on Orang Asli rights awareness, communications, consultations, training and advocacy;

   1.4 2011-2013: Bar Council member acted as independent consultant in the SUHAKAM National Land Inquiry into the Land Rights of Indigenous Peoples ("the SUHAKAM Inquiry"); Bar Council representatives provided expert evidence during the SUHAKAM Inquiry;

   1.5 2013-2014: Bar Council representatives were members of the Federal Government Task Force to review the 2013 SUHAKAM Report of the National Inquiry into the Land Rights of Indigenous Peoples ("the SUHAKAM Report");

1.6 2017: Bar Annual General Meeting resolution passed on the need for recognition of Orang Asli land rights in accordance with the SUHAKAM Report;

1.7 2019: Bar engagement and participation at the 2019 National Orang Asli Convention ("NOAC") organised by the Federal government that culminated in 136 resolutions to restore the dignity of the Orang Asli and address the sustained marginalisation of the Orang Asli ("the 2019 NOAC Resolutions"); and

1.8 June 2019: Joint Memorandum on the Reform of the Aboriginal Peoples Act 1954 and Orang Asli Policy and Administration ("the 2019 Bar Joint Memorandum on APA Reform") presented to Minister in charge of Orang Asli affairs.

2. It is regrettable that the long standing Orang Asli land rights problem persists[1] despite the special constitutional position held by the Peninsular Malaysia Orang Asli[2] and the judicial recognition of pre-existing Peninsular Malaysia Orang Asli land rights at common law.[3] For example, official figures indicate that only 32,779.37 or only 24.3 per cent of the officially-acknowledged Orang Asli land have been legally protected.[4] Compounding matters, the SUHAKAM Report observes that officially-acknowledged Orang Asli lands only account for 17 per cent of total lands claimed as customary lands by the Orang Asli.[5]

3. It must be appreciated that Orang Asli land rights are not only vital for the socio-economic wellbeing of the Orang Asli community but the survival of its unique and varied identities and cultures that are inextricably linked to their particular spatial

[1] For a recent international report covering this issue, see eg. D Mamo (ed.), *The Indigenous World 2022* (IWGIA, 2022), at pp. 248-9.
[2] See eg. art. 8(5)(c) and Item 16 of the Ninth schedule of List I.
[3] See *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418; *Nor Anak Nyawai and Ors v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241; *Superintendent of Land and Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 (Federal Court).
[4] "Ismail Sabri: 80 pc of needs of Orang Asli community fulfilled", *Malay Mail Online*, 4 March 2018 <http://www.themalaymailonline.com/malaysia/article/ismail-sabri-80pc-of-needs-of-orang-asli-community-fulfilled>.
[5] SUHAKAM Report, see <http://www.suhakam.org.my/pusat-media/sumber/laporan-siasatan-awam/>, accessed 26 December 2022, at p. 133.

niches. Orang Asli land rights are also closely connected to their enjoyment of fundamental rights available under Part II of the Federal Constitution.[6]

II. Problems

4. Not dissimilar to Indigenous land issues in other jurisdictions, it would be overly simplistic to assume that effective reform of Peninsular Malaysia Orang Asli land rights can be achieved by a mere stroke of an executive pen or fragmented legislative changes. The issue is multi-jurisdictional and involves land, a finite resource that is constantly in popular demand and subject to contestation.

5. The Bar sees the source of the problem as the non-recognition of Orang Asli land rights, not solely due to the lack of legal provisions but the want of political will to prioritise the recognition of these land rights over government and other land and resource use agendas.

6. This lack of priority can be observed in the: (i) restricted scope and implementation of existing laws for the recognition and protection of Orang Asli land rights; and (ii) limited and delayed efforts in implementing the SUHAKAM Report recommendations for the reform of Orang Asli land rights.

7. In terms of existing laws and policies, the SUHAKAM Report states that Indigenous communities including the Orang Asli are legally and administratively dependent on the federal and state governments and their respective agencies to determine the extent of recognition and protection afforded to Indigenous customary areas.[7] In breach of the legal fiduciary duty owed to the Orang Asli in respect of their customary lands,[8] State governments and their land-related agencies (and the relevant Federal agency, namely, the Jabatan Kemajuan Orang Asli) have recurrently failed to legally protect Orang Asli customary lands rendering the interests of the affected Orang Asli community "invisible" in land registers and consequently, open to "legalised" exploitation by others.

[6] *Id* at p. 156.
[7] See SUHAKAM Report, above n. 6, at ch. 8.
[8] See eg. *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal).

8. Effective executive implementation of the SUHAKAM Report recommendations to address Orang Asli land rights issues has been poor. It has been more than seven years since the Federal government set up a Cabinet Committee to implement 17 of the 18 SUHAKAM Report recommendations to address Indigenous land problems without any real progress. The National Human Rights Action Plan 2018 ('NHRAP")[9] appears to have moderated Indigenous/Orang Asli self-determination and effective participation in terms of: (1) the determination of the applicable and legally recognisable customary land concepts; (2) Indigenous/Orang Asli rights to free, prior and informed consent ("FPIC"); and (3) cultural rights. In addition to delaying the implementation the federal executive has failed to take the basic pre-emptive action of introducing a moratorium on Orang Asli claimed lands until the final implementation of the SUHAKAM Report recommendations.

9. If the current status quo continues, Orang Asli communities will have to continue relying on the courts to resolve their land woes. Many of these communities are of limited financial means and do not receive legal aid to defend their customary lands. Furthermore, the Bar Council notes with concern more recent appellate decisions from the jurisdiction of Sarawak including *TR Sandah AK Tabau*[10] and *TR Nyutan AK Jami*[11] that respectively limit the spatial extent of native customary rights recognisable under the common law and regularise the wrongful extinguishment of prior native customary rights by way of monetary compensation. These adverse judicial developments and the gravity of the Orang Asli land rights issue behove the Federal and State governments to implement the SUHAKAM Report recommendations expeditiously.

III. Solutions

10. From an Indigenous rights perspective, the Bar Council regards the SUHAKAM Report and all its 18 recommendations as a suitable blueprint for the legal and administrative reform of Orang Asli land rights. Consistent with the SUHAKAM Report recommendations and the 2019 NOAC Resolutions, the 2019 Bar Joint

[9] Jabatan Perdana Menteri, Pelan Tindakan Hak Asasi Manusia Kebangsaaan 2018 (2018), at pp. 121-33.
[10] *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2018] 2 MLJ 281.
[11] *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77.

Memorandum on APA Reform includes key areas for reform to the existing Aboriginal Peoples Act 1954 that enhance Orang Asli self-determination in respect of their affairs and customary lands and resources. The Attorney General's Chambers, the Bar Council, legal academics and Orang Asli stakeholders can contribute their respective expertise to ensure that any legal and institutional reform based on the SUHAKAM Report is within the spirit, intent and meaning of the Federal Constitution.

11. In order to achieve Orang Asli rights of self-determination in respect of the management of their internal affairs and to pursue their own social, cultural and economic development,[12] the Bar Council calls for any moderation, dilution and limitation of such rights contained in the NHRAP or any other government policy document on Orang Asli rights to be reversed or curbed, as the case may be, and that any legal, administrative and institutional reform with respect to Orang Asli land rights be conducted with the effective consultation and FPIC of the affected local Orang Asli communities.[13]

12. As determined by the Malaysian appellate courts, the scope and nature of pre-existing Orang Asli land rights, if effectively legislated upon, should be determined in accordance with established customs and usages of the individual community.[14] These rights do not owe their existence to prevailing statutes.[15]

13. In line with the SUHAKAM Report recommendations and the 2019 Bar Joint Memorandum on APA Reform, agencies established for the protection of the Orang Asli, such as the Jabatan Kemajuan Orang Asli, should be recalibrated into coordinating agencies geared towards building and complementing Orang Asli self-determination over their own affairs.

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[12] UNDRIP, see <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>, accessed 26 December 2022, arts. 3 and 4.

[13] UNDRIP, above n. 12, art. 19. For international human rights standards on Indigenous FPIC and consultation, see eg. UN Permanent Forum on Indigenous Issues, *Report of the International Expert Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN ECOSOC Doc E/C.19/2005/3 (2005).

[14] *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal).

[15] *Superintendent Of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 (Court of Appeal).

14. Given the limitations of the court process as the sole legal avenue for determining Orang Asli customary land rights claims, the Bar Council welcomes the SUHAKAM Report recommendation for the establishment of a special court or tribunal that is suitably equipped to determine such claims.[16] Alternative adjudication models can be found in the Waitangi tribunal process and gleaned from other jurisdictions such as Australia.[17] Such a recommendation is consistent with art. 27 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") that provides for "a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate" Indigenous land rights. So as not to deny Orang Asli claimants access to justice, appropriately qualified customary rights claimants should be provided legal aid.

15. In order to preserve the status quo of Orang Asli claimed lands that remain substantially legally unprotected, the Bar Council reiterates its calls for a moratorium on such areas pending the final implementation of the SUHAKAM Report recommendations and the 2019 Bar Joint Memorandum on Reform of the APA.

IV. Conclusion

16. In the name of national and state development, the Peninsular Malaysia Orang Asli have endured insufferable losses to their customary and traditional lands, exacerbated by the failure of the very governments and institutions who were entrusted to protect them. There is no legal or moral reason for this community NOT to enjoy their unique and rightful place in society as Malaysia forges its path to a new destiny. The Bar Council therefore urges for its position in respect of the legal and institutional reform of Orang Asli land rights stated in this Executive Summary to be implemented without further delay.

[16] *Id* at pp. 166-7.

[17] For a suggested and alternative legal framework for an Orang Asli Land Tribunal, see eg. Yogeswaran Subramaniam, *Orang Asli Land Rights by UNDRIP Standards in Peninsular Malaysia: An Evaluation and Possible Reform* (PhD thesis, University of New South Wales, 2013), at pp. 375-7.

Employees' Social Security Act: Ensuring Better Pay-Outs of the Survivors' Pension and Funeral Benefits under the Invalidity Pension Scheme

Executive Summary

Position of the Bar: To make administrative changes to enable more members of the public to avail of benefits available under the Employees' Social Security Act. The putting in place of such administrative measures will help make the Social Security Organisation more proactive and benefit the members of the public.

I. Introduction

1. The Employees' Social Security Act provides benefits under several schemes including:
   (i) The Employment Injury Scheme - Which provides benefits to the insured person and his dependents in the event of an employment injury or death; and

   (ii) The Invalidity Pension Scheme – Which provides benefits to the insured person or his survivors' in the event of invalidity or death for any reason.

2. In order to qualify for benefits under the Invalidity Pension Scheme an insured person must satisfy certain conditions. No benefits are payable if these conditions are not satisfied.

3. The first condition is that the insured person should not have attained the age of 60 at the time of death or invalidity.

4. If the insured person has not attained the age of 60 then he/she and his/her dependents might be entitled to benefits under the invalidity pension scheme if he/she has made a certain minimum number of contributions to SOCSO. The number of contributions made is referred to as a full or a reduced qualifying period – Section 17 and 17A.

5. An insured person will be said to have satisfied the full qualifying period if monthly contributions have been paid in respect of the insured persons for not less than 24 months during the period of forty consecutive months immediately preceding the month in which the notice of invalidity is submitted or monthly contributions have been paid in respect of not less than 2/3 of the number of complete months between the period when contributions first became payable and the month immediately preceding the month in which the notice of invalidity was submitted - Section 17(2).

6. An insured person will be said to have satisfied the reduced qualifying period if monthly contributions have been paid in respect of the insured persons for not less than 24 months and monthly contributions have been paid in respect of not less than 1/3 of the number of complete months between the period when contributions first became payable and the month immediately preceding the month in which the notice of invalidity was submitted – Section 17(3).

7. The full and reduced qualified period is also applicable to dependents of an insured person – Section 17A.

8. If an insured person has not attained the age of 60 and has satisfied either the full or reduced qualifying period then upon the death of the insured person for any reason the dependants of an insured persons will be entitled to what is called a survivors' pension – Section 17A, and Funeral Benefits, Section 29(1).

9. The amount of Survivors' Pension is outlined in the Eighth Schedule and can amount to up to 65% of the average monthly wage (depending on the number of contributions made). The widow/widower will be paid an amount equivalent to three-fifths of the daily rate of survivors' pension (for life) and the children two-fifths of the daily rate of survivors' pension (until marriage or they reach the age of 21) – Section 20A(1).

10. A family member or any person who actually incurs the expenditure of the funeral of an insured person shall be entitled to receive RM2,000.

II. Problem

11. Many persons who contribute to SOCSO and their family members are unaware of the benefits that are available to them. They may have some knowledge about their benefits under the Employment Injury Scheme but many are ignorant of their benefits under the Invalidity Pension Scheme.

12. They are not aware that benefits may be payable for death due to any reason i.e. an illness or accident that is not related to employment. And they are not aware that the insured person and his/her survivors may be entitled to benefits years after they have stopped contributing to SOCSO and are no longer in employment:

> *Example: A begins work on 1/1/2015 and stops working and contributing to SOCSO in 31/12/2017 (3 years). Even if he never works after this – his survivors would be entitled to Survivors' Pension and the Funeral Benefits when he dies of cancer in 2020!*

13. Since those who contribute to SOCSO and their families are unaware of the benefits that they are entitled to they do not put in any claim and end up with nothing.

14. Their ignorance of the law means that many Malaysians lose out from what they are legally entitled to.

15. An administrative mechanism should be set up to solve this problem.

III. The Solution

16. When a death takes place, the Registrar of Births and Deaths should automatically inform SOCSO.

17. SOCSO upon receiving this information will check its records to determine if the person who has passed away (a) has contributed to SOCSO and (b) if this person has satisfied the requirement of either a full or a reduced qualifying period.

18. If the person is not eligible to any benefits then SOCSO does not have to do anything further.

19. However if SOCSO determines that the deceased person has satisfied the requirement and that the family of the deceased person is eligible to receive Survivors Pension/Funeral Benefits then SOCSO needs to contact the family member of the deceased person, inform him/her that they might be entitled to certain benefits under SOCSO and invite him/her to come in and make a claim.

IV. Conclusion

20. A simple administrative decision of requiring the Registrar of Births and Deaths to inform SOCSO when a person dies and a reorientation of SOCSO from passively waiting for claims to be made to pro-actively reaching out to those who are entitled to benefits will benefit a large number of Malaysians.

National Harmony Bills

Executive Summary

Position of the Bar: The Government should enact National Harmony Laws.

I. Introduction

1. The Sedition Act criminalises freedom of speech and expression if that speech or expression falls under 'seditious tendency' definition in the Act. The Act severely encroaches upon the public enjoyment and exercise of fundamental civil liberties.

2. The legislation has been widely criticised as being draconian and archaic, and undermines democratic institutions as well as being an absolute affront to democracy.

3. The offences provided for under the Sedition Act lacks the requirement of intention. The offences are essentially strict liability offences with no element of *mens rea*.

4. The Working Group drafted 3 bills to replace the Sedition Act and to promote national harmony, unity, reconciliation, integration, equality and non-discrimination. The 3 bills are:
   a) **Racial and Religious Hate Crimes Bill**;
   b) **National Harmony and Reconciliation Bill**; and
   c) **National Harmony and Reconciliation Commission Bill**.

II. Racial and Religious Hate Crimes Bill

5. The objective of the Bill is to promote and preserve national harmony by punishing racial and religious hatred and protecting the right to freedom of speech and expression, and to provide for related matters.

6. The Bill makes it a criminal offence to incite racial or religious hatred. Under the Bill, whoever intentionally engages in conduct that is likely to threaten, incite, or incite others to threaten, physical harm towards another person or class of persons or

property of that other person or class of persons on the basis of race or religion would be guilty of a criminal offence.

7. The sections of the Bill have been drafted to only deal specifically with conduct which has an element of physical harm towards another person. It does not criminalise offensive, insulting or insensitive conduct. The Bill also punishes those who inflict physical harm on another person on basis of racial and religious hatred.

(See, Annexure I: Draft Racial and Religious Hate Crimes Bill)

III. National Harmony and Reconciliation Bill

8. The Bill seeks to capture the rights entrenched in Article 8(1) and (2) of the Federal Constitution, that all persons are equal before the law and entitled to the equal protection of the law, except as expressly authorized.

9. Joseph Stiglitz in his book, 'The Price of Inequality: The Avoidable Causes and Invisible Costs of Inequality', wrote that unfairness affects lives and productivity. Whilst James A. Robinson and Daron Acemoglu in 'Why Nations Fail: The Origins of Power, Prosperity and Poverty' wrote that the modern level of prosperity rests upon political foundations and that power has to be centralised and the institutions of power have to be inclusive.

10. The root cause of much racial and religious tension in Malaysia may be found in inequality and discrimination. Such tensions, if not managed may give rise to disputes and conflicts.

11. The Bill is a proposed legislation to prevent unfair discrimination of persons based on religion, race, descent, place of birth, gender, or disability and to provide for related matters.[1]

[1] Undang-undang Penghapusan Diskriminasi Ras dan Etnis, Nombor 40 Tahun 2008, Indonesia.

12. The Bill imposes an obligation on the Government and all persons to promote equality. The Bill also seeks to prohibit unfair discrimination on the grounds of religion, belief, race, descent, place of birth, gender, or disability.

13. Any unfair discrimination would give rise to a complaint under the Bill.

(See, Annexure II: Draft National Harmony Reconciliation Bill)

IV. National Harmony and Reconciliation Commission Bill

14. The Bill is a proposed legislation which relates to the formation of the **National Harmony and Reconciliation Commission** (**"Commission"**) to promote national harmony, unity, reconciliation, integration, equality and non-discrimination and to provide for related matters[2].

15. Matters of this nature ought not to find itself in Court which is typically an adversarial environment. Such an environment is not conducive to providing a win-win resolution.

16. Such conflicts and disputes in Malaysia calls for an institution to manage and resolve them.

17. The structure and processes of the Commission are tailored to provide such management and resolution.

18. The Commission would comprise of not less than 30 Commissioners appointed by the Yang di-Pertuan Agong on recommendation by the Prime Minister after consulting with various stakeholders.

19. The functions of the Commission shall be the functions of the Commission shall be-

(a) to promote awareness of and provide education in relation to national unity, integration and equality,

[2] Maintenance of Religious Harmony Bill 1990, Singapore.

(b) to advise, assist and make recommendations to the Government for the purpose of national unity, integration, non-discrimination and equality,

(c) to inquire into complaints of unfair discrimination with a view to resolution.

20. Further, the Bill empowers the Commission to constitute a Unfair Discrimination Tribunal **("Tribunal")** to inquire into complaints of unfair discrimination with a view to resolve the same. The Tribunal shall comprise of 3 individuals, with at least 1 Commissioner in the Tribunal.

21. The Tribunal has powers to compel witnesses and receive evidence in the inquiry.

22. At the conclusion of the inquiry, the Tribunal shall either dismiss the complaint or make a finding of unfair discrimination. If a finding of unfair discrimination is made by the Tribunal, the Tribunal is empowered to reprimand, issue a prohibitory order or a mandatory order.

(See, Annexure III: Draft National Harmony and Reconciliation Commission Bill)

IV. Conclusion

There is an urgent need to enact National Harmony Laws to foster unity and harmony among the people.

[A draft Racial and Religious Hate Crimes Bill]

A BILL

Intituled

An Act relating to the promotion and preservation of national harmony by punishing racial and religious hatred and protecting the right to freedom of speech and expression, and to provide for related matters.

[ ]

ENACTED by the Parliament of Malaysia as follows:

PART I
PRELIMINARY

1. Short title

(1) This Act may be cited as the Racial and Religious Hate Crimes Act 2014.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette.

2. Definitions

(1) In this Act, unless the context otherwise requires –

"conduct" includes any act, deed, speech, publication, writing, statements, expressions or innuendo.

"engage in conduct" includes use of the internet, e-mail or any electronic means to publish or transmit statements or other material.

"person" includes any company, association, body of persons or public authority, whether incorporated or not.

"publication" includes all written or printed and everything whether of a nature similar to written or printed matter or not containing any visible representation or by

its form, shape or in any other manner capable suggesting words or ideas in every copy or reproduction or substantial reproduction of any publication.

"race" includes—

(i) colour;
(ii) descent or ancestry;
(iii) nationality or national origin;
(iv) ethnicity or ethnic origin;
(v) if 2 or more distinct races are collectively referred to as a race—
  a) each of those distinct races;
  b) that collective race;

"religious belief or activity" means—
(i) holding or not holding a belief, religious belief or view;
(ii) engaging in, not engaging in or refusing to engage in a lawful religious activity

"words" includes any phrase, sentence or other consecutive number or combination of words, oral or written.

3. Incitement of racial hatred[1]

(1) Whoever engages in conduct that is intended to threaten, incite, or incite others to threaten, physical harm towards another person or class of persons or property of that other person or class of persons on the basis of race is guilty of an offence and shall be punished with a fine of not more than RM5,000.00 or imprisonment of not more than 7 years or both.

(2) For the purposes of sub-section (1), conduct may be constituted by a single occasion or by a number of occasions over a period of time.

[1] UK's Public Order Act

4. Incitement of religious hatred[2]

(1) Whoever engages in conduct that is intended to threaten, incite, or incite others to threaten, physical harm towards another person or class of persons or property of that other person or class of persons on the basis of religious belief or activity is guilty of an offence and shall be punished with a fine of not more than RM5,000.00 or imprisonment of not more than 7 years or both.

(2) For the purposes of sub-section (1), conduct may be constituted by a single occasion or by a number of occasions over a period of time.

5. Physical harm on basis of racial and religious hatred[3]

(1) Whoever engages in conduct with the intention to inflict or cause physical harm, or with the knowledge that he is likely thereby to inflict or cause physical harm, towards another person or class of persons or property of that other person or class of persons on the basis of race or religious belief or activity, and thereby inflict or cause physical harm is guilty of an offence and shall be punished with a fine of not more than RM10,000.00 or imprisonment of not more than 10 years or both.

6. Protection of freedom of expression[4]

(1) Nothing in this Act shall be read or given effect in a way which prohibits or restricts discussions or criticisms of particular race, religions or the beliefs or practices of their adherents or of any other belief system, or the beliefs or practices of its adherents.

7. Repeals and savings

(1) The Sedition Act 1948 [Act No. 15] is repealed.

[2] UK's Racial and Religious Hatred Act.
[3] S 321 Penal Code.
[4] Racial and Religious Hatred Act.

[A draft National Harmony and Reconciliation Bill]

A BILL

Intituled

An Act relating to the promotion of national harmony and reconciliation in Malaysia and to prevent unfair discrimination of persons based on religion, race, descent, place of birth, gender[1], or disability and to provide for related matters.

[ ]

ENACTED by the Parliament of Malaysia as follows:

PART I
PRELIMINARY

1. Short title and commencement

(1) This Act may be cited as the National Harmony and Reconciliation Act 2014.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette.

2. Objects

(1) The objects of this Act are –

(i) To give effect to the letter and spirit of the Federal Constitution, in particular Article 8.

(ii) To provide measures to facilitate the eradication of unfair discrimination, particularly on the grounds of religion, belief, race, descent, place of birth, gender, or disability;

(iii) To provide procedures for the determination of circumstances under which discrimination is unfair;

[1] Article 8(2) Federal Constitution.

(iv) To provide measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination;

(v) To provide remedies for victims of unfair discrimination, and persons whose right to equality has been infringed;

(vi) To set out measures to advance persons disadvantaged by unfair discrimination.

(2) Nothing in this Act derogates from the provisions of Article 153 of the Federal Constitution.

3. Relationship with other laws

(1) This Act is to be read together with the National Harmony and Reconciliation Commission Act.

4. Definitions

(1) In this Act, unless the context otherwise requires –

"**belief**" means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief;

"**complainant**" means any person who alleges any contravention of this Act and who institutes proceedings in terms of the Act;

"**disability**[2]" means a person who has a physical, mental, intellectual or sensory impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities;

"discrimination" or "discriminate" shall mean any distinction, exclusion, restriction, or preference, includingin policy, law, rule, regulation, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on or withholds benefits, opportunities or advantages from, any person, based on religion, race, descent, place of birth, gender or disability which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, or equal footing of rights and fundamental freedoms in the areas of education and political, economic, social, cultural or any other field of public life.

[2] Persons with Disabilities Act 2008.

"**equality**" includes the full and equal enjoyment of rights and freedoms as contemplated in the Federal Constitution and includes equality of outcomes;

"**Minister**" shall mean the Minister in charge of the Department of Unity and National Integration.

"**person**" includes any company, association, body of persons or public authority, whether incorporated or not;

"**pregnancy**" includes any condition related to pregnancy;

"**race**" includes—

(a) colour;
(b) descent or ancestry;
(c) nationality or national origin;
(d) ethnicity or ethnic origin;
(e) if 2 or more distinct races are collectively referred to as a race—
  (i) each of those distinct races;
  (ii) that collective race;

"**religion**" means any religion and includes any belief or lack of a religious belief;

5. General responsibility and social commitment by all persons to promote equality

(1) The Government and all persons have a duty and responsibility to promote equality.

(2) The Government and all persons must promote equality in their relationships with other persons and in their public activities.

6. Prohibition of unfair discrimination on ground of religion, race, descent or place of birth

(1) The Government and all persons shall not unfairly discriminate against any person on the ground of **religion, race, descent or place of birth** including-

(i) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(ii) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity based on **religion, race, descent or place of birth**;

(iii) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by persons of a particular **religion, race, descent or place of birth**;

(iv) the provision or continued provision of inferior services on ground of **religion, race, descent or place of birth**, compared to those of another **religion, race, descent or place of birth**;

(v) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration.

7. Prohibition of unfair discrimination on ground of gender

(1) The Government and all persons shall not unfairly discriminate against any person on the ground of gender, including-

(i) discrimination on ground of pregnancy;

(ii) sexual orientation and identity;

(iii) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;

(iv) systemic inequality of access to opportunities by a gender as a result of the sexual division of labour.

8. Prohibition of discrimination on ground of disability

(1) The Government and all persons shall not unfairly discriminate against any person on the ground of disability, including –

(i) denial of any access provided for under the Persons with Disabilities Act 2008;

(ii) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

(iii) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

9. Determination of fairness or unfairness

(1) In determining whether the discrimination is fair, the following must be taken into account:

(i) the context;

(ii) the factors referred to in subsection (2); and

(iii) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(2) The factors referred to in subsection (1)(ii) include the following:

(i) whether the discrimination impairs or is likely to impair human dignity;

(ii) the impact or likely impact of the discrimination on the complainant;

(iii) the nature and extent of the discrimination;

(iv) whether the discrimination is systemic in nature;

(v) whether the discrimination has a legitimate purpose;

(vi) whether and to what extent the discrimination achieves its purpose;

(vii) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(viii) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances, where appropriate, to accommodate diversity.

10. Complaints of unfair discrimination

(1) Any unfair discrimination under Sections 6, 7, 8 and 9 may give rise to a complaint under the National Harmony and Reconciliation Commission Act.

[A draft National Harmony and Reconciliation Commission Bill]

A BILL

Intituled

An Act relating to the formation of the National Harmony and Reconciliation **Commission to promote national harmony, unity, reconciliation, integration, equality and non-discrimination and provide for related matters.**

[ ]

ENACTED by the Parliament of Malaysia as follows:

PART I
PRELIMINARY

1. Short title, commencement and non-application

(1) This Act may be cited as the National Harmony and Reconciliation Commission Act.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette.

(3) Nothing in this Act derogates from the provisions of the Federal Constitution.

2. Definitions

(1) In this Act, unless the context otherwise requires –

"**Commission**" means the National Harmony and Reconciliation Commission.

"**Commissioner**" means a National Harmony and Reconciliation Commissioner appointed by the Yang di-Pertuan Agong pursuant to this Act.

"**group**" means a group or class of persons who share a common attribute in respect of any of the following matters—

(i) Religion or belief,

(ii) Race,

(iii) Descent,

(iv) Place of birth,

(v) Gender, or

(vi) Disability.

A reference to a group includes a reference to a smaller group or smaller class, within a group, of persons who share a common attribute (in addition to the attribute by reference to which the group is defined) in respect of any of the matters specified in above.

"**Minister**" shall mean the Minister in charge of the Department of Unity and National Integration.

"**person**" includes any company, association, body of persons or public authority, whether incorporated or not.

"**Tribunal**" means the tribunal established under section 22.

"**unfair discrimination**" shall have the meaning as defined in the National Harmony and Reconciliation Act.

PART II
ESTABLISHMENT OF THE NATIONAL HARMONY AND RECONCILIATION COMMISSION

3. Establishment

(1) There shall be a body corporate known as the National Harmony and Reconciliation Commission.

(2) The Commission shall be a body corporate having perpetual succession and a common seal, which may sue and be sued in its name and, subject to and for the purposes of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein vested in the Commission upon such terms as it deems fit.

(3) The Commission shall have a common seal which shall bear such device as the Commission shall approve and such seal may be broken, changed, altered or made anew as the Commission thinks fit.

(4) The common seal shall be kept in the custody of the Secretary to the Commission or such other person as may be authorised by the Commission and shall be authenticated by the Secretary or such authorised person or by any officer authorised by the Secretary or such authorised person in writing.

(5) All deeds, documents and other instruments purporting to be sealed with the common seal, authenticated as specified in sub-section 4 shall until the contrary is proved, be deemed to have been validly executed.

(6) The common seal of the Commission shall be officially and judicially noticed.

4. Membership

(1) The Yang di-Pertuan Agong shall appoint not more than 30 individuals as members of the Commission (to be known as Commissioners) on the recommendation of the Prime Minister.

(2) The members of the Commission shall be full time and/or part time Commissioners.

(3) The Prime Minister shall consult with various stakeholders before making his recommendation to the Yang di-Pertuan Agong.

(4) The members of the Commission shall be appointed from amongst men and women of various religious, political and racial backgrounds who:

(i) has experience or knowledge relating to a relevant matter, or

(ii) is suitable for appointment for some other special reason, and having regard to the desirability of the Commissioners together having experience and knowledge relating to the relevant matters.

(5) For the purposes of sub-section 3 above a relevant matter are those matters in respect of which the Commission has functions including, in particular—

(i) unity,

(ii) integration,

(iii) discrimination (whether on grounds of religion, belief, race, descent, place of birth, gender, or disability),

(iv) equality.

(6) The Commission shall include —

(i) a Commissioner appointed who is (or has been) a person with disability.

(ii) a Commissioner appointed from the state of Sabah.

(iii) a Commissioner appointed from the state of Sarawak.

(iv) a Commissioner appointed from the Orang Asli community or has knowledge and is familiar with the Orang Asli community.

(7) A member of the Commission shall hold office for a period of three years and is eligible for reappointment once for another period of three years.

5. Chairperson and Deputy Chairperson

(1) The Yang di-Pertuan Agong shall designate one of the members appointed under section 4 to be the Chairperson of the Commission who shall be a full time Commissioner.

(2) The Chairperson's term of office shall be his period of membership on the Commission and his position shall be a full time position.

(3) A Deputy Chairperson shall be elected by the members of the Commission from amongst themselves.

(4) Where the Chairperson of the Commission is for any reason unable to perform the functions of the Chairperson, or during any period of vacancy in the office of the Chairperson, the Deputy Chairperson shall perform the functions of the Chairperson.

6. Remuneration

(1) The Chairperson of the Commission shall be paid such remuneration and allowances as the Yang di-Pertuan Agong may determine.

(2) Every member of the Commission shall be paid allowances at such rates as the Yang di-Pertuan Agong may determine.

7. Vacation of office

(1) The office of a member of the Commission shall become vacant-

(i) upon the death of the member;

(ii) upon the member resigning from such office by letter addressed to the Yang di-Pertuan Agong;

(iii) upon the expiration of his term of office; or

(iv) upon the member being removed from office on any of the grounds specified in Section 8 below.

8. Removal and Resignation

(1) A member of the Commission may be removed from office by the Yang di-Pertuan Agong if-

(i) the member is adjudged bankrupt by a court of competent jurisdiction;

(ii) the Yang di-Pertuan Agong, after consulting a medical officer or a registered medical practitioner, is of the opinion that the member is physically or mentally incapable of continuing his office;

(iii) the member absents himself from three consecutive meetings of the Commission without obtaining leave of the Commission or, in the case of the Chairperson, without leave of the Prime Minister;

(iv) the Yang di-Pertuan Agong, on the recommendation of the Prime Minister, is of the opinion that the member-

a) has engaged in any paid office or employment which conflicts with his duties as a member of the Commission;

b) has misbehaved or has conducted himself in such a manner as to bring disrepute to the Commission; or

c) has acted in contravention of this Act and in conflict with his duties as a member of the Commission.

(2) A member of the Commission may at any time resign his office by a letter addressed to the Yang di-Pertuan Agong.

9. Executive Secretary and staff of the Commission

(1) The Commission shall appoint an Executive Secretary to the Commission.

(2) The Commission may appoint such other officers and servants as may be necessary to assist the Commission in the discharge of its functions under this Act.

(3) The Commission may delegate to any officer referred to in sub-section 2 any of its powers, and the officer to whom such powers are delegated may exercise those powers subject to the direction of the Commission.

10. Protection

(1) No action, suit, prosecution or proceeding shall be instituted in any court against the Commission or against any member, officer, or servant of the Commission in respect of any act, neglect or default done or committed by him in such capacity provided that he at the time had carried out his functions in good faith.

(2) No action or proceeding, civil or criminal shall be instituted in any court against any member of the Commission in respect of any report made by the Commission under this Act or against any other person in respect of the publication by such person of a substantially true account of such report.

(3) Chapters IX and X of the Penal Code [Act 574] shall apply to members, officers and servants of the Commission as if references to "public servant" had been replaced with "member, officer or servant of the Commission".

PART III
POWERS AND FUNCTIONS OF THE COMMISSION

11. General duties

(1) The Commission shall exercise its function under this Act with a view of promoting, encouraging, supporting and enhancing the development of a society in which:

(i) the people are united and integrated in diversity,
(ii) there is racial, ethnic and religious understanding and harmony,
(iii) people's ability to achieve their potential is not limited by prejudice or unfair discrimination,
(iv) there is respect for and protection of each individual's fundamental liberties,
(v) there is respect for the dignity and worth of individuals,

(vi) each individual has an equal opportunity to participate in society, and

(vii) there is mutual respect based on understanding and acceptance of diversity and equality.

(2) In furtherance to sub-section 1, the functions of the Commission shall be-

(i) to promote awareness of and provide education in relation to national harmony, unity, integration and equality,

(ii) to advise, assist and make recommendations to the Government for the purpose of national unity, integration, non-discrimination and equality,

(iii) to inquire into complaints of unfair discrimination with a view to resolution.

(3) The Commission may exercise any or all of the following powers for the purpose of this section:

(i) publish or otherwise disseminate ideas or information,

(ii) undertake research,

(iii) provide education or training,

(iv) give advice or guidance,

(v) conduct programmes, seminars and workshops,

(vi) issue public statements as and when necessary,

(vii) form committees and working groups,

(viii) arrange for a person to do anything within the above,

(ix) act jointly with, co-operate with or assist a person doing anything within the above, and

(x) undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.

(4) In exercising its functions under the Act, the Commission may:

(i) consult such persons having knowledge or experience relevant to the Commission's functions as the Commission thinks appropriate,

(ii) consult such other persons as the Commission thinks appropriate,

(iii) issue a general invitation to make representations, in a manner likely in the Commission's opinion to bring the invitation to the attention of as large a class of persons who may wish to make representations as is reasonably practicable, and

(iv) take account of any representations made.

12. Promotion of national harmony, unity, integration and equality

(1) For the purpose of section 11(2)(i), the Commission shall take measures to:

(i) to promote understanding of the importance of equality and diversity,

(ii) to promote understanding of the importance of good relations between members of different groups, and between members of groups and others,

(iii) to encourage good practice in relation to relations between members of different groups, and between members of groups and others,

(iv) work towards the elimination of prejudice against, hatred of and hostility towards members of groups,

(v) work towards enabling members of groups to participate in society, and

(vi) to work towards the elimination of unfair discrimination.

13. Advise, assist and recommendations to the Government

(1) For the purpose of section 11(2)(ii), the Commission shall take measures to:

(i) monitor the state of national harmony, unity, integration, non-discrimination and equality,

(ii) review existing legislations, regulations, policies and practices for the purpose of ensuring compliance with this Act,

(iii) recommend the necessary measures to be taken for the purpose of national harmony, unity, integration, non-discrimination and equality, and

(iv) assist and advise the Government in formulating legislations, regulations, policies and practices .

14. Annual report

(1) The Commission shall not later than the first meeting of Parliament of the following year, submit an annual report to Parliament of all its activities during the year to which the report relates.

(2) The report shall contain a list of all matters referred to it, and the action taken in respect of them together with the recommendations of the Commission in respect of each matter.

(3) The Commission may, whenever it considers it necessary to do so, submit special reports to Parliament in respect of any particular matter or matters referred to it, and the action taken in respect thereof.

PART IV
INVESTIGATION INTO UNFAIR DISCRIMINATION

15. General powers to investigate

(1) The Commission shall have the power to investigate any complaints of unfair discrimination it received from or referred to it by any person.

(2) The Commission shall have the power to refer any complaints it receives or that are referred to it under subsection (1) of a criminal nature to the Public Prosecutor.

(3) The Commission may also investigate on its own initiative of instances of unfair discrimination that it has become aware of.

16. Complaints of unfair discrimination

(1) Any person may make or refer a complaint of unfair discrimination to the Commission.

(2) A complaint shall be made in writing and shall include the following:

(i) particulars of the complainant,

(ii) particulars of the party complained of, if identifiable, whose action or inaction is the basis of the complaint, or if not identifiable, a description or any other particulars that are sufficient to enable him to be identified,

(iii) particulars of the unfair discrimination complained of, including the date of and place where the same occurred,

(iv) particulars of any other person who was present during or involved in the act or inaction complained of, if any; and

(v) any other details, including photographs and documents, that the complainant deems appropriate or necessary to include in the complaint.

(3) Notwithstanding the above, a complaint shall not be rejected for want of any of the particulars or details specified in sub-section 2 above unless the complaint becomes impossible or impracticable to be assessed without such particulars or details.

17. Powers of the Commission to investigate into a complaint

(1) After receiving a complaint pursuant to the section 16, or on its own initiative, the Commission shall issue a notice in writing to the person alleged to have committed the unfair discrimination.

(2) The notice shall specify the unfair discrimination complained of and where applicable, a copy of the written complaint together with all supporting documents, if any, furnished to it.

(3) Upon receipt of this notice, the person complained of shall within 14 days:

(i) furnish a written reply denying the complaint, or

(ii) admit to the complaint and provide a draft action plan to remedy the complaint.

18. Preliminary decision on the complaint

(1) The Commission shall, after investigating the complaint, make a decision as to whether:

(i) the complaint should be dismissed,

(ii) the complaint should be sent for Mediation , or

(iii) the complaint should be referred to a Unfair Discrimination Tribunal for inquiry.

(2) The Commission shall only dismiss complaint at this stage if it considers:

(i) the complaint to be outside of its jurisdiction, or

(ii) the complaint is frivolous, vexatious or not in good faith.

(3) The Commission shall inform in writing to the complainant of the decision in sub-section (2) as soon as practicable.

(4) If the Commission decides that the complaint should be dismissed, the Commission shall give its reasons for doing so to the complainant.

19. Mediation

(1) The Commission may call the complainant and the person complained of for mediation with a view of resolving the complaint.

(2) A notice in writing shall be given to the complainant and the person complained of at least 14 days before the mediation date.

(3) The mediation shall be conducted by a Commissioner or by a member of the staff, known as the mediator.

(4) The mediation may be in public or private.

(5) The mediation shall be without prejudice and any disclosure, admission or information given during the mediation shall not be used against any of the parties.

(6) The outcome of the mediation shall be:

(i) The complainant withdraws the complaint,

(ii) The person complained of enters into an resolution agreement with the Commission,

(iii) The person complained of furnishes a draft action plan to the Commission to resolve the complaint, or

(iv) The mediator is of the opinion that a resolution cannot be achieved through the mediation.

20. Action plan

(1) Once a draft action plan is furnished to the Commission, the Commission shall:

(i) approve it, or

(ii) give the person a notice which—

a) states that the draft is not adequate,

b) requires the person to give the Commission a revised draft by a specified time, and

c) may make recommendations about the content of the revised draft.

(2) Before approving the draft action plan, the Commission shall first consult with the complainant, if applicable.

(3) The approved action plan shall have a timeline for completion to be determined by the Commission in consultation with the complainant, if applicable and the person complained of.

(4) An action plan may be varied by agreement between the person complained of and the Commission, taking into account the views of the complainant, if applicable.

(5) If the party complained of fails to adhere to the action plan, the Commission shall have the powers to make orders as an Unfair Discrimination Tribunal at the conclusion of an inquiry under section 26.

21. Resolution agreement

(1) The Commission may enter into an agreement with the person complained of under which—

(i) the person undertakes—

a) not to commit further unfair discrimination,

b) to take, or refrain from taking, other than a specified action, which may include the preparation of a draft action plan, or

c) to make reparations to the complainant.

(2) Before approving the draft action plan, the Commission shall first consult with the complainant, if applicable.

(3) If the party complained of fails to adhere to the action plan, the Commission shall have the powers to make orders as an Unfair Discrimination Tribunal at the conclusion of an inquiry under section 26.

UNFAIR DISCRIMINATION TRIBUNAL

22. Constitution of the Unfair Discrimination Tribunal

(1) The Commission shall constitute an Unfair Discrimination Tribunal when:

(i) the mediator is of the opinion that a resolution cannot be achieved through mediation pursuant to section 19, the mediator shall refer the complaint back to the Commission, or

(ii) it makes a decision after investigation that the Tribunal should inquire into the complaint.

(2) The Tribunal shall comprise of 3 members who shall be appointed by the Commission.

(3) The 3 members may consist of Commissioners or non Commissioners but shall have at least one Commissioner and shall exclude the mediator of the complaint.

(4) The Tribunal shall be assisted by any number of staff of the Commission.

(5) The Tribunal shall be an inquiry held by way of a public hearing.

23. Powers of the Tribunal

(1) The Tribunal shall have the power:

(i) to procure and receive all such evidence, whether written or oral, and to examine all such persons as witnesses as the Tribunal considers necessary or desirable to procure or examine,

(ii) to require the evidence, whether written or oral, of any witnesses to be made on oath or affirmation (such oath or affirmation to be that which could be required of the witness if he was giving evidence in a court of law) or by statutory declaration,

(iii) to summon any person residing in Malaysia to attend any meeting or hearing of the Tribunal to give evidence or produce any document or other thing in his possession,

(iv) to issue a warrant of arrest to compel the attendance of any person who, after having been summoned to attend, fails to do so and does not excuse such failure to the satisfaction of the Tribunal, and to order such person to pay all costs which may have been occasioned in compelling his attendance or by

reason of his refusal to obey the summons, and also to fine such person a sum not exceeding five thousand ringgit,

(v) to fine in a sum not exceeding five thousand ringgit any person who, being required by the Tribunal to give evidence on affirmation or to produce a document or other thing, refuses to do so and does not excuse such refusal to the satisfaction of the Tribunal, and

(vi) to admit, notwithstanding any of the provisions of the Evidence Act 1950 [Act 56], any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings.

24. Legal representation

(1) Any party at an inquiry of Tribunal, as well as persons summoned by the Tribunal, shall have the right to be represented by a legal practitioner of his choice.

(2) The Tribunal shall give a reasonable opportunity for a person giving evidence at an inquiry of Tribunal to be legally represented.

25. Conduct of the Tribunal

(1) The Commission shall have the powers to make regulations for the conduct of the Tribunal.

(2) Any party at the Tribunal as well as persons summoned by the Tribunal, may with leave of the Tribunal, examine or cross-examine any witness on any matter which the Tribunal considers relevant.

26. Conclusion of the Tribunal

(1) At the conclusion of the inquiry, the Tribunal shall:

(i) Dismiss the complaint, or

(ii) Make a finding of unfair discrimination.

(2) Upon making a finding of unfair discrimination pursuant to sub-section 1 above, the Tribunal shall have the power to:

(i) Reprimand the person committing the unfair discrimination,

(ii) Make a mandatory order, or

(iii) Make a prohibitory order.

(3) An order by the Tribunal shall be registrable as an order of the High Court for the purposes of enforcement.

27. Registration of order of the Tribunal

(1) On an application in writing to the High Court, an order made by the Tribunal shall, be recognised as binding and be enforced by entry as a judgment in terms of the order or by action.

(2) In an application under subsection (1) the applicant shall produce the duly authenticated original order or a duly certified copy of the order.

28. Judicial review

(1) Any decision of the Tribunal shall be subject to judicial review.

29. Regulations

(1) The Commission may make regulations for the purpose of carrying out or giving effect to the provisions of this Act.

Proposal for Anti-Discrimination Laws

Executive Summary

Position of the Bar: To eliminate all forms of discrimination.

I. Introduction

1. There are various legislative provisions that restrict, prohibit, and discriminate against various persons in pursuit of various activities, on various grounds.

2. Common forms of discrimination include discrimination based on gender, race, and political alliance.

3. The Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**") defines discrimination against women, in Article 1, as, "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*."

4. The International Convention on the Elimination of all Forms of Racial Discrimination ("**ICERD**") elaborated on the Article 1 of the Charter of the United Nations which emphasizes the prohibition of racial discrimination. ICERD has been ratified by 173 countries which is evidence of its importance in the protection of human rights. Article 1 (1) of ICERD defines racial discrimination as, "*any distinction, exclusion, restriction or preference based on race, colour or descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*

5. Article 1(1) of the International Covenant on Civil and Political Rights ("**ICCPR**") provides that, "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*."

II. The Problems of Discrimination in Malaysia

6. The problems are manifested in different forms and manner.

7. Examples of gender discrimination in legislation include:
   (a) Part II (1) (b) and (c), Second Schedule, Federal Constitution: Citizenship is afforded as of right only to children born outside the country whose father is a citizen at the time of birth. The same right should be accorded to the mother.
   (b) Article 15(1), Federal Constitution: Women should have the same rights as men with respect to the citizenship status of their foreign spouse.
   (c) Article 12(1), Federal Constitution: Without prejudice to the generality of Article 8, there shall be no discrimination on the grounds only of religion, race, descent, or place of birth." The term "gender" should be added.

8. Next, racial discrimination needs to be examined at in the context of existing affirmative policies based upon the legislative guarantees of the Federal Constitution.

9. There are also discrimination on grounds of political belief, denying effective political participation, include among others:
   (a) the need for official registration with a governmental body in order to establish a political party, and the lack of transparency and potential for abuse of administrative discretion in granting such official registration. In some cases, there is no opportunity for judicial review of such exercise of discretion;
   (b) governmental control and monopoly of radio and television, thus denying access to those not favoured or supported by the government of the day;
   (c) the use of laws on sedition to subvert free speech;
   (d) government requirement of annually-renewable permits for printing and publication of newspapers, journals, etc. which effectively forces self-censorship of minority views and opinions;

(e) denial of official permission to publish newspapers in certain languages, in particular languages understood by minority communities, and restrictions in the frequency of such publications;

(f) the increasing resort to and wide interpretation of defamation of religion legislation to silence discussion of matters concerning a majority religion that nonetheless have serious consequences and implications on the freedom to profess and practice the religion of minority communities;

(g) the inability or refusal of law-enforcement agencies to protect the safety of participants at private gatherings on issues affecting minorities from interruption and disruption by groups representing the majority;

(h) the requirement of geographical distribution and presence in multiple governmental or administrative jurisdictions before an organisation can be considered and recognised as a national organisation.

III. Solutions

10. To take not only special measures to end discrimination but to actually ratify the relevant international conventions prohibiting discrimination, and to enact implementing legislation, such as an Equality Act (akin to the United Kingdom Equality Act of 2010) or a slew of anti-discrimination legislation (akin to the Australian federal framework which provides for an Age Discrimination Act 2004, Disability Discrimination Act 1992, Racial Discrimination Act 1975, and Sex Discrimination Act 1984).

11. As regards gender discrimination, the Government has ratified the CEDAW. However, municipal legislation needs to be further strengthened and enhanced to take workplace discrimination etc. into account. The effect of the court decisions in the Beatrice Fernandez (2004) and Guppy Plastics Industries Sdn Bhd (2012) cases need to be reversed through specific anti-gender discrimination legislation.

12. As regards racial discrimination, to sign and ratify the ICERD, and to enact municipal legislation, and the National Harmony Bills.

(See, Executive Summary: National Harmony Bills)

13. As regards political discrimination, to sign and ratify the ICCPR and the International Covenant on Economic, Social and Cultural Rights, in addition to the amendment or repeal of various legislative barriers such as the Sedition Act 1948, the Printing Presses and Publications Act 1984, the Communications and Multimedia Act 1998, the Societies Act 1966, and the Peaceful Assembly Act 2012, among others. Please see other submissions on some of these legislation.

IV. Conclusion

14. The Malaysian Government to take effective measures to review local and national policies and to amend, rescind or nullify laws that have the effect of creating or perpetuating discrimination.

International Conventions

Executive Summary

Position of the Bar: Accelerating the pace of ratification of the six remaining core United Nations instruments relating to human rights.

I. Introduction

1. On 26 June 1945, the Universal Declaration of Human Rights ("UDHR") was adopted by the United Nations General Assembly, of which Malaysia is a member.

2. It is stated in the preamble of the UDHR if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

3. It is also further stated that Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

II. The Problems of not acceding to many of the International Instruments/Conventions

4. Malaysia has still not ratified the six remaining core International Human Rights instruments, namely:
   (a) International Covenant on Civil and Political Rights;
   (b) International Covenant on Economic, Social and Cultural Rights;
   (c) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
   (d) International Convention on the Elimination of All Forms of Racial Discrimination;
   (e) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and
   (f) International Convention for the Protection of All Persons from Enforced Disappearance.

5. Even the three core International Human Rights instruments that Malaysia has acceded to/ratified contain significant reservations which are contrary to the spirit of those instruments. These are:

   (a) Convention on the Elimination of all forms of Discrimination Against Women;

   (b) Convention on the Rights of the Child;

   (c) Convention on the Rights of Persons with Disabilities.

6. Malaysia should also be looking into ratifying the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees, the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness since these involve critical issues right on our very doorstep.

III. Recommendations

7. Malaysia to expeditiously accede to the six remaining core United Nations instruments relating to human rights, without reservations.

8. Malaysia to immediately lift all existing reservations currently in place in respect of the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

9. Malaysia to undertake an immediate review of current legislation, and to implement new legislation, in order to give full and complete effect to all the provision of the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities under Malaysian law.

IV. Conclusion

10. In 2021, Malaysia was elected to be a member to the United Nations Human Rights Council ("UNHRC") for the term 2022 - 24.

11. The Malaysian Government ought to take effective measures to make provisions in our national laws and legislation, where necessary, to usher in the impact of acceding and ratifying those international human rights instruments.

12. To study and consider the enactment of a Human Rights Act in Malaysia, which will serve as a Bill of Rights for all in Malaysia, citizens and non-citizens alike.

Accede to the Rome Statute of the International Criminal Court

Executive Summary

Position of the Bar: Malaysia should immediately accede to the Rome Statute of the International Criminal Court.

I. Introduction

1. The Rome Statute, the founding treaty of the International Criminal Court (ICC), came into effect on July 17, 1998. It seeks to provide an international mechanism to ensure no impunity for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. Malaysia is a signatory to the Final Act of the Rome Statute itself (but has not joined the ICC).

2. The Malaysian Government had announced, in April 2011, that a Cabinet decision had been made to join the ICC. However this was not carried out. Various reasons were provided, the main two being: the Rome Statute would compromise the sovereignty of Malaysia, since it would give jurisdiction for criminal offences in Malaysia to an international body; the Rome Statute would jeopardise the position of the Yang di-Pertuan Agong, who, as the head of the Armed Forces of Malaysia, would be subject to criminal liability for any criminal acts of a member of the Armed Forces of Malaysia.

3. The then Attorney General of Malaysia, Tan Sri Gani Patail, was strongly opposed to Malaysia acceding to the Rome Statute, but the Cabinet had overvied his objections. However, it subsequently transpired that he was able to persuade the then Minister of Foreign Affairs, Tan Sri Anifah Aman, not to execute the instrument of accession.

4. Two successive Presidents of the ICC have visited Malaysia to persuade the government to accede to the Rome Statute, and prevent political and military leaders of rogue nations from escaping international criminal justice for grievous crimes against their own people. The most recent visit was in 2017. Several meetings have also been held outside Malaysia between judges and personnel of the ICC and/or representatives of the Rome Statute's Assembly of State Parties on the one hand and representatives of the Malaysian government on the other. However all these visits came to naught.

5. In 2019, after the success of the Pakatan Harapan coalition in winning the 14th General Election in May 2018, the then government actually signed the instrument of accession to the ICC and deposited it with the Secretary General of the United Nations on 4 March 2019. However, within days of that submission, the Malaysian government announced on 5 April 2019 that it was withdrawing its instrument of accession.

II. Rebutting the excuses given for not acceding to the Rome Statute

6. The truth of the matter is that the jurisdiction of the ICC is a jurisdiction of "last resort". The Rome Statute mandates that recourse to the ICC is only in instances where a country is either not able or willing to prosecute alleged perpetrators of one or more of the four crimes that come within the jurisdiction of the ICC.

7. The Rome Statute also provides for "universal jurisdiction". This means that a person charged with any one of the four crimes that come within the jurisdiction of the ICC can be tried in any Member State of the Rome Statute. This is to ensure that no country will serve as a country of refuge where a person charged with any one of the four crimes can escape international justice. In other words, if Malaysia is a State Party to the Rome Statute, it can try a person charged by the ICC and who is fleeing from justice and who makes his/her way to Malaysia.

8. It is only in the event that Malaysia does not want or is unable to try the case that it would then be obliged to detain the person charged and transmit him/her to The Hague for trial at the ICC.

9. So the issue of the threat to sovereignty of Malaysian law or Malaysian courts does not arise whatsoever.

10. In terms of the position of the YDPA, or any of the other Malay Rulers who are honorary Colonels-in-Chief of various regiments within the Malaysian Armed Forces, it should be acknowledged that the YDPA/Their Royal Highnesses do not have operational command and control over the Armed Forces; their role is purely ceremonial. Criminal liability should only attach to those who have direct command and control authority over the actions of the Armed Forces. It is this reality that has allowed many countries that have a constitutional monarch to accede to the Rome Statute. The risk of jeopardising the position of the YDPA/Their Royal Highnesses and exposing them to possible criminal liability also does not exist.

11. Another rationale for opposing accession to the Rome Statute that was raised in/around March 2019 via a memorandum that was co-authored by two local university law professors and two local university law lecturers was the fact that the decision to accede was purportedly made without prior consultation with Their Royal Highnesses the Malay Rulers. According to this argument, because accession could lead to the possibility that the YDPA/Their Royal Highnesses could face charges by the ICC in the event the Malaysian Armed Forces were accused of committing any one of the four crimes within the jurisdiction of the ICC, this move affected the privileges – specifically the principle of sovereign immunity – of Their Royal Highnesses the Malay Rulers. This would affect the constitutional position of Their Royal Highnesses the Malay Rulers and was therefore something that, under the Malaysian Constitution, required the prior consent of Their Royal Highnesses the Malays Rulers, As that had not been done, the action on the part of the Malaysian government was unconstitutional.

12. This so-called compromise of the constitutional position of Their Royal Highnesses the Malay Rulers was interpreted as an insult to the Malay race. And since Their Royal Highnesses the Malay Rulers are the heads of the religion of Islam in their respective states, this move was also interpreted as an insult to Islam. Thus the move by the Malaysian government violated the triple sensitivities of race, religion and royalty. This led to a significant popular backlash against the move by the Malaysian government. To top it all, references were also made to the idea that the ICC was a form of victors' or Western "justice" being forced or foisted on weak third-world countries, and was an example of neo-colonialism.

13. In truth, none of these was applicable, and the contents of the memorandum were at best misleading and, at worst, patently false.

14. Further, most of the cases tried by the ICC to-date have been referrals by the countries suffering civil war or internal conflict themselves. There have only been a few cases where the United Nations Security Council itself has referred situations to the ICC.

III. Additional benefits of acceding to the Rome Statute

15. Malaysia as a Member State of the Rome Statute would be able to contribute to the development of international criminal jurisprudence. Malaysian judges would be able to offer themselves for election to the ICC. Malaysian lawyers could also offer themselves for election to the positions of Prosecutor and Registrar of the ICC. These are key positions in

the administration of the ICC. Malaysia has been significantly absent in international law circles ever since Justice Tan Sri L C Vohrah stepped down as a judge of the International Criminal Tribunal for the former Yugoslavia in 2005. Malaysia's accession to the Rome Statute would signal to the international community that Malaysia intends to resume its participation in and contribution to international criminal jurisprudence.

16. The Malaysian Bar also took the position that had Malaysia been a State Party to the Rome Statute, the investigation of the events surrounding the downing of flight MH17 in 2014 over the territory of Ukraine could have been pursued through the ICC. As a State Party, Malaysia could have referred the matter to the ICC as of right. Also, the tragedy involved the deaths of a large number of persons from The Netherlands, which is a State Party to the ICC. Further, Ukraine had given jurisdiction to the ICC in this regard. Instead, Malaysia agreed to constitute and participate in a joint investigation led by investigators from the Netherlands, which ultimately concluded that Russian-backed separatists were responsible for the shooting down of MH17. A trial eventually took place before a court in the Netherlands and three accused persons were convicted under the law of the Netherlands, albeit in absentia.

IV. Solution

17. One of the arguments then Attorney General of Malaysia Tan Sri Gani Patail used to oppose accession was to say Malaysia needed to have bespoke legislation, and that would take time, and further that Malaysia would have to review all its legislation to ensure that what was required by virtue of accession to the Rome Statute was first put in place in respect of Malaysia prior to any accession. (One of the only things done thus far was to amend the law to provide for the transfer of prisoners from Malaysia to another country.)

18. However it should be noted that the Commonwealth Magistrates' and Justices' Association already has in place template legislation for Commonwealth countries to provide for membership of the ICC and to confer domestic jurisdiction for the prosecution of the four crimes that come within the jurisdiction of the ICC.

V. Conclusion

19. The Bar Council believes that it is incumbent upon the Malaysian government to accede to international treaties, conventions, covenants and legal instruments concomitant with its stated ambitions to play a more active role at the international level.

20. The Bar Council further believes that, specifically, membership of the Rome Statute/International Criminal Court would be a positive signal that Malaysia does not subscribe to the notion of impunity for persons charged with the major crimes that come within the jurisdiction of the ICC. It would lessen Malaysia's isolation from the international rule of law system, and strengthen the administration of international justice.

21. Membership of the Rome Statute/International Criminal Court would also provide new opportunities for Malaysian judges and lawyers to work at an international level by then being eligible to apply for positions within the ICC, thus increasing the breadth and depth of experience and expertise of Malaysian judges and lawyers.

Proposed Amendments to the Persons with Disabilities Act 2008

Executive Summary

Position of the Bar:

1. Revise Article 8 (2) of the Federal Constitution to expressly prohibit discrimination on the ground of disability.
2. Establish an independent Disability Commission.
3. Establish a tribunal as a grievance redress mechanism.
4. Establish a task force to amend the PwD Act 2008.

The Persons with Disabilities Act 2008 (PwD Act 2008) has to be amended to update existing provisions and include new provisions to adequately uphold and protect the rights of persons with disabilities (PwD) and care partners.[1] The amendments should ensure the meaningful engagement and equitable inclusion in mainstream Malaysian society of PwD and their care partners.

Article 8(2) of the Federal Constitution needs to be revised to expressly prohibit discrimination on the ground of disability. Malaysia should sign and ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD).

Proposed amendments to the PwD Act towards harmonization with the CRPD:

1. Include in the PwD Act the critical phrase wherever appropriate throughout the Act: “on an equal basis with others.”
2. Update the definition of disability to permit the rights of more groups.
3. Include comprehensive definitions of discrimination and harassment.
4. Establish an independent Disability Commission whose decision makers and policy advisors include persons with lived experience of disabilities and care partners, and with powers to investigate discrimination and rights infringement.
5. Establish a legal requirement for remedies for those affected by discrimination or harassment. Establish a tribunal as a grievance redress mechanism.

1 The term “care partner,” as distinct from "caregiver" underscores the value of the relationship with, and the dignity of, the person in need of care. It shifts the perception of dependence to a relationship in which both parties contribute to the interpersonal dynamic.

6. Repeal all ouster clauses, including and not limited to Sections 41 and 42 of the PwD Act 2008 that prevent and protect government and public servants from being sued.
7. Pursue comprehensive harmonization of domestic legislation with the CRPD in diverse sectors, including: education; health; communications, multimedia, digitalization; human resources development; employment and self-employment; housing and local government; works; transport; youth and sports; elections; financial services and finance; domestic trade and consumer affairs.
8. Introduce legal rights, protection and reasonable accommodation as a legal requirement in the forms of assistance, support and anti-discriminatory provision for care partners.

Conclusion

Government plans in 2019 to establish a task force to reform the PwD Act 2008 have yet to materialize. It is critical to establish a task force with experiences in advocacy and OKU rights issues, and must include persons with lived experience of disabilities and care partners.

(See, Annexure: Amendments to the Persons with Disabilities Act 2008)

Key Facts
1. PwD account for 16% of the population; 6.6% of women serve as informal care partners.
2. Malaysia ratified the CRPD on 19 July 2010.
3. Malaysia has yet to ratify the Optional Protocol to the CRPD.
4. The PwD Act 2008 was gazetted on 24 January 2008.
5. Malaysia has not harmonized any domestic legislation with the CRPD.

Annexure:

Amendments to the Persons with Disabilities Act 2008

A. The Malaysian Bar proposes that the Persons with Disabilities Act 2008 (PwD Act 2008) be amended to update existing provisions and include new provisions that ensure the effectiveness of the Act in upholding and protecting the rights of persons with disabilities and care partners.[1]

B. The amendments should ensure the meaningful participation and equitable inclusion in mainstream Malaysian society of persons with disabilities and their care partners.

C. The amended Act should include provisions on:

(a) Enforcement;

(b) Implementation;

(c) Coordination of regular monitoring, including of the implementation, by institutions and agencies, of the status of legislation and related regulations;

(d) Timely sharing, in a designated official website (public domain), of documentation on regularly updated outcomes of monitoring progress;

(e) Institutional arrangements that are:

(i) Proactive in ensuring access to the rights of persons with disabilities and their care partners;

(ii) Responsive to the evolving situation of persons with diverse disabilities.[2]

Introduction

1. Persons with disabilities (PwD) account for 15% of the population, with 6.6% of women serving as informal care partners.[3] The impact of the discrimination that PwD face is extended to their care partners, family members, volunteers, allies, and professionals in disability services.

[1] The term “care partner,” as distinct from "caregiver" underscores the value of the relationship with, and the dignity of, the person in need of care. It shifts the perception of dependence to a relationship in which both parties contribute to the interpersonal dynamic.

[2] Opening paragraph of Act 685: An Act to provide for the registration, protection, rehabilitation, development and wellbeing of persons with disabilities, the establishment of the National Council for Persons with Disabilities, and for matters connected therewith.

[3] Institute for Health Systems Research (IHSR), National Institutes of Health, Ministry of Health Malaysia (2020). National Health and Morbidity Survey (NHMS) 2019: Vol. II: Healthcare Demand. <https://iku.gov.my/images/IKU/Document/REPORT/NHMS2019/Report_NHMS2019-HCD-eBook_p.pdf>

2. Malaysia ratified the Convention on the Rights of Persons with Disabilities (CRPD)[4] on 19 July 2010. Malaysia has yet to ratify the Optional Protocol to the CRPD.

3. The PwD Act 2008 was gazetted on 24 January 2008. Although the PwD Act 2008 is based on the CRPD, there are, however, certain critical weaknesses and omissions in the PwD Act. For example:

3.1 The Act has no provision requiring the timely:

(a) Development, issuance and wide circulation across all ministries, government agencies and institutions of rules and regulations for implementing the PwD Act, with no efforts in this regard by the Ministry of Women, Family and Community Development or by the National Council established under the Act.

(b) Establishment of a mechanism for enforcement, at all levels (federal, State and local) of the PwD Act 2008.

3.2 The definition of disability in the PwD Act 2008 partially adopted that in the CRPD, with the critical omission of the phrase "on an equal basis with others."

3.3 Matters related to the PwD Act fall under the purview of the Jabatan Pembangunan OKU (JPOKU) which is located under the Jabatan Kebajikan Masyarakat. JPOKU is primarily social welfare-driven, while the Act requires a rights-based approach. JPOKU ought to be a standalone Jabatan to operationalize the realization of PwD rights.

4. Twelve years after ratification, Malaysia has still not harmonized any domestic legislation with the CRPD (CRPD Art. 33).[5] The Pwd Act is but one of many laws that require harmonization. That includes Article 8 (2) of the Federal Constitution which does not expressly prohibit discrimination against disability.

[4] United Nations Convention on the Rights of Persons with Disabilities (CRPD). Department of Economic and Social Affairs, UN. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

[5] United Nations Economic and Social Commission for Asia and the Pacific (2022). Harmonization of national laws with the convention on the rights of persons with disabilities overview of trends in Asia and the Pacific. United Nations ST/ESCAP/3047 <https://www.unescap.org/kp/2022/harmonization-national-laws-convention-rights-persons-disabilities-overview-trends-asia-and>.

The following are proposed amendments to the PwD Act towards harmonization with the CRPD:

1. Include in the PwD Act the critical phrase wherever appropriate throughout the Act: “on an equal basis with others.”

2. Update the definition of disability to permit the rights of more groups such as but not limited to the following to be upheld and protected:
   Persons with:
   (a) dementia;
   (b) disabilities associated with cancer, other noncommunicable diseases; and ageing;
   (c) cognitive and other impairments associated with viral infections;
   (d) rare diseases;
   (e) psychosocial disabilities;
   (f) neurodiversity;
   (g) temporary disabilities.

3. Include definitions of discrimination and harassment.

4. Establish a legal requirement for remedies for those affected by discrimination and / or harassment.

5. Introduce timebound penalties for non-compliance with the provisions of the Act.

6. Introduce a legal requirement for rules and regulations for implementation of the spirit and intent of the PwD Act and the CRPD:

   6.1 Introduce mechanisms for enforcement of the rights of PwDs, including and not limited to a tribunal system with State and local presence and authority to provide grievance redressal at the doorstep of PwD, to handle infringement of PwD rights, as it is more cost-effective and members of the proposed tribunal could be specialists in reasonable accommodation, realization of PwD rights to equitable

inclusion and meaningful participation, disability, gender and access to justice issues.

6.2 Repeal all ouster clauses, including and not limited to Sections 41 and 42 of the PwD Act 2008 that prevent and protect government and public servants from being sued when they claim to have acted in good faith;

6.3 Establish an independent Disability Commission whose decision makers and policy advisors include persons with lived experience of disabilities and care partners, and with powers to:

(a) Propose specific actions to mainstream disability issues;

(b) Investigate discrimination and infringement of rights, other disability issues and provide legal advice;

(c) Compel any person to appear before it and produce any document regarding any disability-related issues in an enquiry initiated by the Commission;

(d) Initiate action on its own accord, including suo motu action, relating to non-compliance with the Act and intervene whenever favourable for PwD in legal suits concerning disability issues;

(e) Initiate action on its own accord, including suo motu action, relating to discrimination against persons with disabilities;

(f) Submit to Parliament for review and debate an annual report and raise in Parliament issues concerning PwD rights.

6.4 Honour Malaysia's obligations under the CRPD by, among others, working on the following:

(a) Pursue comprehensive harmonization of domestic legislation with the CRPD in diverse sectors, ~~(~~including and not limited to the following:

(i) Education;

(ii) Health;

(iii) Communications and multimedia;

(iv) Human resources development;

(v) Employment and self-employment;

(vi) Housing and local government;

(vii) Works;

(viii) Transport;

(ix) Youth and sports;

(x) Elections;

(xi) Financial services and finance;

(xii) Domestic trade and consumer affairs.

(b) Revise Article 8 (2) of the Federal Constitution to expressly prohibit discrimination on the ground of disability.

(c) Develop implementing rules to give effect to legislative measures that uphold and protect the rights of persons with disabilities and address discrimination and harassment experienced by persons with disabilities and those closely associated with them;

(d) Devise, including by learning good practice lessons, means of strengthening multi-sectoral, multi-ministerial and multi-level coordination and cooperation to mainstream disability inclusion;

(e) Mobilize human, budgetary and other resources to advocate, on a continuous basis, for public, civil society and private sector understanding and acceptance of the rights of persons with disabilities.

6.5 Introduce legal rights, protection and reasonable accommodation as a legal requirement in the forms of assistance, support and anti-discriminatory provision for care partners of PwD. The Indian "Rights of Persons with Disabilities Act 2016[6] stipulates a "care-giver allowance.". The United Kingdom Equality Act 2010[7] makes it "illegal to discriminate against a carer because of their responsibilities as a carer, or because of the individual(s) they care for." In addition, there is provision under other legislation for families to obtain a "Disability Living Allowance" and "Carer's Allowance."[8]

[6] Government of India (2016). The Rights of Persons with Disabilities Act, 2016 (Act No. 49 of 2016). <https://legislative.gov.in/sites/default/files/A2016-49_1.pdf>

[7] Government of the United Kingdom. Equality Act 2010. <https://www.peoplefirstinfo.org.uk/looking-after-someone/being-a-carer/equality-act-2010-provisions-for-carers/>

[8] Working Families (2022). A Guide to Benefits if you Care for a Disabled Child. <https://workingfamilies.org.uk/articles/a-guide-to-benefits-for-disabled-children/>

Additional Issues

1. Withdraw reservations to CRPD art. 15 on "Freedom from torture or cruel, inhuman or degrading treatment or punishment" and art. 18 on "Liberty of movement and nationality."
2. Sign and ratify the Optional Protocol to the CRPD.

(See, Attachment: Some Key Gaps in PwD access to rights)

In conclusion:

Malaysia has secured a seat in the UN Human Rights Council (HRC), we need to rise up to meet international obligations, including those attached to Malaysia as a State party to the Convention on the Rights of Persons with Disabilities.

The Government in 2019 had announced that a task force would be established to reform the PwD Act 2008. To date (29 December 2022), no task force has been set up.

The establishment of a task force is to review and amend the PwD Act 2008 with substantive amendments that are harmonized with the CRPD.

Malaysia needs task force members with hands-on experiences in advocacy, drafting and analysis of OKU rights issues, and understanding of all the General comments issued by the Committee on the Rights of Persons with Disabilities, to enable expeditious progress on the amendments work ahead.

The task force must include persons with lived experience of disabilities and care partners, both participating as equal partners, as well as have ready access to resources and reasonable accommodations to enable meaningful engagement.

The Malaysian Bar acknowledges the Contributions of the below mentioned in preparing this Position Paper (listed in alphabetical order of family name):

1. Mary Chen, Chairperson, Trustee-Founder, Challenges Foundation, and Member, Harapan OKU Law Reform Group.
2. Sangeet Kaur Deo, Member, Harapan OKU Law Reform Group, Member, Association of Women Lawyers.
3. Dato' Dr. Amar-Singh HSS, Advisor, National Early Childhood Intervention Council, and Member, OKURightsMatter Project.
4. Anit Kaur Randhawa, Member, Harapan OKU Law Reform Group, and Vice-President (Legal), Medico Legal Society Malaysia (MLSM), Member, Association of Women Lawyers.
5. Meera Samanther, Executive Committee Member, Association of Women Lawyers, Member, Harapan OKU Law Reform Group, and former President, Women's Aid Organization.
6. Sharifah Tahir, Care Partner and Advocate; and Founder of UniquelyMeInitiatives.
7. San Yuen Wah, Honorary Senior Advisor (Disability Inclusion), Social Development Division, United Nations Economic and Social Commission for Asia and the Pacific (ESCAP); Member, OKURightsMatter Project; and Member, Harapan OKU Law Reform Group.
8. Wong Yoon Loong, Executive Director, National Council for the Blind, Malaysia; Member, Harapan OKU Law Reform Group; and President, Malaysian Confederation of the Disabled.

Attachment: Some Key Gaps in PwD access to rights are illustrated below.

Physical accessibility (CRPD art. 9)

Accessibility, although provided for in the Persons with Disabilities (PwD) Act 2008, does not make mandatory the implementation of minimum standards and universal design as set out in By-law 34A of Uniform Building By-laws (UBBL) 1984. The Ministry of Housing and Local Government has to proactively collaborate with all Chief Ministers, to ensure that Local Authorities enforce implementation of the Street, Drainage and Building Act 1974 Act 133, for accessibility of all public infrastructure, including transport, under their purview. There is no penalty for non-compliance with the UBBL. Thus, UBBL34A has been ignored, with systematic exclusion of PwD from meaningful participation in all aspects of mainstream life and the development process.

Digital accessibility and access to information (CRPD Art. 21)

There has been a rapid digitalization of society, accelerated by the COVID-19 pandemic. This has created greater engagement of persons with disabilities and care partners in public discussions and meetings. Commercial, financial and government transactions and services are increasingly conducted online; these enable the participation of many, particularly those with mobility and logistical challenges. For example, the revenue (hasil) website for LHDN is accessible for Blind persons to file tax forms. However, many other government websites are not accessible, and generally digitalization is not disability-inclusive. These have deepened inequalities, worsening PwD marginalization.

Access to justice (CRPD Art 13)

Malaysia needs to work on disability inclusion in the criminal justice system to ensure PwD access to justice. Polis Diraja Malaysia (PDRM) has made a promising start by adopting the *Autisme Garis Panduan Polis Diraja Malaysia.* The Garis Panduan needs to be codified into the Police Act to give it the necessary enforcement authority. Furthermore, PDRM needs to develop rules and regulations to implement this and systematically conduct continuous training on implementation and enforcement.

Similar *Garis Panduan*, SOPs and implementing rules and regulations are required for other disability groups, together with inclusive training programmes for~~,~~ PDRM and members of the legal profession. The SOPs must ensure the professional delivery of disability-sensitive

support, at all stages (enforcement, judicial and corrections process) for persons of all disability groups to cover all possible roles that they might play in the criminal justice system.

The SOPs must be followed in the case of any PwD who is subjected to the criminal justice system in any capacity – as legal counsel, as judicial officer, or as victim, accused, suspect or witness. PwDs vulnerability is increased when they are victims and have limited or no means to articulate their issues. The Police too must be continuously sensitized to disability inclusion in the criminal justice system.

Education (CRPD Art. 24)

Students with disabilities were denied their right to apply for entry to academic institutions of higher learning which were not categorized in the UPU system as OKU-friendly. Instead, they were directed to apply to community colleges. Advocacy and interventions in 2021 by Senator Datuk YB Ras Adibah, supported by members of Harapan OKU, led to an improvement in the situation. Instead of only being allowed to apply to community colleges and to choose from two diploma courses and 10 vocational training courses, qualified students with disabilities could choose from 237 degree courses in public universities. The Ministry of Higher Education has rectified the Portal Rasmi Bahagian Kemasukan Pelajar Institut Pengajian Tinggi Awam. It is also commendable that the rectification was undertaken on time for OKU student applications for the 2021-2022 academic year.

The national policy on inclusive education improved via the Government's zero reject policy. However, in practice, the focus is still on segregation. Children with disabilities and their families experience many obstacles.[9] Inclusive education ought to start at pre-school level and not primary school level only. Some efforts initiated by YB Ras Adibah to introduce Malaysian Sign Language learning in pre-schools in Sarawak and in the Klang Valley need to examined and introduced as national policy for nationwide implementation.

Universal Design for Learning is not a reality in classrooms.

Physical access to classrooms and toilets is limited or non-existent.

[9] Amar-Singh HSS (2020). Education in Malaysia for Children with Special Needs: Progress, Critical Gaps, Efforts under Way and Policy. Asia-Pacific Economic Cooperation (APEC) Human Resources Development Working Group (HRDWG). 11 February 2020, Malaysia.

Also poor in government schools is access to the following:

(a) Disability-inclusive ICT infrastructure and services for e-learning and e-teaching/e-training;

(b) Teacher aides;

(c) Principals and teachers with an understanding of the duty to counter ableism[10] in schools and training institutions and with special education knowledge.

Parents with means utilize private services that are beyond the reach of most families. Of concern: services are very limited in rural, remote and under-served urban communities, with some (indigenous communities) having no access.

Employment (CRPD Art. 27)

Generally, PwD unemployment and economic inactivity – particularly among women, youth and rural inhabitants – exceed that of persons without disabilities.[11] There is also a greater risk of vulnerable PwD employment and insufficient social protection. University graduates with disabilities are jobless years after graduation, despite continuous attempts to seek employment.

Government measures to improve PwD employment include the 1% employment quota scheme; and engaging, via the Ministry of Human Resources and the Social Security Organisation, the cooperation of the private sector. Systematic efforts are needed for meaningful progress on the following:

(a) Training more PwD in skills that meet evolving labour market needs, with job coaching, mentoring, apprenticeship and internship arrangements in mainstream workplaces;

(b) Disability inclusion awareness raising, with incentives, for civil service Heads of Departments to make reasonable accommodation, as well as hire and retain employees with disabilities;

[10] Ableism is thinking, believing or behaving as though a person without disability is more capable or superior than a person with disability. See Ableism in <https://www.okurightsmatter.com/ableism>.

[11] United Nations Economic and Social Commission for Asia and the Pacific (2021). *Disability at a Glance 2021: The Shaping of Disability-Inclusive Employment in Asia and the Pacific* <https://repository.unescap.org/handle/20.500.12870/4061>.

(c) Introduce comprehensive policy, disability inclusion awareness raising, financial and taxation initiatives for the private sector to support:
    (i) Remunerative work opportunities for PwD;
    (ii) PwD to succeed as entrepreneurs and in various forms of gig employment.

PwD Health Issues (CRPD Art. 25)

Meeting PwD needs for healthcare, habilitation and rehabilitation should not be an afterthought --- that should, instead, be integral to health care SOPs and given high priority. SOPs and resource allocations are needed to ensure regular, uninterrupted provision of health care to OKUs and support for care partners.

The COVID-19 pandemic has highlighted how PwD have been further disabled by a healthcare system that is ill-prepared for disability inclusion, especially under crisis conditions. PwD are now more isolated, with access to services crippled, livelihoods dismembered and inclusion undermined. PwD and persons with chronic illnesses are extremely vulnerable to infection.

Protection of the Rights of Migrants

Executive Summary

Position of the Bar: Advocating Safe Migration, Integrity, and Human Rights for All.

I. Introduction

1. There are presently approximately 2.1 million documented migrant workers.[1]

2. The estimate for the number of undocumented migrant workers ranges from 1 million to 4 million.

3. Migrants workers constitute approximately 25% to 30% of the total labour force; and in some sectors i.e construction and plantation, they constitute about 70% to 90% of the labour force.

II. Problems

4. Malaysia does not have a properly constituted national mechanism to deal with the issue of migrant labour.

5. There needs to be a comprehensive labour policy that provides for the projections of the type and form of labour that Malaysia needs to respond to the current situation. Such a policy should define the kind of skills and capacities to be developed and all issues pertaining to recruitment and placement.

6. At the core of this policy should be the principles of respect of basic human rights, access to employment, safe and healthy working conditions and social security. The rights of migrant workers need to be defined and recognized especially in areas of conflict in the course of exercising the rights enshrined both by international and national instruments. The right to seek redress when there are labour rights violations and the need to seek

[1] 'About 2.1 million foreign workers in Malaysia as at June 2022 says Statistics Department'. *The Star*. 20 Oct 2022.

health care treatment should be recognized by all related agencies so that the legal status requirements are easily met without any form of conditions.

III. Solutions

7. Ratification of International Instruments

7.1. International Convention on the Protection of the Rights of Migrant Workers and Members of their Families 1990.

7.2. ILO Convention No. 97 Migration for Employment Convention (Revised) 1949.

7.3. ILO Convention No. 143 Migrant Workers (Supplementary Provisions) 1975.

7.4. ILO Convention 189 Decent Work for Domestic Workers.

8. Ministry of Human Resources should be the lead Ministry

8.1. Ministry of Human Resources should be the lead Ministry in respect of Migrant Workers policy including recruitment, placement and employment. The Central Role of the Ministry of Human Resources should be complemented by the formation of an Inter-Ministerial coordinating body.

9. Migrant Workers should have Real Access to Justice.

9.1. Mechanism and procedure need to be developed so that:-

(a) A migrant worker is allowed to remain in the country in order to pursue a claim which he/she has lodges;

(b) The migrant worker is allowed to work during this period in order that he/she can support himself/herself; and

(c) All cases involving migrant workers are fast tracked.

9.2. A Special Pass should be issued and then a Visit Pass should be issued until conclusion of the migrant worker's case.

9.3. The Legal Aid Bureau (Bureau Bantuan Guaman) services should be extended to migrant workers and the scheme should cover labour cases of migrant workers.

9.4. The National Legal Aid Foundation (Yayasan Bantuan Guaman Kebangsaan) (YBGK) scheme should be extended to migrants in Malaysia. There is a critical need for the YBGK to be extended to migrants as almost all migrants are unrepresented in criminal cases.

10. Recognize Domestic Workers and provide them all Basic Benefits and Rights

10.1. A Domestic Workers Act should be enacted to define domestic work and the rights of domestic works e.g rest day, sick leave, annual leave, hours of work, hours of rest etc are stated.

10.2. The Domestic Workers Act should comply with ILO Convention 189 ~ Convention on Domestic Work.

10.3. A Standard Contract should also be developed, for all domestic workers and their employers.

11. Recognise the Rights of Migrant Workers to become Members of Trade Unions and to take part in Trade Union Activities.

11.1. Presently there is no prohibition for migrant workers from becoming members of trade union activity.

11.2. Sanctions should be imposed on employers who deny the migrant workers the basic right to unionization.

11.3. The law should be amended to allow migrant workers to become Office Bearers of Trade Unions.

12. Introducing strong sanction in case of Exploitative Labour Practices

12.1. It is proposed that the maximum fine under the Employment Act be increased from RM10,000-00 to ensure that there is no blatant disregard of the provisions of the Employment Act.

13. Develop a Simple Way to Determine if a Migrant Worker is Documented

13.1. All migrant workers be given an Identity Card that is recognized by all government departments.

14. Stop Draining the resources of the Prison System

14.1. A vast majority of migrants in our prison system are there as a result of immigration offences.

14.2. We propose that the following policy be adopted:-

(a) Deport migrant workers who are found guilty of immigration offences. Putting them into the prison system is a drain on valuable resources;

(b) Doing away with the punishment of whipping which we consider to be a form of cruel and inhumane treatment.

15. Providing Amnesty and opportunity for regularization

15.1. Providing amnesty and opportunities for undocumented workers to be regularized should be part of the policy framework. Mechanisms should exist where those who are undocumented can surrender and leave the country when they want to, without any threat of sanctions.

16. Health

16.1. Migrant workers should be entitled to the same medical benefits that Malaysian citizens are entitled to in the public health systems. The present system of making migrant workers pay exorbitant rates for treatment in government hospitals is ill

conceived. Discouraging migrant workers from seeking treatment is detrimental to everyone in the long run.

17. Education

17.1. Education is a fundamental right. Children of migrant workers, refugees, asylum seekers and stateless persons should be entitled to free schooling along the same lines as that of Malaysian children.

18. Social Security Legislation

18.1. The social security compensation scheme (SOCSO) be extended to all migrant workers;

18.2. The Employees Provident Fund (EPF) be extended to all migrant workers;

19. Workers Minimum Standard of Housing and Amenities Act 1990 (Amendment Act 2019) ("Act 446") and Employees Minimum Standards of Housing Accommodation and Amenities (Accommodation and Centralised Accommodation) Regulations 2020 ("Regulations")

19.1. There should be robust enforcement by the Authorities as the compliance of the Act 446 and the Regulation made thereof.

20. Department of Labour

20.1. The Labour Inspection regime in Malaysia should be strengthened.

21. Factories and Machinery Act 1967; Occupational Safety and Health Act 1994; and Construction Industry Development Board (CIDB).

21.1. All accidents and injuries should be investigated under applicable laws:- Factories and Machinery Act 1967; or Occupational Safety and Health Act 1994; or CIDB.

21.2. Where there are infractions of the law, then legal prosecution should be commenced or sanctions imposed.

22. Report of the "Independent Committee on the Management of Foreign Workers

22.1. The Report of the "Independent Committee on the Management of Foreign Workers" was submitted to the Special Cabinet Meeting on the 22nd of May 2019;

22.2. The Recommendations in the Report should be implemented by the government immediately;

22.3. The Report should also be made public.

IV. Conclusion

23. It is time that Malaysia has a properly constituted national mechanism to deal with the issue of migrant labour.

(See, Annexure: Bar Council Comprehensive Framework for Migrants)

Conference: Developing a Comprehensive Policy Framework for Migrant Labour
18 – 19 February 2008

Recommendations

Introduction

Malaysia has been experiencing full employment since the early 1990s. The number of documented migrant workers in the country is 2.1 million and together with those who are undocumented, migrant workers constitute roughly 25% to 30% of the total labour workforce. In fact the percentage of migrants in our workforce is probably the highest in the region or even the world[1]. Malaysia needs migrant labour and will continue to depend heavily on migrant labour for many years to come. In the construction industry, for example, the portion of migrant workers is between 70-90%.

Despite the huge presence of migrant workers in the country, the Malaysian government does not have in place a comprehensive policy framework to deal with migrant labour. What we have instead are a series of interim measures and ad hoc policies. To compound the problem, different governments agencies and Ministries have been tasked to deal with different facets of the Migrant issue. After more than 30 years it is unfortunate that Malaysia does not have a properly constituted national mechanism to deal with the issue of migrant labour.

Conference

The Conference: Developing a Comprehensive Policy Framework for Migrant Workers was organised to deal with the gaps in existing policy and come out with a comprehensive policy framework that would address the various dimensions of the situation of migrant labour.

The specific objectives of the Conference were as follows:

1. To document the contents, consequences and gaps in existing Malaysian labour migration policies and other relevant policies, as well as their implementation;

2. To compare Malaysian policy and practices with international best practices;

[1] Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

3. To develop a concrete policy framework for the placement and treatment of migrant workers, as well as a plan of action for its development and implementation;

4. To achieve consensus and mobilize support among stakeholders, governmental and others for measures under the above point 3.

The Conference took place on 18 and 19 February 2008 at the Crystal Crown Hotel in Petaling Jaya and was attended by a broad spectrum of people including representatives from government agencies and ministries dealing with migrant labour, members of the judiciary, representative from the AG's chambers, members of foreign missions and civil society groups including NGOs, academics, Trade Unions and Employers' Organizations.

Rights Based Approach

We believe that the crux to developing a just way of dealing with migrant workers is to see them as human being and by the adoption of a rights based approach.

The rights-based approach is anchored on the belief that every human being has inalienable rights. This fundamental principle is enshrined in Article 2 of the Universal Declaration of Human Rights which states, " … everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status".

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs". The principle of non-discrimination and equal rights for all persons is also enshrined in Article 8 of the Federal Constitution.

The rights based approach means that we no longer consider persons as Indonesian, or Bangladeshi or migrant workers, but as a human being whose dignity and well-being we should be concerned about. In accordance with this, the terms and conditions of employment of foreign workers should be no less favourable than that of Malaysian workers[2]. Our treatment of foreign workers should comply with ILO's Decent Work Principles that encompass respect for basic human rights, access to employment, safe and healthy working conditions and social security.

[2] If we look at the provisions of both the Employment Act and the Industrial Relations Act, we will find that migrant workers are "covered". In fact the Section 60L of the Employment Act makes it an offence for an employer to practice any form of discrimination between migrant workers and local workers

Comprehensive Labour Policy

The rights based approach should be part of a comprehensive labour policy that provides projections of the type and form of labour that Malaysia needs to respond to the current situation. Such a labour policy should define the kind of skills and capacities to be developed, and all issues pertaining to recruitment and placement.

At the core of this policy should be the principles of respect of basic human rights, access to employment, safe and healthy working conditions and social security. The rights of migrant workers need to be defined and recognised especially in areas of conflict, in the course of exercising the rights enshrined both by international and national instruments. The right to seek redress when there are labour rights violations and the need to seek health care treatment should be recognised by all related agencies so that the legal status requirements are easily met without any form of conditions.

Recommendations

The Conference came out with 16 recommendations covering three broad areas:

A. Right to Livelihood
B. Arrest and Detention
C. Social Challenges

A. Right to Livelihood

1. Ratification of International Conventions

The Malaysian government as a show of its commitment to such a rights-based approach should ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and all international human rights conventions and International Labour Standards that are applicable to non-citizen migrant workers. Three specific instruments that were put together to specifically deal with the situation of migrant workers are – ILO Conventions 97 and 143 on migration for employment and the 1990 International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families.

2. Giving the Ministry of Human Resources the Leading Role

At the heart of a comprehensive policy on migrant workers is the issue of “work” not security. Hence the power to permit companies to recruit migrant workers should rest with the Ministry of Human Resources rather than the Ministry of Home Affairs.

If there is a demand for foreign labour then the Ministry of Human Resources is in the best position to determine the specifics of such a demand i.e. in which industries and why such a demand exists. In fact since it is the Ministry of Human Resources to which migrant workers turn to when they faced problems at the workplace, it seems painfully obvious that it should be the Ministry of Human Resources which is in the best position to determine which companies deserve to be given the permission to recruit migrant workers.

The central role played by the Ministry of Human Resources should be complemented by the formation of an Inter-Ministerial Coordinating Body.

Various Ministries and government agencies are involved in the management of migrant workers, but this work is poorly coordinated. The Ministry of Home Affairs (KHEDN) is responsible for approving outsourcing companies and approving applications for those who want to bring in migrant workers. The running of detention centres for migrant workers is under the Jabatan Penjara which used to be under the Ministry of Internal Security (KKDN). Meanwhile when migrant workers face work related problems they turn either to the Labour Department or the Industrial Relations Department, which are under the Ministry of Human Resources.

An example of poor coordination between different government agencies is epitomized by the recent story in the NST[3] that 442 foreigners continue to remain in prison even after having served their sentences as a result of lack of coordination between the Prisons Department and the Immigration Department. The lack of inter departmental coordination is also evident when hundreds of migrant workers are denied a special pass by officials in the Immigration Department despite the fact that they need to remain in the country to pursue claims that they have made in the Labour Office or Industrial Relations Department.

The current Inter-Ministerial Coordinating Body, which is a Cabinet Committee, does not work. There is a lack of transparency and questions arise about its effectiveness.

An inter-ministerial/departmental body needs to be set up to deal with all matters pertaining to the recruitment, placement and employment of foreign workers. Such a body should see representation from the following Ministries – Human Resources, Home Affairs, Health and Education. A body of this nature, which houses Ministries and Departments, which deal with, the various dimension of the situation of migrant workers, would be a minimum starting point to the developing of coherent and workable policy pertaining to migrant workers. This body will set in place monitoring and evaluation mechanism as well as address areas of conflict, developing a consolidated approach including capacity building, and conducting multi-stakeholder dialogues and consultation.

Such a coordinating body should be chaired by the Ministry of Human Resources that has been identified as the pivotal Ministry for the management of migrant workers.

[3] Free, but they're still in jail: NST 9 February 2008

3. Giving Foreign Workers Real Access to Justice

It is extremely difficult for a migrant worker to remain in the country, in order to pursue a claim in the courts, when he/she no longer has a valid work permit.

The current policy of issuing a special pass to migrant workers caught in such a situation is fraught with problems. Employers often flaunt the law and deny migrant workers their rights in law. When asked to account, employers have the luxury of arbitrarily cancelling the work permit of their foreign workers, refusing to take part in negotiations and delaying the court process. They do this with impunity because they know that the foreign worker caught in such a situation has great difficulty remaining in the country to pursue his legal rights.

In order to remedy this situation mechanisms and procedures need to be developed in so that:

(a) A migrant worker is allowed to remain in the country in order to pursue a claim which he/she has lodged;
(b) The migrant worker is allowed to work during this period in order that he/she can support himself/herself; and
(c) All cases involving migrant workers are fast tracked.

This can be done by first issuing the migrant worker with a Special Pass and then a Visit Pass.[4] The Special Pass would allow the migrant worker to remain in the country and seek employment. Upon obtaining employment the migrant worker can then be issued with a Visit Pass so that he/she can work while waiting for the outcome of the legal action. The Visit Pass obtained under such circumstances will cease once the migrant worker's case is amicably settled or the relevant court makes a final decision.

4. Scrapping Labour Outsourcing

Thousands of migrant workers have been exploited and left stranded without jobs or food as a result of the policy of allowing outsourcing companies to operate. Migrant workers have lost thousands of ringgit as a result of unscrupulous agents. The system has failed and has led to a form of bonded labour and trafficking in human persons.

Only employers should be given the right to recruit. Contractors for labour should not be given this opportunity. Such direct recruitment will take place within the framework of MOU's signed between the Malaysia and the sending countries, which must stipulate the need to adhere to the ILO's Basic Work Principles.

[4] The details of this proposed mechanism are outlined in the Bar Council Memorandum on Special Pass.

5. Recognising Domestic Servants as Workers and Providing them all Basic Benefits and Rights

Around 380,000 migrant workers are employed as domestic servants. The Employment Act provides very minimal protection to domestic servants. There is no provision that domestic servants receive a rest day, sick leave, annual leave or paid public holidays. There is no provision for overtime and also no restriction on the number of hours that a domestic servant can be made to work. It cannot be right that domestic servants be made to work 24 hours a day, 365 days a year!

Since domestic workers work in individualised and isolated work conditions, state intervention is necessary to ensure worker rights are accorded and protected. Thus domestic workers must be recognized as workers.

A new domestic workers act should be developed where forms of work are defined; a comprehensive standard contract signed in source country and attested in Malaysia is enforced; days off determined; mechanisms for monitoring established; benefits such as basic social security and contract completion bonus are defined and responsibilities and penalties stated.

6. Recognizing the Right of Migrant Workers to become Members of Trade Unions and to take part in Trade Union Activities

The Trade Union Act does not prohibit migrant workers from becoming members of trade unions or taking part in trade union activities. The Employment Act specifically states that nothing in the employment contract shall restrict the right of a worker to join, participate in or organize a trade union.[5]

Notwithstanding this, many standard employment contracts that are furnished to migrant workers provide an express prohibition against becoming a member of a trade union or taking part in trade union activities. All employers must be advised on the proper position in law and care must be taken to ensure that all employment contracts are free of such repugnant provisions. Sanctions should be imposed on employers who deny their migrant workers their basic rights to unionize.

7. Introducing Strong Sanctions in case of Exploitative Labour Practices

Employers have no qualms about denying their workers their rights in law because the sanctions against such exploitative labour practices are so weak. The maximum fine, for example, of a breach of provisions in the Employment Act is a mere RM10,000. There is no provision for jail terms. As long as there is no threat of strong sanctions, employers will flaunt the law. The only way to ensure that employers have a greater regard for the

[5] Section 8, Employment Act

law is to introduce harsher penalties including jail terms for employers who blatantly and wilfully deny their workers their basic rights as outlined in law.

In many cases involving the non-payment of wages, the labour department appears reluctant to fine the employer even where severe exploitation is present and complaints are made. Cases are conveniently classified as claims under Section 69 of the Employment Act, which involves protracted litigation when the issue could have been expeditiously solved.

8. Setting up Wages Councils

Wages Councils need to be set up in sectors where wages are particularly depressed and it is difficult for workers to form trade unions. For a start Wages Councils need to be set up to provide for minimum wages in the following sectors – Construction industry, restaurant outlets and domestic servants.

9. Giving Refugees, Asylum Seekers and Stateless Persons the Right to Work

Refugees, asylum seekers and stateless persons are not given the opportunity to work. In order to survive they are forced to accept employment in the informal sector of the economy and in the kind of jobs that regularised workers would generally avoid. Their "illegal" status means that they are not in the position to complain or combat instances of abuse. They suffer great hardship and are prone to much exploitation.

We propose that refugees, asylum seekers and stateless persons who are in Malaysia be allowed to work based on the terms and conditions granted to migrant labour.

B. Arrest and Detention

1. Develop a Simple Way to Determine if a Migrant Worker is Documented

It is unfortunate that after all these years the authorities have yet to device a simple mechanism and procedure to determine the legal status of migrant workers. In light of this there is all the more reason why the authorities should uphold and reaffirm the right of all migrant workers to keep their passports.

The i-kad that the Ministry of Home Affairs proposes to introduce for all documented workers is a good idea, but the authorities should issue such a card to the migrant worker within two weeks of his/her arrival in the country.

As it is, the kad jalan that is issued is often only issued weeks after the migrant worker comes to the country, and this places the migrant worker in a very vulnerable situation –

where he often does not have either his passport or any other documentation with him/her. In addition to issuing the i-kad, arrangements must be made to have sufficient i-kad "readers" made available to enforcement agencies.

2. <u>Disband RELA</u>

Raids should only be conducted by those who are properly trained to handle arrests and only by those who have the necessary equipment to recognise if the documents carried by the migrant worker (including the i-kad) are genuine.

Far too often, raids are carried out by departments and agencies, for example RELA, which do not have the ability to determine the authenticity of documents in the processions of migrant workers. The result of such raids is that they are ineffective and prove a great inconvenience to a large number of migrant workers who are documented. RELA has been formed through the emergency ordinance regulations. The perspective is then derived from the angle of security. The record of abuses and RELA's framework demands that RELA should be disbanded.

If the Immigration department lacks capacity, then the department needs to be expanded and strengthened.

3. <u>Stop draining the resources of the Prison System</u>

There are presently 11,900 foreigners in our prison system. Foreigners make up 33% of the prison population. It has to be pointed out, however that foreigner only account for 2%[6] of the crimes committed in Malaysia and that the vast majority of foreigners in our prison system, are there as a result of immigration offences.

The overcrowding in prisons causes many problems to the Jabatan Penjara and makes it difficult for them to concentrate on rehabilitation. We propose that it become policy to:

(a) Deport migrant workers who are found guilty of immigration offences. Putting them into the prison system is a drain on valuable resources[7];

(b) Doing away with the punishment of whipping which we consider to be a form of cruel and inhumane treatment;

No one should be deported without due process and those arrested for alleged immigration offences must have access to legal representation.

[6] Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

[7] It is estimated that it cost roughly RM25 per day to maintain a person in prison. What this means is that when a Session Court judge sentences a migrant worker to 3 months in jail, it cost the taxpayer RM2150. Much more than the cost of paying for the deportation of the migrant worker concerned.

4. Providing amnesty and opportunities for regularization

Providing amnesty and opportunities for undocumented workers to be regularised should be part of the policy framework. Mechanisms should exist where those who are undocumented can surrender and leave the country when they want to, without any threat of sanctions.

C. Social Challenges

1. Health

Migrant workers should be entitled to the same medical benefits that Malaysian citizens are entitled to in the public health system. The present system of making migrant workers pay exorbitant rates for treatment in government hospitals is ill conceived. Discouraging migrant workers from seeking treatment is detrimental to everyone in the long run.

There should be proper screening of all migrant workers to prevent the spread of infectious diseases. However, regular mandatory testing of migrant workers is discriminatory, threatens the job security of workers and with deportation included, makes access to treatment a problem. This form of screening brings about a profiling of migrants as vectors of diseases and creates a false sense of security that Malaysians are free from diseases. If there is a need to screen the health of migrants, then the health screening must be done with consent and counselling and the principle of confidentiality upheld.

2. Education

Education is a fundamental right. Children of migrant workers, refugees, asylum seekers and stateless persons should be entitled to free schooling along the same lines as that of Malaysian children.

The argument that providing health and education to such classes of people is a drain on the resources of the nation is ill conceived. Migrant workers make significant contribution to the GDP. In addition to this, it is important to point out that they pay a levy. Between 1998 and 2002, RM700 million was collected in levies, but only between RM6 – RM14 million a year of this is used in direct operating expenditure.[8]

[8] Relevance, Risks and Benefits of Labour Migration in Malaysia: Vijayakumari Kanapathy

3. Media

In order to change attitudes about migrant workers, the media needs to play an important role. The media rather than reinforcing stereotypes about migrant workers should raise awareness of migrant workers' rights, highlight human rights violations, give migrants a voice and highlight the important and positive contribution that migrant workers make to the Malaysian economy.

Conclusion

The above recommendations can only work if principles of governance namely democracy, transparency and accountability are adhered to and corruption is eliminated.

It is important that we develop a meaningful and effective system of social dialogue so that all stakeholders concerns will be discussed and effectively resolved through regular meetings.

Recommendations from the Conference: Developing a Comprehensive Policy Framework for Migrant Labour

Bar Council

16 July 2008

Refugees & Asylum Seekers

Executive Summary

Position of the Bar: There is an urgent need for policy and Administrative Reform as regards Refugees & Asylum Seekers in Malaysia.

I. Introduction

1. As of May 2018, Malaysia currently hosts an urban population of approximately 157,000 UNHCR-registered persons of concern (i.e. asylum seekers and refugees).

2. 158,160 are from Myanmar, comprising 106, 120 Rohingyas, 23,280 Chins and 28,760 from other ethnic groups from conflict affected areas or fleeing persecution in Myanmar.

3. The remaining individuals 24,820 refugees and asylum seekers are from 50 countries fleeing war and persecution including 6,870 Pakistanis, 3,340 Yemenis, 2,800 Syriane, 3,030 Somalis, 3,390 Afghans, 1,500 Sri Lankans, 750 Iraqis, 630 Palestians and others.

4. 66% of refuges and asylum seekers are men and 34% are women. There are 48,500 children below the age of 18.

II. Recommendations

5. Ratification of International Instruments

   i. 1951 Convention relating to the Status of Refugees, its 1967 Protocol.

   ii. 1954 Convention relating to the Status of Stateless Persons.

6. Establishment of a Designated Body specializing in refugees, and asylum seekers related issues that coordinates closely with the relevant ministries including the Ministry of Home Affairs, Foreign Affairs, Education, Health etc.

7. Reviving the Government of Malaysia – UNHCR Joint Task Force which was established in 2016 with a view to prioritizing implementation of the Recommendations of the Task Force.

8. Cooperation between the Government of Malaysia and the Office of the High Commissioner of Refugees (UNHCR).

   i. Adoption of a formal Status Agreement between the Government and the Office of the High Commissioner for Refugees (UNHCR).

9. The Establishment and implementation of a comprehensive national legislative and policy Framework for Refugees.

   i. Kindly refer to Bar Council Paper on 'Developing a Comprehensive Policy Framework for Refugees & Asylum Seekers in Malaysia' (BC~ Recommendations) ~ Recommendations 1A – Para 1.1 – 1.6 ~ Administrative & Legislative Framework (Pages 6 – 8).

(See, Annexure: Bar Council Memorandum on Developing a Comprehensive Policy Framework for Refugees and Asylum Seekers in Malaysia)

10. Provision of Basic Security to ensure refugees, asylum seekers and stateless persons have security from violence and exploitation.

   i. Ensure refugees and asylum-seekers are not penalized for illegal entry or stay, that detention is only used as a measure of last resort and where it is deemed strictly necessary, it is only used for a short period of time and it is subjected to safeguards, preventing arbitrary and/or indefinite detention. In doing so, the Government can, inter alia, implement measures such as providing an exemption order under the current Immigration Act 1959/63 and/or extending the use of the IMM-13 pass to other groups of refugees.

   ii. Implement the alternatives to detention (ATD) pilot project for unaccompanied children and establish other ATD mechanisms such as screening and referral

protocols for women, children, victims of human trafficking and other vulnerable asylum-seekers and refugees.

iii. Kindly refer to BC Recommendations – Part B – Para 1.7.1 to para 1.7.10 ~ pages 8 – 10.

11. Meeting Basic Needs

i. The Malaysian Government to provide for the basic needs and livelihood of refugees and asylum seekers.

ii. The Bar states that Refugees and Asylum Seekers be provided the legal **right to work**.

iii. Kindly refer to BC Recommendations Part C Para 1.8.1 to 1.8.4 at Page 10.

12. Education

i. The Malaysian Government to provide education opportunities for refugees and asylum-seekers – including at government schools, including preschools, primary, secondary as well as religious schools.

ii. Kindly refer to BC Recommendations Part D at pages 11 – 12 – Para 1.9.1 – 1.9.9.

13. Healthcare

i. The Malaysian Government to ensure better access to healthcare services for refugees and asylum seekers.

ii. The primary recommendation is that refugees and asylum seekers pay the same rates as Malaysians for public health services.

iii. Kindly refer to BC Recommendations Part E at pages 12 – 14 – Para 1.10.1 – 1.10.13.

III. Conclusion

14. There is an urgent need to set up a Department within Government to take care of the affairs pertaining to refugees and asylum seekers.

15. The government should implement policies that ensure:-

i. The legal right to work for Refugees and Asylum seekers;

ii. The recognition of documentation pertaining to the status of refugees & asylum seekers; or alternatively the government should issue identification documentation for refuges and asylum seekers;

iii. Release all Refugees & Asylum Seekers being held in detention by the authorities;

iv. Allow UNHCR immediate access to Immigration Detention Centre and other detention centres to carry out Refugees Status Determination;

v. To ensure that no refuges or asylum seeker children are held in detention.

DEVELOPING A COMPREHENSIVE POLICY FRAMEWORK FOR REFUGEES AND ASYLUM-SEEKERS IN MALAYSIA*

A Recent History of Refugees in Malaysia – Since 1975

Migration and the movement of peoples has been an important feature of Malaysia's history. In the modern era, Malaysia's refugee story begins in 1975 with the arrival of Indochinese refugees by boat. It was in that year as well that the United Nations High Commission for Refugees (UNHCR) began its operations. From 1975 until 1996 Malaysia hosted over 250,000 Vietnamese refugees, working with UNHCR and other Non-Governmental Organisations in providing them protection and assistance. During the same period, Malaysia offered local integration to some 13,000 Muslim Cham refugees from Cambodia. Over the period of two decades, as part of an international burden sharing effort, more than 240,000 Vietnamese refugees were resettled to countries including Australia, Canada, Denmark, Finland, France, New Zealand, Norway, Sweden and the United States, while more than 9,000 of them returned home safely to Vietnam.

During the 1970s and 1980s, Malaysia witnessed the arrival of some 50,000 Filipino Muslims from Mindanao who fled to the east Malaysian state of Sabah. These refugees were received and eventually locally settled into Sabah by the Malaysian Government with the support of UNHCR. Some 360 Bosnian refugees were also given temporary refuge in Malaysia in the 1990s, many of whom were resettled or returned home safely at the end of the conflict in the former Yugoslavia.

The 1990s saw the arrival of refugees from the Indonesian province of Aceh. In 1991, the first boatloads of 51 refugees from the Indonesian province of Aceh landed on the island of Penang, marking the beginning of the wave of these refugees into Malaysia, fleeing civil conflict. In 2005, the Malaysian Government issued temporary stay permits called IMM13 documents to these refugees, which allowed them to work and move, a humanitarian gesture on the part of the Malaysian Government following the devastation of the province of Aceh due to the tsunami in December 2004. The refugee situation for this population was phased out in 2007 after the situation in the province of Aceh improved.

* Roundtable on Developing A Comprehensive Policy Framework For Refugees & Asylum-Seekers organised by the Bar Council on 23-6-2009.

The Rohingyas began arriving in Malaysia in the 1990s, and by 2000 it was estimated that there were some 10,000 Rohingyas in Malaysia. Very small numbers of non-Rohingya refugees from Myanmar were also present in Malaysia during this time. Today, 90% of all refugees and asylum-seekers registered with UNHCR in Malaysia are from Myanmar. As of end August 2009, there are some 60,700 refugees and asylum-seekers registered with UNHCR in Malaysia. Some 54,900 are from Myanmar, comprising some 25,100 Chins, 15,900 Rohingyas, 3,800 Myanmar Muslims and the remaining are other ethnic minorities from Myanmar.

Malaysia has also seen the arrival of refugees of other nationalities in smaller numbers over the recent years. As of end February 2010, there are some 82,400 refugees and asylum-seekers registered with UNHCR in Malaysia. The population includes 76,200 persons from Myanmar and some 6,200 refugees and asylum-seekers from other countries, including some 3,100 Sri Lankans, 840 Somalis, 550 Iraqis and 540 Afghans.

Current situation for refugees and asylum-seekers in Malaysia

Although Malaysia is not a State Party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Malaysian Government continues to cooperate with UNHCR in addressing refugee issues on humanitarian grounds.

Because Malaysia is not a State Party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, there are currently no legislative or administrative provisions in place for dealing with the situation of refugees or asylum-seekers in the country. UNHCR conducts all activities related to the reception, registration, documentation and status determination of refugees and asylum-seekers. UNHCR works in cooperation with the Ministry of Foreign Affairs, Ministry of Home Affairs and the Immigration Department in order to respond to refugee issues.

The refugee population in Malaysia as at the end of February 2010 consists of 82,400 registered refugees and asylum-seekers and as well as an estimated unregistered population of about 45,000 persons. Close to 92% of the registered refugee population in Malaysia are from Myanmar while persons from countries such as Sri Lanka, Somalia, Iraq, Afghanistan and Palestine make up the majority of the remaining registered refugee population. The majority of the refugees and asylum-seekers are located in the greater Kuala Lumpur metropolitan area, in Penang and in Johor Bahru.

There are no formal reception centres or camps for refugees or asylum-seekers in Malaysia. They therefore often have to take up residence in low-cost housing areas in major cities where irregular migrant workers also live and in proximity to employment opportunities in the informal sector. With no legal rights to work, they have no choice but to seek out low-paying jobs and constantly risk being exploited by employers. Often, the nature of the employment is such that there is no employment contract. Refugees and asylum-seekers who take up unofficial employment are excluded from legal remedies and social protection. They are exposed to hazardous and unhealthy work conditions, and have to endure sexual harassment and gender-based violence. Employers have been known to extort their refugee and asylum-seeker employees, who are susceptible to extortion for being employed. They also risk arrest if picked up in the frequent street controls and raids, which occur in areas known to host large number of irregular migrant workers.

Refugees and asylum-seekers, particularly women and children, are often at risk of arrest, prosecution, detention and deportation and in some cases are trafficked upon deportation.

Refugees recognised by UNHCR cannot easily access public services, as they do not hold any government issued documentation attesting to their status. Whilst refugees and asylum-seekers are not prevented from accessing government medical facilities, in-patient ward deposits at the Hospital Kuala Lumpur as at 16 June 2009 for third class wards was still between 1000% (medical ward deposit) to 1333% (surgical ward deposit) to 2667% (maternity and obstetrics and gynaecology ward deposit) higher for refugees and asylum-seekers even after taking into account a 50% discount on fees charged to UNHCR recognised refugees and asylum-seekers for healthcare services at government hospitals.

In addition, their uncertain status and predicament contributes to a negative medical and psychological condition. A participatory action research by the Health Equity Initiative on access by Myanmar refugees to healthcare services in the Klang Valley conducted in co-operation with 11 refugee organisations from Myanmar and 500 refugee respondents from January to April 2009 showed that:-

a) 56 out of the 73 households interviewed reported that they were unable to cope with their problems;
b) 93.2% avoided going to the doctor because it cost too much;
c) 67.1% said that they could rarely or only sometimes afford medical care;
d) of the 28 respondents (from a total of 73 households interviewed) who had chronic illness, only 8 said they were able to afford regular treatment;

e) indebtedness was high; and
f) 40 out of the 73 households stated that their problems caused them to suffer from anxiety, stress, worry about the future.

A mental health screening of 100 refugees from Myanmar for panic disorder conducted between May 2008 and April 2009 by the Health Equity Initiative showed that at least 50% of respondents experienced panic attacks. The precipitating factors identified were:-

a) continuous security threats (of arrest, detention and deportation);
b) loss;
c) inability to work and meet their basic living needs;
d) problems with regard to registration;
e) rape and sexual violence;
f) exploitation by employers in terms of unpaid wages;
g) inability to access health care services;
h) past trauma including being subject to torture or witnessing torture and death of loved ones;
i) human trafficking at the border; and
j) whipping.

Refugee children of school-going age are particularly affected, as without formal identification they are unable to access any form of national education programs. The lack of documentation also impedes the registration of birth of refugee children.

The absence of a formal legal framework to regulate the situation of refugees and asylum-seekers in Malaysia directly affects the protection of their human rights in many ways. While UNHCR has worked out a number of ad-hoc arrangements with individual law enforcement agencies and line Ministries, these measures are by nature only temporary and do not provide for a sustainable and predictable basis for ensuring adequate protection to refugees and asylum-seekers.

Why does Malaysia need a legal and administrative framework for refugee policy?

(i) Since 1975 Malaysia has seen the arrival of refuges and is likely to do so in the future.
(ii) Malaysia has implemented a de facto policy for refugees including:-

a) non-return to countries of origin until conditions are conducive;

b) allowing refugees to work in the informal sector;
c) allowing refugees to access health care services;
d) allowing non-governmental organizations to provide assistance to refugees;
e) cooperating with UNHCR on a humanitarian basis and allowing UNHCR to register, determine refugee status and extend protection to refugees; and
f) facilitating resettlement of refugees to third countries.

(iii) The de facto policy has been ad hoc and inconsistent and in some cases has led to abuses for which the Malaysian Government has been severely criticised.

(iv) The Malaysian Government's international commitments including becoming a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child have created international obligations for Malaysia to abide by in respect of the treatment of refugees.

(v) Malaysia has an opportunity through practical solutions to the refugee problem here to show the region and the world how refugees can be managed in a way that ensures safety and dignity for refugees while protecting national interests.

Conclusion

Given its status in the international community and comparatively high degree of development, and given its commitment to humanitarian principles, Malaysia should become a signatory to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

If, however, the Malaysian Government is still not yet prepared to take these steps, the Malaysian Government should at the very least put in place an appropriate legal and administrative framework for dealing with refugees and asylum-seekers in a more humane and appropriate, and in a less-arbitrary, manner.

What is needed is an all-encompassing, all-inclusive and predictable policy which will be adhered to by all Ministries, departments and law enforcement agencies within the Malaysian Government and which civil society/non-governmental organisations and other stakeholders (including the refugee and

asylum-seeking community) can understand and can perform their complementary roles in a consistent and effective manner.

We append herewith a set of recommendations for the formulation of a comprehensive policy framework for managing refugees and asylum-seekers in Malaysia, with a view towards enhancing their social protection. This two-prong approach envisages (i) building upon the responses of the Malaysian Government given to the international community during the Universal Periodic Review process, and (ii) continuing to work with civil society/non-governmental organisations both international and domestic in partnership and complementarity.

RECOMMENDATIONS

1. Short-term Recommendations

A. ADMINISTRATIVE & LEGISLATIVE FRAMEWORK

1.1 The Malaysian Government to clearly state its respect for and adherence to the principle of non-refoulement, which is part of customary international law.

1.2 The Malaysian Government to develop with the United Nations High Commission for refugees (UNHCR) and other stakeholders an administrative framework to distinguish refugees and asylum-seekers from irregular migrants and apply international standards for the treatment of foreign nationals.

1.3 The Malaysian Government to open up engagement with UNHCR in developing a legislative framework to coordinate policy and enforcement measures towards irregular migrants claiming refugee status to NGOs working in this area of relief and assistance to refugees and asylum-seekers.

1.4 The Malaysian Government to move forward from simply establishing administrative arrangements to provide assistance and protection to such persons on humanitarian grounds on a case-by-case basis, which

effectively distinguishes persons claiming such status from the irregular migrants, to a regular system.

1.5 The Malaysian Government to ensure that fair protection processes is the foundation for effective protection and a core state responsibility. In particular, to create a more favourable protection environment for refugees and asylum-seekers and members of their families.

1.5.1 The Attorney-General to recommend an amendment to the Immigration Act 1959/63 (Revised – 1975) (hereinafter the "Immigration Act") to exempt refugees and asylum-seekers from Section 6(1)(c) of the Immigration Act[1]. Alternatively invoke the power of exemption provided by Section 55 of the Immigration Act [2]. Such exemption should not only cover refugees and asylum-seekers themselves but also members of their families.

1.5.2 The Ministry of Home Affairs through the Immigration Department should immediately issue an administrative directive to all its personnel to recognise UNHCR refugee identity documentation. Other law enforcement agencies should also be informed of and agree to this administrative directive.

1.6 The Malaysian Government to ensure a Fair Protection Process for refugees and asylum-seekers.

1.6.1 The Ministry of Home Affairs should request UNHCR to carry out a comprehensive registration and timely refugee status determination for all refugees and asylum-seekers. This would include issuing an administrative directive granting immediate access by UNHCR to both immigration detention centres (IDCs) and prisons to seek, identify, register and release refuges and asylum-seekers who have yet to be registered with UNHCR.

[1] Section 6 of the Immigration Act 1959/63 (revised – 1975) entitled "Control of entry in Malaysia" reads: (1) No person other than a citizen shall enter Malaysia unless— *(a)* he is in possession of a valid Entry Permit lawfully issued to him under section 10; *(b)* his name is endorsed upon a valid Entry Permit in accordance with section 12, and he is in the company of the holder of the Permit; *(c)* he is in possession of a valid Pass lawfully issued to him to enter Malaysia; or *(d)* he is exempted from this section by an order made under section 55. (2) (*Deleted by Act 27 of 1963*). (3) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes. (4) The burden of proof that a person entered Malaysia without contravening subsection (1) shall lie upon that person, and in any prosecution for an offence under subsection (1), it shall not be necessary to specify in the charge the date, time, place or manner of the entry of such person into Malaysia, or the means of travel used for such entry, and such prosecution may be held at any place in Malaysia.

[2] Section 55 of the Immigration Act 1959/63 (revised – 1975) entitled "Power to exempt" reads: (1) Notwithstanding anything contained in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto. (2) Every order made under this section which relates to a class of persons shall be published in the *Gazette*.

1.6.2 The Immigration Department should refer refugees and asylum-seekers to UNHCR for screening at border entry points. For this to be feasible, UNHCR personnel should be stationed at border entry points.

1.6.3 The Immigration Department should seek out support and best practice from other countries in the establishment of refugee reception and protection-sensitive border management practices. [At the Universal Periodic Review session on Malaysia at the United Nations Human Rights Council in Geneva, February 2009, the Malaysian Government stated that it is improving its legislative framework to establish an appropriate mechanism for the treatment of persons claiming refugee status and/or asylum-seekers. The Malaysian Government has made it known to the international community that it is engaged with UNHCR in developing a legislative framework to coordinate policy and enforcement measures towards irregular migrants claiming refugee status.]

B. BASIC SECURITY

1.7 The Malaysian Government to ensure refugees have security from violence and exploitation.

1.7.1 The Ministry of Home Affairs should issue an immediate administrative directive stating that recognised groups of refugees are being allowed to stay in Malaysia on humanitarian grounds and should therefore not be arrested, detained or deported. Other law enforcement agencies should also be informed of and agree to this administrative directive.

1.7.2 In the event of the arrest of refugees or asylum-seekers, the arresting agency should refer these individuals to UNHCR for immediate screening to determine their eligibility for refugee status, and if recognised as refugees or asylum-seekers, released to UNHCR.

1.7.3 In cases of domestic violence, trafficking and child abuse, victims amongst refugees and asylum-seekers should have equal access to government shelters for victims of domestic violence and trafficking, as well as access to child protection services

such as shelter and counselling and rehabilitation for abused children.

1.7.4 To avoid exploitation due to statelessness, the National Registration Department should allow for birth registration for children of refugees and asylum-seekers and to make the process easier.

1.7.5 Likewise, the Ministry of Home Affairs should allow refugees to register their marriages with the Civil Registry using their UNHCR identity cards as a recognised and acceptable form of identification. Muslim refugees and asylum-seekers should be able to access the Shariah court system whereby various family disputes including marriage, divorce, maintenance and custody could be adjudicated upon.

1.7.6 The Ministry of Home Affairs should issue IMM13 documents to Rohingyas who are already in Malaysia as promised earlier, and renew lapsed IMM13 documents.

1.7.7 UNHCR, the United Nations Children's Fund (UNICEF), non-governmental organisations and other stakeholders should be invited to become membership of the Technical Committee formed by the Malaysian Government to coordinate implementation of recommendations of the Committee on the Convention on the Rights of the Child (CRC Committee), so as to ensure adequate protection and coverage of the rights of children of refugees and asylum-seekers.

1.7.8 A similar Technical Committee should be established to coordinate the implementation of recommendations of the Committee on the Elimination of all forms of Discrimination Again Women (CEDAW Committee) in respect of refugees and asylum-seekers and members of the families who are women. (The CEDAW Committee in its Concluding Comments to Malaysia in May 2006 encouraged Malaysia to adopt gender sensitive programming and laws and regulations that bring about the protection of women refugees and asylum-seekers.)

1.7.9 Open up engagement with NGOs and other stakeholders, in addition to the UNHCR, to develop a legislative framework to coordinate policy and enforcement measures towards refugees and asylum-seekers.

1.7.10 Immediately put into place a moratorium on whipping as a sentence for breaches of the Immigration Act, and expedite the training of judicial and legal service officers in international human rights norms (particularly the non-acceptability of whipping).

C. MEETING BASIC NEEDS

1.8 The Malaysian Government to provide for the basic needs and livelihood of refugees and asylum-seekers.

1.8.1 Adopt a foreign worker replacement policy. Instead of simply allowing labour brokers to continue to source fresh migrant workers from countries of origin, priority should be given to the employment of refugees and asylum-seekers and members of their families who are already physically present in Malaysia. The Ministry of Home Affairs should issue IMM13 documents to these groups of people as well in order to enable them to take up employment.

1.8.2 The Ministry of Home Affairs and the Immigration Department should adapt its Semi-Skilled and Unskilled Workers Programme so as to create work opportunities for refugees and asylum-seekers until such time as they can return home or be resettled in a third country.

1.8.3 The Ministry of Home Affairs to issue immediately issue an administrative directive allowing and encouraging NGOs to provide humanitarian support to refugees and asylum-seekers to meet their basic needs.

1.8.4 Exempt providers of care, welfare and education to refugees, asylum-seekers and undocumented migrants and their families from the operation of the Immigration Act pursuant to section 55 of the Act. (This is in order to be consistent with the positive spirit underlying the statement made to the United Nations Human Rights Council in paragraph 38 of the National Report prepared in respect of the Universal Periodic Review of Malaysia[3]).

[3] In paragraph 38 of the National Report prepared and presented by the Malaysian Government at the Universal Period Review session on Malaysia in February 2009, it was stated that: "In full compliance with its treaty obligation under the CRC, all children in Malaysia are not

D. EDUCATION

1.9 The Malaysian Government to provide education opportunities for refugees and asylum-seekers.

1.9.1 The Ministry of Education should allow, assist and support refugee and asylum-seeker children to attend Government schools including pre-schools, primary, secondary as well as religious schools and sit for Government school examinations. In particular, the local Jabatan Pelajaran should make available their standard term examination papers which are released to the local schools twice annually for the benefit of the education of children of refugees and asylum-seekers.

1.9.2 The Ministry of Education should allow, assist and support access to vocational schools, technical education and vocational training centres for 'out-of-school' refugee and asylum-seeker youth under the age of 18 years, and to tertiary education and public colleges and universities for qualified refugee and asylum-seeker youth. Such youth, having fully completed vocational programmes and related examinations, should be accorded full certificates and qualifications no different from that accorded to Malaysians.

1.9.3 The Ministry of Education to provide approval for and grant accreditation to community education centres to be run by NGOs to be established and for the NGOs to run classes at these centres following the Malaysian curriculum and education syllabus, and to permit/licence them to administer Government public examinations such as UPSR and PMR to the children of refugees and asylum-seekers registered at these approved community education centres. Such children, having completed school programmes and related public examinations, should be accorded full certificates and qualifications.

1.9.4 The Ministry of Education to allow and support informal learning centres set-up and operated by refugee and asylum-

denied access to education. The Government also constantly engages with various international organisations such as the United Nations Children's Fund (UNICEF) and the Office of the United Nations High Commissioner for Refugees (UNHCR), and civil societies, to ensure that children of illegal immigrants attend informal classes to be conducted by NGOs, such as, through community-based schooling."

seeker communities for their children pending resettlement to a third country.

1.9.5 Given that community education centres perform the role which should properly be the responsibility of the Ministry of Education, government funding for approved community education centres should be urgently considered. The Ministry of Education should allocate financial resources to provide educational materials and facilities at approved community education centres including provision of free textbooks and uniforms to all children of refugees and asylum-seekers attending such approved community education centres.

1.9.6 The Ministry of Education to deploy, to the extent possible, Malaysian teachers (and in particular Bahasa Malaysia teachers) to teach at approved community education centres.

1.9.7 The Ministry of Education to allow, to the extent possible, usage of existing school facilities such as school fields, sports related amenities, computer classrooms and halls, for the benefit of children of refugees and asylum-seekers.

1.9.8 The Ministry of Education, together with local and other authorities, to allow, to the extent possible, usage of available buildings or land currently vacant for the setting-up of approved community education centres to increase enrolment of children of refugees and asylum-seekers.

1.9.9 The Ministry of Education to allow enrolment of children of refugees and asylum-seekers in any private school throughout Malaysia.

E. HEALTHCARE

1.10 The Malaysian Government to ensure better access to health care services for refugees and asylum-seekers.

1.10.1 The Ministry of Health to apply rates paid by Malaysians for public health services to refugees and asylum-seekers.

1.10.2 The Ministry of Health to allow refugees and asylum-seekers the right to work in order that they can finance their health needs and

enjoy access to the determinants of health including food, housing, sanitation, and education for their children.

1.10.3 The Ministry of Health to extend the current good practice of having community health worker translators at Hospital Sg. Buloh, IPR and PKKN to other hospitals and clinics run by the Malaysian Government to increase information access and facilitate improved communication between the refugee or asylum-seeker and the healthcare provider.

1.10.4 The Ministry of Health to simplify procedures and increase access of refugees and asylum-seekers to comprehensive care covering antenatal, maternal, infant and child, adolescent, adult and elderly care. Also ensure that free courses on sexual reproductive and family development are made available for these groups in their own languages.

1.10.5 The Ministry of Health to waive the deposit of RM700 required for patients requiring acute in-patient psychiatric care because they are a danger to themselves and to others and need this care.

1.10.6 The Ministry of Health to apply the rates for outpatient care paid by Malaysians to refugees and asylum-seekers because they require the treatment and do not have the resources.

1.10.7 Arrest and detention of refugees and asylum-seekers is not only a barrier to access to health care but also contributes to mental health morbidity and compromising the effectiveness of therapeutic interventions. The Ministry of Home Affairs to review the policy of arrest, detention and deportation of refugees and asylum-seekers for administrative infractions related to immigration offences and develop alternatives in line with the general principles related to detention. In particular, vulnerable individuals - including children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, elderly persons, the disabled or those with physical or mental health needs – should not be placed in detention.

1.10.8 The Ministry of Health to waive all deposits and fees so that refugee and asylum-seekers who are survivors of sexual and gender based violence have access to One Stop Crisis Centres in the country. Refugee and asylum-seeker survivors of sexual and gender based violence should be granted legal guarantees that

they will not be charged for their undocumented status, will not be refouled and will be granted witness support where necessary.

1.10.9 The Ministry of Health to make the testing and treatment for infectious diseases free for refugees and asylum-seekers in the interest of the health of Malaysians and as part of the responsibility that countries share with regard to global health challenges.

1.10.10 The Ministry of Health to increase access by refugees and asylum-seekers to culturally and linguistically appropriate prevention programs related to infectious diseases.

1.10.11 The Ministry of Health, together with the Ministry of Home Affairs, to improve living conditions of detention centres and set up permanent clinics at immigration detention centres, under the purview of the Ministry of Health. Clinics should be equipped with a full time medical doctor, male and female medical assistants, and adequate facilities to address first line treatment needs of detainees and make referrals for medical emergencies and second line treatment.

1.10.12 The Ministry of Home Affairs to allow access by NGOs and welfare providers to assist with broader psychosocial needs of refugees and asylum-seekers detained in prisons and IDCs. (In this regard, the Malaysian Government is also encouraged to work with international agencies like the International Committee of the Red Cross (ICRC) that have a commitment and capacity to support national efforts to increase the delivery of health services in detention centres.)

1.10.13 The Ministry of Health to increase the access of children of refugees and asylum-seekers to vaccination services, health and other medical services, and to education. (The CRC Committee in 2007 called on the Malaysian Government to allocate resources for children of refugees and asylum-seekers especially for social and health services and education, and to provide access to free and formal primary, secondary and other forms of education, and access to official examinations.)

2. Medium term

2.1 The Ministry of Home Affairs is to encourage and assist refugee communities to be self-reliant and to encourage Malaysian civil society and NGOs to support refugees in this effort.

2.2 The Ministry of Home Affairs/Immigration Department should identify and allow some refugees and asylum-seekers with good local integration potential to stay in Malaysia on a long-term basis.

2.3 The Immigration Department should continue to facilitate the resettlement of refugees. As and when it becomes possible, the Immigration Department should facilitate the return of refugees to their home countries if and when conditions improve.

2.4 UNHCR to increase resettlement efforts to third countries.

2.5 Malaysia should accede to the 1951 Convention and the 1967 Protocol.

2.6 The Ministry of Foreign Affairs should continue and expand its effort to encourage ASEAN to take a lead towards promoting positive change in Myanmar in order to create conditions that will facilitate voluntary return of refugees.

2.7 The Malaysian Government to persuade the Government of the country of origin to recognise refugees and asylum-seekers as being nationals of the country as a first step to arriving at a solution to the issue of refugees and asylum-seekers fleeing their home country.

2.8 The Malaysian Government to persuade the Government of country of origin to recognise that it is governmental policy or action which is causing refugees and asylum-seekers to leave their country of origin.

2.9 The Malaysian Government to work with other governments in the region to address the root causes or the domestic situation in the country of origin. In particular, to accept that although it is the primary obligation of the country of origin to settle its domestic affairs free from external interference, regional peace and stability must be an overriding factor. The Malaysian Government to evolve a regional solution to the problem of refugees and asylum-seekers for ASEAN.

2.10 The Ministry of Foreign Affairs should work with Malaysian lawmakers (in particular the Inter-Parliamentary Caucus on Myanmar) to amend the

current ASEAN policy of non-interference in the internal affairs of a member country to recognise that what happens in one member country has both direct and indirect consequences on other member countries. (Note for example the suspension of free trade agreement negotiations between the European Union and ASEAN over the question of Myanmar. Malaysia and other ASEAN member countries are paying a huge economic price for what is happening in Myanmar.)

2.11 The Malaysian Government to encourage the use of investments by ASEAN-based corporations in Myanmar and the reliance by members of the military junta on services provided by ASEAN countries (e.g. medical and financial services in Singapore) to leverage change in Myanmar.

2.12 Provide guidance to the Judicial and Legal Service to read into the provision of the right to life under Article 5 of Part II of the Malaysian Federal Constitution that deals with fundamental liberties the right of non-refoulement under Article 33 of the 1951 Convention on the status of Refugees.

2.13 Ensure the regular training for judges, prosecutors, the representatives of the police and other law enforcement agencies on human rights, non-discrimination and the legally binding nature of the international law on refugees and asylum-seekers.

3. <u>Long term</u>

3.1 All ASEAN member countries to accede to the 1951 Convention and the 1967 Protocol.

3.2 All ASEAN member countries to accede to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

3.3 Establish a regional treaty mechanism for protection of refugees, asylum-seekers and undocumented migrants.

3.4 Enhance the use of the ASEAN Inter-Governmental Commission on Human Rights (AICHR) to ensure continued protection of refugees, asylum-seekers and undocumented migrants in ASEAN member countries. In respect of women and children, recourse should additionally be had to the ASEAN Commission on Women and Children (ACWC) for an ASEAN-wide plan of action.

3.5 The Malaysian Governmental to recognise the presence of a sizeable refugee and asylum-seeker population in Malaysia and the need to provide quality education to children of refugees and asylum-seekers. In particular:-

3.5.1 Malaysian Government to take full responsibility for the education of children of refugees and asylum-seekers and for them to be integrated into the mainstream education system;

3.5.2 Malaysian Government to take partial responsibility for the provision by the Malaysian Government of school property in the urban area/cities and also partial funding in order to assist NGOs to run schools to provide essential education to the children of refugees and asylum-seekers in our midst.

Bar Council Malaysia
Dated: 20 June 2011

Stateless Persons in Malaysia

Executive Summary

Position of the Bar: The Stateless persons should be accorded recognition and be granted nationality on an urgent basis.

I. Introduction

1. To be stateless is to be invisible and denied basic rights in Malaysia, including education, healthcare, voting and employment.

2. There is no exact data on Stateless Persons in Malaysia. In 2016, there were at least 290,000 stateless children in Malaysia.[1]

3. Between 2015 and June 30 2020, the Home Ministry received 31,494 requests for citizenship for individuals under the age of 21 in under Article 15(A) of the Federal Constitution.[2]

4. Datuk Seri Hamzah Zainuddin, the former Home Minister told the Dewan Rakyat that 28,211 applications were being processed, while for Sabah, 9,388 were being processed on July 2020.[3]

II. Issues Pertaining to Stateless Persons in Malaysia

5. Studies have shown that:-
    a. Illiteracy and language hampered the stateless persons' understanding of the application process, including when they were interviewed by National Registration Department (NRD) officers. [4]

[1] H.Chiew. (2017). *'An invisible jail' – stateless children in Malaysia.* Malaysia Kini. https://www.malaysiakini.com/news/387600
[2] V.Babulalal,N.Daim & A.Yunus. (2020). *Giving stateless kids an identity does not mean automatic citizenship for them*. New Straits Times.
[3] Veena Babulal, Nuradzimmah Daim, Arfa Yunus (2020). *Giving stateless kids an identity does not mean automatic citizenship for them [NSTTV]*. News Straits Times.
[4] Ida Lim (Dec 2020), *Here's why stateless individuals face so many challenges in being recognised as Malaysian citizen, home minister told.* Malay Mail. https://www.malaymail.com/news/malaysia/2020/12/15/heres-why-stateless-individuals-face-so-many-challenges-in-being-recognised/1932203

b. The Development of Human Resources for Rural Areas (DHRRA) Malaysia stated stateless people also struggled to provide supporting documents to substantiate their applications.

c. The stateless community also face challenges due to NRD procedures and requirements, including the existing SOP which requires the presence of two witnesses, at least 15 years older than the subject, to initiate late birth registration.

d. Fear of being arrested by the authorities further perpetuates their lack of identity.

III. Recommendation

6. The recommendations are as below:-

i. Clear guideline to facilitate the full implementation of legislation pertaining to nationality;

ii. Applications for nationality paperwork should be processed promptly, and applicants should be given explanations for rejections in order to take appropriate action;

iii. Government of Malaysia to maintain and implement procedural reforms recommended by the Malaysian Indian Blueprint (2017); and

iv. Government should make changes to legislation and procedures, which are necessary to recognize stateless people as nationals.

The Universities and University Colleges Act 1971

Executive Summary

Position of the Bar: Repeal the Universities and University Colleges Act 1971 ("UUCA") [Act 30], and enact a new legislation to standardise the establishment of universities, affirm the value of academic freedom and freedom of association, speech and expression within campuses, consistent with the Federal Constitution.

I. Introduction

1. The UUCA was in force from 30 April 1971. This Act aims to provide for the establishment, maintenance and administration of universities and university colleges and for other matters connected with it.

2. The UUCA was amended in 1975, which first introduced, through Act A295, new provisions[1] and amendments to existing provisions[2], prohibiting our university students from participating, associating or expressing their opinions relating to any political party or organisation ("the restricting provisions").

3. According to the then Education Minister, the purported objectives of introducing the restricting provisions was to:

   (a) tackle the purportedly increasing influence of communism amongst the students; and

   (b) restore peace within the universities, the lack of which was said to have indirectly hindered the Government's effort in reducing the social gaps between the Bumiputras and other races through higher education[3].

[1] Sections 15A, 15B, 15C, 15D, 16A, 16B and 16C.
[2] Sections 15 and 16.
[3] See Hansard (8 April 1975), page 4390 – 4400.

4. Since then, the restricting provisions were subject to piecemeal amendments in 1996, 2009 and 2013, all of which were only cosmetic in nature and stopped short of liberating our university students from the shackles of the past, despite the irrelevancy of the purported objectives as stated above.

II. The Problems with the UUCA

5. Presently, while the UUCA permits membership in a political party, the university students are still barred from standing for campus election or holding any post in any society or organisation on campus if the student holds any post in a political party.

6. The management of a university also retains the power to declare a society or organisation as being "unsuitable to the interest and well-being of the student or university" and thereby restricting the students' right to participate or express support for, sympathy with or opposition to such society or organisation.

7. Directly related to the restricting provisions is the power of the university's board, as granted by Section 16C of the UUCA, to make disciplinary rules governing the conduct of the students which shall be published in the Gazette.

(a) Currently, almost all universities or university colleges established under UUCA have adopted a substantially similar model "Disciplinary Rules"[4] which prohibits students or student organisations from, among other things, carrying out the following activities –

(i) organising assemblies;[5]

(ii) owning, using or having in possession, custody or control, for public address purposes, any loudspeaking, loudhailer, amplifier etc;[6]

(iii) making, flying exhibiting, displaying any flag, banner, placard, poster, emblem or device which is conducive to the promotion of indiscipline, disorder, disobedience etc;[7]

(iv) publishing, distributing or circulating any documents;[8]

[4] For the purposes of this Executive Summary, reference will be made to University Of Malaya (Discipline Of Students) Rules 1999 [PU(A) 267/1999] ("**1999 Rules**").

[5] Rule 9 of the 1999 Rules.

[6] Rule 10 of the 1999 Rules.

[7] Rule 11 of the 1999 Rules.

(v) organising, carrying out or participating in any activity outside the campus which has "direct adverse effect on the university" or which is "prejudicial to the interest of the university";[9]

(vi) making representations to the public in relation to any matters pertaining to the university;[10]

(vii) making any objection to the entry into, the presence in, or the expulsion from the campus of any person, body or group of persons;[11]

(viii) conducting himself, whether within or outside the campus, in any manner, which is detrimental or prejudicial to the interest, well-being or good name of the university or to public order, safety, security, morality, decency or discipline.[12]

(b) The students being the largest group of stakeholders within the campus are not represented in the Board. It is therefore logical to deduce that the Disciplinary Rules were passed without proper consultation with the students whose constitutional rights would be seriously affected.

8. The restrictive provisions under the UUCA together with the prohibitions under the Disciplinary Rules are unnecessarily repressive, unreasonable and disproportionate barriers to the university students' freedom of expression under Article 10(1)(c) and freedom of speech and expression under Article 10(1)(a), of our Federal Constitution.

9. The UUCA further empowers the Minister in charge of higher education to appoint Vice-Chancellors, whose appointments are, based on past practice, political in nature.

10. The Vice-Chancellor yields extensive power in restricting students' activity within the campus.

(a) He is empowered, by virtue of Section 16A of the UUCA, to suspend or dissolve any student organisation which he considers to be detrimental or prejudicial to the interest of the university.

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[8] Rules 12 of the 1999 Rules.
[9] Rule 13 of the 1999 Rules.
[10] Rule 15 of the 1999 Rules.
[11] Rule 16 of the 1999 Rules.
[12] Rule 3(a) of the 1999 Rules.

(b) By virtue of Section 16 of the UUCA, he is also the disciplinary authority in respect of university students who is responsible to notify, charge, hear any student whom he considers to have committed a disciplinary offence and decide on any disciplinary action taken against such student.

11. Given the nature of the VC's appointment, it is no surprise that the repressive provisions and disciplinary rules under the UUCA had often been used against students critical against the Government who would not be targeted if not for their identity as students.

12. Section 8 of the UUCA further imposes a standard constitution set out in First Schedule to the UUCA to be adopted by all universities and university colleges.

13. In general, the standard constitution restricts the students' participation in the administration of the university and the ability to conduct activities within the campus.

(a) Article 48(2) of the First Schedule provides for the election of a Students' Representative Council (SRC).

(b) However, Article 48(11) of the First Schedule restricts the SRC's ability to maintain any fund and all expenses by the SRC must be authorised by the VC in writing.

(c) Article 48(10)(b) of the First Schedule further provides that insofar as the student welfare facilities in the university are concerned, the SRC's ability to conduct its activity will be subject to the VC's direction.

(d) For the establishment of any other student bodies other than the SRC, it can only be done with the prior approval of the VC and subject to such terms and conditions as the VC may specify (Article 49 of the First Schedule).

(e) The SRC or a student established may be suspended or dissolved by the Board if, among other reasons, it appears to the Board to have conducted itself in a manner which in the opinion of the Board is "detrimental or prejudicial to the well-being or reputation of the University".

14. University students therefore, by virtue of their identity, do not enjoy the same freedom of association as an ordinary citizen would have enjoyed under the Federal Constitution.

III. Solution

15. To repeal the UUCA and enact new legislation to standardise the establishment, maintenance and administration of universities. Such new legislation must affirm the value of academic freedom, guarantee the autonomous existence of students' union and the fundamental liberties of all students, academics and employees of the universities.

IV. Conclusion

16. The UUCA was enacted and later amended to address specific problems of national security and serious social and economic inequality in the 1970s.

17. The continuing existence of UUCA can no longer be justified as Malaysia progresses towards a more democratic nation.

18. The UUCA is unnecessarily restrictive and unjustifiably distinguishes the students and academics of our universities from the general public insofar as the right to fundamental liberties under the Federal Constitution is concerned.

19. The Bar Council is therefore of the view that the UUCA must be repealed and be replaced with new legislation for higher education with a view to restore the lost liberties of our students and academics since more than 40 years ago.

20. In line with aspirations above, consideration should be given to revamping or reviewing the application of the following legislation on students, academicians and other members of our universities or other higher learning institutions.

(a) The **Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605)**, particularly the Second Schedule thereto ie. the **Statutory Bodies Disciplinary Regulations**, which contains provisions[13] that severely restrict the freedom of expressions naturally required by the academicians as the conscience of the society.

Rule 18 of the Statutory Bodies Disciplinary Regulations, for example, prohibits an academician[14] from, *inter alia* –

(i) making any public statement, whether orally or in writing or in any other manner, that is detrimental to any policy, programme or decision of the statutory body or the Government on any issue;

(ii) making any public statement which may embarrass or bring disrepute to the statutory body or the Government;

(iii) making any comments on any weaknesses of any policy, programme or decision of the statutory body or the Government;

(iv) circulating such statement or comments, whether made by him or any other person.

We are of the view that any provisions or rules which are restrictive of the academicians' freedom of expression will seriously hinder and discourage the academicians from playing their role as the public intellectuals.

It is therefore suggested that the Minister for Education should promptly exercise his power pursuant to Section 25 of the Act to exempt the academicians from the application of the draconian provisions contained therein.

[13] See Rules 18, 19 and 20 of the Second Schedule to Act 605.

[14] Being an 'officer' as defined under Section 4 of Act 605.

(b) The **Education Institutions (Discipline) Act 1976 (Act 174)** which is applicable specifically to students of UiTM, polytechnics, teacher training colleges, community colleges, matriculation colleges etc.[15] also contains provisions similar to that of the UUCA which restricts the students' right to freedom of association, speech and expression[16].

(c) The **Private Higher Educational Institutions Act 1996 (Act 555)** also contains provisions similar to that of the UUCA which restricts the students' right to freedom of association, speech and expression[17]. Students may also face further pressure from the management of their respective institutions as any activities deemed by the government to be in breached of the restrictive provisions in Act 555 may be used to deregister the institution as a whole pursuant to Section 55(1)(e) of the Act.

The 1996 Act also regulates the issuance of teaching permit to any person who intends to teach in any private higher educational institution. Section 52 of the Act grants extensive power to the Director General to refuse to issue a teaching permit to any person if he/she is "for any reason not a fit and proper person to teach".[18] In the absence of any express provisions safeguarding academic freedom within the private educational institutions, Section 52 is open to be abused against any academicians or teaching staffs whose academic works are critical of the power that be.

[15] Refer to First Schedule to Act 174 for a complete list of all higher learning institutions which are subject to the application of this Act.
[16] See Part III and Part IV of, and Second Schedule to Act 174.
[17] See Part VIII of Act 555.
[18] See Section 52(1)(e) of Act 555.

Setting up a Freedom of Information Regime in Malaysia

Executive Summary

Position of the Bar: To uphold and put into place a Freedom of Information regime in Malaysia.

In this regard:

(a) to enact a Freedom to Information Act; and

(b) repeal or amend existing federal acts that restricts Freedom to Information, inter alia, the Official Secrets Act 1972, the Printing Presses and Publications Act 1984, Section 203A of the Penal Code, the Whistleblowers Protection Act 2010 and the Data Protection Act 2010.

I. Introduction

1. The Selangor State Government had on 12th August 2011 enacted the Freedom of Information (State of Selangor) Enactment 2011 and subsequently, the Penang State Government had on 9th January 2012 enacted the Penang Freedom of Information Enactment 2010.

2. The Malaysian Bar had at all times stressed the importance of having a Freedom to Information Regime for the rest of the remaining Malaysian states. In this regard, a federal act should be enacted by Parliament setting into place such a regime so as to:

   2.1 streamline the first two state enactments, thereby maintaining a consistent level of governance over every state of Malaysia; and

   2.2 provide for the same degree of rights under a national regime.

II. Problems in not having a Freedom to Information regime

3. Malaysia has a hotchpot of federal acts that entrenches privacy and high levels of secrecy in regard to government documents. These federal acts in their current form provides effective mechanisms to restrict:

3.1 the freedom to information, by restricting citizen's rights in accessing government documents and information about public projects utilising taxpayers' money; and

3.2 the freedom of speech and expression, by stopping and penalising the dissemination of information that may be vital in detecting or exposing abuse of power and the misuse of funds, by any individual or groups of individuals, within the government machinery.

Restriction of Freedom to Information

4. Federal acts were enacted to restrict freedom to information. Such acts are mainly, amongst others, the Official Secrets Act 1972, the Printing Presses and Publications Act 1984, Section 203A of the Penal Code, S. 223 of the Communications And Multimedia Act 1998 and the Data Protection Act 2010.

5. The Official Secrets Act 1972 in its current form, amongst others:

5.1 has an extremely wide definition of what is "official secret" in the Official Secrets Act 1972;

5.2 gives the Minister of Home Affairs the right to add matters, at any time and without the need to give reasons, to the already wide definition of what is "official secret"; and

5.3 empowers a very large number of public officers, placed at all levels of central, state and local governments, to certify any material as an "official secret".

6. Whistle blowers are not given the relevant protection as there is an inherent weakness in the Whistleblower Protection Act 2010. This act does not extend immunity from prosecutions under the Official Secrets Act 1972, Financial Services Act 2013, Data Protection Act 2010 or Section 203A of the Penal Code, amongst others[1].

(See, Executive Summary: Whistleblower Protection Act 2010)

[1] Section 6(1) of the Whistleblower Act 2010.

7. The arrest and prosecution of Rafizi Ramli with two offences under the Official Secrets Act 1972 for allegedly releasing classified information on 1 Malaysia Development Berhad (1MDB)[2] is an example of the use of the Official Secrets Act 1972 by the previous government, in stifling the citizens right to know how the government utilises taxpayers' money. Also, the Member of Parliament in this instance, cannot rely on the Whistleblower Protection Act 2010 for immunity as his alleged disclosure is not allowed according to the Official Secrets Act 1972.

Restrictions to Freedom of Information and Freedom of Speech and Expression

8. Oppressive control of the press and online publishers. The Printing Presses and Publications Act 1984 were used many times in controlling the issuance of licenses to publications. Decisions made by the Home Affairs Minister are final. This act has a strong mechanism built within it to curb all types of dissemination of information without giving the publishers of such information, the opportunity to be heard in regard to the reason for suspension[3]. The act was also used in suspending two newspapers under The Edge Media Group as their reports on state-owned 1 Malaysia Development Berhad (1MDB) was said to have run foul of the act, as explained by a Home Affairs Ministry officer[4].

9. The Communications and Multimedia Act 1998 were used to censor the internet in numerous occasions[5]. An example, was where access to the whistleblower website, Sarawak Report, was blocked in July 2015 for allegedly publishing unverified information relating to the Prime Minister and 1MDB. Section 223 of the Communications and Multimedia Act 1998 was used. This section was used to criminalise release of information that may be potentially crucial in exposing abuse of power or misuse of public funds by the government or any government officer.

[2] 'Rafizi charged for violating Official Secrets Act 1972 (Updated)' *The Sun Daily*. 8 April 2016. Retrieved from: http://www.thesundaily.my/news/1754831

[3] 'Press Release: Repeal the Printing Presses and Publications Act; Independent Regulation to Preserve Independence of Media'. *Malaysian Bar*. 28 December 2013.

[4] The Malay Mail: 'The Edge's 1 MDB reports in breach of publication law, Home Ministry says after freeze'. *The Malay Mail*. 24 July 2015. Retrieved from: https://www.malaymail.com/s/939209/the-edge-daily-and-weekly-suspended-three-months-over-1mdb-reports/

[5] 'Press Release: Section 233(1) Communications and Multimedia Act 1998 creates a chilling effect on Freedom of Speech and Expression, and Should be Repealed'. *Malaysian Bar*. 21 December 2015.

10. In 2018, it was recently revealed that guarantees had been provided to pay an estimated RM38 billion worth of debts on behalf of 1Malaysia Development Bhd (1MDB), where such entity is now unable to pay its debts[6]. This confirmation by the administration in 2018 shows that legal mechanisms have indeed curbed a healthy public discourse and investigations into the use of government funds vis-à-vis 1Malaysia Development Bhd. (1MDB).

III. Solutions

11. The then-Finance Minister in 2018 had stated that the government would "…carry out its administration based on the principles of competency, accountability and transparency ('CAT')", when he had announced Malaysia's debts amounted to RM1.087 trillion, wherein debts of 1MDB was stated to be a contributor[7].

12. A comprehensive Freedom to Information regime is ideal in implementing the principles of CAT in the federal level. The Malaysian Bar shares similar views as stated in its Press Statement dated 15th July 2010[8].

13. A Federal Act providing for Freedom to Information should be enacted to entrench this regime in Malaysia. Both the Penang and Selangor Enactments should be repealed to allow for a generic and uniformed approach should a federal act be enacted.

14. The Federal Act should provide for the following, amongst others:

    14.1 A guarantee that any citizen of Malaysia has the right to information held by the government, ie, maximum disclosure. Exemptions from disclosure must be listed specifically in the Act. The wide and all embracing definition of what amounts to "Official Secrets" in Section 2 of the Official Secrets Act 1972 should be narrowed[9]. Section 2A of this Act should be repealed altogether as a minister cannot have unfettered discretion to make law by classifying certain classes of

[6] The Star Online: 'Malaysia's debts and liabilities soar past trillion ringgit mark'. *The Star Online*. 25 May 2018. Retrieved from: https://www.thestar.com.my/news/nation/2018/05/22/guan-eng-confirms-national-debt-more-than-rm1-trillion/
[7] *Ibid.*
[8] Bar Council Press Statement on Freedom of Information: Recognise greater freedom of the people through wider freedom of information, 15 July 2010.
[9] Memorandum on the Official Secrets (Amendment) Bill 1986 submitted by the Bar Council on behalf of the Malaysian Bar, dated 6th November 1986.

information as being "Official Secrets". The making of laws should be left to Parliament;

14.2 Mandatory mechanisms to be established in each government department, be it state or federal, so as to provide information to the public;

14.3 Statutory duty of all government officers to provide requested information. Failure to provide the requested information within a certain dateline will cause the relevant officers to be subjected to disciplinary proceedings as akin to any employment misconducted. Penal penalties may be imposed upon such errant officers if in the event the forseeable monetary losses or physical harm to the public crosses statutory mandatory thresholds. The test for such forseeability may be adopted from the test for tortious negligence;[10]

14.4 An Information Commission to be established in the Act. Information Commissioners must be appointed independently by Parliament and is answerable only to Parliament. Such Commissioners are appointed to decide whether such requests or withholding of information is according to the act;

14.5 Information Commissioners' duties to be broad and to include powers and authority, amongst others, to implement provisions of the Act and to conduct checks and audits on all government departments;

14.6 Data Protection Commissioners and Information Commissioners should be autonomous and housed under a single Information Commission to promote, set into place and protect information rights,[11]with improved coordination, crossed implementation and synchronization of information and digital rights. Therefore, the Date Protection Act 2010 is to be amended to include personal data collected by all government agencies.

IV. Conclusion

15. A Freedom to Information regime in Malaysia should be implemented on an urgent basis. Openness and transparency in governance is a mark of a developed nation.

[10] Federal Court in Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong [2016] 6 MLJ 413, 11 October 2016, at paragraphs 35 and 36 of its judgement noted that a duty of care arises in regard to the discharge of duties by public officers in government departments.

[11] Information Commissioner's Office in the United Kingdom (https://ico.org.uk/).

Legal and Institutional Reforms for Strengthening Environmental Governance and Upholding Environmental Justice

Executive Summary

Position of the Bar:

We would like to propose for –

I. an amendment to the Federal Constitution to recognise every person's right to a safe, clean, healthy and sustainable environment; and

II. 3 specific reforms to strengthen Malaysia's environmental governance via the civil justice system:

A. developing specific civil procedure rules for environmental proceedings;

B. enhancing the Environmental Courts; and

C. developing a policy for environmental justice.

I. Constitutional Amendment

Introduction

1. We propose for an amendment to the Federal Constitution to recognise every person's fundamental right to a safe, clean, healthy and sustainable environment.
2. Against the intense exploitation of our natural resources and the triple planetary crisis (climate change, biodiversity and pollution) confronting us and future generations, our body of laws have not been keeping up with the ecological pressure we put on our environment.
3. On 26 July 2022, the United Nations General Assembly passed a historic resolution declaring access to a clean, healthy and sustainable environment a universal human right.

Problem

4. There is no explicit legal recognition of the right to a clean and healthy environment.
5. Article 5(1) of the Federal Constitution enshrines every person's right to life. Our judiciary have on various occasions stated that this extends to a person's right to an

environment that sustains life. However, there are also various occasions when the judiciary has declined to give Article 5(1) this broader interpretation.

6. With no express constitutional provision that recognises a person's right to a safe, clean, healthy and sustainable environment, there is no legal obligation on the part of decision-makers in the public sector or private sector to take into account environmental or sustainability factors, unless expressly required to do so under specific legislations.

Solution

7. We propose to amend the Federal Constitution to recognise every person's right to a safe, clean, healthy and sustainable environment as part of our fundamental liberty in Article 5(1).
8. This will elevate this right to its rightful place of a constitutional right (instead of merely in the realm of discretion).

II. Strengthening Environmental Governance via Reforms of the Civil Justice System

Introduction

9. Broadly, environmental governance falls under the mandate of the Department of Environment ("DOE"). The DOE implements the Environmental Quality Act 1974 ("EQA"). It is tasked with receiving complaints of offences under the EQA and carries out investigations. Successful investigations are then referred for prosecution before the criminal courts.
10. The DOE is also empowered to initiate civil claims against polluters. However, this has been unheard of. This is very likely due to the DOE's lack of capacity.
11. If one were to search across the Malaysian law reports, civil environmental cases are few and far between. As such, one could surmise that Malaysians have thus far relied on the government to protect their interests and hold polluters to account through criminal law. Another deduction that could be drawn is that it is difficult for those who have been adversely affected to have access to justice.
12. The criminal justice system is important for punishing and deterring criminal behaviour. The civil justice system is important for compensatory and restorative justice, ensuring that those who pollute pay proportionately to the scale of the harm

they have caused. This extends to actions that are not only criminal but also careless (via the law of torts, nuisance and others).

13. The under-utilisation of the civil justice system is a systemic gap in upholding environmental justice. As a nation, our reliance mainly on the DOE to use only the criminal justice system for environmental governance results in a serious bottle neck to the Rule of Law.

14. To enhance the role of the civil justice system, we propose 3 specific reforms as follows.

A. Developing Civil Procedure Rules for Environmental Proceedings

Introduction

15. There are no dedicated rules of civil procedure, or rules of court, for proceedings that concern environmental harm.

Problems

16. Litigants in environmental cases often have their *locus standi* challenged. They may not have suffered special harm, or they may be future generations.

17. Sometimes environmental cases are brought pre-emptively, before actual harm is caused:

    (a) as such, they need to be determined urgently;

    (b) the assessment of the potential harm can be difficult to establish and/or demonstrate without extensive expert evidence;

    (c) sometimes, the scientific community's views on the nature, likelihood and extent of harm may be inconsistent;

    (d) sometimes, there may not be any evidence at all that an activity that will have some impact on the environment will adversely impact the quality of the environment or human health.

18. Although most environmental cases are filed in the interest of the public, these invariably have to be brought in the names of individual litigants. These individuals are personally exposed to potentially very high costs in the event they fail.

19. Where environmental cases are brought against large industry players, these players often have the resources to commence various strategic lawsuits against public

participation (SLAPP). These lawsuits are filed not to ventilate genuine concerns, but to intimidate, wear out and distract the litigants who brought the environmental cases.

Solution

20. We call for the urgent development of rules of civil proceeding specifically for environmental proceedings.

21. The judiciary had initiated this as a new order (Order 70A) in the Rules of Court 2012. Unfortunately, this did not continue to completion. We propose for the Rules Committee to immediately resume efforts in developing these rules.

22. Among others, we propose the following –

    a) Research and adopt innovative decisions on locus standi in foreign jurisdictions.

    b) Guided by the precautionary principle (that was expressed in the 1992 Rio Declaration), to develop court rules to provide that if there is strong suspicion that a certain activity may have environmentally harmful consequences, it is better to control that activity now rather than to wait for incontrovertible scientific evidence. That the balance of convenience be shifted accordingly in this regard, where pre-emptive remedies are sought.

    c) Where strategic lawsuits against public participation are involved, to transfer them to the environmental court before which the environmental case concerned is heard, to be determined by the same judge.

    d) No costs to be awarded against unsuccessful litigants who have commenced environmental cases in the interests of the public.

B. Enhancing the Environmental Courts

Introduction

23. The Chief Registrar's Practice Direction No. 3 of 2012 has established the criminal Environmental Courts to hear criminal cases arising from a list of statutes that have been identified as being related to the environment.

24. Practice Direction No. 7 of 2015 has established the civil Environmental Courts to hear civil disputes that involve:

    (a) claims for compensation arising from damage or destruction of property caused by actions that cause damage to the environment;

(b) claims for compensation arising from personal injury caused by actions that cause damage to the environment; and

(c) disturbances or restrictions that are inconsistent with one's right to use or the enjoyment of his land or nuisance that is caused by noise, water or air pollution or vibrations.

II. Problem

25. The establishment of the civil and criminal Environmental Courts are mainly in terms of the administrative allocation of cases. While we understand that the judges presiding in these courts undergo extra training, these courts are not specialised courts.

26. These courts have the same jurisdiction and powers as conventional courts. They are therefore restricted only to conventional remedies.

27. The same rules of civil and criminal procedure apply. Environmental cases often present their own challenges (eg. issues of locus standi, challenges in establishing causation and heavy reliance on expert evidence) that are significantly different from conventional cases.

III. Solution

28. We propose for the expansion of the jurisdiction and powers of the criminal and civil Environmental Courts.

29. Judges presiding over the criminal and civil Environmental Courts should be suitably qualified, with the knowledge and aptitude for hearing environmental disputes.

30. Provide effective training and capacity-building for judges and judicial officers on the concepts, principles and issues relating to environmental justice. These should keep up with the constantly developing bodies of scientific knowledge, business best practices and societal expectations.

C. Developing a Policy for Environmental Justice

Introduction

31. Environmental justice relates to the fair distribution of environmental benefits and burdens.

32. Legal systems are concerned with upholding justice in a given society. As Malaysia matures and develops, and as scientific knowledge about the impact of human

activities on our natural environment become more established, it is important that our legal system focusses on a fair distribution of environmental benefits and burdens among the various members of society.

33. As the judiciary forms the core of the legal system, there ought to be a policy document on environmental justice to guide the interpretation and application of the law.

Problem

34. Concepts, principles and issues relating to environmental justice are not yet common knowledge. Unlike the concepts, principles and issues relating to, say, human rights, these are relatively new bodies of knowledge.

35. Compounding the lack of knowledge is the presence of legacy notions, namely that natural resources are free goods to be exploited. Our system, premised upon an exploitative approach to development, leave little room for concepts of stewardship over the environment. Most people espouse these notions intuitively, including judges and others involved in the administration of justice.

36. These gaps in awareness and knowledge concerning concepts, principles and issues relating to environmental justice, as well as the lack of an official policy position, will lead to inconsistency, and worse, serious injustices.

Solution

37. We propose that the Judiciary, in collaboration with all relevant stakeholders and experts (the legal profession, the Attorney General's Chambers, academics, representatives from government and industry, civil society organisations and communities living in vulnerable locations), develop a Policy for Environmental Justice.

38. The Policy for Environmental Justice should at least be consistent with international standards, principles and practices for upholding environmental justice. At the same time, it should take into account Malaysia's unique circumstances and the plurality of its legal system, particularly native customary laws.

39. The Policy for Environmental Justice should acknowledge and recognise that every person's right to a healthy environment is a fundamental right, and a constitutional right. Ouster clauses that prevent judicial review for better enforcement and more effective punishment for offences against the environment ought not be upheld.

40. The Policy for Environmental Justice should, among others, contain:

(a) guiding values and principles (eg. the United Nations Sustainable Development Goals, the United Nations Guiding Principles on Business & Human Rights);

(b) references to relevant international laws, treaties, conventions, etc. (eg. the United Nations Framework Convention on Climate Change, the Universal Declaration of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples);

(c) the express recognition that conventional legal concepts, principles and remedies (at least where applied conventionally) may not be adequate or effective in upholding environmental justice in every case. The Policy for Environmental Justice should encourage judges to refer to developments in other jurisdictions;

(d) emphasis on improving access to environmental justice by all segments of society; and

(e) emphasis on providing suitable continuous training and capacity-building for judges and judicial officers on the concepts, principles and issues relating to environmental justice.

Amendments to the Legal Profession Act 1976

Executive Summary

Position of the Bar:

The Malaysian Bar intends to revamp and modernise the Legal Profession Act 1976 with a view to make it relevant to the members and the legal profession.

In order to meet the needs and challenges of the 21st century in the delivery of legal services, a regulatory framework for the legal profession that is adequate and responsive is necessary to support its continued growth in Peninsular Malaysia, and to achieve these aims.

Thus, since 2019, the Bar Council has been working closely with the Attorney General and the Attorney General's Chambers ("AGC") on this matter. Most recently, on 6 July 2021, we submitted proposed amendments to the Legal Profession Act 1976 ("LPA 1976") particularly with regard to the following: (i) Limited Liability Law Partnerships; (ii) Bar Council Legal Aid Centre; (iii) amendments to section 77; and (iv) amendments to sections 11, 15 and 36 regarding pupillage ("BC Proposed Amendment Bill"), and have had several feedback sessions with the AGC in order to finalise the wordings of the BC Proposed Amendment Bill as well as the Cabinet Memorandum.

I. LIMITED LIABILITY LAW PARTNERSHIPS

1. While the Limited Liability Partnerships Act 2012 ("LLP Act 2012") has introduced the concept of limited liability partnerships, the LPA 1976 only contemplates advocates and solicitors practising through sole proprietorships and conventional partnerships, and thus requires necessary legislative amendments to the LPA 1976 in order for members of the Bar to be able to practice as limited liability law partnerships.

2. In 2015/2016, the Bar Council had submitted proposed amendments to the LPA 1976 for this purpose to the AGC for review and approval, with several meetings being held with the AGC thereafter to finalise the proposal. Since then, the Bar Council has continued to advocate and work together with the AGC for the

proposed amendments relating to limited liability law partnerships (along with other proposed amendments to the LPA 1976) to be finalised and tabled in Parliament at the soonest opportunity.

3. Whilst other professions are able to harness the advantages of a limited liability partnership model to their practice, the legal profession is still unable to embrace the same.

4. Furthermore, given the increasing pace of globalisation and multi-jurisdictional work and opportunities, all of which have an impact on the delivery of legal services, it is vital that members of the Bar are given the institutional support to be able to thrive and compete on not just a local level, but to be on par with, and to meet, international needs and expectations.

5. Being able to benefit from the LLP Act 2012 and having the option of setting up a Limited Liability Law Partnership, will provide advocates and solicitors with greater flexibility in the way they carry out their practice, and in enhancing the overall delivery of legal services to members of the public.

II. BAR COUNCIL LEGAL AID CENTRE

6. The Bar Council currently administers 15 Legal Aid Centres across Peninsular Malaysia, with at least one in each State, operated by the respective State Bar Committee.

7. In the BC Proposed Amendment Bill, we seek to include an entire new Part into the LPA 1976 in order to establish a Bar Council Legal Aid Centre. The provisions, among others, provides for the Centre's functions as well as the process for issuance of Legal Aid Certificates to recipients who will be known as 'aided persons'.

8. Placing the existing Legal Aid scheme on statutory footing strengthens the Bar's mandate to act in the public interest, as envisioned under paragraphs 42(1)*(g)* and *(h)* of the LPA 1976, where the purposes of the Malaysian Bar are "to protect and assist the public in all matters touching ancillary or incidental to the law" and "to

make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented by advocates and solicitors".

9. The existence of the Bar Council Legal Aid Centre, with a principal office, would promote the streamlining and consistency of operations, generating efficiencies across all Legal Aid Centres in the different States.

III. AMENDMENTS TO SECTION 77(1)

10. Section 77(1) of the LPA 1976 currently empowers the Bar Council to make rules, with the approval of the Attorney General, for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

11. In the performance of our regulatory functions, the Bar Council has found it necessary that other areas concerning the legal profession also require the forming and passing of rules, in order to assist Members.

12. Thus, we have proposed that section 77(1) be widened to the effect that the Bar Council, with the approval of the Attorney General, may also make rules relating to: fees, salaries, allowances and working conditions of advocates and solicitors and pupils, as well as regarding admission.

Fees

13. With the view to enhance access by a much wider, if not, all members of the public to legal representation, the Bar Council has in principle approved that conditional fee arrangements be allowed. The rationale is that if the rule of law should be the order of the day in a civilised society, there should be meaningful and easy access to legal representation.

14. Currently in Malaysia, a hybrid form of conditional fee arrangement has been endorsed and approved by the Courts. The hybrid form requires the party seeking a conditional fee arrangement to pay a fixed retainer and a sum based upon a percentage of a sum upon success of the claim or defence. What is success or partial success as the case may be is to be agreed upon between the advocate and solicitor and client prior to entering into the arrangement.

15. Besides the United States of America, a number of Commonwealth jurisdictions such as Canada, England and Wales, Hong Kong, New Zealand, New South Wales of Australia and Western Australia, Lithuania and South Africa have allowed and have been practising conditional fees arrangements. In this manner, it would be useful to bring Malaysia in line with other Commonwealth jurisdictions.

16. Thus, the Bar Council has been working on proposed rules regarding conditional fees for both personal injury and non-personal injury, and had submitted our proposals to AGC in 2019 and 2020, respectively. This will provide statutory sanction to such an arrangement instead of merely relying upon case law.

17. AGC has since provided their recommendation for amendments to be made to section 77(1) of the LPA 1976 to include that rules may be made in regard to "fees".

<u>Salaries, allowances and working conditions of advocates and solicitors and pupils</u>

18. In 2020/2021, the Bar Council conducted a series of surveys, the 'National Survey on Minimum Salary of Young Lawyers' and State-level surveys, with the objective of gaining a better understanding of the perspectives and financial challenges faced by young members of the Bar. The results of the surveys were concerning to the Bar Council as it indicated that the following issues have arisen in some instances:

(a) unfairly low allowance or wage;
(b) lack of compensation for overtime work in cases of low remuneration;
(c) non-reimbursement (or delayed reimbursement) of expenses incurred for work-related travel; and
(d) absence of appointment / employment letters for junior lawyers.

(collectively, "working conditions")

19. Concerns have continued to be raised regarding such working conditions and related aspects. The Bar Council is committed, and is seeking to address these

issues and improve employment conditions with a view to instituting more equitable arrangements and best practices for all concerned.

20. In this manner, the proposed amendment to section 77(1) will empower the Bar Council, with the approval of the Attorney General, to make rules regarding these matters.

IV. AMENDMENTS TO SECTIONS 11, 15 AND 36

21. Our proposed amendments to sections 11(1) and 15(3) of the LPA 1976 are to bring in line current practices regarding an aspect of pupillage to a statutory basis. These amendments seek to make the order obtained by a pupil under section 36(2) (colloquially referred to as the *"short-call order"*), a requirement for admission as an advocate and solicitor of the High Court.

22. We are also proposing amendments to section 36(2) regarding the *short-call order* to the effect that, at the expiration of three months from the date of the *short-call order*, the pupil may appear in chambers in the High Court and in the subordinate courts, to conduct any cause or matter, as well as before any Magistrate to conduct any cause, matter or trial.

23. As future lawyers, exposure to the functions and workings of the Court system provides valuable experience for pupils, enabling them to acquire familiarity with Court processes and to practise and improve advocacy skills, amongst others.

CONCLUSION

24. The above are the areas which require immediate amendments to the LPA 1976.

*(See, Annexure: BC Proposed Amendment Bill (draft dated 29.6.2021)***)**

25. Over the course of our engagements with the AGC since 2019, the Malaysian Bar has other areas under consideration for amendments to the LPA 1976 which we hope to be able to bring to fruition. However, due to the pressing need in particular, for our Members to be able to practise via a Limited Liability

Partnership model, we hope that the current amendments as proposed will be able to be tabled in Parliament at the earliest opportunity.

26. The Malaysian Bar also reiterates our position that the management and functions of the Bar and legal profession as a whole must remain, at all times, independent. The following areas are highlighted wherein the Malaysian Bar categorically objects:

- Interference in elections, voting procedures and composition of the Bar Council members;
- Academia to be allowed to practice law;
- Re-assessment of client's account management to be held by Amanah Raya Berhad;
- Establishment of Inns of Court Malaysia by statute.

A BILL

intituled

An Act to amend the Legal Profession Act 1976.

[ ]

ENACTED by the Parliament of Malaysia as follows:

Short title and commencement

1. (1) This Act may be cited as the Legal Profession (Amendment) Act 2021.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette* and the Minister may appoint different dates for the coming into operation of different provisions of this Act.

Amendment of section 3

2. The Legal Profession Act 1976 [Act 166], which is referred to as the "principal Act" in this Act, is amended in section 3 by inserting after the definition of "legal officer" the following definitions:

"limited liability law partnership" means a limited liability partnership approved under section 40R and registered in accordance with the requirements of that section;

"limited liability partnership" means a limited liability partnership registered under the Limited Liability Partnerships Act 2012 [Act 743], and includes a limited liability partnership registered on conversion of a conventional partnership under section 32 of the Limited Liability Partnerships Act 2012, but does not include a foreign limited liability partnership registered under section 45 of the Limited Liability Partnerships Act 2012;"

Amendment of section 11

3. Subsection 11(1) of the principal Act is amended —

(a) in paragraph *(d)*, by substituting for the full stop at the end of the paragraph a semi colon and inserting the word "and"; and

(b) by inserting after paragraph *(d)* the following paragraph:

"*(e)* has obtained the order under subsection 36(2)."

Amendment of section 15

4. Subsection 15(3) of the principal Act is amended —

(a) in paragraph *(f)*, by deleting the word "and" at the end of the paragraph;

(b) in paragraph *(g)*, by substituting for the full stop at the end of the paragraph a semi colon and inserting the word "and"; and

(c) by inserting after paragraph *(g)* the following paragraph:

"*(h)* a true copy of the order obtained under subsection 36(2)."

Amendment of section 30

5. Subsection 30(1) of the principal Act is amended—

(a) in paragraph (a), by substituting for the words "on his own account or in partnership" the words "on his own account, in partnership or in limited liability law partnership"; and

(b) in paragraph (b), by substituting for the words "or a firm of advocates and solicitors" the words ", a firm of advocates and solicitors or a limited liability law partnership".

Amendment of section 36

6. Section 36 of the principal Act is amended by substituting for subsection (2) the following subsections —

"(2) A Judge may, upon application made in chambers by a master within thirty days from the commencement of the pupillage, make an order that the pupil in chambers be permitted to appear on behalf of the master or of the firm or the limited liability law partnership in which the master is practising.

(2A) Any application under subsection (2) after the expiry of thirty days from the commencement of the pupillage of the master's pupil in chambers shall require the leave of court.

(2B) The order made under subsection (2) permits the pupil in chambers, within the period of three months from the date of the order, to appear before a Judge or a Registrar of the High Court in chambers, a Sessions Court Judge or a Magistrate in chambers, or before a Registrar of the Subordinate Courts to—

(a) mention a case, including entering judgment in default;

(b) apply for bail; or

(c) take a consent judgment or order.

(2C) At the expiration of the period of three months from the date of the order under subsection (2), the pupil in chambers may appear—

(a) in chambers in the High Court and in the subordinate courts to conduct any cause or matter; and

(b) before any Magistrate to conduct any cause, matter or trial,

including to represent an arrested person in a remand proceeding or make a plea in mitigation on behalf of an accused when participating in any programme established or recognised by the Bar Council."

Amendment of section 40F

7. Subsection 40F(1) of the principal Act is amended by inserting after the words "a Malaysian law firm may apply jointly" the words "or by means of a limited liability partnership formed pursuant to an arrangement between such foreign law firm and Malaysian law firm".

Amendment of section 40O

8. Section 40O of the principal Act is amended by inserting after paragraph (h) the following paragraph:

"*(ha)* the manner and means by which a limited liability partnership may be formed for the purposes of an international partnership".

New Part IVB

9. The principal Act is amended by inserting after section 40O the following Part:

"Part IVB

LIMITED LIABILITY LAW PARTNERSHIPS

"**Interpretation**

40P. In this Part, unless the context otherwise requires—

"compliance officer" means a compliance officer appointed under section 27 of the Limited Liability Partnerships Act 2012;

"limited liability partnership agreement" has the meaning assigned to it in the Limited Liability Partnerships Act 2012;

"Registrar" has the meaning assigned to it in the Limited Liability Partnerships Act 2012.

Application for approval to form limited liability law partnerships, *etc.*

40Q. Advocates and solicitors who wish to form a limited liability law partnership or to convert an existing firm into a limited liability law partnership for the purpose of carrying on the practice of advocates and solicitors shall apply to the Bar Council for approval of—

(a) the proposed limited liability law partnership;

(b) the conversion of an existing firm into a proposed limited liability law partnership, if applicable; and

(c) the proposed name of the limited liability law partnership.

Approval for formation of or conversion into limited liability law partnership

40R. (1) Upon receipt of the application under section 40Q, the Bar Council may approve the formation of a limited liability law partnership or the conversion of an existing firm into a limited liability law partnership.

(2) A firm approved by the Bar Council to be a limited liability law partnership shall not be recognized or deemed to be a limited liability law partnership until the firm is registered under the Limited Liability Partnerships Act 2012 as a limited liability partnership and its name is entered into the register under subsection 40ZB(2).

Approval for name of limited liability law partnership

40S. (1) In the case of a conversion from an existing firm into a limited liability law partnership, the Bar Council may approve the proposed name of a limited liability law partnership if—

(a) the name is the same name as that of the existing firm ending with the words as required under subsection 13(1) of the Limited Liability Partnerships Act 2012; and

(b) the name is not likely to be confused with the name of an existing limited liability law partnership or firm.

(2) In the case of—

(a) the formation of a new limited liability law partnership not through conversion;

(b) change in the name of an existing limited liability law partnership;

the Bar Council may approve the proposed name of a limited liability law partnership if it is—

(i) not misleading, or it is compatible with the dignity of the legal profession; and

(ii) not likely to be confused with the name of an existing limited liability law partnership or firm.

(3) No name of a limited liability law partnership may be changed without the prior approval in writing of the Bar Council

Rights and obligations of limited liability law partnership

40T. (1) A limited liability law partnership may do anything that an advocate and solicitor may do by law and shall do all things that an advocate and solicitor is required to do by law.

(2) Notwithstanding subsection (1), a limited liability law partnership shall not do anything that may only be done by an advocate and solicitor as a natural person.

Effect of conversion into limited liability law partnership

40U. Without prejudice to section 33 of the Limited Liability Partnership Act 2012, upon conversion of a firm into a limited liability law partnership—

(a) all persons who have engaged or are engaging such firm in connection with its practice of advocates and solicitors shall be deemed to be persons who have engaged or are engaging such limited liability law partnership in connection with its practice of advocates and solicitors without the need for the consent of or notification to any person

making such engagement or any other person and without further assurance, act or deed;

(b) all assets and property held by such firm, either alone or jointly with any other person, for or in connection with its practice of advocates and solicitors, whether for any such person or otherwise, shall vest in such limited liability law partnership subject to such trusts or other arrangements as had applied to such firm;

(c) all documents, records, goods or things held by or for, or in the possession of, such firm shall be deemed to be held by or for, or in the possession of, such limited liability law partnership;

(d) any lien or other security held by such firm, either alone or jointly with any other person for its own benefit or as a nominee or trustee, shall be deemed to be held by the limited liability law partnership;

(e) any subsisting undertaking, consent, power of attorney, instruction, order, mandate, authority or other instrument, whether by deed or otherwise, entered into by, given by or to, or made for the benefit of, such firm for or in connection with its practice of advocates and solicitors shall be deemed to be entered into by, given by or to, or made for the benefit of, such limited liability law partnership;

(f) any account between such firm and the person engaging or who had engaged such firm or otherwise for or in connection with its practice of advocates and solicitors shall be deemed to become an account between such limited liability law partnership and such person subject to the terms and conditions as had applied to such account with such firm; and

(g) any filing or correspondence or matter with or involving any registry, court, tribunal, tax or revenue body, stock exchange or any other

governmental, public or regulatory authority made by such firm or an advocate and solicitor of such firm for or in connection with its practice of advocates and solicitors shall be deemed to have been made by or with such limited liability law partnership.

Relationship between client and limited liability law partnership

40V. A limited liability law partnership shall have the rights and shall be subject to the fiduciary, confidential and ethical requirements with respect to each client of the limited liability law partnership same as the rights and the fiduciary, confidential and ethical requirements that exist at law with respect to an advocate and solicitor and his client.

Standard of conduct

40W. A partner, consultant or employee of a limited liability law partnership who is an advocate and solicitor providing services which only can be provided by an advocate and solicitor under this Act shall be subject to the same standards of conduct and competence in respect of such services as if he were personally providing such services as an advocate and solicitor in a firm.

Misconduct

40X. (1) An act or omission of an advocate and solicitor may constitute misconduct within the meaning of Part VII or be subject to disciplinary action even though it is only done or occurs while the advocate and solicitor practices as an advocate and solicitor under a limited liability law partnership.

(2) The partners of the limited liability law partnership shall be jointly liable to disciplinary proceedings under this Act for any such misconduct where such misconduct cannot be attributed to the act or omission of a particular advocate and solicitor.

(3) A partner, compliance officer or an employee of a limited liability law partnership who is an advocate and solicitor shall not—

(a) be a partner or a consultant or an employee of any qualified foreign law firm or Malaysian law firm;

(b) be a partner or a consultant or an employee of another limited liability law partnership; or

(c) practise as an advocate and solicitor on his own account.

Effect of disciplinary action

40Y. Where an advocate and solicitor has been suspended from practice or struck off the Roll pursuant to disciplinary proceedings under this Act, the advocate and solicitor shall not be involved in the management of a limited liability law partnership.

Cessation of practice of advocate and solicitor

40Z. (1) A limited liability law partnership shall not carry on the practice of an advocate and solicitor if at any time any partner of the limited liability law partnership is not a practising advocate and solicitor.

(2) If a limited liability law partnership carries on business in contravention of subsection (1)—

(a) the limited liability law partnership; and

(b) the person who is a partner during the period that the limited liability law partnership so carries on such business and is cognizant of the fact that the limited liability law partnership is carrying on business in contravention of subsection (1),

commits an offence and shall, on conviction, be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both.

Winding up of limited liability law partnership

40ZA. (1) Notwithstanding section 49 of the Limited Liability Partnership Act 2012, the High Court may, upon application by the Bar Council, order the winding up of a limited liability law partnership under the Limited Liability Partnerships Act 2012 on any of the following ground:

(a) the limited liability law partnership fails to comply with the requirements of this Act or the rules made under section 40ZF relating to a limited liability law partnership; or

(b) the practice of the limited liability law partnership has been conducted in a manner incompatible with the dignity of the legal profession.

(2) The winding-up of a limited liability law partnership under the Limited Liability Partnerships Act 2012 shall be without prejudice to—

(a) any right to institute disciplinary proceedings against an advocate and solicitor practising under the limited liability law partnership; or

(b) any right of the Bar Council or State Bar Committee to exercise any rights or powers under this Act.

Register of limited liability law partnerships

40ZB. (1) The Bar Council shall—

(a) keep and maintain a register of limited liability law partnerships approved under section 40R in such form and manner as the Bar Council thinks fit and have custody of the register and all documents relating to it; and

(b) allow any person to inspect the register referred to in paragraph *(a)* in such manner as the Bar Council thinks fit.

(2) The Bar Council shall enter the name of a limited liability law partnership approved under section 40R in the register.

(3) The Bar Council shall remove from or strike off the register the name of a limited liability law partnership which has ceased carrying on the practice of an advocate and solicitor or which has been wound-up.

(4) Notwithstanding the removal from or striking off the register, the Bar Council may restore the name of a limited liability law partnership to the register for the purpose of enabling the Bar Council or any State Bar Committee or any other person to exercise any rights or powers in relation to such limited liability law partnership under this Act for or in connection with—

(a) professional practice, etiquette, conduct, discipline or disciplinary proceedings under Parts VI and VII;

(b) the protection of clients or former clients of the limited liability law partnership; or

(c) the rights and powers under section 119.

Right of appeal against decision of Bar Council

40ZC. (1) Any person who is aggrieved by a decision of the Bar Council under section 40R or 40S may appeal to the High Court.

(2) The person making an appeal under subsection (1) shall comply with the rules made under section 40ZF.

(3) On the hearing of an appeal under this section, the High Court may—

(a) affirm the decision of the Bar Council; or

(b) direct the Bar Council to approve the application made under section 40Q, with or without conditions as specified by the High Court.

This Part to prevail over inconsistent provisions of limited liability partnership agreement

40ZD. This Part and any rules made under section 40ZF shall prevail over any inconsistent provision of any limited liability partnership agreement.

Application of Limited Liability Partnerships Act 2012 and other written law to limited liability law partnership

40ZE. (1) The provisions of this Part and the rules made under section 40ZF shall be read together with the provisions of the Limited Liability Partnerships Act 2012.

(2) In the case of any conflict or inconsistency between any provision of the Limited Liability Partnerships Act 2012 and any provision of this Part, the provision of this Part shall prevail.

Rules on limited liability law partnership

40ZF. (1) The Bar Council may, with the approval of the Attorney General, make rules for the purposes of this Part.

(2) Without prejudice to the generality of subsection (1), the rules made under subsection (1) may provide for—

(a) matters relating to the name of a limited liability law partnership;

(b) restrictions to be imposed on persons or classes of persons who are the partners or compliance officers of a limited liability law partnership;

(c) the payment of fees on applications made under this Part or any rules made under this Part;

(d) the keeping of accounts by a limited liability law partnership; and

(e) the nature and content of official correspondence, documents and publications issued by a limited liability law partnership."

New Part VA

10. The principal Act is amended by inserting after section 76 the following Part:

"Part VA

BAR COUNCIL LEGAL AID CENTRE

"**Interpretation**

76A. In this Part, unless the context otherwise requires—

"legal aid" means the legal services provided by the Centre to an aided person, including representing the aided person in any proceedings;

"aided person" means a person who receives legal aid under this Part;

"Director" means the Director of the Legal Aid Centre appointed under section 76F;

"guardian" in relation to a child, includes any person who, in the opinion of the Director is properly appointed as the next friend or guardian *ad litem* of the child;

"Legal Aid Certificate" means a certificate filed in court under section 76G;

"Centre" means the Bar Council Legal Aid Centre under section 76B;

"Means Test" means a test, approved by the Bar Council, that a person must satisfy in order to be eligible for legal aid.

Bar Council Legal Aid Centre

76B. (1) The Bar Council shall administer a centre known as the "Bar Council Legal Aid Centre" with one or more branches in each State.

(2) The Centre shall be responsible to the Bar Council, and the Bar Council may give directions to the Centre for the purposes of carrying out the functions in section 76C.

Functions of the Centre

76C. (1) The functions of the Centre shall be to—

(a) provide legal aid to aided persons who satisfy the Means Test;

(b) promote legal literacy in a manner determined and approved by the Bar Council;

(c) assist the public in all matters in relation to justice;

(d) engage the service of members of the Malaysian Bar in the performance of its functions;

(e) establish any branch throughout Malaysia in co-operation with the relevant State Bar Committee;

(f) maintain a client account for any aided person, in accordance with any rules made pursuant to section 78;

(g) carry on any activity that is relevant to, or in connection with, the performance of its functions;

(h) receive, in consideration of the services rendered by it, any fee or disbursement or contribution from the aided person, or such payment of costs as may be awarded to the aided person, in accordance with the rules made by the Bar Council; and

(i) establish committee and sub-committee as it may deem necessary for the performance of its functions.

(2) Notwithstanding paragraph (1)*(a)*, the Bar Council may, in special circumstances, direct the Centre to provide legal aid to any person, including any entity, that does not satisfy the Means Test.

Principal office of the Centre

76D. The principal office of the Centre shall be situated in such place as may be determined by the Bar Council.

Branches of the Centre

76E. (1) Where the Centre establishes a branch in any state outside its principal office, such branch shall be managed and administered by the Centre, with the assistance of the relevant State Bar Committee.

(2) The Bar Council shall delegate its power, as it may deem necessary, to the relevant State Bar Committee for the purpose of administration of the branch of the Centre.

(3) Any branch of the Centre shall also be answerable to the relevant State Bar Committee.

Appointment of Director and staff of the Centre

76F. (1) The Bar Council may employ and remunerate any advocate and solicitor or any person deemed qualified and suitable to be the Director who shall be responsible for—

(a) the day-to-day management and administration of the Centre and its activities;

(b) the preparation of programmes and projects in the performance of the Centre's functions for the consideration and approval of the Bar Council; and

(c) performing all directions of the Bar Council.

(2) The Bar Council may employ and remunerate any person deemed qualified and suitable to be a staff of the Centre to assist the Director in the performance of the duties under this Part and to assist the aided person.

Legal Aid Certificate

76G. (1) Where the Centre represents an aided person in any proceedings, the Centre shall file a Legal Aid Certificate in Form 1 of the Second Schedule, in the registry of the court in which the proceedings are pending or are to be taken.

(2) No court fee shall be charged for the filing of the Legal Aid Certificate.

Aided person not liable to pay costs

76H. (1) Where any Legal Aid Certificate is filed, the aided person shall not, except where expressly provided under this Act, be liable for costs to any other party in any proceeding to which the Legal Aid Certificate relates.

(2) Subject to the provisions of this Act, any person who conducts any investigation and prepares or publishes any report, gives any opinion, or conducts any proceeding, shall not take or seek, or agree to take or seek any fee, profit or reward including pecuniary or otherwise from the aided person.

False statement by aided person

76I. Any person who seeks legal aid or advice as an aided person, and furnishes information in his application, knowing it to be a false statement or representation commits an offence, and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to an imprisonment for a term not exceeding one month, or to both.

Legal aid obtained through fraud

76J. (1) Where it appears to the Centre that the legal aid was obtained by any person through fraud or misrepresentation, the Centre shall cancel the Legal Aid Certificate and discharge itself from further acting for that person.

(2) For the purpose of subsection (1), the Centre shall be entitled to reimbursement of all sums paid, and all legal fees for work done for that person.

(3) Where the Centre cancels the Legal Aid Certificate, the Centre shall file a notification of the cancellation of Legal Aid Certificate in Form 2 of the Second Schedule in court and serve the notification to the other parties.

(4) No court fee shall be charged for the filing of the notification of the cancellation of Legal Aid Certificate.

(5) Upon filing of the notification under subsection (3)—

(a) the Centre shall cease to represent that person; and

(b) all proceedings shall be stayed for a period of fourteen days.

(6) The period of stay of proceedings under paragraph (5)*(b)* may be reduced or extended by order of the court in which the proceedings is pending.

(7) The court may, in the course of or at the conclusion of any proceedings, order any person who has obtained legal aid by fraud or misrepresentation, to pay the costs of the Centre, or the costs of the other party, or the costs of both the Centre and the other party.

(8) The costs of the Centre under subsection (7) shall, unless otherwise directed by the court, be paid to the Centre and shall include—

(a) any appropriate fee and charge for work done; and

(b) any expenses incurred by the Centre.

Memorandum of Notification

76K. (1) When a party makes an application for legal aid, the Centre shall, as soon as practicable notify any other party and file a Memorandum of Notification in Form 3 of the Second Schedule in the court in which the proceeding has been instituted.

(2) No court fee shall be charged for the filing of the Memorandum of Notification.

(3) Where a Memorandum of Notification is filed under subsection (1), all proceedings shall be stayed for a period not exceeding twenty one days for enquiries to be made by the Centre on the applicant's eligibility for legal aid and for the applicant to accept the Centre's terms before the issuance of a Legal Aid Certificate.

(4) Notwithstanding subsection (3), the filing of the Memorandum of Notification shall not affect the following:

(a) an interlocutory order for an injunction, or for the appointment of a receiver or manager;

(b) an order to prevent the lapse of a caveat against dealings with land;

(c) any other order which, in the opinion of the court in which the proceedings is pending, is necessary to prevent an irremediable injustice;

(d) unless otherwise ordered by the court in which the proceedings is pending, the institution or continuance of proceedings to obtain, enforce or otherwise carry into effect, any such order as is mentioned in paragraph *(a), (b)* or *(c)* or a decree to that effect.

(5) The period of stay of proceedings under subsection (3) may be reduced or extended, by order of the court in which the proceedings is pending.

Report on activities of the Centre and annual audit of accounts

76L. (1) The Centre shall furnish the Bar Council with such report, audited accounts and other information with respect to its activities as the Bar Council may require.

(2) An annual audit of the Centre's accounts shall be conducted by the Bar Council's auditors, and shall be presented together with the Bar Council's accounts, at the annual general meeting of the Malaysian Bar.

Bar Council may make rules

76M. (1) The Bar Council may, with the approval of the Attorney General, make rules as are necessary or expedient for the purpose of carrying into effect the provisions of this Part.

(2) Without prejudice to the generality of subsection (1), any rules made by the Bar Council may provide for any or all of the following:

(a) any fee, charge and costs in relation to any proceeding to which an aided person is a party;

(b) the recovery of any sum due in respect of legal aid, or for the enforcement of any order or agreement for costs made in favour of the aided person;

(c) any provision relating to person under section 76F;

(d) where there is a change in circumstances to the aided person; and

(e) the payment of any fee for any advocate and solicitor."

Amendment to section 77

11. ~~Section 77 of the principal Act is amended by inserting after the words "make rules for regulating the professional practice, etiquette, conduct" the words ", fees, remuneration, admission".~~ Section 77 of the principal Act is amended by substituting for subsection (1) the following subsection:

"(1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General,

make rules for regulating the advocates and solicitors and pupils on the following:

(a) professional practice, etiquette, conduct and discipline;

(b) fees;

(c) salaries;

(d) allowances;

(e) working conditions; and

(f) admission.".

Amendment to section 78A

12. Section 78A of the principal Act is amended—

(a) in subsection (1)—

(i) by inserting after the words "advocates and solicitors" the words "and limited liability law partnerships";

(ii) in paragraph (a), by inserting after the words "advocate and solicitor" the words "and limited liability law partnership"; and

(iii) in paragraph (c), by inserting after the words "advocates and solicitors" the words "and limited liability law partnerships";

(b) in subsection (2)—

(i) in paragraph (b), by inserting after the words "advocates and solicitors" the words "and limited liability law partnerships";

(ii) substituting for paragraph (c) the following paragraph:

"require advocates and solicitors and limited liability law partnerships to make payments by way of contributions or premiums on any indemnity or policy taken out under subsection (1) and provide for proceedings by the Malaysian Bar or its insurers against any advocate and solicitor who or limited liability law partnership which fails to do so for recovery of the appropriate contributions or premiums;

(iii) in paragraph (d), by inserting after the words "prescribe the conditions which a" the words "professional indemnity or" and inserting after the words "for the purpose of" the words "paragraph 1*(b)* or";

(iv) in paragraph (f)—

(A) by inserting after the words "advocate and solicitor" the words "or a limited liability law partnership"; and

(B) by substituting for the words “against him” the words “against the advocate and solicitor or the limited liability law partnership”;

(v) in paragraph (g)—

(A) by inserting after the words “entitled to a Sijil Annual unless he is” the words “indemnified or”; and

(B) by inserting after the paragraph the following paragraph:

“*(ga)* prescribe that a limited liability law partnership shall not be used for purposes of carrying on the practice of an advocate and solicitor unless the limited liability law partnership is indemnified or insured as required by the rules for the period as specified in such rules;”; and

(c) in subsection (3)—

(i) by inserting after the words “advocate and solicitor” the words “or limited liability law partnership”; and

(ii) by substituting for the words “to insure himself further against loss arising from such claims as may be instituted against him” the words “to insure the advocate and solicitor or the limited liability law partnership further against loss arising from such claims as may be instituted against the advocate and solicitor or the limited liability law partnership”.

~~**New sections 78B, 78C, 78D and 78E**~~

~~**13.** The principal Act is amended by inserting after section 78A the following sections:~~

"Malaysian Bar Professional Indemnity Fund

Malaysian Bar Professional Indemnity Fund

78B. (1) Notwithstanding any other written laws, there is established a fund which shall be known as the "Malaysian Bar Professional Indemnity Fund" and may be referred to as the "Fund", which shall be maintained and administered by the Malaysian Bar.

(2) Subject to the provisions of this Act, the Fund shall provide indemnity to advocates and solicitors and limited liability law partnerships against any class of professional liability as may be specified by rules made or mandatory practice standards or codes determined under section 78E.

(3) The Fund shall consist of—

(a) contributions payable by advocates and solicitors for the purposes of professional indemnity under this section and section 78C;

(b) all sums received by the Bar Council under any insurance effected under subsection (4);

(c) any other moneys which may belong or accrue to the Fund or be received by the Bar Council in respect of the Fund; and

(d) all other moneys and property which may in any manner become payable to or vested in the Bar Council in respect of any matter incidental to its functions and powers.

(4) The Bar Council may insure the Fund with any registered insurance company in Malaysia for any purpose and on any terms as the Bar Council may consider expedient.

Contribution by advocate and solicitor

78C. All practising advocates and solicitors and limited liability law partnerships shall contribute a sum to the Fund as determined by the Bar Council.

Payment out of the Fund

78D. (1) All moneys and investments of the Fund shall be expended for the following purposes:

(a) payments for claims of indemnity;

(b) payments of any costs, charges and expenses of establishing, administering, maintaining and controlling the Fund;

(c) payments of any costs, charges and expenses in promoting risk management amongst advocates and solicitors and any related activities and programmes pursuant thereto;

(d) payments of any expenses lawfully incurred by the Bar Council including fees and costs, and the remuneration of persons employed or engaged by the Bar Council;

(e) payments of any premiums on insurance effected by the Bar Council under subsection 78B(*4*);

(f) payments of any other expenses, costs or expenditure properly incurred or accepted by the Malaysian Bar, for purposes of its powers and carrying out its duties and functions;

(g) payments of any other sums payable out of the Fund by virtue of this section; and

~~*(h)* generally paying any expenses for carrying into effect the provisions of this section and in connection with the establishment, maintenance, administration and control of the Fund.~~

~~**Power to make rules, mandatory practice standards or codes in relation to the Fund**~~

~~**78E.** The Bar Council may make rules or determine the mandatory practice standards or codes for maintaining, managing, administering and controlling the Fund and in particular make rules or determine the mandatory practice standards or codes of the following:~~

~~*(a)* specify the terms and conditions on which professional indemnity is to be available;~~

~~*(b)* provide for the management, administration and protection of the Fund and require advocates and solicitors and limited liability law partnerships to make payments to the Fund;~~

~~*(c)* require advocates and solicitors and limited liability law partnerships to make contributions towards any indemnity under the Fund and provide for proceedings by the Bar Council against any advocate and solicitor who or limited liability law partnership which fails to make such contributions for recovery of the contributions;~~

~~*(d)* specify the amount of any payment required from an advocate and solicitor or limited liability law partnership;~~

~~*(e)* specify the circumstances where an advocate and solicitor or a limited liability law partnership has failed to comply with the~~

~~rules or mandatory practice standards or codes and provide for proceedings by the Bar Council against the advocate and solicitor or the limited liability law partnership in respect of any sum paid by the Bar Council by way of indemnity;~~

~~*(f)* specify that an advocate and solicitor shall not be entitled to a Sijil Annual or practising certificate unless he has contributed to the Fund as required by the rules or mandatory practice standards or codes for the period to which the Sijil Annual and Practising Certificate relates;~~

~~*(g)* specify that a limited liability law partnership shall not carry on the practice of an advocate and solicitor unless the limited liability law partnership has contributed to the Fund as required by the rules or mandatory practice standards or codes for the period as specified in such rules or mandatory practice standards or codes;~~

~~*(h)* empower the Bar Council to take such steps as it considers necessary or expedient to ascertain and ensure that the rules or mandatory practice standards or codes are complied with; and~~

~~*(i)* provide such procedure, incidental procedure or other provisions as may be necessary or expedient, for the purposes of the rules or mandatory practice standards or codes."~~

Amendment of section 80

14. Section 80 of the principal Act is amended—

(a) by substituting for subsection (8) the following subsection:

"(8) Where it is proved to the satisfaction of the Bar Council that any person has sustained loss in consequence of dishonesty on the part of—

(a) an advocate and solicitor, or any clerk or servant of an advocate and solicitor, in connection with that advocate and solicitor's practice in Malaysia as an advocate and solicitor or with any trust of which that advocate and solicitor is a trustee; or

(b) an advocate and solicitor practising under a limited liability law partnership or any clerk or servant of a limited liability law partnership, in connection with the limited liability law partnership's practice as advocates and solicitors in Malaysia or with any trust of which that limited liability law partnership or any advocate and solicitor of such limited liability law partnership is a trustee,

then subject to this section, the Malaysian Bar may, if the Bar Council thinks fair and reasonable, make a grant to that person out of the Fund for the purpose of relieving or mitigating that loss.";

(b) by substituting for subsection (9) the following subsection:

"(9) A grant may be made under this section whether or not—

(a) the advocate and solicitor referred to in paragraph (8)(a) or (b) had a valid practising certificate when the act of dishonesty was committed, and notwithstanding that subsequent to the commission of the act the advocate and solicitor has died or had his name removed from or struck off the Roll or has ceased to practise or been suspended from practice; or

(b) the limited liability law partnership has ceased to carry on the practice of an advocate and solicitor or has been wound-up.";

(c) in subsection (10)—

(i) by substituting for paragraph *(a)* the following paragraph:

"(a) the Malaysian Bar shall to the extent of the amount of the grant be subrogated to all such rights and remedies as the person to whom the grant is made may have against the advocate and solicitor or clerk or servant of the advocate and solicitor, or the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership in respect of the loss,"; and

(ii) in paragraph *(b)*—

(A) by inserting after the words "by way of bankruptcy" the words ", winding-up,"; and

(B) by substituting for the words "the advocate and solicitor, clerk or servant" the words "the advocate and solicitor or clerk or servant of the advocate and solicitor, or the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership,"; and

(d) by substituting for subsection (11) the following subsection:

"(11) Reference in paragraphs (10)(a) and (b) to the person to whom the grant is made or the advocate and solicitor or clerk or servant of the advocate and solicitor, or the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited

liability law partnership shall include in the case of death, insolvency or other disability of the advocate and solicitor or clerk or servant of the advocate and solicitor, or the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership, reference to his personal representatives or any other person having authority to administer his estate.".

Amendment of section 82

15. Section 82 of the principle Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Advocate and solicitor or limited liability law partnership acting as agent";

(b) by substituting for subsections (1), (2), (3) and (4) the following subsections:

"(1) An advocate and solicitor or a limited liability law partnership shall not wilfully and knowingly—

(a) act as agent in any legal proceedings or matters which under this Act may be done only by an advocate and solicitor who has a valid practising certificate for;

(b) permit his name to be used, in any legal proceedings or matters which under this Act may be done only by an advocate and solicitor who has a valid practising certificate, on behalf or for the profit of;

(c) send any legal process to; or

(d) do any other act enabling,

another advocate and solicitor who does not have a valid practising certificate or a limited liability law partnership which is not authorised to carry on the practice of an advocate and solicitor, to appear, do, practise or purport to practise as an advocate and solicitor in any such proceedings or matters.

(2) An advocate and solicitor shall not authorise any unauthorised person to operate—

(a) any bank account in his name or in the name of his firm or in the name of the limited liability law partnership under which he practices; and

(b) any bank account maintained by him or his firm, or by the limited liability law partnership under which he practices, in connection with his practice as an advocate and solicitor.

(3) A limited liability law partnership shall not authorise any unauthorised person or limited liability law partnership which is not authorised to carry on the practice of an advocate and solicitor to operate—

(a) any bank account in its name; and

(b) any bank account maintained by the limited liability law partnership in connection with its practice as an advocate and solicitor.

(4) Any advocate and solicitor who contravenes subsection (1) or (2), or any partner of or other person involved in the management or control of a limited liability law partnership who contravenes subsection (3), may be liable to disciplinary proceedings.

(5) Any unauthorised person who acts or practises or purports to practise as an advocate and solicitor or a limited liability law partnership which is not authorised to carry on the practice of an advocate and solicitor commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding one year or to both."

Amendment to section 83

16. Section 83 of the principle Act is amended—

(a) in the shoulder note, by inserting after the words "Advocate and solicitor" the words "and limited liability law partnership";

(b) in subsection (1)—

(i) by substituting for the words "No advocate and solicitor shall, in connection with his practice," the words "No advocate and solicitor or limited liability law partnership shall, in connection with the advocate and solicitor's or the limited liability law partnership's practice,"; and

(ii) by substituting for the words "his knowledge" the words "the advocate and solicitor's or the limited liability law partnership's knowledge";

(c) in subsection (2)—

(i) in the English language text, by substituting for the words "of the Malaysian Bar" the words "or the Malaysian Bar";

(ii) by substituting for the words "no advocate and solicitor shall in connection with his practice" the words "no advocate and solicitor or limited liability law partnership shall in connection with the

advocate and solicitor's or the limited liability law partnership's practice"; and

(iii) in paragraph (b), by inserting after the words "by an advocate and solicitor" the words "or a limited liability law partnership";

(d) in subsection (3), by inserting after the words "an advocate and solicitor" the words "or which is a limited liability law partnership";

(e) in subsection (4)—

(i) by deleting the words "for this purpose"; and

(ii) by inserting after the words "advocate and solicitor" the words "or limited liability law partnership";

(f) in subsection (5)—

(i) by inserting after the words "Before an advocate and solicitor" the words "or a limited liability law partnership"; and

(ii) by substituting for the words "his practice as such, he shall" the words "the advocate and solicitor's or the limited liability law partnership's practice as such, the advocate and solicitor or the limited liability law partnership shall"; and

(g) in subsection (6), by inserting after the words "advocate and solicitor who" the words ", or any partner of or other person involved in the management or control of a limited liability law partnership which,".

Amendment to section 84

17. Section 84 of the principal Act is amended—

(a) in the shoulder note, by inserting after the words "Advocate and solicitor" the words "or limited liability law partnership";

(b) by substituting for subsection (1) the following subsection:

"(1) Where an advocate and solicitor or a limited liability law partnership acts for a housing developer in a sale of immovable property developed under a housing development—

(a) the advocate and solicitor;

(b) the limited liability law partnership; or

(c) any other advocate and solicitor of the firm or of the limited liability law partnership, of which the advocate and solicitor referred to in paragraph (a) is a partner or employee of the firm or of the limited liability law partnership,

shall not in the same transaction act for the purchaser of that property.";

(c) by inserting after subsection (1) the following subsections:

"(1A) A written agreement prepared by the advocate and solicitor, the limited liability law partnership, or any other advocate and solicitor of the firm or of the limited liability law partnership, of which the advocate and solicitor referred to in paragraph (1)(a) is a partner or employee of the firm or of the limited liability law partnership acting for the developer in respect of such transaction shall be scrutinized by an advocate and solicitor or a limited liability law partnership acting for the purchaser.

(1B) If the written agreement in respect of the transaction referred to in subsection (1A) is not scrutinized by such advocate and solicitor or limited liability law partnership acting for the purchaser, the advocate and solicitor or the limited liability law partnership acting for the housing developer shall obtain a certificate signed by the purchaser showing that

the purchaser does not intend to engage an advocate and solicitor or limited liability law partnership to scrutinize the agreement for him.";

(d) by substituting for subsection (2) the following subsection:

"(2) For the purpose of this section, a certificate shall not be valid unless it is signed by the purchaser in the presence of a Commissioner for Oaths who is not—

(a) an advocate and solicitor practising in partnership with, or as an employee of, the advocate and solicitor acting for the housing developer; or

(b) a partner or an employee of the limited liability law partnership acting for the housing developer.";

(e) in subsection (3), by substituting for the words "its own advocate and solicitor" the words "the advocate and solicitor or limited liability law partnership engaged by the developer or purchaser, respectively"; and

(f) in subsection (5)—

(i) by inserting after the words "Subsection (1)" the words ", (1A) or (1B)"; and

(ii) by substituting for the words "an advocate and solicitor who acts" the words "an advocate and solicitor who acts, or a limited liability law partnership which acts,".

Amendment to section 86

18. Section 86 of the principal Act is amended—

(a) in the shoulder note, by substituting for the word "solicitor" the words "advocate and solicitor or limited liability law partnership";

(b) in subsection (1), by inserting after the words "advocate and solicitor" the words "or limited liability law partnership";

(c) in subsection (2)—

(i) by inserting after the words "an advocate and solicitor" the words "or a limited liability law partnership"; and

(ii) by substituting for the words "he has in his custody or control" the words "the advocate and solicitor or the limited liability law partnership has in the advocate and solicitor's or the limited liability law partnership's custody or control"; and

(d) in subsection (3)—

(i) by substituting for the words "the advocate and solicitor alleging that he has a claim" the words "the advocate and solicitor or the limited liability law partnership alleging that the advocate and solicitor or the limited liability law partnership has a claim"; and

(ii) by inserting after the words "the advocate and solicitor's lien" the words "or the limited liability law partnership's lien".

Amendment to section 87

19. Section 87 of the principal Act is amended—

(a) in the shoulder note, by deleting the words "from advocate and solicitor"; and

(b) in subsection (1)—

(i) by inserting after the words “between the advocate and solicitor” the words “or limited liability law partnership”;

(ii) by inserting after the words “moneys due from an advocate and solicitor” the words “or a limited liability law partnership”; and

(iii) by inserting after the words “by the advocate and solicitor” the words “or the limited liability law partnership”.

Amendment to section 88

20. Section 88 of the principal Act is amended—

(a) by substituting for subsection (1) the following subsection:

“(1) If the Bar Council has reasonable cause to believe that—

(a) an advocate and solicitor or any clerk or servant of an advocate and solicitor; or

(b) an advocate and solicitor practising under a limited liability law partnership or any clerk or servant of a limited liability law partnership,

has been guilty of dishonesty in connection with that advocate and solicitor's or limited liability law partnership’s practice as an advocate and solicitor or in connection with any trust of which that advocate and solicitor or limited liability law partnership is a trustee, the Bar Council may issue a certificate to that effect and thereupon the First Schedule, except paragraph 7 thereof, shall apply in relation to that advocate and

solicitor or advocate and solicitor practising under the limited liability law partnership.";

(b) by substituting for subsection (2) the following subsection:

"(2) Where the name of an advocate and solicitor or an advocate and solicitor practising under a limited liability law partnership is removed from or struck off the Roll, or an advocate and solicitor or an advocate and solicitor practising under a limited liability law partnership is suspended from practice, the advocate and solicitor or the limited liability law partnership under which he is practising shall, within twenty-one days from the material date, satisfy the Bar Council that the advocate and solicitor or the limited liability law partnership has made suitable arrangements for making available to the advocate and solicitor's or the limited liability law partnership's client, or to some other advocate and solicitor or advocates and solicitors instructed by the advocate and solicitor's or the limited liability law partnership's client, or by himself or the limited liability law partnership—

(a) all deeds, wills, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents—

(i) the advocate and solicitor's possession or control, or in the possession or control of the advocate and solicitor's firm or the limited liability law partnership; or

(ii) relating to any trust of which the advocate and solicitor is the sole trustee or co-trustee with one or more of his partners, clerks or servants, or the limited liability law partnership is the sole trustee or co-trustee with one or more of its partners, clerks or

servants; and

(b) all sums of money which are—

(i) due from the advocate and solicitor or his firm to his or his firm's client, or due from the limited liability law partnership to its client; or

(ii) held by the advocate and solicitor or his firm on behalf of his or his firm's client, or held by the limited liability law partnership on behalf of its client; or

(iii) subject to any such trust referred to in paragraph (a).”; and

(c) in subsection (3)—

(i) by substituting for the words “If he fails so” the words “If the advocate and solicitor or the limited liability law partnership fails”;

(ii) by substituting for the word “Schedule” the words “First Schedule”;

(iii) by substituting for the words “in relation to him” the words “in relation to the advocate and solicitor or the limited liability law partnership”.

(d) in subsection (5), by substituting for the word “Schedule” the words “First Schedule”.

Amendment to section 89

21. Section 89 of the principal Act is amended—

(a) in the shoulder note, by deleting the words "in the possession of advocate and solicitor"; and

(b) in subsection (1)—

(i) by substituting for paragraph (a) the following paragraph:

"*(a)* a complaint is made to the Bar Council that there has been undue delay on the part of—

(i) an advocate and solicitor in connection with any matter in which the advocate and solicitor or his firm has been instructed on behalf of a client;

(ii) a limited liability law partnership in connection with any matter in which the limited liability law partnership has been instructed on behalf of its client; or

(iii) any matter which relates to the administration of a trust of which that advocate and solicitor or the limited liability law partnership is the sole trustee or co-trustee with one or more of the advocate and solicitor's or the limited liability law partnership's partners, clerks or servants;";

(ii) in paragraph (b), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership";

(iii) in paragraph (c), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership";

(iv) in paragraph (d)—

(A) by inserting after the words “the advocate and solicitor” the words “or the limited liability law partnership”; and

(B) substituting for the words “that he” the words “that the advocate and solicitor or the limited liability law partnership”;

(v) by substituting for the word “Schedule” the words “First Schedule”; and

(v) by substituting for the words “in relation to that advocate and solicitor” the words “in relation to that advocate and solicitor or limited liability law partnership”.

Amendment to section 90

22. Subsection 91(1) of the principal Act is amended by substituting for the word “Schedule” the words “First Schedule”.

Amendment to section 91

23. Subsection 90(1) of the principal Act is amended by substituting for the word “Schedule” the words “First Schedule”.

Amendment to section 94

24. Subsection 94(3) of the principal Act is amended—

(a) in paragraph *(k)*, by inserting after the words “any rules made thereunder or any” the words “mandatory practice standards or codes or“

(b) in paragraph *(n)*, by deleting the word "and" at the end of the paragraph;

(c) in paragraph *(o)*, by substituting for the full stop at the end of the paragraph a semi colon and inserting the word "and"; and

(d) by inserting after paragraph *(o)* the following paragraph:

"*(p)* the failure without reasonable excuse to ensure as a partner of, or as a person involved in the management or control of, a limited liability law partnership that such limited liability law partnership complies with the requirements of this Act and all rules made thereunder or any direction or ruling of the Bar Council.".

Amendment of Part VII

25. The principal Act is amended by substituting for the heading of Part VII appearing after section 111 the following heading:

"PART VIII

REMUNERATION OF ADVOCATES AND SOLICITORS AND LIMITED LIABILITY LAW PARTNERSHIPS"

Amendment to section 112

26. Section 112 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"**Prohibition to purchase interest of client**"; and

(b) in subsection (1)—

(i) by substituting for the words “no advocate and solicitor” the words “no advocate and solicitor or limited liability law partnership”;

(ii) in paragraph (a), by substituting for the words “his client” the words “the advocate and solicitor’s or the limited liability law partnership’s client”; and

(iii) in paragraph (b), by substituting for the words “he is retained” the words “the advocate and solicitor or the limited liability law partnership is retained”.

Amendment to section 113

27. Section 113 of the principal Act is amended—

(a) in subsection (3), by inserting after the words “advocates and solicitors” the
words “and limited liability law partnerships”;

(b) in paragraph 4(a), by inserting after the words “advocate and solicitor” the words “or the limited liability law partnership”;

(c) in paragraph (5)*(a)*—

(i) by substituting for the words “by an advocate and solicitor from his client” the words “by an advocate or solicitor or a limited liability law partnership from the advocate and solicitor’s or the limited liability law partnership’s client”; and

(ii) by substituting for the words “due to him” the words “due to the advocate and solicitor or the limited liability law partnership”; and

(d) in subsection (6), by inserting after the words “advocates and solicitors” the words “or limited liability law partnerships”.

Amendment to section 114

28. Section 114 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

“ **Agreement for remuneration from client**”;

(b) in subsection (1)—

(i) by inserting after for the words “an advocate and solicitor and his client” the words “or a limited liability law partnership and its client”; and

(ii) by inserting after the words “the advocate and solicitor” the words “or the limited liability law partnership”

(c) in subsection (2)—

(i) by inserting after the words “the remuneration of the advocate and solicitor” the words “or the limited liability law partnership”; and

(ii) by inserting after the words “made by the advocate and solicitor” the words “or the limited liability law partnership”;

(d) in subsection (4)—

(i) by inserting after the words “advocate and solicitor” the words “or a limited liability law partnership”; and

(ii) in the proviso, by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 115

29. Section 115 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"**Cost of negotiation of mortgagor**";

(b) in subsection (1)—

(i) by inserting after the words "If a mortgage is made to an advocate and solicitor" the words "or a limited liability law partnership";

(ii) in the national language text, by substituting for the words "sama ada dia seorang atau dengan orang lain" dengan perkataan "sama ada bersendirian atau bersesama dengan mana-mana orang lain";

(iii) by substituting for the words "he, or the firm of which he is a member" the words "the advocate and solicitor, the firm of which the advocate and solicitor is a member or the limited liability law partnership under which the advocate and solicitor practices, or the limited liability law partnership, as the case may be,";

(iv) by substituting for the words "acts done by him or them" the words "acts done by the advocate and solicitor or the limited liability law partnership";

(v) by substituting for the words "such usual costs as he or they" the words "such usual costs as the advocate and solicitor or the limited liability law partnership"; and

(vi) by substituting for the words “and the mortgagor had retained and employed him or them” the words “or a limited liability law partnership and the mortgagor had retained and employed the advocate and solicitor or the limited liability law partnership”;

(c) in subsection (2)—

(i) by substituting for the words “an advocate and solicitor either alone or jointly with any other person” the words “an advocate and solicitor or a limited liability law partnership, either alone or jointly with any other person,”;

(ii) by substituting for the words “that advocate and solicitor, or by the firm of which he is a member,” the words “that advocate and solicitor, the firm of which the advocate and solicitor is a member or the limited liability law partnership under which the advocate and solicitor practices, or the limited liability law partnership, as the case may be,”;

(iii) by substituting for the words “then he or they” the words “then the advocate and solicitor or the limited liability law partnership”;

(iv) by substituting for the words “such usual costs as he or they” the words “such usual costs as the advocate and solicitor or the limited liability law partnership”;

(v) by substituting for the words “and had remained vested by transfer or transmission in, a person who was not an advocate and solicitor and that mortgagor has retained and employed him” the words “and had remained vested by transfer or transmission in, a person who was not an advocate and solicitor or a limited liability law

partnership and that mortgagor has retained and employed the advocate and solicitor or the limited liability law partnership".

Amendment to section 116

30. Section 116 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"**Agreement for costing contentious business**"; and

(b) in subsection (1)—

(i) by substituting for the words "an advocate and solicitor may make an agreement in writing with his client" the words "an advocate and solicitor or a limited liability law partnership may make an agreement in writing with his or its client";

(ii) by substituting for the words "his costs" the words "the advocate and solicitor's or the limited liability law partnership's costs";

(iii) by substituting for the words "such advocate and solicitor" the words "such advocate and solicitor or limited liability law partnership"; and

(iv) by substituting for the words "at which he would" the words "at which the advocate and solicitor or the limited liability law partnership would".

Amendment to section 117

31. Section 117 of the principal Act is amended—

(a) in subsection (1) in the proviso—

(i) by inserting after the words "any agreement" the words "under section 116"; and

(ii) by inserting after the words "his own advocate and solicitor" the words "or the limited liability law partnership under the agreement";

(b) in subsection (2), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership";

(c) in subsection (3), by inserting after the words "an advocate and solicitor" the words "or a limited liability law partnership"; and

(d) in subsection (4)—

(i) by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership";

(ii) by substituting for the words "he shall be relieved from any responsibility to which he would" the words "the advocate and solicitor or the limited liability law partnership shall be relieved from any responsibility to which the advocate and solicitor or the limited liability law partnership would"; and

(iii) by inserting after the words "as an advocate and solicitor" the words "or a limited liability law partnership".

Amendment to section 118

32. Section 118 of the principal Act is amended—

(a) in subsection (5), by substituting for the words "the advocate and solicitor to be repaid by him," the words "the advocate and solicitor or the limited liability law partnership to be repaid by the advocate and solicitor or the limited liability law partnership,"; and

(b) in paragraph (7)*(b)*—

(i) by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership"; and

(ii) by substituting for the words "order him to refund the amount so received by him" the words "order the advocate and solicitor or the limited liability law partnership to refund the amount so received by the advocate and solicitor or the limited liability law partnership".

Amendment to section 119

33. Section 119 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Agreement not performed due to death of advocate and solicitor, or winding up of limited liability law partnership";

(b) by substituting for subsection (1) the following subsection:

"(1) Where an advocate and solicitor or a limited liability law partnership has made an agreement with the advocate and solicitor's or the limited liability law partnership's client in pursuance of section 116 and anything has been done by the advocate and solicitor or the limited liability law partnership under the agreement, but before the agreement

has been completely performed by the advocate and solicitor or the limited liability law partnership —

(a) the advocate and solicitor dies or becomes incapable of acting due to any reason; or

(b) the limited liability law partnership is wound up or becomes incapable of acting due to any other reason,

an application may be made to the Court by any party to the agreement or by the representatives of the party, and the Court shall thereupon have the same power to enforce or set aside the agreement, if it had not been acted upon."; and

(c) in subsection (4)—

(i) in the national language text, by deleting the word "seorang"; and

(ii) by inserting after the words "advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 120

34. Section 120 of the principal Act is amended—

(a) in subsection (1)—

(i) by inserting after the words "his advocate and solicitor" the words "or the limited liability law partnership acting for him";

(ii) by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership"; and

(iii) by substituting for the words “the same within the meaning of this section” the words “the agreement within the meaning of section 116”;

(b) in subsection (2)—

(i) by inserting after the words “an advocate and solicitor” the words “or a limited liability law partnership”; and

(ii) by inserting after the words “the change of advocate and solicitor” the words “or limited liability law partnership”; and

(c) in subsection (3)—

(i) by inserting after the words “the advocate and solicitor” the words “the limited liability law partnership”; and

(ii) by substituting for the words “to be paid by him” the words “to be paid by the advocate and solicitor or the limited liability law partnership”;

(iii) by substituting for the words “improper delay or other conduct on his part” the words “improper delay or other improper conduct on the part of the advocate and solicitor or the limited liability law partnership”;

(iv) by inserting after the words “changing his advocate and solicitor” the words “or the limited liability law partnership acting for him”.

Amendment to section 121

35. Section 121 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Where remuneration not subject of agreement"; and

(b) in subsection (1)—

(i) by inserting after the words "the remuneration of an advocate and solicitor" the words "or a limited liability law partnership";

(ii) by substituting for the words "done by him" the words "done by the advocate and solicitor or the limited liability law partnership";

(iii) by deleting the word "solicitor's";

(iv) by inserting after the words "the option of the advocate and solicitor" the words "or the limited liability law partnership"; and

(v) in the proviso—

(A) in paragraph (a), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership"; and

(B) in paragraph (c), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 122

36. Section 122 of the principal Act is amended by substituting for section 122 the following section:

"**Interpretation**

122. In this Part, unless the context otherwise requires—

"advocate and solicitor" includes the executors, administrators and assignees of an advocate and solicitor;

"limited liability law partnership" includes the receivers, managers and liquidators of a limited liability law partnership.".

Amendment to section 123

37. Section 123 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Entitlement to charge on property for costs"; and

(b) by inserting after the words "Any court in which an advocate and solicitor" the words "or a limited liability law partnership";

(c) by inserting after the words "declare the advocate and solicitor" the words "or the limited liability law partnership";

(d) by substituting for the words "for such advocate and solicitor's taxed costs" the words "for such advocate and solicitor's or limited liability law partnership's taxed costs";

(e) by inserting after the words "against the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 124

38. Section 124 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Prohibition on suing for costs until delivery of bill of cost"; and

(b) substituting for subsection (1) the following subsection—

"(1) Except as authorized by this Act, no advocate and solicitor or limited liability law partnership shall without the leave of the court commence or maintain any action for the recovery of any costs due for any business done by the advocate and solicitor or the limited liability law partnership until the expiration of one month after the advocate and solicitor or the limited liability law partnership has delivered to the party to be charged therewith, or sent by post to, or left with him at, his office or place of business, dwelling house or last known place of abode, a bill of costs, which bill—

(a) shall be signed—

(i) by the advocate and solicitor;

(ii) in the case of a partnership or a limited liability law partnership, by any of the partners, either with his own name or with the name or style of the partnership or the limited liability law partnership;

(iii) by another advocate and solicitor employed by the advocate and solicitor referred to in subparagraph (i) or the partnership or the limited liability law partnership referred to in subparagraph (ii); or

(b) shall be enclosed in or accompanied by a letter, signed in the like manner, referring to the bill."; and

(c) in subsection (2), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 125

39. Section 125 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Power of Court to authorize commencement of action";

(b) by substituting for the words "an advocate and solicitor to commence an action for recovery of his costs and also refer his bill of costs" the words "an advocate and solicitor or a limited liability law partnership to commence an action for recovery of the advocate and solicitor's or the limited liability law partnership's costs and also refer the advocate and solicitor's or the limited liability law partnership's bill of costs"; and

(c) by inserting after the words "to defeat and delay the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 126

40. Section 126 of the principal Act is amended—

(a) in subsection (1)—

(i) by inserting after the words "any advocate and solicitor" the words "or limited liability law partnership";

(ii) by inserting after the words "to the advocate and solicitor" the words "or the limited liability law partnership"; and

(iii) by inserting after the words "by the advocate and solicitor" the words "or the limited liability law partnership"; and

(b) in subsection (3)—

(i) by inserting after the words "an advocate and solicitor and his client" the words "or a limited liability law partnership and its client"; and

(ii) by substituting for the words "solicitor's bill" the words "bill of costs".

Amendment to section 127

41. Section 127 of the principal Act is amended by inserting after the words "by the advocate and solicitor of either party" the words "or by the limited liability law partnership acting for either party,".

Amendment to section 128

42. Section 128 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Time limit for taxation of bill of cost";

(b) in subsection (1), by substituting for the words "a solicitor's bill of costs, except upon notice to the advocates and solicitors" the words "a bill of costs, except upon notice to the advocate and solicitors or the limited liability law partnership".

Amendment to section 129

43. Section 129 of the principal Act is amended by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 130

44. Section 130 of the principal Act is amended—

(a) in the shoulder note, by deleting the word "**solicitor's**"; and

(b) in subsection (1)—

(i) by deleting the words "solicitor's";

(ii) by inserting after the words "in the possession of the advocate and solicitor" the words "or the limited liability law partnership"; and

(iii) by substituting for the words "such advocate and solicitor may have" the words "such advocate and solicitor or limited liability law partnership may have".

Amendment to section 131

45. Section 131 of the principal Act is amended—

(a) by substituting for the shoulder note the following shoulder note:

"Court may order delivery of copy of bill of costs to applicant";

(b) by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership"; and

(c) by substituting for the words "the bill" the words "the bill of costs".

Amendment to section 132

46. Section 132 of the principal Act is amended—

(a) by inserting after the words "advocate and solicitor and client" the words "or limited liability law partnership and client"; and

(b) by substituting for the words "Rules of the High Court" the words "Rules of Court 2012 [P.U. (A) 205/2012]".

Amendment to section 133

47. Section 133 of the principal Act is amended—

(a) in the shoulder note, by deleting the words "**by counsel**";

(b) by inserting after the words "an advocate and solicitor for his client," the words "a limited liability law partnership for its client,"; and

(c) by substituting for the words "the advocate and solicitor and improperly retained by him" the words "the advocate and solicitor or the limited liability law partnership and improperly retained by the advocate and solicitor or the limited liability law partnership".

Amendment to section 134

48. Section 134 of the principal Act is amended—

(a) in the shoulder note, by deleting the words "**payable by solicitors**";

(b) in subsection (1)—

(i) by inserting after the words "In case any order for taxation" the word "of a bill of costs";

(ii) by inserting after the words "or of advocate and solicitor" the words "or limited liability law partnership"; and

(iii) in paragraph (a), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership"; and

(c) in subsection (2), by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership".

Amendment to section 141

49. Section 141 of the principal Act is amended—

(a) in the shoulder note, by inserting after the words "**advocate and solicitor**" the words "**or limited liability law partnership**";

(b) in subsection (1)—

(i) by inserting after the words "any advocate and solicitor" the words "or limited liability law partnership"; and

(ii) by inserting after the words "by an advocate and solicitor" the words "or a limited liability law partnership"; and

(c) in subsection (2), by substituting for the words "an advocate and solicitor keeps an account of his client moneys shall not, in respect of any liability of the advocate and solicitor" the words "an advocate and solicitor or a limited liability law partnership keeps an account of the advocate and solicitor's or the limited liability law partnership's client moneys shall not, in respect of any liability of the advocate and solicitor or the limited liability law partnership".

Amendment of Schedule

50. The Schedule to the principle Act is amended—

(a) by renaming it as the "First Schedule";

(b) in the heading, by inserting after the words "AN ADVOCATE AND SOLICITOR" the words "OR A LIMITED LIABILITY LAW PARTNERSHIP";

(c) in paragraph 1, by substituting for the words "the advocate and solicitor or his firm, or relating to any trust of which he is a sole trustee or is co-trustee only with one or more of his partners, clerks or servants" the words "the advocate and solicitor or his firm, or the limited liability law partnership or relating to any trust of which the advocate and solicitor or the limited liability law partnership is a sole trustee or is co-trustee only with one or more of the advocate and solicitor's or the limited liability law partnership's partners, clerks or servants";'

(d) in paragraph 3, by inserting after the words "the advocate and solicitor" the words "or the limited liability law partnership";

(e) in paragraph 5, by inserting after the words "the advocate and solicitor" the
words ", the limited liability law partnership;

(f) in paragraph 7, by inserting after the words "the advocate and solicitor or his firm" the words " or the limited liability law partnership";

(g) in paragraph 9—

(i) by substituting for the words "due from the advocate and solicitor or to his firm, or held by him or his firm on behalf of, his or his

firm's clients or subject to any trust of which he is" the words "due from the advocate and solicitor or his firm or the limited liability law partnership, or due to the advocate and solicitor or his firm or the limited liability law partnership, or held by the advocate and solicitor or his firm on behalf of his or his firm's client, or held by the limited liability law partnership or the limited liability law partnership on behalf of its client, or subject to any trust of which the advocate and solicitor or the limited liability law partnership is"; and

(ii) by substituting for the words "shall serve on the solicitor or his firm," the words "shall serve on the advocate and solicitor or his firm or the limited liability law partnership,";

(h) in paragraph 10, by inserting after the words "the advocate and solicitor or his firm," the words "or the limited liability law partnership,";

(h) in paragraph 11—

(i) by inserting after the words "in the name of the advocate and solicitor or his firm" the words "or the limited liability law partnership"; and

(ii) by substituting for the words "his client" the words "the advocate and solicitor's or the limited liability law partnership's client"; and

(iii) by substituting for the words "such special account as the advocate and solicitor or his firm might have operated" the words "such special account as the advocate and solicitor or his firm or the limited liability law partnership might have operated";

(j) in subparagraph 12(1)—

(i) by substituting for the words "a notice on the advocate and solicitor, or his firm, or banker" the words "a notice on the advocate and solicitor or his firm, the limited liability law partnership, or the banker "; and

(ii) in subsubparagraph (a) of the proviso—

(A) by inserting after the words "where the advocate and solicitor" the words "or the limited liability law partnership"; and

(B) by substituting for the words "one or more of his partners, clerks or servants" the words "one or more of the advocate and solicitor's or the limited liability law partnership's partners, clerks or servants"; and

(k) in paragraph 14, by substituting for the words "shall be paid by the advocate and solicitor and shall be recoverable from him" the words "shall be paid by the advocate and solicitor or the limited liability law partnership and shall be recoverable from the advocate and solicitor or the limited liability law partnership".

Insertion of new Second Schedule

51. The principal Act is amended by inserting immediately after the Schedule, the following new Second Schedule:

"SECOND SCHEDULE

[Section 76G, subsection 76J(3) and section 76K]

FORMS

FORM 1
(Title of case)

LEGAL AID CERTIFICATE
(Section 76G)

Bar Council Legal Aid Centre (name of state eg: Selangor)

This is to certify that ……. (name and identity card number of the aided person) having an address at …….. (state the address), has duly qualified to receive legal aid under paragraph 76C(1)*(a)* of the Legal Profession Act 1976.

Dated the …….. day of .....

……
Bar Council Legal Aid Centre (state)

Served on:
(1)
(2)
(3)
This Legal Aid Certificate is filed by Bar Council Legal Aid Centre (state) ……., representing …….. (name of aided person) and having an address for service at ……
(Bar Council Legal Aid Centre (state) address), Tel: ..... ; Facsimile: .....
File Ref:

FORM 2

(Title of case)
CANCELLATION OF LEGAL AID CERTIFICATE
(Subsection 76J(3))

Bar Council Legal Aid Centre (name of state eg: Selangor)

TAKE NOTICE that the Legal Aid Certificate issued to …….. (name and identity card number of the aided person) having an address at …….. (state the address), on …… day of …… (month) ….. (year) is hereby cancelled and the aided person is thereby no longer entitled to legal aid under the Legal Profession Act 1976.

Dated the ….. day of ……

……
Bar Council Legal Aid Centre (state)

Served on:
(1)
(2)
(3)

This Cancellation of Legal Aid Certificate is filed by Bar Council Legal Aid Centre (state), representing ……..(name of aided person) and having an address for service at ……..(Bar Council Legal Aid Centre (state) address), Tel: ……..; Facsimile: ……..
File Ref:

FORM 3

(Title of case)
MEMORANDUM OF NOTIFICATION
(Section 76K)

Bar Council Legal Aid Centre (name of state eg: Selangor)

TAKE NOTICE that …….. (name and identity card number of the aided person) having an address at …….. (state the address), is an aided person and is represented by the Bar Council Legal Aid (state) in these proceedings and this Memorandum is filed pursuant to section 76K of the Legal Profession Act 1976.

Dated the …….. day of ……

……
Bar Council Legal Aid Centre (state)

Served on:
(1)
(2)
(3)

This Memorandum of Notification is filed by ……..Bar Council Legal Aid Centre (state), representing …….. (name of aided person) and having an address for service at …….. (Bar Council Legal Aid Centre (state) address), Tel: .....;
Facsimile: ……
File Ref.

[PN(U2)3155]"

EXPLANATORY STATEMENT

This Bill seeks to amend the Legal Profession Act 1976 ("Act 166").

2. *Clause 1* contains the short title and provision on the commencement of the proposed Act.

3. *Clause 2* seeks to amend section 3 of Act 166 by inserting new definitions of "limited liability law partnership" and "limited liability partnership" into Act 166.

4. *Clause 3* seeks to amend subsection 11(1) of Act 166 to introduce a new paragraph 11(1)(e) to provide that a qualified person may, in addition to the other requirements in subsection 11(1), be admitted as an advocate and solicitor if he has obtained the order under subsection 36(2).

5. *Clause 4* seeks to amend subsection 15(3) of Act 166 to introduce a new paragraph 15(3)(h) to provide every petitioner shall, not less than fourteen days before his petition is to be heard or such shorter period as the Court may allow, file an affidavit exhibiting, in addition to the other requirements in subsection 15(3), a true copy of the order obtained under subsection 36(2).

6. *Clause 5* seeks to amend section 30 of Act 166.

Subclause 3(a) seeks to amend paragraph 30(1)(a) of Act 166 to prohibit an advocate and solicitor from applying for a practising certificate unless he is practising or intends to practice in limited liability law partnership in Malaysia.

Subclause 3(b) seeks to amend paragraph 30(1)(b) of Act 166 to prohibit an advocate and solicitor from applying for a practising certificate unless he is or is about to be employed full time in his practice in Malaysia by a limited liability law partnership in practice in Malaysia.

7. *Clause 6* seeks to amend and redraft section 36 of Act 166 by substituting for subsection (2) the following proposed subsections.

The proposed subsections (2) and (2A) seek to provide that a Judge may, upon application made in chambers by a master within thirty dates from the commencement of the pupil in chamber's pupillage, make an order that the pupil in chambers be permitted to appear on behalf of the master or of the firm or the limited liability law partnership in which the master is practising and that any application made after the expiry of such thirty days shall require the leave of court.

The proposed subsections (2B) and (2C) seek to clarify that the order made under subsection (2) permits the pupil in chambers, at the expiration of three months from the date of order, to conduct trials before any Magistrate, and represent an arrested person in a remand proceeding or make a plea in mitigation on behalf of an accused when participating in any programme established or recognised by the Bar Council.

8. *Clause 7* seeks to amend subsection 40F(1) of Act 166 to allow a foreign law firm and a Malaysian law firm to apply by means of a limited liability partnership formed pursuant to an arrangement between such foreign law firm and Malaysian law firm to the Bar Council for an international partnership licence if they satisfy such conditions as the Bar Council may think fit to impose in any particular case.

9. *Clause 8* seeks to amend section 40O of Act 166 to introduce a new paragraph 4O *(ha)* into Act 166 to provide for the power of the Bar Council to make rules, with the approval of the Attorney General, in relation to the manner and means by which a limited liability partnership may be formed for the purposes of an international partnership.

10. *Clause 9* seeks to introduce a new Part IVB into Act 166 to provide for matters relating to limited liability law partnerships.

The proposed section 40P seeks to provide for the definitions of "compliance officer", "limited liability partnership agreement" and "Registrar" into Act 166.

The proposed section 40Q deals with the application to the Bar Council for approval to form a limited liability law partnership or to convert an existing firm into a limited liability law partnership for the purpose of carrying on the practice of an advocates and solicitors.

The proposed section 40R seeks to empower the Bar Council to approve the formation of or conversion into a limited liability law partnership. However, a limited liability law partnership approved by the Bar Council shall not be deemed to be a limited liability law partnership until it is registered under the Limited Liability Partnerships Act 2012 [Act 743] and its name is entered into the register under the proposed subsection 40ZB (2).

The proposed section 40S seeks to deal with the approval for the name of a limited liability law partnership.

The proposed subsection 40S(1) seeks to empower the Bar Council to approve the name of a limited liability law partnership in the case of a conversion from an existing firm into a limited liability law partnership if the name of the proposed limited liability law partnership is the same as that of the existing firm ending with the words as required under subsection 13(1) of the Limited Liability Partnerships Act 2012 and the name is not likely to be confused with an existing limited liability law partnership or firm.

The proposed subsection 40S(2) seeks to empower the Bar Council to approve the proposed name of a limited liability law partnership in the case of the formation of a new limited liability law partnership not through conversion or the change in the name of an existing limited liability law partnership if the proposed name is not misleading, or is compatible with the dignity of the legal profession and is not likely to be confused with an existing limited liability law partnership or firm.

The proposed subsection 40S(3) prohibits the name of a limited liability law partnership to be changed without the prior approval in writing of the Bar Council.

The proposed section 40T provides that a limited liability law partnership is empowered to do anything that an advocate and solicitor may do by law and the limited liability law partnership shall do all things that an advocate and solicitor is required to do by law. However the limited liability law partnership shall not do anything that may only be done by an advocate and solicitor as a natural person.

The proposed section 40U provides for the effects of the conversion of a firm into a limited liability law partnership which relates to the clients, assets and property, documents, lien or security, etc.

The proposed section 40V provides that a limited liability law partnership shall have the rights and are subject to the fiduciary, confidential and ethical requirements with respect to each client of the limited liability law partnership that exist at law with respect to an advocate and solicitor and his client.

The proposed section 40W provides that a partner, consultant or employee of a limited liability law partnership who is an advocate and solicitor providing services which only can be provided by an advocate and solicitor under Act 166 shall be subject to the same standards of conduct and competence in respect of such services as if he were personally providing such services as an advocate and solicitor in a firm.

The proposed section 40X seeks to provide that an act or omission of an advocate and solicitor may constitute misconduct within the meaning of Part VII of Act 166 and be subject to disciplinary action even though it is only done or occurs while the advocate and solicitor practices as an advocate and solicitor under a limited liability law partnership. The partners of the limited liability law partnership shall also be jointly liable to disciplinary proceedings under Act 166 for any such misconduct where such misconduct cannot be attributed to the act or omission of a particular advocate and solicitor. The proposed section 40X further prohibits a partner, compliance officer or an employee of a limited liability law partnership who is an advocate and solicitor from

being a partner or a consultant or an employee of any qualified foreign law firm or Malaysian law firm, a partner or a consultant or an employee of another limited liability law partnership or to practise as an advocate and solicitor on his own account.

The proposed section 40Y prohibits an advocate and solicitor from being involved in the management of a limited liability law partnership if the advocate and solicitor has been suspended from practice or struck off the Roll pursuant to disciplinary proceedings under Act 166.

The proposed section 40Z prohibits a limited liability law partnership from carrying on the practice of an advocate and solicitor if at any time any partner of the limited liability law partnership is not a practising advocate and solicitor. The contravention of this proposed section constitutes an offence.

The proposed section 40ZA empowers the Court, upon application by the Bar Council, to order the winding-up of a limited liability law partnership under the Limited Liability Partnership Act 2012 on certain grounds.

The proposed section 40ZB seeks to require the Bar Council to keep a register of limited liability law partnerships approved under the proposed section 40R in such form and manner as the Bar Council thinks fit and to allow any person to inspect such register.

The proposed section 40ZB also requires the Bar Council to remove from or strike off the register the name of a limited liability law partnership which has ceased carrying on the practice of an advocate and solicitor or which has been wound-up. The proposed section 40ZB also empowers the Bar Council to restore the name of the limited liability law partnership to the register for certain purposes.

The proposed section 40ZC deals with the right to appeal to the Court against the decision of the Bar Council by any person who is aggrieved by a decision of the Bar Council under the proposed section 40R or 40S.

The proposed section 40ZD seeks to provide that the proposed Part IVB and any rules made under the proposed section 40ZF shall prevail over any inconsistent provision of any limited liability partnership agreement.

The proposed section 40ZE seeks to provide that the provisions of the proposed Part IVB and the rules made under section 40ZF shall be read together with the provisions of the Limited Liability Partnerships Act 2012 and that in the case of conflict or inconsistency between any provision of the Limited Liability Partnerships Act 2012 and any provision of the proposed Part IVB, the provision of the proposed Part IVB shall prevail.

The proposed section 40ZF seeks to empower the Bar Council, with the approval of the Attorney General, to make rules for the purposes of the proposed Part IVB.

11. *Clause 10* seeks to introduce a new Part VA into Act 166 to provide for matters relating to the Bar Council Legal Aid Centre.

The proposed section 76A contains the definition of certain words and expression used in this Part.

The proposed section 76B seeks to enable the Bar Council to administer the Bar Council Legal Aid Centre ("Centre") with one or more branches in each State. Further, the Bar Council may give directions to the Centre and the Centre shall be responsible to the Bar Council.

The proposed section 76C sets out the functions of the Centre which include, to provide legal aid to aided persons who satisfy the Means Test, to promote legal literacy, to assist the public in all matters in relation to justice and to engage the service of members of the Malaysian Bar in the performance of its functions.

The proposed section 76D seeks to empower the Bar Council to determine the location of the principal office of the Centre.

The proposed section 76E seeks to provide that where the Centre establishes a branch in any state outside its principal office, such branch shall be managed and administered by the Centre, with the assistance of the relevant State Bar Committee. The Bar Council may delegate its power to the relevant State Bar Committee for the purposes of administration of the branch of the Centre and the branch of the Centre shall also be answerable to the relevant State Bar Committee.

The proposed section 76F seeks to allow the Bar Council to employ the Director and staff of the Centre.

The proposed section 76G seeks to provide that where the Centre represents an aided person in any proceedings, the Centre shall file a Legal Aid Certificate in the relevant court registry and no court fee shall be charged for the filing of the certificate.

The proposed section 76H seeks to provide that where a Legal Aid Certificate is filed, the aided person shall not, unless the contrary is expressly provided in the proposed Act, be liable for costs to any other party in any proceedings related to the Legal Aid Certificate.

The proposed section 76I seeks to make it an offence for any person, seeking legal aid or advice, as an aided person to furnish a false statement or representation in his application.

The proposed section 76J seeks to allow the Centre to cancel a Legal Aid Certificate and discharge itself from further acting for a person where it appears to the Centre that the legal aid was obtained by the person through fraud or misrepresentation.

The proposed section 76K seeks to provide that when a party has made an application to the Centre for legal aid, the Centre may file a Memorandum of Notification in the court in which proceedings have been instituted for the proceedings to be stayed for a period of not exceeding twenty-one days for the Centre to make enquiries on the

eligibility of the applicant for legal aid and no court fee shall be charged for the filing of the Memorandum of Notification.

The proposed section 76L seeks to require the Centre to furnish the Bar Council with such reports, audited accounts and other information with respect to its activities. Further, this clause provides that an annual audit of the Centre's account shall be conducted by the Bar Council's auditors and be presented at the annual general meeting of the Malaysian Bar together with the Bar Council's accounts.

The proposed section 76M seeks to empower the Bar Council, with the approval of the Attorney General, to make rules as are necessary or expedient for the purposes of carrying into effect the provisions of this Part.

12. *Clause 11* seeks to amend section 77 of Act 166, to clarify that Bar Council is empowered to make rules ~~regulating fees, remuneration and admission of advocates and solicitors, with the approval of the Attorney General.~~ relating to fees, salaries, allowances, working conditions and admission of the advocates and solicitors and pupils.

13. *Clause 12* seeks to amend section 78A of Act 166.

Subclause 12(a) seeks to amend subsection 78A(1) of Act 166 to provide that the Bar Council may make rules, with the approval of the Attorney General, concerning the taking out of professional indemnity for limited liability law partnerships against any class of professional liability and the rules may make provisions to authorize the Bar Council to take out and maintain insurance in the name of the Malaysian Bar with any person permitted by law to carry on professional liability insurance business or pecuniary loss insurance business and covering every limited liability law partnership, and to require limited liability law partnerships to take out and maintain indemnity or insurance.

Paragraph 12(b)(i) seeks to amend paragraph 78A(2)(b) of Act 166 to provide that the rules made under section 78A of Act 166 may require limited liability law

partnerships to make payments to any fund established under subsection 78A(1) of Act 166.

Paragraph 12(b)(ii) seeks to amend paragraph 78A(2)(c) of Act 166 to provide that the rules made under section 78A of Act 166 may require limited liability law partnerships to make payments by way of contributions or premiums on any indemnity or policy taken out under subsection 78A(1) of Act 166 and to provide for proceedings by the Malaysian Bar or its insurers against any limited liability law partnership who fails to do so for recovery of the appropriate contributions or premiums.

Paragraph 12(b)(iii) seeks to amend paragraph 78A(2)(d) of Act 166 to provide that the rules made under section 78A of Act 166 may prescribe the conditions which a professional indemnity or insurance policy must satisfy for the purpose of paragraph 1*(b)* or 1*(c)*.

Paragraph 12(b)(iv) seeks to amend paragraph 78A(2)(f) of Act 166 to provide that the rules made under section 78A of Act 166 may specify the circumstances in which where a limited liability law partnership has failed to comply with the rules, proceedings in respect of any sum paid by way of indemnity may be taken against the limited liability law partnership by the Malaysian Bar or its insurers.

Paragraph 12(b)(v) seeks to amend subsection 78A(2)*(g)* of Act 166 to provide that an advocate and solicitor shall not be entitled to a Sijil Annual unless he is indemnified or insured as required by the rules to which the Sijil Annual relates. It also inserts a new paragraph 78(2)*(ga)* to provide that the rules made under section 78A of Act 166 may prescribe that a limited liability law partnership shall not be used for purposes of carrying on the practice of an advocate and solicitor unless the limited liability law partnership is indemnified or insured as required by the rules for the period as specified in such rules.

Subclause 12(c) seeks to amend subsection 78A(3) of Act 166 to provide that nothing in section 78A of Act 166 shall affect the right of any limited liability law partnership, in addition to the indemnity provided in the rules made under section 78A

of Act 166, to insure the limited liability law partnership further against loss arising from such claims as may be instituted against the limited liability law partnership.

~~14. *Clause 13* seeks to introduce new sections 78B, 78C, 78D and 78E into Act 166 to provide for matters relating to the Malaysian Bar Professional Indemnity Fund.~~

~~The proposed section 78B seeks to provide for the establishment of the "Malaysian Bar Professional Indemnity Fund" ("Fund") which shall provide indemnity to advocates and solicitors and limited liability law partnerships against any class of professional liability, and shall be maintained and administered by the Malaysian Bar.~~

~~The proposed section 78C seeks to provide that all practising advocates and solicitors and limited liability law partnerships shall contribute a sum to the Fund as determined by the Bar Council.~~

~~The proposed section 78D seeks to provide for payments out of the Fund including for payments for claims of indemnity.~~

~~The proposed section 78E seeks to empower the Bar Council to make rules or determine mandatory practice standards or codes for the maintenance, management, administration and control of the Fund.~~

15. *Clause 14* seeks to amend section 80 of Act 166.

Subclause *14(a)* seeks to amend and redraft subsection 80(8) of Act 166 to empower the Malaysian Bar to make a grant to a person out of the Fund for the purpose of relieving or mitigating his loss where it is proved to the satisfaction of the Bar Council that the person has sustained loss in consequence of dishonesty on the part of an advocate and solicitor practising under a limited liability law partnership or any clerk or servant of a limited liability law partnership, in connection with the limited liability law partnership's practice as advocates and solicitors in Malaysia or with any trust of which that limited liability law partnership or any advocate and solicitor of such limited liability law partnership is a trustee.

Subclause 14(b) seeks to amend and redraft subsection 80(9) of Act 166 to provide that a grant may be made under subsection 80 of Act 166 whether or not the limited liability law partnership has ceased to carry on the practice of an advocate and solicitor or has been wound-up.

Paragraph 14(c)(i) seeks to amend and redraft paragraph 80(10)(a) of Act 166 to provide that on any grant made by the Malaysian Bar under section 80 of Act 166, the Malaysian Bar shall, to the extent of the amount of the grant, be subrogated to all such rights and remedies as the person to whom the grant is made may have against the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership in respect of the loss.

Paragraph 14(c)(ii) seeks to amend paragraph 80(10)(b) of Act 166 to provide that on any grant made by the Malaysian Bar under section 80 of Act 166, the person to whom the grant is made shall have no right by way of winding-up to receive any sum out of the assets of the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership in respect of the loss until the Fund has been reimbursed with the full amount of the grant.

Subclause 14(d) seeks to amend and redraft subsection 80(11) of Act 166 to provide that the reference in the proposed paragraphs 80(10)(a) and (b) to the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership shall include in the case of death, insolvency or other disability of the advocate and solicitor or clerk or servant of the advocate and solicitor, or the advocate and solicitor practising under the limited liability law partnership or the clerk or servant of the limited liability law partnership, reference to his personal representatives or any other person having authority to administer his estate.

16. *Clause 15* seeks to amend section 82 of Act 166 to prohibit an advocate and solicitor or limited liability law partnership from wilfully and knowingly act as agent in any legal proceedings of any kind or in any matter which under Act 166 can be done

only by an advocate and solicitor who has a valid practising certificate for another advocate and solicitor who does not have a valid practising certificate or another limited liability law partnership which is not authorised to carry on the practice of an advocate and solicitor, etc.

17. *Clause 16* seeks to amend section 83 of Act 166.

Subclause 16(b) seeks to amend subsection 83(1) of Act 166 to prohibit a limited liability law partnership from employing or giving remuneration to any person who to its knowledge is an undischarged bankrupt or has been struck off the Roll suspended from practising as an advocate and solicitor, convicted of certain offences etc. without the consent of the court obtained on an application by originating summons served upon the Attorney General and upon the Malaysian Bar.

Subclause 16(c) seeks to amend subsection 83(2) of Act 166 to empower the Court on application made by or on behalf of the Attorney General or the Malaysian Bar to make an order directing that no limited liability law partnership shall in connection with its practice employ or remunerate any person referred to in paragraphs 83(2)(a) and (b) of Act 166.

Subclause 16(d) seeks to amend subsection 83(3) of Act 166 to provide that the application under subsection 83(2) of Act 166 shall be served not less than ten days before the application is to be heard upon the person in respect of whom it is made and upon his employer or previous employer which is a limited liability law partnership.

Subclause 16(e) seeks to amend subsection 83(4) of Act 166 to provide that the order made under subsection 83(2) of Act 166 shall be filed in a file to be kept by the Registrar which may be inspected by any limited liability law partnership without fee.

Subclause 16(f) seeks to amend subsection 83(5) of Act 166 to provide that before a limited liability law partnership employs or remunerates any person (other than an advocate and solicitor or a qualified person), the limited liability law partnership shall require that person to make a statutory declaration stating that he is

not an undischarged bankrupt and that he does not come within the class of persons enumerated in paragraphs 83(1)(a) to (f) of Act 166 and that he is not a person in respect of whom an order has been made under subsection 83(2) of Act 166 .

Subclause 16(g) seeks to amend subsection 83(6) of Act 166 to provide that any partner of or other person involved in the management or control of a limited liability law partnership which acts in contravention of section 83 of Act 166 may be liable to disciplinary proceedings.

18. *Clause 17* seeks to amend section 84 of Act 166.

Subclause 17(b) seeks to amend and redraft subsection 84(1) of Act 166 to provide that if a limited liability law partnership acts for a housing developer in a sale of immovable property, the limited liability law partnership or any other advocate and solicitor of the limited liability law partnership, of which the advocate and solicitor referred to in proposed paragraph 84(1)(a) of Act 166 is a partner or employee of the limited liability law partnership, shall not in the same transaction act for the purchaser of that property.

Subclause 17(c) seeks to introduce new subsections 84(1A) and (1B) into Act 166 by amending and redrafting the existing subsection 80(1) of Act 166. These provisions are redrafted from the existing subsection 84(1) of Act 166.

The proposed subsection 84(1A) seeks to require that a written agreement prepared by the advocate and solicitor, the limited liability law partnership, or any other advocate and solicitor of the firm or of the limited liability law partnership, of which the advocate and solicitor referred to in paragraph 84(1)(a) is a partner or employee of the firm or of the limited liability law partnership acting for the developer in respect of such transaction to be scrutinized by an advocate and solicitor or a limited liability law partnership acting for the purchaser.

The proposed subsection 84(1B) seeks to provide that if the written agreement in respect of the transaction referred to in proposed subsection 84(1A) is not

scrutinized by such advocate and solicitor or limited liability law partnership acting for the purchaser, the advocate and solicitor or the limited liability law partnership acting for the housing developer shall obtain a certificate signed by the purchaser showing that the purchaser does not intend to engage an advocate and solicitor or limited liability law partnership to scrutinize the agreement for him

Subclause 17(d) seeks to amend and redraft subsection 84(2) of Act 166 to provide that a certificate is not valid unless it is signed by the purchaser in the presence of a Commissioner for Oaths who is not a partner or an employee of the limited liability law partnership acting for the housing developer.

Subclause 17(e) seeks to amend subsection 84(3) of Act 166 to provide that the developer and the purchaser shall each pay for the fees of the limited liability law partnership engaged by the developer or purchaser, respectively.

Subclause 17(f) seeks to amend subsection 84(5) of Act 166 to provide that the proposed subsection 84(1) is without prejudice to any law affecting a limited liability law partnership which acts for parties where there is a conflict of interest or whenever a conflict of interest may arise.

19. *Clause 18* seeks to amend section 86 of Act 166.

Subclause 18(b) seeks to amend subsection 86(1) of Act 166 to empower a client or his representative to issue a summons for the delivery of a cash account, or the payment of moneys, or the delivery of securities if the relationship of limited liability law partnership and client exists, or has existed.

Subclause 18(c) seeks to amend subsection 86(2) of Act 166 to empower the Court or a Judge to order a limited liability law partnership to deliver to the applicant a list of the moneys or securities which it has in its custody or control on behalf of the applicant, or to bring into court the whole or any part of the same, within such time as the Court or Judge orders.

Subclause 18(d) seeks to amend subsection 86(3) of Act 166 to provide that in the event of a limited liability law partnership alleges that the limited liability law partnership has a claim for costs, the Court or Judge may make such provision for the payment thereof or security therefor or the protection of the limited liability law partnership's lien, if any, as the Court or Judge thinks fair and reasonable.

20. *Clause 19* seeks to amend seeks to amend subsection 87(1) of Act 166 to empower the Registrar to make an interim certificate as to the amount payable by the limited liability law partnership if, during the taxation of any bill of costs or the taking of any account between the limited liability law partnership and client, it appears to the Registrar that there are moneys due from the limited liability law partnership to the client.

21. *Clause 20* seeks to amend section 88 of Act 166.

Subclause 20(a) seeks to amend and redraft subsection 88(1) of Act 166 to provide that if the Bar Council has reasonable cause to believe that an advocate and solicitor practising under a limited liability law partnership or any clerk or servant of a limited liability law partnership has been guilty of dishonesty in connection with that limited liability law partnership's practice as an advocate and solicitor or in connection with any trust of which that limited liability law partnership is a trustee, the Bar Council may issue a certificate to that effect. The proposed amendment also states that the Schedule to Act 166, except paragraph 7, shall apply to that advocate and solicitor.

Subclause 20(b) seeks to amend and redraft subsection 88(2) of Act 166 to provide that where the name of an advocate and solicitor practising under a limited liability law partnership is removed from or struck off the Roll, or suspended from practice, the limited liability law partnership under which he is practising shall, within twenty-one days from the material date, satisfy the Bar Council that the limited liability law partnership has made suitable arrangements for making available certain documents and sums of money to the limited liability law partnership's client, or advocates and solicitors instructed by the limited liability law partnership's client, or by the limited liability law partnership.

Subclause 20(c) seeks to amend subsection 88(3) of Act 166 to provide the application of the Schedule of Act 166 to the limited liability law partnership if the limited liability law partnership fails to satisfy the Bar Council as required by subsection 88(2) of Act 166.

22. *Clause 21* seeks to amend section 89 of Act 166. *Subclause 21(b*) seeks to amend subsection 89(1) of Act 166 to provide for the application of the Schedule to Act 166 to a limited liability law partnership if all the conditions in paragraphs 89(1)(a), (b), (c) and (d) of Act 166 are satisfied.

Paragraph 21(b)(i) seeks to amend and redraft paragraph 89(1)(a) of Act 166 to provide for the first condition i.e., a complaint is made to the Bar Council that there has been undue delay on the part of a limited liability law partnership in connection with any matter in which the limited liability law partnership has been instructed on behalf of its client or any matter which relates to the administration of a trust of which the limited liability law partnership is the sole trustee or co-trustee with one or more of its partners, clerks or servants.

Paragraph 21(b)(ii) seeks to amend paragraph 89(1)(b) of Act 166 to provide for the second condition i.e., where the Bar Council has invited the limited liability law partnership by notice in writing to give an explanation in respect of the matter referred to in paragraph 89(1)(a) of Act 166.

Paragraph 21(b)(iii) seeks to amend paragraph 89(1)(c) of Act 166 to provide for the third condition i.e., where the limited liability law partnership has, within a period of not less than twenty-one days specified in the notice referred to paragraph 89(1)(b) of Act 166, failed to give an explanation in respect of the matter referred to in paragraph 89(1)(a) of Act 166 which the Bar Council regard as sufficient and satisfactory.

Paragraph 21(b)(iv) seeks to amend paragraph 89(1)(d) of Act 166 to provide for the fourth condition i.e., where the limited liability law partnership has been notified in writing by the Bar Council that the limited liability law partnership has failed to give

explanation as specified in paragraph 89(1)(c) of Act 166.

23. *Clause 24* seeks to amend subsection 94(3) of Act 166.

Paragraph 24(a) seeks to provide that breach of any mandatory practice standards or codes determined by the Bar Council may amount to "misconduct" for purposes of the section.

Paragraph 24(d) seeks to insert a new paragraph 94(3)(p) into Act 166 to provide that the failure without reasonable excuse to ensure as a partner of, or as a person involved in the management or control of, a limited liability law partnership that such limited liability law partnership complies with the requirements of Act 166 and all rules and rulings made under Act 166 is a misconduct.

24. *Clause 26* seeks to amend section 112 of Act 166.

Paragraph 26(b)(ii) seeks to amend paragraph 112(1)(a) of Act 166 to prohibit a limited liability law partnership from purchasing or agreeing to purchase either directly or indirectly an interest or any part of the interest which is the subject matter of its client or that of the other party in the same suit, action or other contentious proceeding brought or to be brought or maintained.

Paragraph 26(b)(iii) seeks to amend paragraph 112(1)(b) of Act 166 to prohibit a limited liability law partnership from entering into any agreement by which the limited liability law partnership is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding.

25. *Clause 27* seeks to amend section 113 of Act 166.

Subclause 27(a) seeks to amend subsection 113(3) of Act 166 to provide that the Solicitors Costs Committee or any four of the members of the Committee (the Chief Judge or his nominee being one) may make general orders prescribing and regulating

in any manner as they think fair and reasonable the remuneration of limited liability law partnerships in respect of non-contentious business and any order made under this section may revoke or alter any previous order so made.

Subclause 27(b) seeks to amend paragraph 113(4)(a) of Act 166 to provide that the order made under section 113 of Act 166 may regulate the amount or remuneration by considering the position of the party for whom the limited liability law partnership is concerned in the business, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, and the like.

Subclause 27(c) seeks to amend paragraph 113(5)(a) of Act 166 to provide that an order under section 113 of Act 166 may authorize and regulate the taking by a limited liability law partnership from its client of security for payment of any remuneration, to be ascertained by taxation or otherwise, which may become due to the limited liability law partnership under any such order.

Subclause 27(d) seeks to amend subsection 113(6) of Act 166 to provide that as long as an order made under section 113 of Act 166 is in operation, taxation of bills of costs of limited liability law partnerships in respect of non-contentious business shall, subject to section 121 of Act 166, be regulated by that order.

26. *Clause 28* seeks to amend section 114 of Act 166.

Subclause 28(b) seeks to amend subsection 114(1) of Act 166 to provide that whether or not any order is in force under section 113 of Act 166, a limited liability law partnership and its client may, either before or after or in the course of the transaction of any noncontentious business, make an agreement as to the remuneration of the limited liability law partnership provided that such agreement shall not provide for costs at a scale lower than that provided by any order made under section 113 of Act 166.

Subclause 28(c) seeks to amend subsection 114(2) of Act 166 to provide that the

agreement made under subsection 114(1) of Act 166 may provide for the remuneration of the limited liability law partnership by a gross sum, or by commission or percentage, or by salary, or otherwise, and it may be made on the terms that the amount of the remuneration stipulated in the agreement shall or shall not include all or any disbursements made by the limited liability law partnership in respect of searches, plans, travelling, stamps, fees or other matters.

Paragraph 28(d)(i) seeks to amend subsection 114(4) of Act 166 to provide that the agreement made under subsection 114(1) of Act 166 may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a limited liability law partnership.

Paragraph 28(d)(ii) seeks to amend the proviso to subsection 114(4) of Act 166 to provide certain powers to the taxing officer and the Court if, on any taxation of costs, the agreement made under subsection 114(1) of Act 166 is relied on by the limited liability law partnership and objected to by the client as unfair or unreasonable.

27. *Clause 29* seeks to amend section 115 of Act 166.

Subclause 29(b) seeks to amend subsection 115(1) of Act 166 to provide that if a mortgage is made to a limited liability law partnership, either alone or jointly with any other person, the limited liability law partnership shall be entitled to recover from the mortgagor in respect of all business transacted and acts done by the limited liability law partnership in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, such usual costs as limited liability law partnership would have been entitled to receive if the mortgage had been made to a person who was not a limited liability law partnership and the mortgagor had retained and employed the limited liability law partnership to transact that business.

Subclause 29(c) seeks to amend subsection 115(2) of Act 166 to provide that if a mortgage has been made to, or has become vested by transfer or transmission in, a limited liability law partnership either alone or jointly with any other person, and any business is transacted or acts are done by that the limited liability law partnership, in

relation to that mortgage or the security thereby created or the property comprised thereunder, then the limited liability law partnership shall be entitled to recover from the mortgagor on whose behalf the business was transacted or the acts were done, and to charge against the security, such usual costs as the limited liability law partnership would have been entitled to receive if the mortgage had been made to, and had remained vested by transfer or transmission in, a person who was not a limited liability law partnership and that mortgagor has retained and employed the limited liability law partnership to transact that business and do these acts.

28. *Clause 30* seeks to amend subsection 116(1) of Act 166 to provide that a limited liability law partnership may make an agreement in writing with its client respecting the amount and manner of payment for the whole or any part of its costs in respect of contentious business done or to be done by such limited liability law partnership, either by a gross sum, or otherwise, and either at the same rate or at a greater or lesser rate than the rate at which the limited liability law partnership would otherwise be entitled to be remunerated.

29. *Clause 31* seeks to amend section 117 of Act 166.

Subclause 31(a) seeks to amend the proviso to subsection 117(1) of Act 166 to provide that the client who has entered into any agreement pursuant to section 116 of Act 166 shall not be entitled to recover from any other person, under any order for the payment of any costs which are the subject of the agreement, more than the amount payable by the client to the limited liability law under the agreement.

Subclause 31(b) seeks to amend subsection 117(2) of Act 166 to provide that an agreement entered pursuant to section 116 of Act 166 shall be deemed to exclude any further claim of the limited liability law partnership beyond the terms of agreement in respect of any services, fees, charges or disbursements in relation to the conduct and completion of the business in reference to which the agreement is made, except such services, fees, charges or disbursements, if any, as are expressly excepted by the agreement.

Subclause 31(c) seeks to amend subsection 117(3) of Act 166 to provide that the costs of a limited liability law partnership in any case where there is any agreement as is referred to in section 116 of Act 166 shall not be subject to taxation, nor to section 124 of Act 166.

Subclause 31(d) seeks to amend subsection 117(4) of Act 166 to provide that any provision in any agreement entered pursuant to section 116 of Act 166 which states that the limited liability law partnership shall not be liable for negligence, or that the limited liability law partnership shall be relieved from any responsibility to which the limited liability law partnership would otherwise be subject as a limited liability law partnership, shall be wholly void.

30. *Clause 32* seeks to amend section 118 of Act 166.

Subclause 32(a) seeks to amend subsection 118(5) of Act 166 to provide that when the amount agreed under an agreement entered pursuant to section 116 of Act 166 has been paid by or on behalf of the client or by any person chargeable with or entitled to pay the same, any Court or a Judge having jurisdiction to examine and enforce the agreement may, on application by the person who has paid the amount within twelve months after payment and, if it appears to the Court or Judge that the special circumstances of the case require the agreement to be reopened, reopen the agreement and order the costs, fees, charges and disbursements to be taxed, and the whole or any portion of the amount received by the limited liability law partnership to be repaid by the limited liability law partnership, on such terms and conditions as to the Court or Judge seems fair and reasonable.

Subclause 32(b) seeks to amend paragraph 118(7)(b) of Act 166 to provide that any court which would have had jurisdiction to enforce the agreement entered pursuant to section 116 of Act 166 may, if it thinks fair and reasonable, order the limited liability law partnership to refund the amount so received by the limited liability law partnership under the agreement or any part thereof if the limited liability law partnership accepts payment without approval of the Registrar or the Court or the Judge.

31. *Clause 33* seeks to amend section 119 of Act 166.

Subclause 33(b) seeks to amend and redraft subsection 119(1) of Act 166 to provide that where a limited liability law partnership has made an agreement with its client in pursuance of section 116 of Act 166 but before the agreement has been completely performed by the limited liability law partnership, the limited liability law partnership is wound-up or becomes incapable of acting due to any other reason, the party to the agreement or the representatives of the party may make application to the Court for enforcing or setting aside the agreement.

Subclause 33(c) seeks to amend subsection 119(4) of Act 166 to provide that the payment of the amount found to be due may be enforced in the same manner as if the agreement entered pursuant to section 116 of Act 166 had been completely performed by the limited liability law partnership.

32. *Clause 34* seeks to amend section 120 of Act 166.

Subclause 34(a) seeks to amend subsection 120(1) of Act 166 to provide that a client may change the limited liability law partnership acting for him before the conclusion of the business to which the agreement entered pursuant to section 116 of Act 166 relates and in that case, the limited liability law partnership who is a party to the agreement shall be deemed to have become incapable of acting under the agreement within the meaning of section 116 of Act 166.

Subclause 34(b) seeks to amend subsection 120(2) of Act 166 to provide that where any order is made for taxation of the amount due to a limited liability law partnership in respect of business done under the agreement entered pursuant to section 116 of Act 166, the Court shall direct the Registrar to have regard to the circumstances under which the change of limited liability law partnership has taken place.

Subclause 34(c) seeks to amend subsection 120(3) of Act 166 to provide that upon taxation, the limited liability law partnership shall not be considered to be entitled

to the full amount of the remuneration agreed to be paid to it unless it appears that there has been no default, negligence, improper delay or other conduct on the part of the limited liability law partnership affording reasonable ground to the client for changing the limited liability law partnership acting for him.

33. *Clause 35* seeks to amend section 121 of Act 166.

Subclause 35(b) seeks to amend subsection 121(1) of Act 166 to provide that where the remuneration of a limited liability law partnership in respect of contentious business done by it is not the subject of an agreement made pursuant to section 116 of Act 166, the bill of costs may at the option of the limited liability law partnership either contain detailed items or be for a gross sum.

Subparagraph 35(b)(v)(A) seeks to amend paragraph (a) of the proviso to subsection 121(1) of Act 166 to provide that at any time before service upon a client of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable therewith may require the limited liability law partnership to deliver to him in lieu of the cost a bill containing detailed items, and the gross sum bill shall thereupon be of no effect.

Subparagraph 35(b)(v)(B) seeks to amend paragraph (c) of the proviso to subsection 121(1) of Act 166 to provide that if a gross sum bill is referred to taxation, whether under section 121 of Act 166 or otherwise, nothing in section 121 of Act 166 shall prejudice any rules of court with respect to taxation and the limited liability law partnership shall furnish the taxing officer with such details of any of the costs covered by the bill as the taxing officer may require.

34. *Clause 36* seeks to insert a new definition of "limited liability law partnership" into section 122 of Act 166.

35. *Clause 37* seeks to amend section 123 of Act 166 to provide that any court in which a limited liability law partnership has been employed to prosecute or defend any

suit, matter or proceeding may at any time declare the limited liability law partnership entitled to a charge on the property recovered or preserved in such suit, matter or proceeding for such limited liability law partnership's taxed costs in reference to that suit, matter or proceeding, and all conveyance and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value without notice, be void as against the limited liability law partnership.

36. *Clause 38* seeks to amend section 124 of Act 166.

Subclause 38(b) seeks to amend and redraft subsection 124(1) of Act 166 to provide that no limited liability law partnership shall without the leave of the court commence or maintain any action for the recovery of any costs due for any business done by the limited liability law partnership until the expiration of one month after the limited liability law partnership has delivered the bill of costs to the party to be charged therewith in the manner as specified in that subsection.

Subclause 38(c) seeks to amend subsection 124(2) of Act 166 to provide that where a bill of costs is proved to have been delivered in compliance with subsection 124(1) of Act 166, it shall not be necessary for the limited liability law partnership to prove the contents of the bill of costs and it shall be presumed until the contrary is shown to be a bill of costs *bona fide* complying with this Act.

37. *Clause 39* seeks to amend section 125 of Act 166 to provide that the Court may authorize a limited liability law partnership to commence an action for recovery of its costs and also refer its bill of costs for taxation by the Registrar, although one month has not expired from the delivery of the bill of costs, upon proof to its satisfaction that any party chargeable therewith is about to quit Malaysia, or to have a receiving order made against him, or to compound with his creditors or to take any other steps or do any other act which in its opinion would tend to defeat or delay the limited liability law partnership in obtaining payment.

38. *Clause 40* seeks to amend section 126 of Act 166.

Subclause 40(a) seeks to amend subsection 126(1) of Act 166 to provide that an order for the taxation of a bill of costs delivered by any limited liability law partnership may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the limited liability law partnership, at any time within six months from the delivery of the bill of costs, or, by the limited liability law partnership after the expiration of one calendar month, and within a year from, the delivery.

Subclause 40(b) seeks to amend subsection 126(3) of Act 166 to provide that where a limited liability law partnership and its client consent to taxation of a bill of costs, the Registrar may proceed to tax the bill of costs notwithstanding that there is no order therefore.

39. *Clause 41* seeks to amend section 127 of Act 166 to provide that if the order for taxation of costs is obtained by a limited liability law partnership acting for either party, the costs of obtaining the order for taxation of costs, including the petition order and service of order, other than any court fees payable thereon or disbursements, shall be the sum of twenty-five ringgit provided that if one of the parties does not consent to taxation, the cost of obtaining an order of court shall be the sum of one hundred and fifty ringgit.

40. *Clause 42* seeks to amend section 128(1) of Act 166 seeks to amend subsection 128(1) of Act 166 to provide that after the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a bill of costs, except upon notice to the limited liability law partnership and under special circumstances to be proved to the satisfaction of the Court.

41. *Clause 43* seeks to amend section 129 of Act 166 to provide that all petitions by a party chargeable with or liable for a bill of costs shall, unless the same has been already paid, contain a submission by the party to pay the amount of the bill of costs to the limited liability law partnership when taxed.

42. *Clause 44* seeks to amend subsection 130(1) of Act 166 to provide that an order for the delivery of a bill of costs, and for delivery up of any deeds, documents or other papers in the possession of the limited liability law partnership may, subject to any lien which such limited liability law partnership may have, and for the taxation of the bill when delivered, be obtained on a petition of course.

43. *Clause 45* seeks to amend section 131 of Act 166 to provide that when the application is made by a party other than the party chargeable, the Court may order the limited liability law partnership to deliver to the party making the application a copy of the bill of costs, upon payment of the costs of making the copy.

44. *Clause 46* seeks to amend section 132 of Act 166 to require the bills of costs for taxation as between limited liability law partnership and client to be drawn in the manner provided by the *Rules of Court 2012 [P.U. (A) 205/2012]* and to provide that the taxation shall be governed by the Rules.

45. *Clause 47* seeks to amend section 133 of Act 166 to empower the Registrar to allow interest at any rate and from any time as he thinks fair and reasonable on moneys disbursed by a limited liability law partnership for its client, and on moneys of the client in the hands of the limited liability law partnership and improperly retained by it.

46. *Clause 48* seeks to amend section 134 of Act 166.

Subclause 48(b) seeks to amend subsection 134(1) of Act 166 to provide that if order for taxation of a bill of costs is made upon the application of a limited liability law partnership, the costs of the order and taxation, except when the order has been made after the expiration of one year, shall be paid by the limited liability law partnership if the bill of costs when taxed is less by a sixth part than the bill of costs.

Subclause 48(c) seeks to amend subsection 134(2) of Act 166 to provide that every order for any reference under section 125 of Act 166 shall direct the Registrar to tax the costs of the reference, and to certify what, upon the reference, is found to be due

to or from the limited liability law partnership in respect of the bill of costs, and of the costs of the reference, if payable.

47. *Clause 49* seeks to amend section 141 of Act 166.

Subclause 49(b) seeks to amend subsection 141(1) of Act 166 to provide that no bank shall, in connection with any transaction relating to the account of any limited liability law partnership kept with it or with any other bank (other than an account kept by a limited liability law partnership as trustee for a specified beneficiary), incur any liability or be under any obligation to make any inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the moneys paid or credited to it.

Subclause 49(c) seeks to amend subsection 141(2) of Act 166 to provide that a bank at which a limited liability law partnership keeps an account of its client moneys shall not have or obtain any recourse or right, whether by way of set-off, counterclaim, charge or otherwise, against moneys standing to the credit of that account in respect of any liability of the limited liability law partnership to the bank, not being a liability in connection with that account.

48. *Clause 50* seeks to amend the Schedule to Act 166.

Subclause 50(a) seeks to rename the Schedule as the "First Schedule" to Act 166.

Subclause 50(c) seeks to amend paragraph 1 of the Schedule to Act 166 to provide that the Bar Council may require the production or delivery to any person appointed by the Bar Council at a time and place to be fixed by the Bar Council, and may take possession, of all deeds, wills, documents constituting or evidencing the title to any property, papers, books of account, records, vouchers and other documents in the possession or control of the limited liability law partnership or relating to any trust of which such limited liability law partnership is a sole trustee or is co-trustee only with one or more of its partners, clerks or servants.

Subclause 50(d) seeks to amend paragraph 3 of the Schedule to Act 166 to provide that upon the taking possession of the documents referred to in paragraph 1 of the Schedule, the Bar Council shall serve a notice giving particulars and the date of taking possession thereof upon the limited liability law partnership and every person from whom those documents were received, or from whose premises they were taken by virtue of an order made under paragraph 2 of the Schedule.

Subclause 50(e) seeks to amend paragraph 5 of the Schedule to Act 166 to provide that within fourteen days after the service of a notice under paragraph 3 of the Schedule, the limited liability law partnership upon whom the notice was served may apply to a Judge in chambers for an order directing the Bar Council to return those documents to the person from whom they were received, or from whose premises they were taken, as the case may be, by the Bar Council or to such other person as the applicant may require, and on the hearing of any such application the Judge may make such order with respect to the matter as he may think fair and reasonable.

Subclause 50(f) seeks to amend paragraph 7 of the Schedule to Act 166 to provide that the High Court or a Judge thereof may, on the application of the Bar Council, order that no payment shall be made, without the leave of the High Court or a Judge, by any banker named in the order out of any banking account in the name of the limited liability law partnership.

Subclause 50(g) seeks to amend paragraph 9 of the Schedule to Act 166 to provide that the Bar Council may, on a resolution in that behalf made by the Council take control of all sums of money due from the limited liability law partnership, or due to the limited liability law partnership, or held by the limited liability law partnership or the limited liability law partnership on behalf of its client, or subject to any trust of which the limited liability law partnership is the sole trustee or co-trustee only with one or more of its partners, clerks or servants, and for that purpose the Bar Council shall serve on the limited liability law partnership, and, except where section 98 of Act 166 applies, on any banker and on any other person having possession or control of any such sums of money a notice, together with a certified copy of the resolution, prohibiting the payment

out of such sums of money otherwise than pursuant to paragraph 11 or 12 of the Schedule to Act 166.

Subclause 50(i) seeks to amend paragraph 10 of the Schedule to Act 166 to provide that within fourteen days of the service of a notice under paragraph 9 of the Schedule, the limited liability law partnership upon whom the notice was served, may apply to a Judge in chambers for an order directing the Bar Council to withdraw the notice, and on the hearing of the application the Judge may make any order with respect to the matter as he may think fair and reasonable.

Subclause 50(j) seeks to amend paragraph 11 of the Schedule to Act 166 to provide that subject to the service of any notice under paragraph 9 of the Schedule, and to any application that may be made under paragraph 10 of the Schedule, the Bar Council or any person in that behalf appointed by the Bar Council may withdraw the moneys, or from time to time any part of the moneys, in any banking account in the name of the limited liability law partnership due to be held on behalf of its client, and pay them into a special account or special accounts in the name of the Bar Council or such person appointed by the Council and may operate, and otherwise deal with, such special account or accounts as the limited liability law partnership might have operated on, or otherwise deal with, the banking account.

Paragraph 50(j)(i) seeks to amend subparagraph 12(1) of the Schedule to Act 166 to provide that the Bar Council may serve a notice on the limited liability law partnership, upon whom a notice has been served under paragraph 9 of the Schedule, directing that, immediately after the expiration of eight days from service of the first-mentioned notice, such moneys as are referred to in that notice be transferred in accordance with the directions of the Bar Council.

Paragraph 50(j)(ii) seeks to amend subsubparagraph (a) of the proviso to subparagraph 12(1) of the Schedule to Act 166 to provide that no such directions shall be given by the Bar Council except with the approval of the person to whom the moneys belong, being in the case of a trust the trustee, and, where the limited liability law

partnership is the sole trustee of a trust or a co-trustee thereof with one or more of its partners, clerks or servants, the person beneficially entitled to the moneys.

Subclause 50(k) seeks to amend paragraph 14 of the Schedule to Act 166 to provide that any costs incurred by the Bar Council for the purpose of the Schedule of Act 166 shall be paid by the limited liability law partnership and shall be recoverable from the limited liability law partnership as a debt owing to the Bar Council.

49. *Clause 51* seeks to introduce a new Second Schedule to Act 166 which contains forms in relation to the new section 76G, subsection 76J(3) and section 76K.

50. Other amendments not specifically dealt with in this Statement are minor or consequential in nature.

[…]

Sedition Act 1948

Executive Summary

Position of the Bar: Repeal the Sedition Act 1948

I. Introduction

1. The origin of the Act can be traced back to the Sedition Enactment 1948 that was enacted by the British colonialists as a means to clamp down on any dissension against the government of the day.

2. The Act, by virtue of the broad scope of what is meant by "seditious tendency", is the antithesis of democracy, rule of law and human rights.

3. It is aimed at stifling free speech and expression which are within the bounds of propriety. The history of sedition cases in this country points to a picture that frank and honest discussion on important issues has many a times, been penalised in the name of sedition. It is therefore an archaic and a draconian piece of legislation.

II. Problems with the Sedition Act 1948

4. The definition of seditious tendency in Section 3 is so wide that it deserves a special mention.

"(1) A 'seditious tendency' is a tendency—

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to excite the subject of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia.

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152,153 or 181 of the Federal Constitution."

5. Section 3(3) states that the intention of the person who has uttered "any seditious words or printed, published… any publication… **shall be deemed to be irrelevant** if in fact the words, publication… had a seditious tendency".

6. The Court of Appeal in the case of *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia* [2017] 1 MLJ 436, struck down Section 3(3) of the Sedition Act 1948 — which provides that the intention of the accused is irrelevant to a sedition charge — as invalid, as it is a disproportionate restriction on freedom of speech for the purposes of Article 10(2) of the Federal Constitution, and in breach of the guarantee of equal treatment and equal protection before the law under Article 8 of the Federal Constitution.

7. However, the aforesaid judgement of the Court of Appeal was later reversed by the Federal Court, on appeal.

8. Section 3(1)(c) of the Sedition Act 1948 makes it an offence "to bring into hatred or contempt or excite disaffection against the administration of justice".

9. Further, the inclusion of the word "hatred" in Section 3(1)(e)[1] in respect of the different races or classes in Malaysia, and the new provision relating to seditious tendency in Section 3(2)(c)(ii) of producing "feelings of ill will, hostility or hatred" "between different races or classes of the population of Malaysia", or "between persons or groups of persons on the ground of religion", have far reaching

[1] Refer to Act A145, Sedition (Amendment) Act 2015, which was Gazetted on 4 June 2015. It is noted that the amendments have not yet come into force.

implications as they are wide and ambiguous. Criminal offences must have the hallmark of clarity and certainty.

10. The amendment to Section 4(1) is worrying too. A person convicted of sedition is now liable to be imprisoned for a minimum term of three years and a maximum term of seven years. The sanction of a fine in lieu of imprisonment has been removed. The imposition of mandatory imprisonment for sedition is harsh and disproportionate to the purported offence. In the case of a Member of Parliament, it will result in automatic disqualification. Moreover, by prescribing a minimum term of imprisonment, the Government curtails the discretion of the Judiciary in sentencing matters.

III. Solution

11. The Malaysian Bar calls for the repeal of the Sedition Act 1948 and pending its repeal, a moratorium on the use of the Sedition Act 1948 and for authorities to cease all investigations pursuant to the Sedition Act 1948 and withdraw all pending sedition charges.

12. However, we recognise that no freedom is without limits and propose that the Sedition Act 1948 be replaced with National Harmony laws. Such National Harmony laws should not seek to criminalise thought, speech and expression, but rather provide a framework that recognises and encourages interaction, discourse, debate and learning.

IV. Conclusion

13. The Act ought to be repealed in view of the above circumstances.

Death Penalty

Executive Summary

Position of the Bar: Total abolition of the death penalty.

I. Introduction

1. The death penalty is currently retained for 33 offences in Malaysia, and as of February 2022, 1,341 people were reported to be on death row in Malaysia, including 506 (38%) foreign nationals. Of the total, 67.5% have been convicted of drug trafficking and several ethnic minorities with less advantaged socio-economic backgrounds are over-represented on death row[1].

2. While the Malaysian Bar wholeheartedly welcomes the abolishment of the mandatory death penalty in 2022, we remain resolute in our position that the death penalty is an extreme, abhorrent and inhumane punishment that should be abolished altogether.

II. Problems with the Death Penalty

3. The death penalty breaches two essential human rights: the right to life and the right to live free from torture. Both rights are protected under the Universal Declaration of Human Rights, adopted by the UN in 1948.

4. Appreciating that the risk of executing innocent people exists in any justice system, a cruel, inhuman and degrading sentence like the death penalty poses a serious problem as it is irreversible and irreparable.

5. Statistics and studies do not support the notion that the death penalty functions as an effective deterrence.

6. The death penalty is often used in a disproportional manner against those convicted, such as drug mules.

[1] Amnesty International (22 January 2021). 'Death Penalty Abolition'. Accessed 23 December 2022 at: https://www.amnesty.my/abolish-death-penalty/

III. Solution

7. The relevant laws should be reviewed and amended to have the death penalty commuted to sentences of imprisonment, proportionate to the gravity of offences committed, and take into consideration the mitigating factors and distinctive circumstances that surround each case.

IV. Conclusion

8. The death penalty for all crimes should be abolished without delay. The abolishment of the death penalty would elevate Malaysia to exemplary international standards as more than 70% of the world's countries have abolished capital punishment in law or practice as of July 2022[2].

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[2] Statistics by Death Penalty Information Center. Accessed 23 December 2022 at: https://worldpopulationreview.com/country-rankings/countries-with-death-penalty

Security Offences (Special Measures) Act 2012

Executive Summary

Position of the Bar: Repeal the Security Offences (Special Measures) Act 2012 ("SOSMA").

I. Introduction

1. SOSMA was enacted in 2012 as part of several legislations designed to replace the Internal Security Act 1960 ("ISA") that was repealed in 2012. SOSMA does not create new offences but serves as a procedural law that would replace the Criminal Procedure Code ("CPC") in security offences.

2. SOSMA has resulted in arbitrary powers to the police that substantially erodes the right of an accused to a fair trial and undermines the equality protections and fundamental liberties under the Constitution.

3. The Malaysian Bar's position is that SOSMA is an unnecessary piece of legislation inasmuch as the "security offences" under SOSMA are already found in Parts VI and VIA of the Penal Code. The Malaysian Bar calls for the repeal of SOSMA.

II. Problems with SOSMA

4. Section 3 – Interpretation

   4.1 Section 3 defines *'security offences'* as offences in the First Schedule, which refers to offences under Parts VI and VIA of the Penal Code.

   4.2 This is too wide. At the Bill stage, the government represented the Bill as one to combat the specific threat of terrorism. However the definition of *'security offences'* under Section 3 and the First Schedule goes far beyond the threat of terrorism, thus lending itself to abuse.

   4.3 Definition of "*sensitive information"* in Section 3. "*Sensitive information"* is widely defined. It purports to cover every government document, information or

material, including information falling within one or more of the categories outlined therein whether or not classified as "Top Secret", "Secret", "Confidential" or "Restricted".

4.4 Thus, whistleblowers who intend to disclose public wrong-doing of ministers or civil servants may be caught by the wide definition of "*sensitive information".*

5. Section 4 – Power of arrest and detention

5.1 Section 4 allows for detention for 24 hours and a police officer of or above the rank of Superintendent of Police may extend the detention for not more than 28 days for investigation. This is detention without trial and arbitrary powers in the hands of the police. This was what ISA purported to do.

5.2 The extension beyond the first 24 hours should be limited and sparingly granted, and subjected to judicial approval and oversight. Section 4 should be brought in line with Section 117 of the CPC. After the expiry of the initial 24 hours, the police must obtain a remand order.

5.3 Section 4(10) takes the section outside the ambit of Articles 5 and 9 of the Federal Constitution and section 117 of the CPC and as such should be removed completely.

6. Section 5 – Notification of next-of-kin and consultation with legal practitioner

6.1 Under Section 28A of the CPC, the police officer must allow the detained person to consult a lawyer of his choice and the police officer to inform the person that "*he may communicate or attempt to communicate and consult*" a lawyer of his choice. Section 5 attempts to take away this obligation.

6.2 Section 5(2) provides that the police may authorise a delay of the right to consult a lawyer up to 48 hours.

6.3 Further, Section 5(3) removes the section from the ambit of Article 5 of the Federal Constitution that provides the right to a lawyer.

7. Section 6 – Power to intercept communication

7.1 Interception of communications by the State is a violation of personal liberties. This section allows interceptions such without judicial oversight.

7.2 Wide powers given arbitrarily to intercept communications which can be used later against the suspect during trial.

7.3 Further, Section 6(6) removes the section from the ambit of Articles 5 of the Federal Constitution.

8. Section 7 – Special procedures relating to Electronic Monitoring Devices ("EMD")

8.1 The use of EMD raises ethical, legal and practical issues. EMD is an invasive technology which will place a restriction upon a person's liberties.

8.2 Section 7(1) allows the Public Prosecutor to make the application for EMD by way of *ex parte*.

9. Part IV – Special procedures relating to sensitive information

9.1 Section 8(1) seems to override the provisions of Section 51A of the CPC. The scope of "*sensitive information"* is very wide.

9.2 Section 8(2) shows that a court is to act as a mere rubber stamp to the Public Prosecutor. This is a breach of the doctrine of separation of powers.

9.3 Section 8(8) – any decision made by the trial court especially in relation to the acceptance of such sensitive information is non-appealable – this provision seems to truncate the powers of an appellate court under their appellate jurisdiction.

10. Section 13 – Bail

10.1 Issue of bail pending trial. Section 13(1) states that *"bail shall not be granted"*.

10.2 SOSMA does not allow bail once the suspect has been charged in court. This runs against the fundamental liberties of an accused. The continuous detention from the time of arrest until the conclusion of the trial has to be revamped.

11. Section 14 – Evidence of witness given in a special manner

11.1 The Prosecution has an unfair advantage in that their witnesses are given protection under the Act.

11.2 The act of taking evidence without adhering to the principle of natural justice – this section further provides a draconian provision to override Article 5 of the Federal Constitution (Liberty of person) and Section 264 of the Criminal Procedure Code (Evidence taken in presence of accused).

12. Section 17 – Inconsistency with the Evidence Act 1950

12.1 SOSMA overrides Evidence Act 1950.

13. Section 18 – Statement by any person who is dead, etc.

13.1 Evidence recorded from persons who are dead is admissible in court – does this provision mean that such evidence can be accepted "in toto" or should the court attach weight to such evidence before it is deemed admissible.

14. Section 20 – Documents or things seized or howsoever obtained

14.1 All documents seized during raid can be used as evidence against accused.

15. Section 21 – Evidence of identification of accused or other person

15.1 Evidence of identification of the suspect/accused during the investigation process can be via reference to photographs or other methods. This is valid under SOSMA – this provision breaches the established precedence of identification evidence.

16. Section 22 – Lists of documents and things

16.1 Issue of search list - provision allows whatever seize during raids and investigation can be made admissible against the accused.

17. Section 23 – Non-production of exhibit

17.1 Failure to produce exhibits by the prosecution during trial is not fatal for the prosecution.

18. Section 24 – Admissibility of intercepted communication and monitoring, tracking or surveillance information

18.1 Relates to admissibility of intercepted communications – this is to be read with Section 6 of the Act. This intercepted communication is admissible in trial – evidence cannot be led to compel the police as to how they came by this evidence.

19. Section 25 – Admissibility of documents produced by computers and of statements contained therein

19.1 Admissibility of documents produced by computer and the statement therein is admissible – provision seem to suggest it can override the requirement of the Evidence Act 1950.

20. Section 26 - the position relating to evidence of an accomplice and *agent provocateur*

20.1 Section 26(2) – SOSMA overrides any "**rule of law**" and "**written law**" (this goes against the very grain of the Federal Constitution). This Act supersedes every fundamental liberties and Act of Parliament which protect fairness and justice.

21. Section 30 – Detention pending exhaustion of legal process.

21.1 This provision allows the Public Prosecutor to apply to court to remand the accused who is acquitted at the end of the trial. This translates to a detention during the appeal process which again runs counter to the fundamental liberties of an individual and to the principles of everyone being equal under the law and punishment according to law. SOSMA cannot intervene and breach the fundamental liberties of an accused, especially when the accused is acquitted by the court of law. Such an application by the Public Prosecutor is an affront to the rule of law.

III. Solution

22. Repeal SOSMA.

IV. Conclusion

23. It is draconian and disregards the constitutional safeguards in the Federal Constitution.

Prevention of Crime Act 1959

Executive Summary

Position of the Bar: Repeal the Prevention of Crime Act 1959 ("POCA")

I. Introduction

1. POCA was enacted to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons.[1]

2. POCA, which suggests the reversion of presumption of innocence, prevention and restriction of a suspect's right to legal representation or effective legal representation, and ultimate prohibition or rendered illusory recourse to judicial scrutiny by the Courts, violates the rule of law and shows a clear rejection to the fundamental principles which govern the criminal justice system.

II. Problems with the Prevention of Crime Act 1959

3. Pursuant to **Section 4 of POCA**, during a remand hearing, the Magistrate is obliged to accept the written statements from the police and the Deputy Public Prosecutor without scrutiny. Effectively, the Court's role is reduced to rubber-stamping the detention. It is apt to recall the findings[2] by YAA Tun Tengku Maimun binti Tuan Mat in Zaidi bin Kanapiah (dissenting judgment) – wherein Her Ladyship held that Section 4 of POCA was invalid and unconstitutional under Article 4(1) of the Federal Constitution.

4. There is a defence of "political belief" under **Section 4(2A)**, however, this defence is too limited.

[1] Preamble to Prevention of Crime Act 1959
[2] Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759

5. Following the **deletion of Section 6 of POCA**[3], the right of the detainee to appear and make his/her case (for non–detention) before an Inquiry Officer appointed by the Ministry of Home Affairs is removed. Effectively, the detainee is now deprived of his/her basic right of natural justice to be heard at the earliest possible instance, to know the allegations made against him/her, and to respond to them.

6. **Section 7B of POCA** establishes the Prevention of Crime Board (POCB), which in effect sidelines the Judiciary, should be done away with completely. It is reiterated that all detentions must be subject to judicial oversight and review.

7. Further, it is to be noted that pursuant to **Section 7B of POCA,** the POCB is to constitute of a Chairman, who shall be a legally qualified person with at least fifteen years of experience, a Deputy Chairman and three to six other members. Additionally, there is no mention of how the POCB is to arrive at its decisions, and it would appear to be on a majority basis.

8. Under **Sections 8 and 9 of POCA**, an Inquiry Officer, who is not a police officer, is appointed by the Minister to conduct an administrative inquiry to ascertain whether the suspected person falls within the registrable categories in POCA. At this inquiry, the suspect is denied the right to be legally represented, save when his evidence is recorded. POCA also allows the Inquiry Officer to gather evidence against the suspected person from third parties, in the absence of the suspected person and/or his legal representatives.

9. This denial of due process is further compounded when a detainee is now not able to challenge the recommendation made by the Inquiry Officer to the POCB, following the deletion of **Section 11 of POCA**.[4] An Inquiry Officer is, in effect, given absolute liberty to make recommendations based on information submitted by the police to the POCB, without any input from the detainee.

[3] Prevention of Crime (Amendment) Act 2017 (Act A1549)
[4] Ibid

10. The POCB is, in turn, given wide powers to affirm or reverse the Inquiry Officer's recommendations in **Section 10A of POCA**, again without the POCB having first heard from the detainee.

11. Additionally, **Section 15B of POCA** provides that there shall be no judicial review of the POCB's decision, except in regard to any question on compliance with any procedural requirement. Even these limited graounds for judicial review is rendered illusory as the Court is precluded from requiring the Inquiry Officer or the POCB to produce information (for the purpose of the judicial review) what the Inquiry Officer or POCB unilaterally considers to be "*against the public interest to disclose or produce"* – **Section 21A of POCA**.

12. **Section 15B of POCA** been found by the Federal Court[5] to be unconstitutional, as being inconsistent with Article 4(1) of the Federal Constitution.

III. Solution

13. POCA is another form of detention without trial and it should be repealed.

14. Malaysia's experience with detention without trial laws is a blight on our nation's history. Not only does it represent a disregard for the rule of law, the principles of natural justice and human rights, it is also a painful memory for the many individuals who were detained without trial as well as for their families. One would recall that the authorities are alleged to have inflicted torture and inhumane treatment upon persons detained under the repealed Internal Security Act 1960.

15. Malaysia, being a member of the United Nations Human Rights Council for the 2022–24 term, should take this opportunity to uphold its commitment to the protection of human rights by repealing POCA.

[5] Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356

16. The Malaysian Bar has always been and continues to be against detention without trial. No person should be deprived of their freedom and civil liberties without due process. Detention without trial runs counter to the rule of law, the rules of natural justice and the basic principle of the criminal justice system that a person is innocent until proven guilty.

Prevention of Terrorism Act 2015

Executive Summary

Position of the Bar: Repeal the Prevention of Terrorism Act 2015 ("POTA")

I. Introduction

1. POTA as drafted is entirely wide and general in its objects and ambit. POTA is not a focused or tailored legislation with respect to the purpose and objects specifically set out in the White Paper.[1] It has wandered far off the perimeters of the White Paper. The provisions in POTA are disproportionate to the objectives of the White Paper in addressing the particular mischief of new threats that exist such as the Islamist State ("IS") in relation to the 'foreign fighters' phenomenon.

2. POTA is in essence a poorly disguised reversal by the Government in seeking to reintroduce provisions of the repealed Internal Security Act 1960 ('ISA'), Emergency (Public Order and Prevention of Crime) Ordinance 1969 and Restricted Residence Act 1933.

II. Problems

3. The total period of detention would be the sum of 24 hours + 21 days + 38 days = 60 days. This is the same period of initial detention that was provided for under the repealed ISA.

4. POTA provides for a two-year period of detention without trial with unlimited extensions of such detention or five-year restriction orders also with unlimited extensions, and denies the right of a detained person to be heard and to have legal representation.

[1] On 26 November 2014, the Government through the Prime Minister tabled a White Paper titled 'Ke Arah Menangani Ancaman Kumpulan Islamic State'. This White Paper sets out and explains the new terrorism threat posed by the Islamic State ('IS') and the 'foreign fighters' phenomenon amongst Malaysian citizens. The White Paper had proposed for a specific and appropriate new law to be enacted to deal with any new threats that exist such as the IS relating to presence of and/or participation by Malaysian citizens in conflict zones and the return to Malaysia of these citizens, as well as the involvement of Malaysians in militant activities.

5. It prevents judicial oversight by ousting the jurisdiction of the Courts, save in limited matters of procedure.

6. Specific provisions of POTA which are cause for concern:

6.1 Section 4 – Remand

i. Matters concerning terrorism are currently heard by a Magistrate. The Magistrate is not given any information or material or substantiated grounds for the detention of a suspect for the initial period of and the subsequent period of 38 days.

ii. The Magistrate is obliged to accept the written statements from the police and the Deputy Public Prosecutor without scrutiny and lend itself to rubber-stamping the detention.

6.2 Section 4(3) and (6) – defence of political belief too limited

i. While a person's political activity and beliefs should not be a ground for detention without trial, the definition on political activity and beliefs is too narrow and ought to be expanded.

ii. It is unfair to restrict political activity and beliefs to only "*tenets of a political party registered under the Societies Act 1966*" when political activity and beliefs are wider than this.

6.3 Section 8 - Prevention of Terrorism Board

The provision for the establishment of the Prevention of Terrorism Board, which is in effect a device to sideline the Judiciary, should be done away with completely. It is reiterated that all detentions must be subject to judicial oversight and review.

III. Solution

7. Repeal POTA.

IV. Conclusion

8. There are already sufficient and substantive anti-terrorism legislation in the form of Chapter VIA of the Penal Code.

9. Section 130J of the Penal Code already provides an offence in relation to the ‘foreign fighters’ phenomenon.

10. POTA is antithetical to the rule of law, the principles of natural justice and human rights.

Amendments to the Trustee Act 1949
Executive Summary

Position of the Bar: Reforms to be made to the Trustees Act 1949, and related legislation.

I. Introduction

1. Malaysia's Trustees Act 1949 ("**TA 1949**") was first enacted in 1949 and has been minimally amended over the last 74 years, with its last amendment being in 1974. To our knowledge, there has been no comprehensive review of Malaysia's private trust law since its enactment.

2. While our TA 1949 was based on the English's Trustee Act 1925, the United Kingdom (England and Wales) ("**UK**") has long since recognised the need for reforms to be made to its Trustee Act 1925, among other trust legislation, in order to facilitate trust administration in an increasingly modernised world. Pursuant to joint recommendations made by The Law Commission and the Scottish Law Commission, the Trustee Act 2000 was then legislated, coming into force on 1 February 2001, substantially repealing the Trustee Act 1925.

3. Singapore and Hong Kong, whose trust legislation are also based on English law, similarly embarked on reforms to be made to the relevant statute(s), cumulating in the passing of the Trustees (Amendment) Act 2004 in Singapore, and the Trust Law (Amendment) Ordinance 2013 in Hong Kong. Both these jurisdictions employ successful onshore models in supporting the development of their private wealth management industry.

4. Whereas in New Zealand, the Trusts Act 2019 recently came into force on 30 January 2021, repealing its prior law, the Trustee Act 1956.

5. In comparison, our TA 1949 is outdated – as it was enacted during a time where it would have been applied to mostly wills and domestic / family settlements. The Act now struggles to remain relevant and be applicable to modern trust infrastructure and needs, and is largely perceived by practitioners to be archaic and not often applied.

II. The Opportunity

6. Over the next five years, it is estimated that Asia (excluding Japan) together with North America will be the leading financial wealth generators globally[1].

7. In Southeast Asia, Malaysia accounts for 17% of wealth and is expected to grow at a compound annual growth rate of 4.5% in the next five years, compared to the global rate of 3.2% for the same period[2].

8. While Malaysia serves trusts which may be set up under the Labuan regime, it is important to also ensure that our mainland infrastructure is on par with other regional onshore counterparts such as Singapore and Hong Kong in order to attract more trusts to be set up here, rather than in these neighbouring countries.

9. Not all settlors may want, or feel the necessity, to establish their trust under the Labuan regime. The expansion and development of the mainland market will supplement what is offered in the Labuan market by serving existing mainland practitioners and clientele, as well as expanding the practice and industry here – thus ensuring that Malaysia's infrastructure, both in Labuan and mainland, are able to attract, address and serve the needs of different segments of the market.

III. The Issues, Gaps & Problems with TA 1949

10. Despite Malaysia's growing potential and evolvement of the private wealth management industry over the years, the TA 1949 has not kept up to pace with the development of trusts practice in the present day – which now also comprises commercial enterprises, the sophisticated management of investment funds, and international financial transactions.

[1] Boston Consulting Group, When Clients Take the Lead, Global Wealth 2021, June 2021
[2] Kumar, Sumit (22 January 2021). 'GrowingChampions: Vast wealth management potential in Malaysia, but players need to restructure operating model to tap this opportunity'. *The Edge Malaysia*

11. Fundamentally, the nature and purpose of trusts and assets that used to be characteristically held by trustees when the TA 1949 was enacted, have considerably changed. In addition, the financial services and investment industry have matured over the years and have an impact on the ways in which trustees now carry out their duties and in acting in the best interest of their client(s).

12. While some trusts today may benefit from having been professional drafted, thus avoiding some of the constraints that may otherwise occur due to the limitations in the TA 1949, the Act would still apply in other cases and where it is not covered by the trust instrument.

13. Further, while the interpretation and application of trust principles in Malaysia is based on English common law and rules of equity (section 3 of the Civil Law Act 1956), as the UK has since made statutory changes to its relevant trust legislation, case law in this respect may have either ceased to be developed or now interpreted according to UK's newer legislation.

14. Thus, the following are some aspects which should be considered for reform:

(a) Trustees' statutory duty of care

Recommendation: To provide for a statutorily-enacted objective trustees' standard of care which would be applicable to a range of functions, as prescribed. Such duty of care would have regard to any special knowledge or experience held by the trustee (or which the trustee holds out as having).

Rationale:

(i) The UK's Joint Commission Report on 'Trustees' Powers and Duties'[3] ("**UK Joint Commission Report**") and Hong Kong's Financial Services and Treasury Bureau's Consultation Paper Outcome on 'Review of the Trustee Ordinance and Related Matters' [4] ("**HK FSTB Consultation Outcome**") recommended that the trustees' duty of care be statutorily

[3] 'Trustees' Powers and Duties'. *The Law Commission and Scottish Law Commission.* 12 May 1999, pg 36
[4] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper Outcome'. *Financial Services and Treasury Bureau.* February 2010, pg 2 – 4

enacted, as among others, it would make the law more certain and accessible to the public.

(ii) In addition, while trustees are subject to a duty at common law in the performance of their investment function, there may be cases where different standards of care applies in the appointment and supervision of agents due to certain sections in the TA 1949, thus not forming a coherent whole and leading to uncertainty, as follows:

- Section 28(1) provides that trustees may employ agents, etc, and shall not be responsible for the default of the agent if the employment was done in "good faith";
- Section 35(1) provides that trustees are not liable for the acts of any banker, broker, or other person with whom any trust money or securities may be deposited, nor for any loss, unless the loss happens through the trustees' "wilful default";
- Thus, as recognised in the UK Joint Commission Report, there may be cases where "different standards of care apply to the initial appointment of the agent by the trustees and their subsequent control of him or her, even though there is no clear boundary between the two events"[5].

(iii) In a similar manner, Hong Kong's Financial Services and Treasury Bureau's Consultation Paper on 'Review of the Trustee Ordinance and Related Matters' [6] ("**HK FSTB Consultation Paper**") finds that the enactment of a trustees' duty of will "provide more certainty for settlors and trustees and give better protection to beneficiaries".

(iv) The relevant trust laws in UK, Hong Kong and Singapore have been amended to introduce trustees' statutory duty of care.

[5] 'Trustees' Powers and Duties'. *The Law Commission and Scottish Law Commission.* 12 May 1999. pg. 35 – 36
[6] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 12 – 14

[See, Annexure I: Relevant Extracts of the Trustee Act 2000 (United Kingdom); Trustees (Amendment) Act 2004 (Singapore); Trust Law (Amendment) Ordinance 2013 (Hong Kong)]

(b) Trustees' power of investment

Recommendation: To provide for a statutorily-enacted general investment power of trustees (subject to any expression of a contrary intention in the trust instrument) and the inclusion of safeguards in this respect.

Rationale:

(i) Currently, the TA 1949 provides that a trustee may invest only in certain categories – i.e. "authorized investments". These sections have not been amended since 1974.

(ii) In UK, the Trustee Act 2000 provides trustees with a general default power of investment.

(iii) It is noted that prior to the 2000 legislation, the Trustee Investments Act 1961 had allowed for "narrower-range investments" and "wider-range investments", as provided for in the First Schedule. The former consisting of mainly fixed-interest securities, and the latter of shares (with some restrictions) and authorised unit trusts[7].

(iv) However, the UK Joint Commission Report recognised[8] in 1999 that due to the restrictions imposed on such categories of investment, trustees may "be precluded from making investments which would be appropriate to the trust, and which appear prudent", and that "the assets of a trust increase in value to a lesser extent than they probably would if trustees had freedom to decide in what to invest." Thus, it was recommended, and supported during the consultation process, that trustees should have the general power to make an investment as they would have if they were absolute owners of the trust assets.

[7] Trustees' Powers and Duties'. *The Law Commission and Scottish Law Commission.* 12 May 1999. pg. 13
[8] Trustees' Powers and Duties'. *The Law Commission and Scottish Law Commission.* 12 May 1999. pg. 17

(v) The enumeration of an "authorized investment list" in statute would inevitably also lead to rigidity, resulting in an inability to take into account the numerous instruments that are available, and are increasingly developing, in the financial services market today.

(vi) In addition to UK, Singapore's legislation has also been amended to provide trustees with a general default power of investment, alongside the safeguards that (i) "standard investment criteria" must be considered; (ii) proper advice must be considered and obtained; and (iii) duty of care would apply in the performance of the trustees' investment function.

[See, Annexure II: Relevant Extracts of the Trustee Act 2000 (United Kingdom); Trustees (Amendment) Act 2004 (Singapore)]

(c) Trustees' power to insure assets

Recommendation: Section 24 of TA 1949 should be amended. The trustee should be empowered: (i) to insure the trust property against risks of loss or damage due to any event, not limited to only by fire; (ii) to insure up to market value or full replacement value of the property; (iii) the section should be applicable to bare trustees, with the relevant safeguards; and (iv) the insurance premiums should be allowed to be paid out of trust capital or income.

Rationale:

(i) The current provision of section 24 of TA 1949 is unduly restrictive for the following reasons:

- it is limited to losses or damage arising only from fire;
- it is limited to the "full value" of the property (rather than market value or replacement value);
- the section is inapplicable to bare trustees; and
- the insurance premiums must be paid out of the income of trust properties.

(ii) These weaknesses have been identified in the HK FSTB Consultation Paper[9] and HK FSTB Consultation Outcome[10], as well as in Singapore's Academy of Law's Report on 'Reform of Certain Aspects of the Trustees Act' [11] ("**SG Law Reform Committee Report**"), noting that the remedying of these shortcomings will afford greater protection to trust properties.

(iii) The relevant trust laws in UK, Hong Kong and Singapore have been amended accordingly.

[See, Annexure III: Relevant Extracts of the Trustee Act 2000 (United Kingdom); Trustees (Amendment) Act 2004 (Singapore); Trust Law (Amendment) Ordinance 2013 (Hong Kong)]

(d) Trustees' power to appoint agents

Recommendation: Section 28 of TA 1949 should be amended to provide trustees with a general power of appointing agents (with the relevant safeguards, and subject to any expression of a contrary intention in the trust instrument).

Rationale:

(i) Currently, pursuant to section 28(1) of TA 1949, trustees may, instead of acting personally, employ agents, such as solicitors, bankers, stockbrokers or other persons, "to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate". Whereas subsection (2) provides for the situation where the trust property is situated outside Malaysia.

(ii) In comparing the wordings of subsection (1) and (2), this section has been interpreted[12] to mean that the general power in subsection (1) is confined only to administrative functions (also known as ministerial directions) and

[9] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 28 – 29
[10] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper Outcome'. *Financial Services and Treasury Bureau.* February 2010, pg.10
[11] 'Reform of Certain Aspects of the Trustees Act: A Report of the Law Reform Committee of the Singapore Academy of Law'. *Singapore Academy of Law.* 31 March 2003, pg. 11
[12] 'Trustees' Powers and Duties: Consultation Paper'. *The Law Commission and Scottish Law Commission.* n.d. pg. 42; Retrieved from: https://www.lawcom.gov.uk/document/trustees-powers-and-duties-consultation/; 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 22

not trustees' fiduciary powers and duties – which is allowed for under subsection (2).

(iii) Further, in relation to subsection (2), the HK FSTB Consultation Paper recognised [13] that with present advancements in communication technology, it has made it unnecessary for trustees to delegate fiduciary responsibility to overseas agents for properties which are situated outside the country.

(iv) The UK Joint Commission Report also recognised[14] that the distinction between fiduciary duties and administrative duties were the "product of a time when the decisions which trustees had to take were both comparatively straightforward and frequent", and that it is "increasingly unrealistic, given that many of these tasks (particularly in relation to investment) now arise regularly and often require speedy professional advice and execution. … the "exigencies of business" now justify the delegation of these discretions because adherence to the present restrictions is likely to frustrate the trustees' paramount duty to act in the best interests of the trust."

(v) Furthermore, the HK FSTB Consultation Outcome[15] finds that, "it is a common practice that trustees would delegate their investment functions to agents like professional investors or qualified asset managers to manage the trust assets".

(vi) Thus, in tandem with the introduction of a general power of appointing trustees, we also propose for powers to appoint nominees and custodians (with the relevant safeguards).

[13] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 23
[14] 'Trustees' Powers and Duties: Consultation Paper'. *The Law Commission and Scottish Law Commission.* n.d. pg. 86
[15] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper Outcome'. *Financial Services and Treasury Bureau.* February 2010, pg. 8

(vii) The relevant trust laws in UK, Hong Kong and Singapore have been amended to provide for the general power of appointing trustees, nominees and custodians.

[See, Annexure IV: Relevant Extracts of the Trustee Act 2000 (United Kingdom); Trustees (Amendment) Act 2004 (Singapore); Trust Law (Amendment) Ordinance 2013 (Hong Kong)]

(e) Remuneration of trustees

Recommendation: To statutorily provide that professional trustees' may receive reasonable remuneration for their services in connection with the trust.

Rationale:

(i) There exists a general rule in common law to the effect that a trustee cannot be remunerated for his services except, where there is an express charging expression in the relevant trust instrument, or it is in accordance with statute, or as permitted by court. The traditional rationale behind the rule is predicated on conflict of interest and duties of a trustee.

(ii) The UK Joint Commission Report, HK FSTB Consultation Paper and SG Law Reform Committee Report recognised[16] that, with the increase in complexity in trusts in modern times, having a statutory default charging clause (which can be opted out of) will encourage the trust to appoint professional trustees who are equipped with the necessary skills in order to effectively administer the trust.

(iii) Furthermore, the UK Joint Commission Report[17] points out that, in the absence of a charging clause, it is unlikely that professional trustees will be willing to administer the trust. This may be detrimental to the trust and may mean that, in particular, beneficiaries under home-made wills would be penalised. An application may instead need to be made to court,

[16] 'Trustees' Powers and Duties'. *The Law Commission and Scottish Law Commission.* 12 May 1999. pg. 73; 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 32; 'Reform of Certain Aspects of the Trustees Act: A Report of the Law Reform Committee of the Singapore Academy of Law'. *Singapore Academy of Law.* 31 March 2003. pg. 14

[17] 'Trustees' Powers and Duties: Consultation Paper'. *The Law Commission and Scottish Law Commission.* n.d. pg. 160; Trustees' Powers and Duties'. *The Law Commission and Scottish Law Commission.* 12 May 1999. pg. 73

incurring resource and costs, to appoint a trustee, who would be authorised to charge for its services.

(iv) The relevant trust laws in UK, Hong Kong and Singapore have been amended to provide that professional trustees' may receive reasonable renumeration.

[See, Annexure V: Relevant Extracts of the Trustee Act 2000 (United Kingdom); Trustees (Amendment) Act 2004 (Singapore); Trust Law (Amendment) Ordinance 2013 (Hong Kong)]

(f) Beneficiaries' right to remove trustees

Recommendation: To provide beneficiaries with the right to remove trustees in certain circumstances.

Rationale:

(i) Currently, beneficiaries may remove trustees only in limited circumstances – if authorised by the trust instrument, or through an application to court in accordance with the provisions of TA 1949.

(ii) The UK Trusts of Land and Appointment of Trustees Act 1996 contains more flexibility as it provides that, should all the beneficiaries of a trust, who are of full age and capacity and (taken together) are absolutely entitled to the trust property, and if the trust instrument does not nominate any person for the purpose of appointing new trustees, the beneficiaries may, in writing, direct a trustee to retire from the trust.

(iii) As noted in the HK FSTB Consultation Paper [18] and supported by submitters in the HK FSTB Consultation Outcome[19], "it may not be in their [the beneficiaries] best interest to terminate a trust and re-settle the assets or apply to court to replace the trustee due to the time and costs involved". Further, a court-free process would provide "a relatively easy means for beneficiaries of a trust, who are dissatisfied with a trustee, to

[18] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 43
[19] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper Outcome'. *Financial Services and Treasury Bureau.* February 2010, pg. 19

remove the trustee and appoint a new trustee without the need to terminate the trust."

(iv) Hong Kong has since similarly legislated for the same.

[See, Annexure VI: Relevant Extracts of the Trusts of Land and Appointment of Trustees Act 1996 (United Kingdom); Trust Law (Amendment) Ordinance 2013 (Hong Kong)]

(g) Rule against perpetuities (also known as the rule against remoteness of vesting) and accumulations

Recommendation: To introduce (i) a fixed perpetuity period of up to 150 years, and for accumulations to be allowed to be accumulated for the duration of the settlement; and (ii) to adopt the "wait and see" principle. Relevant amendments to be made to the Civil Law Act 1956.

Rationale:

On Perpetuities

(i) Currently, the rule against perpetuities as developed in English law is applicable in Malaysia (section 3 of the Civil Law Act 1956). The rule against perpetuities generally restricts future dispositions of property by prescribing a certain time limit (i.e. the 'perpetuity period) for when the estate or interest in the trust property must take effect. If there is a possibility that the interest may vest outside that period, the interest fails from the time of the purported creation of such estate or interest.

(ii) The perpetuity period is based on the lives in being at the time the trust is created + 21 years, or a fixed period of up to 80 years (if specified in the settlement). As have been recognised in other jurisdictions[20], in practice, the rule is immensely complex to apply and creates significant difficulties and uncertainties.

[20] UK: 'The Rules Against Perpetuities and Excessive Accumulations': A Consultation Paper. *The Law Commission.* Law Commission Consultation Paper No 133. 1993. pg. 50; HK: 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 47; New Zealand: 'Perpetuities and the Revocation and Variation of Trusts'. *Law Commission.* Review of the Law of Trusts: Third Issues Paper (Issues Paper 22). April 2011. pg. 24

(iii) The traditional justification for the rule has been that it is to:

- strike a balance between the freedom of the present generation and the freedom of the future generation, in dealing with the assets;
- ensure that property is freely alienable – that land, in particular, would not be subject to a trust longer than it is desirable.

(iv) In UK, the Perpetuities and Accumulations Act 1964 was initially enacted (which permitted the settlor to opt for a period not exceeding 80 years), and thereafter replaced with the Perpetuities and Accumulations Act 2009, which came into force on 5 April 2010, introducing a perpetuity period of 125 years.

(v) In Singapore, the perpetuity period is provided for at a maximum of 100 years, whereas in New Zealand it is 150 years.

(vi) Whereas, in Hong Kong, the Perpetuities and Accumulations Ordinance was enacted in 1970 and modelled after UK's 1964 Act. However, pursuant to its 2014 reforms, the rule against perpetuities has since been abolished – there is no fixed termination date.

(vii) The UK Law Commission Report on 'The Rules against Perpetuities and Excessive Accumulations'[21] and HK FSTB Consultation Paper[22] both find that the common law rule leads to harsh results as it may render a disposition void from the outset, and result in being vested in someone whom a settlor had not intended to provide for.

(viii) The New Zealand Law Commission in its 'Review of the Law of Trusts: Preferred Approach Issues Paper[23] also highlights that the rule against perpetuities is complex, poorly understood, causing uncertainty and considerable problems in practice.

[21] 'The Rules Against Perpetuities and Excessive Accumulations'. *The Law Commission.* Item 7 of the Sixth Programme of Law Reform: The Law of Trusts. 1998.
[22] 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 47
[23] 'Review of the Law of Trusts: Preferred Approach'. *Law Commission.* Issues Paper 31. November 2012.

(ix) Thus, in order to remedy the rule's harshness and complexity, as well as to promote certainty in application of the law, we propose that, following the approach in New Zealand, a fixed perpetuity period of up to 150 years be introduced. The period of 150 years takes into account the increase in life expectancy and, as noted in the aforementioned New Zealand report, will allow most trusts established for the duration of a life in being plus 21 years to continue until their natural end.

On Accumulations

(x) Similar arguments have been made regarding the rule against accumulations, which have generally been set out in statute. In Malaysia, it is governed by section 17 of the Civil Law Act 1956, which provides several accumulation periods for which the income of the trust may be accumulated. The traditional rationale for the rule has been, that it is to prevent settlors from restricting the enjoyment of the income of the trust property by the beneficiaries, and to prevent excessive wealth from being concentrated on a few hands, to the detriment of the economy.

(xi) The UK Law Commission Report and HK FSTB Consultation Paper both acknowledge that such fears are unfounded and "that there was no case, economic or otherwise, for restricting accumulations to any period less than the perpetuity period."[24] Furthermore, the reports find that the various accumulations periods provided for creates uncertainties and complexities in the law, including in scenarios where the court has to determine the relevant accumulation period in the absence of a selection by the settlor.

(xii) Both jurisdictions have since legislated to repeal the rule (save for in relation to charitable trusts).

(xiii) Thus, we propose that accumulations be allowed to be accumulated for the duration of the settlement (except in relation to charitable trusts).

[24] 'The Rules Against Perpetuities and Excessive Accumulations'. *The Law Commission.* Item 7 of the Sixth Programme of Law Reform: The Law of Trusts. 1998, pg. 124; 'Review of the Trustee Ordinance and Related Matters: Consultation Paper'. *Financial Services and Treasury Bureau.* June 2009. pg. 48

"Wait and see" principle

(xiv) As highlighted above, one of the consequences of breaching the rule against perpetuities is that the interests are void at the outset. Both UK and Hong Kong had already in their prior Act(s) in 1964 and 1970, respectively, adopted the "wait and see" approach which has the effect that the interests are no longer void from the outset just because of the *possibility* that they may vest outside the perpetuity period. It will not be void until such time that it becomes *apparent* that it would vest outside the perpetuity period.

(xv) We propose the same to be adopted. The "wait and see" principle would apply to the proposed 150-year perpetuity period.

[See, Annexure VII: Relevant Extracts of the Trustees (Amendment) Act 2004 & Civil Law Act 1990(Singapore); Perpetuities and Accumulations Act 2009 (United Kingdom); Perpetuities and Accumulations Ordinance (Hong Kong)]

(h) Variations of trusts

Recommendation: To statutorily empower the Court to vary the trust in certain circumstances, as stated below.

Rationale:

(i) Generally, Courts have limited jurisdiction in amending a trust instrument in order to respect, and not derogate from, the settlor's express intention, as reflected in the trust instrument.

(ii) Circumstances where the Courts may do so include, pursuant to its inherent jurisdiction (known as the "emergency" or "salvage" jurisdiction) to approve or sanction a course of action by trustees in order to avert damage or prejudice to the beneficiaries, as a result of unforeseen events. Section 59 of the TA 1949 also allows the Court to authorize dealings regarding the management and administration of trust property.

(iii) The Singapore's Academy of Law's 'Report on Introducing a Statutory Variation of Trusts Jurisdiction'[25] found that the two methods described above are only *ad-hoc* in nature and cannot "be invoked to adjust or vary beneficial interests by way of rewriting, remoulding or rearranging the trust"[26]. Circumstances which may arise requiring variation of the trust include to "allow beneficiaries to receive their benefits free of the trust or on improved terms beyond those imposed by the settlor which avert the impact of unforeseen changes in their circumstances" – for instance, minimizing unforeseen tax burdens, as well as to "delay the falling in of the beneficial interest (by extending the duration of the trust, for example), where this is beneficial to all trust beneficiaries"[27].

(iv) It is to be noted that beneficiaries who are of full age, sound mind, and between them wholly entitled to the trust property, may, in agreement, apply to have the trust terminated and assets transferred to themselves as beneficiaries absolutely (*Saunders v Vautier*).

(v) Thus, the UK Variation of Trusts Act, enacted in 1958, was viewed as a statutory extension of the principle embodied in *Saunders v Vautier* as it broadly allowed the Court to approve variation to terms of the trust on behalf of persons who are unable to assent to the arrangement for themselves (e.g. infants, unborn or unascertained persons). The arrangement must be to the benefit of those persons.

(vi) In addition to UK, Hong Kong enacted the Variation of Trusts Ordinance in 1964, whilst the Singapore Academy of Law has, pursuant to the aforementioned report, recently recommended for similar legislation to be enacted in order to "enable the courts to facilitate changes in beneficial interests or administrative powers which are beneficial to all beneficiaries,

[25] 'Report on Introducing a Statutory Variation of Trusts Jurisdiction. *Singapore Academy of Law.* Singapore Academy of Law: Law Reform Committee. April 2019
[26] Ibid. Pg 7
[27] Ibid. Pg 12

especially when trusts of long duration become unsuitable or inexpedient over time."[28]

(vii) Thus, we propose the same to be adopted.

[See, Annexure VIII: Variation of Trusts Act 1958 (United Kingdom); Variation of Trusts Ordinance (Hong Kong); Singapore's Academy of Law's 'Report on Introducing a Statutory Variation of Trusts Jurisdiction' (Singapore)]

(i) Trustees (Incorporation) Act 1952

Recommendation: To reform the Trustees (Incorporation) Act 1952 with a view of establishing a Commission to effectively regulate non-profit organizations.

Rationale:

(i) Currently, trustees may be appointed by any body or association of persons to be registered under the Trustees (Incorporation) Act 1952 for any religious, educational, literary, scientific, social or charitable purpose. The application is made to the Legal Affairs Division, Prime Minister's Department (Bahagian Hal Ehwal Undang-Undang, "BHEUU").

(ii) However, unlike Charity Commissions which have been set up in, for example, UK[29], Singapore[30] and New Zealand[31], the Act lacks a comprehensive framework for proper regulation, support and growth, of non-profit organizations ("NPO") / the "third sector".

(iii) The Government has, in recent years, mooted to improve the existing regulatory framework and to form a Charity Commission. It appears that a study was being undertaken for these purposes in 2017[32].

[28] Ibid. Pg. 13
[29] Charities Act 2022
[30] Charities Act 1994
[31] Charities Act 2005
[32] 'Govt mulls replacing Trustee Act (Act258) to curb abuse'. *New Straits Times.* 9 Nov 2017. Accessed at: https://www.nst.com.my/news/government-public-policy/2017/11/301171/govt-mulls-replacing-trustee-act-act258-curb-abuse; 'Dr. Wan Azizah moots formation of Charity Commission to improve social finance sector'. *Malay Mail.* 20 Feb 2020. Accessed at: https://www.malaymail.com/news/malaysia/2020/02/20/dr-wan-azizah-moots-formation-of-charity-commission-to-improve-social-finan/1839386;
'Trustees Incorporation of Non-Profit Organization'. *BHEUU.* n.d. Accessed at: https://www.bheuu.gov.my/pdf/ForumNPO2018/Dasar.pdf

IV. Solution

15. A comprehensive review should be undertaken with a view of reforming the Trustees Act 1949, and related legislation, to be made more relevant and applicable to current trust practices.

16. Such reforms should, at minimum, encompass the aspects as elaborated above, namely:

    i. enactment of a trustee duty of care applicable in certain prescribed areas;

    ii. enactment of a general power of investment for trustees, including safeguards;

    iii. amendment of section 24(1) of TA 1949 regarding trustees' power to insure;

    iv. enactment of trustees' power to appoint agents, nominees and custodians;

    v. to provide that professional trustees' may receive reasonable remuneration;

    vi. to provide for beneficiaries' right to remove trustees in certain circumstances;

    vii. to introduce a fixed perpetuity period of up to 150 years, for accumulations to be allowed to be accumulated for the duration of the settlement, and to adopt the "wait and see" principle;

    viii. to provide that the Court may vary the trust in certain circumstances (extension of the rule in *Saunders v Vautier*);

    ix. to reform the Trustees (Incorporation) Act 1952 with a view of establishing a Commission to effectively regulate the NPO sector.

V. Conclusion

17. Shortly after her appointment as the Minister in the Prime Minister's Department (Law and Institutional Reform), YB Dato' Sri Azalina Othman Said released a statement[33] noting that the "foremost focus of this portfolio" is to address laws that are outdated in order to ensure its relevance with the times.

[33] Media statement by Dato' Sri Azalina Othman Said dated 3 December 2022

18. It is also noted that the Companies Commission of Malaysia (Suruhanjaya Syarikat Malaysia) is currently reviewing the Trust Companies Act 1949 with a view to replacing that Act with a new Trust Companies Act[34].

19. In this manner, reforms to the Trustees Act 1949 and other legislation as noted above, is a much-needed and timely endeavor to bring it in line with international standards, and to enable the effective administration of modern trusts.

[34] Suruhanjaya Syarikat Malaysia (29 August 2022). 'SSM's Efforts in the Reform of the Trust Companies Act 1949'. *The Edge Malaysia*

Changes to legislation: *Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Trustee Act 2000

2000 CHAPTER 29

An Act to amend the law relating to trustees and persons having the investment powers of trustees; and for connected purposes. [23rd November 2000]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications etc. (not altering text)

C1 Act power to apply conferred (26.11.2008) by Pensions Act 2008 (c. 30), **ss. 68(2)**, 149(2)

C2 Act applied (5.7.2010) by The National Employment Savings Trust Order 2010 (S.I. 2010/917), arts. 1(3), **16**

PART I

THE DUTY OF CARE

1 The duty of care.

(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called "the duty of care".

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Modifications etc. (not altering text)

C3 S. 1(1) applied by 1993 c. 10, s. 73F(5) (as inserted (27.2.2007) by Charities Act 2006 (c. 50), **ss. 39**, 79(2); S.I. 2007/309, art. 2, Sch.)

C4 S. 1(1) applied by 1993 c. 10, s. 73B(2) (as inserted (18.3.2008) by Charities Act 2006 (c. 50), **ss. 36**, 79(2) (with Sch. 10 para. 12); S.I. 2008/751, art. 2, Sch.)

2 Application of duty of care.

Schedule 1 makes provision about when the duty of care applies to a trustee.

PART II

INVESTMENT

3 General power of investment.

(1) Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.

(2) In this Act the power under subsection (1) is called "the general power of investment".

(3) The general power of investment does not permit a trustee to make investments in land other than in loans secured on land (but see also section 8).

(4) A person invests in a loan secured on land if he has rights under any contract under which—

(a) one person provides another with credit, and

(b) the obligation of the borrower to repay is secured on land.

(5) "Credit" includes any cash loan or other financial accommodation.

(6) "Cash" includes money in any form.

4 Standard investment criteria.

(1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.

(2) A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a trust, are—

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

[F1(4) This section has effect subject to section 292C(6) of the Charities Act 2011 (which disapplies the duties under this section in cases where they would otherwise apply in relation to a social investment within the meaning of Part 14A of that Act).**]**

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

SCHEDULES

SCHEDULE 1

Section 2.

APPLICATION OF DUTY OF CARE

Investment

1 The duty of care applies to a trustee—

(a) when exercising the general power of investment or any other power of investment, however conferred;

(b) when carrying out a duty to which he is subject under section 4 or 5 (duties relating to the exercise of a power of investment or to the review of investments).

Acquisition of land

2 The duty of care applies to a trustee—

(a) when exercising the power under section 8 to acquire land;

(b) when exercising any other power to acquire land, however conferred;

(c) when exercising any power in relation to land acquired under a power mentioned in sub-paragraph (a) or (b).

Agents, nominees and custodians

3 (1) The duty of care applies to a trustee—

(a) when entering into arrangements under which a person is authorised under section 11 to exercise functions as an agent;

(b) when entering into arrangements under which a person is appointed under section 16 to act as a nominee;

(c) when entering into arrangements under which a person is appointed under section 17 or 18 to act as a custodian;

(d) when entering into arrangements under which, under any other power, however conferred, a person is authorised to exercise functions as an agent or is appointed to act as a nominee or custodian;

(e) when carrying out his duties under section 22 (review of agent, nominee or custodian, etc.).

(2) For the purposes of sub-paragraph (1), entering into arrangements under which a person is authorised to exercise functions or is appointed to act as a nominee or custodian includes, in particular—

(a) selecting the person who is to act,

(b) determining any terms on which he is to act, and

(c) if the person is being authorised to exercise asset management functions, the preparation of a policy statement under section 15.

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Compounding of liabilities

4 The duty of care applies to a trustee—

(a) when exercising the power under section 15 of the Trustee Act 1925 to do any of the things referred to in that section;

(b) when exercising any corresponding power, however conferred.

Insurance

5 The duty of care applies to a trustee—

(a) when exercising the power under section 19 of the Trustee Act 1925 to insure property;

(b) when exercising any corresponding power, however conferred.

Reversionary interests, valuations and audit

6 The duty of care applies to a trustee—

(a) when exercising the power under section 22(1) or (3) of the Trustee Act 1925 to do any of the things referred to there;

(b) when exercising any corresponding power, however conferred.

Exclusion of duty of care

7 The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply.

SCHEDULE 2

Section 40.

MINOR AND CONSEQUENTIAL AMENDMENTS

PART I

THE TRUSTEE INVESTMENTS ACT 1961 AND THE CHARITIES ACT 1993

The Trustee Investments Act 1961 (c.62)

1 (1) Sections 1, 2, 5, 6, 12, 13 and 15 shall cease to have effect, except in so far as they are applied by or under any other enactment.

(2) Section 3 and Schedules 2 and 3 shall cease to have effect, except in so far as they relate to a trustee having a power of investment conferred on him under an enactment—

(a) which was passed before the passing of the 1961 Act, and

(b) which is not amended by this Schedule.

(3) Omit—

(a) sections 8 and 9,

(b) paragraph 1(1) of Schedule 4, and

(c) section 16(1), in so far as it relates to paragraph 1(1) of Schedule 4.

Trustees (Amendment) Act 2004
(No. 45 of 2004)

Table of Contents

Long Title

Enacting Formula

1 Short title and commencement

2 Amendment of section 3

3 New Part IA

4 Repeal and re-enactment of sections 4, 5 and 6

5 Repeal of section 8

6 Amendment of section 9

7 Amendment of section 11

8 Amendment of section 12

9 Amendment of section 15

10 Amendment of section 16

11 Repeal and re-enactment of section 21

12 Amendment of section 22

13 Repeal of section 23

14 Amendment of section 24

15 Repeal of section 25

16 Repeal and re-enactment of section 27

17 Amendment of section 32

18 Amendment of section 33

19 New Parts IVA and IVB

20 Repeal of Part VII

21 New sections 86 to 90

22 Repeal and re-enactment of First Schedule

23 Repeal and re-enactment of Third Schedule

24 Related amendments to Civil Law Act

25 Related and consequential amendments to other written laws

26 Savings, transitional and further consequential provisions

THE SCHEDULE Consequential Amendments to Other Written Laws

REPUBLIC OF SINGAPORE

GOVERNMENT GAZETTE

ACTS SUPPLEMENT

Published by Authority

NO. 43] FRIDAY, NOVEMBER 12 [2004

The following Act was passed by Parliament on 19th October 2004 and assented to by the President on 4th November 2004:—

TRUSTEES (AMENDMENT) ACT 2004

(No. 45 of 2004)

I assent.

S R NATHAN,
President,
4th November 2004.

Date of Commencement: 15th December 2004

An Act to amend the Trustees Act (Chapter 337 of the 1999 Revised Edition) and to make related and consequential amendments to the Civil Law Act (Chapter 43 of the 1999 Revised Edition), the Interpretation Act (Chapter 1 of the 2002 Revised Edition) and certain other written laws.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the Trustees (Amendment) Act 2004 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

Amendment of section 3

2. Section 3 of the Trustees Act is amended —

(*a*) by deleting the definitions of "approved company", "approved valuer" and "authorised unit trust scheme";

(*b*) by inserting, immediately after the definition of "debentures", the following definition:

" "general power of investment", in relation to a trustee, means the general power of investment conferred on him by section 4;";

(*c*) by deleting the definition of "land" and substituting the following definition:

" "land" has the same meaning as in section 4 of the Land Titles Act (Cap. 157);";

(*d*) by inserting, immediately after the definition of "solicitor", the following definitions:

" "standard investment criteria", in relation to a trust, means the standard investment criteria set out in section 5(3);

"statutory duty of care", in relation to a trustee, means the duty of care required to be exercised by him under Part IA;"; and

(*e*) by deleting the definitions of "unit" and "unit trust scheme".

New Part IA

3. The Trustees Act is amended by inserting, immediately after section 3, the following Part:

"PART IA

STATUTORY DUTY OF CARE

Trustees' statutory duty of care

3A.—(1) In exercising any power, carrying out any duty or doing any act referred to in the First Schedule, a trustee shall exercise such care and skill as is reasonable in the circumstances, having regard in particular —

(*a*) to any special knowledge or experience that he has or holds himself out as having; and

(*b*) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that may reasonably be expected of a person acting in the course of that kind of business or profession.

(2) This section shall apply in relation to trusts whether created before, on or after the date of commencement of the Trustees (Amendment) Act 2004 except if, or in so far as, it appears from the trust instrument that the requirements of subsection (1) are not meant to apply.".

Repeal and re-enactment of sections 4, 5 and 6

Repeal and re-enactment of First Schedule

22. The First Schedule to the Trustees Act is repealed and the following Schedule substituted therefor:

"FIRST SCHEDULE

Sections 3A(1) and 41N

APPLICATION OF STATUTORY DUTY OF CARE UNDER PART IA

Investment

1. The duty of care under Part IA applies to a trustee —

(*a*) when exercising the general power of investment or any other power of investment, however conferred; or

(*b*) when carrying out any duty imposed on him by this Act in relation to the investment of trust funds.

Acquisition of land

2. The duty of care under Part IA applies to a trustee —

(*a*) when exercising any power to acquire land, however conferred; or

(*b*) when exercising any power in relation to land acquired under a power mentioned in sub-paragraph (*a*).

Agents, nominees and custodians

3.—(1) The duty of care under Part IA applies to a trustee —

(*a*) when entering into arrangements under which a person is authorised under section 41B to exercise functions as an agent;

(*b*) when entering into arrangements under which a person is appointed under section 41G to act as a nominee;

(*c*) when entering into arrangements under which a person is appointed under section 41H or 41I to act as a custodian;

(*d*) when entering into arrangements under which, under any other power, however conferred, a person is authorised to exercise functions as an agent or is appointed to act as a nominee or custodian; or

(*e*) when carrying out his duties under section 41M (Review of agents, nominees and custodians, etc.).

(2) For the purposes of sub-paragraph (1), entering into arrangements under which a person is authorised to exercise functions or is appointed to act as a nominee or custodian includes, in

particular —

(*a*) selecting the person who is to act;

(*b*) determining any terms on which he is to act; and

(*c*) if the person is being authorised to exercise asset management functions, the preparation of a policy statement under section 41F.

Compounding of liabilities

4. The duty of care under Part IA applies to a trustee —

(*a*) when exercising the power under section 16 to do any of the things referred to in that section; or

(*b*) when exercising any corresponding power, however conferred.

Insurance

5. The duty of care under Part IA applies to a trustee —

(*a*) when exercising the power under section 21 to insure property; or

(*b*) when exercising any corresponding power, however conferred.

Reversionary interests, valuations and audit

6. The duty of care under Part IA applies to a trustee —

(*a*) when exercising the power under section 24(1) or (4) to do any of the things referred to therein; or

(*b*) when exercising any corresponding power, however conferred.".

Repeal and re-enactment of Third Schedule

23. The Third Schedule to the Trustees Act is repealed and the following Schedule substituted therefor:

"THIRD SCHEDULE

Section 27(5)

FORM OF

POWER OF ATTORNEY UNDER SECTION 27 (5)

Ord. No. 13 of 2013
A431

Trust Law (Amendment) Ordinance 2013

Contents

Section Page

Part 1

Preliminary

1. Short title and commencement A447

Part 2

Amendments to Trustee Ordinance

2. Trustee Ordinance amended A449
3. Section 2 amended (interpretation) A449
4. Section 3 amended (application) A449
5. Part IA added A451

Part IA

Statutory Duty of Care

3A. Statutory duty of care A451

6. Section 4 amended (authorized investments) A455
7. Section 7 substituted A455

7. Retention of unauthorized investment A455

8. Section 8 repealed (investment in bearer securities) A457
9. Section 11 amended (powers supplementary to powers of investment) A457

"(1) This Ordinance applies to trusts (whenever created) including, so far as this Ordinance applies, executorships and administratorships whenever constituted.

(2) Subject to subsection (2A), the powers conferred by this Ordinance on trustees are in addition to the powers conferred by the instrument creating the trust or an enactment.

(2A) The powers conferred by this Ordinance on trustees—

(a) apply if, and so far only as, a contrary intention is not expressed in the instrument creating the trust or an enactment; and

(b) have effect subject to the terms of that instrument or enactment.

(2B) Subsections (1) and (2) have effect except as otherwise stated in this Ordinance.".

5. Part IA added

After section 3—

Add

"Part IA

Statutory Duty of Care

3A. Statutory duty of care

(1) If the statutory duty of care applies to a trustee as provided in the Third Schedule, the trustee must exercise the care and skill that is reasonable in the circumstances, having regard to—

(a) any special knowledge or experience that the trustee has or holds out as having; and

(b) if the trustee is acting in that capacity in the course of a business or profession, any special knowledge or experience that is reasonably expected of a person acting in the course of that kind of business or profession.

(2) If the statutory duty of care applies to a trustee when exercising a power or doing an act, that duty has effect in place of any common law rules and equitable principles regarding the duty and standard of care owed by the trustee to the beneficiaries of the trust when exercising the power or doing the act.

(3) The statutory duty of care does not apply to a trustee if, or in so far as, it appears from the instrument creating the trust or an enactment that the duty is not meant to apply.

(4) The statutory duty of care does not apply in relation to a trust created before the commencement date of this section in so far as provision to the effect that subsection (1) does not apply is made by a deed executed—

(a) if the trust was created by a person who is of full capacity, by that person;

(b) if the trust was created by more than one person, by all the persons who are of full capacity; or

(c) if none of the persons creating the trust is of full capacity, by—

(i) the sole beneficiary under the trust who is absolutely entitled to the property subject to the trust and—

(A) is an individual of full age and capacity; or

(B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or

(ii) all the beneficiaries under the trust who (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—

(A) an individual of full age and capacity; or

(B) a body corporate whose constitution does not prohibit it from exercising the power under this section.".

6. Section 4 amended (authorized investments)

Section 4(1)(a)—

Repeal the semicolon

Substitute

"subject to the compliance with any condition specified in relation to the investment in that Schedule;".

7. Section 7 substituted

Section 7—

Repeal the section

Substitute

"**7. Retention of unauthorized investment**

A trustee is not liable for a breach of trust only because of the trustee's continuing to hold an investment which has ceased to be an investment authorized by the instrument creating the trust or the general law if the trustee has discharged the statutory duty of care in doing so.".

"**Third Schedule** [ss. 2, 3A & 41O]

Application of Statutory Duty of Care

Division 1—Investment

1. The statutory duty of care applies to a trustee when—

   (a) exercising the power of investment under section 4(1) or any other power of investment, however conferred;

   (b) exercising the power under section 5, 11(1), (2), (3), (4) or (5), 12 or 41I; or

   (c) continuing to hold an investment that has ceased to be an investment authorized by the instrument creating the trust or the general law as mentioned in section 7.

2. For the purpose of section 1(a) of this Schedule, when investing any trust funds in any investment specified in the Second Schedule, the trustee must discharge the statutory duty of care in addition to complying with that Schedule.

Division 2—Agents, Nominees and Custodians

3. The statutory duty of care applies to a trustee when—

   (a) entering into arrangements under which a person is authorized, under section 41B or any other power (however conferred), to exercise functions as an agent;

   (b) entering into arrangements under which a person is appointed, under section 41G or any other power (however conferred), to act as a nominee;

(c) entering into arrangements under which a person is appointed, under section 41H or any other power (however conferred), to act as a custodian; or

(d) carrying out a trustee's duty under section 41M (review of agents) or 41N (review of nominees and custodians).

4. For the purpose of section 3 of this Schedule, entering into arrangements under which a person is authorized to exercise functions as an agent or is appointed to act as a nominee or custodian includes—

(a) selecting the person who is to act;

(b) determining the terms on which the person is to act; and

(c) if the person is being authorized to exercise asset management functions, the preparation of a policy statement under section 41F.

Division 3—Power to Do Other Things

5. The statutory duty of care applies to a trustee when—

(a) exercising powers relating to trust properties conferred by section 16; or

(b) exercising any corresponding power, however conferred.

Division 4—Insurance

6. The statutory duty of care applies to a trustee when—

(a) exercising the power under section 21 to insure property; or

(b) exercising any corresponding power, however conferred.

Division 5—Reversionary Interests, Valuations and Audit

7. The statutory duty of care applies to a trustee when—

(a) exercising the power under section 24(1) or (3); or

(b) exercising any corresponding power, however conferred.

Fourth Schedule [s. 110]

Transitional and Saving Provisions

1. Savings for repeal of section 8 (investment in bearer securities)

If, immediately before the commencement date of section 8 of the 2013 amending Ordinance, a banker or banking company holds any securities payable to bearer deposited with it under the repealed section 8, then on and after that date, the banker or banking company is to be treated as having been appointed as a custodian of the securities under section 41I.

2. Savings for repeal of section 23 (deposit of documents for safe custody)

If, immediately before the commencement date of section 16 of the 2013 amending Ordinance, a banker, banking company or any other company holds any documents deposited with it under the repealed section 23, then on and after that date, the banker, banking company or other company is to be treated as having been appointed as a custodian of the documents under section 41H.

Changes to legislation: *Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Trustee Act 2000

2000 CHAPTER 29

An Act to amend the law relating to trustees and persons having the investment powers of trustees; and for connected purposes. [23rd November 2000]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications etc. (not altering text)

C1 Act power to apply conferred (26.11.2008) by Pensions Act 2008 (c. 30), **ss. 68(2)**, 149(2)

C2 Act applied (5.7.2010) by The National Employment Savings Trust Order 2010 (S.I. 2010/917), arts. 1(3), **16**

PART I

THE DUTY OF CARE

1 The duty of care.

(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called "the duty of care".

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Modifications etc. (not altering text)

C3 S. 1(1) applied by 1993 c. 10, s. 73F(5) (as inserted (27.2.2007) by Charities Act 2006 (c. 50), **ss. 39**, 79(2); S.I. 2007/309, art. 2, Sch.)

C4 S. 1(1) applied by 1993 c. 10, s. 73B(2) (as inserted (18.3.2008) by Charities Act 2006 (c. 50), **ss. 36**, 79(2) (with Sch. 10 para. 12); S.I. 2008/751, art. 2, Sch.)

2 Application of duty of care.

Schedule 1 makes provision about when the duty of care applies to a trustee.

PART II

INVESTMENT

3 General power of investment.

(1) Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.

(2) In this Act the power under subsection (1) is called "the general power of investment".

(3) The general power of investment does not permit a trustee to make investments in land other than in loans secured on land (but see also section 8).

(4) A person invests in a loan secured on land if he has rights under any contract under which—

(a) one person provides another with credit, and

(b) the obligation of the borrower to repay is secured on land.

(5) "Credit" includes any cash loan or other financial accommodation.

(6) "Cash" includes money in any form.

4 Standard investment criteria.

(1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.

(2) A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a trust, are—

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

[F1(4) This section has effect subject to section 292C(6) of the Charities Act 2011 (which disapplies the duties under this section in cases where they would otherwise apply in relation to a social investment within the meaning of Part 14A of that Act).**]**

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Textual Amendments

F1 S. 4(4) inserted (31.7.2016) by Charities (Protection and Social Investment) Act 2016 (c. 4), **ss. 15(3)**, 17(4); S.I. 2016/815, reg. 2(k)

Modifications etc. (not altering text)

C5 Ss. 4, 5 applied by 1956 c. lxvii s. 5(1A) (as substituted (10.3.2015) by The Charities (People's Dispensary for Sick Animals) Order 2015 (S.I. 2015/198), art. 1, **Sch. Scheme para. 4**)

C6 S. 4 excluded by 2011 c. 25, s. 292C(6) (as inserted (31.7.2016) by Charities (Protection and Social Investment) Act 2016 (c. 4), **ss. 15(1)**, 17(4); S.I. 2016/815, reg. 2(k))

C7 S. 4 applied (with modifications) by 1961 c. xxxviii, s. 9(1) (as substituted (1.9.2017) by The Charities (Shakespeare Birthplace Trust) Order 2017 (S.I. 2017/783), art. 1, **Sch. Scheme para. 5**)

5 Advice.

(1) Before exercising any power of investment, whether arising under this Part or otherwise, a trustee must (unless the exception applies) obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

(2) When reviewing the investments of the trust, a trustee must (unless the exception applies) obtain and consider proper advice about whether, having regard to the standard investment criteria, the investments should be varied.

(3) The exception is that a trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

(4) Proper advice is the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment.

[[F2](5) This section has effect subject to section 292C(6) of the Charities Act 2011 (which disapplies the duties under this section in cases where they would otherwise apply in relation to a social investment within the meaning of Part 14A of that Act).**]**

Textual Amendments

F2 S. 5(5) inserted (31.7.2016) by Charities (Protection and Social Investment) Act 2016 (c. 4), **ss. 15(4)**, 17(4); S.I. 2016/815, reg. 2(k)

Modifications etc. (not altering text)

C5 Ss. 4, 5 applied by 1956 c. lxvii s. 5(1A) (as substituted (10.3.2015) by The Charities (People's Dispensary for Sick Animals) Order 2015 (S.I. 2015/198), art. 1, **Sch. Scheme para. 4**)

C8 S. 5 excluded by 2011 c. 25, s. 292C(6) (as inserted (31.7.2016) by Charities (Protection and Social Investment) Act 2016 (c. 4), **ss. 15(1)**, 17(4); S.I. 2016/815, reg. 2(k))

C9 S. 5 applied (with modifications) by 1961 c. xxxviii, s. 9(1) (as substituted (1.9.2017) by The Charities (Shakespeare Birthplace Trust) Order 2017 (S.I. 2017/783), art. 1, **Sch. Scheme para. 5**)

6 Restriction or exclusion of this Part etc.

(1) The general power of investment is—

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(a) in addition to powers conferred on trustees otherwise than by this Act, but

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

(2) For the purposes of this Act, an enactment or a provision of subordinate legislation is not to be regarded as being, or as being part of, a trust instrument.

(3) In this Act "subordinate legislation" has the same meaning as in the [M1]Interpretation Act 1978.

Marginal Citations

M1 1978 c. 30.

7 Existing trusts.

(1) This Part applies in relation to trusts whether created before or after its commencement.

(2) No provision relating to the powers of a trustee contained in a trust instrument made before 3rd August 1961 is to be treated (for the purposes of section 6(1)(b)) as restricting or excluding the general power of investment.

(3) A provision contained in a trust instrument made before the commencement of this Part which—

(a) has effect under section 3(2) of the [M2]Trustee Investments Act 1961 as a power to invest under that Act, or

(b) confers power to invest under that Act,

is to be treated as conferring the general power of investment on a trustee.

Marginal Citations

M2 1961 c. 62.

PART III

ACQUISITION OF LAND

8 Power to acquire freehold and leasehold land.

(1) A trustee may acquire freehold or leasehold land in the United Kingdom—

(a) as an investment,

(b) for occupation by a beneficiary, or

(c) for any other reason.

(2) "Freehold or leasehold land" means—

(a) in relation to England and Wales, a legal estate in land,

(b) in relation to Scotland—

Trustees (Amendment) Act 2004
(No. 45 of 2004)

Table of Contents

Long Title

Enacting Formula

1 Short title and commencement

2 Amendment of section 3

3 New Part IA

4 Repeal and re-enactment of sections 4, 5 and 6

5 Repeal of section 8

6 Amendment of section 9

7 Amendment of section 11

8 Amendment of section 12

9 Amendment of section 15

10 Amendment of section 16

11 Repeal and re-enactment of section 21

12 Amendment of section 22

13 Repeal of section 23

14 Amendment of section 24

15 Repeal of section 25

4. Sections 4, 5 and 6 of the Trustees Act are repealed and the following sections substituted therefor:

"**General power of investment**

4.—(1) Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.

(2) For the purpose of subsection (1), "investment" includes investment in assets that do not yield any income.

(3) This section shall apply in relation to trusts whether created before, on or after the date of commencement of the Trustees (Amendment) Act 2004.

Standard investment criteria

5.—(1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee shall have regard to the standard investment criteria.

(2) A trustee shall, from time to time, review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a trust, are —

(*a*) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind; and

(*b*) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

(4) This section shall apply in relation to trusts whether created before, on or after the date of commencement of the Trustees (Amendment) Act 2004.

Advice

6.—(1) Except as otherwise provided by subsection (3), a trustee shall, before exercising any power of investment, whether arising under this Part or otherwise, obtain and consider proper advice about the way in which the power should be exercised, having regard to the standard investment criteria.

(2) Except as otherwise provided by subsection (3), a trustee shall, when reviewing the investments of the trust, obtain and consider proper advice about whether the investments should be varied, having regard to the standard investment criteria.

(3) A trustee need not obtain the advice required under subsection (1) or (2) if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

(4) In this section, "proper advice" means the advice of a person who is reasonably believed by the trustee to be qualified to give such advice by his ability in and practical experience of financial and other matters relating to the proposed investment.

(5) This section shall apply in relation to trusts whether created before, on or after the date of commencement of the Trustees (Amendment) Act 2004.".

Repeal of section 8

5. Section 8 of the Trustees Act is repealed.

Amendment of section 9

6. Section 9 of the Trustees Act is amended —

(*a*) by deleting the words "section 5(2)" in subsection (1)(*a*) and (*b*) and substituting in each case the words "section 6"; and

(*b*) by deleting subsections (2) and (3).

Amendment of section 11

7. Section 11 of the Trustees Act is amended —

(*a*) by deleting subsection (3); and

(*b*) by deleting the words "in good faith" in subsections (4A) and (5) and substituting in each case the words "if they have discharged the statutory duty of care".

Amendment of section 12

8. Section 12 of the Trustees Act is amended by deleting subsection (4) and substituting the following subsection:

"(4) In subsection (3), "dwelling-house" means a place of residence and includes a building or tenement wholly or principally used, constructed or adapted for human habitation.".

Amendment of section 15

Changes to legislation: *Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Trustee Act 2000

2000 CHAPTER 29

An Act to amend the law relating to trustees and persons having the investment powers of trustees; and for connected purposes. [23rd November 2000]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications etc. (not altering text)

C1 Act power to apply conferred (26.11.2008) by Pensions Act 2008 (c. 30), **ss. 68(2)**, 149(2)

C2 Act applied (5.7.2010) by The National Employment Savings Trust Order 2010 (S.I. 2010/917), arts. 1(3), **16**

PART I

THE DUTY OF CARE

1 The duty of care.

(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called "the duty of care".

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Marginal Citations

M9 1837 c. 26.

M10 1925 c. 23.

PART VI

MISCELLANEOUS AND SUPPLEMENTARY

34 Power to insure.

(1) For section 19 of the [M11]Trustee Act 1925 (power to insure) substitute—

"**19 Power to insure.**

(1) A trustee may—

(a) insure any property which is subject to the trust against risks of loss or damage due to any event, and

(b) pay the premiums out of the trust funds.

(2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries—

(a) that any property specified in the direction is not to be insured;

(b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.

(3) Property is held on a bare trust if it is held on trust for—

(a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust, or

(b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.

(4) If a direction under subsection (2) of this section is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 11 of the Trustee Act 2000 (power to employ agents).

(5) In this section "trust funds" means any income or capital funds of the trust."

(2) In section 20(1) of the [M12]Trustee Act 1925 (application of insurance money) omit "whether by fire or otherwise".

(3) The amendments made by this section apply in relation to trusts whether created before or after its commencement.

Marginal Citations

M11 1925 c. 19.

M12 1925 c. 19.

Trustees (Amendment) Act 2004
(No. 45 of 2004)

Table of Contents

Long Title

Enacting Formula

1 Short title and commencement

2 Amendment of section 3

3 New Part IA

4 Repeal and re-enactment of sections 4, 5 and 6

5 Repeal of section 8

6 Amendment of section 9

7 Amendment of section 11

8 Amendment of section 12

9 Amendment of section 15

10 Amendment of section 16

11 Repeal and re-enactment of section 21

12 Amendment of section 22

13 Repeal of section 23

14 Amendment of section 24

15 Repeal of section 25

16 Repeal and re-enactment of section 27

17 Amendment of section 32

18 Amendment of section 33

19 New Parts IVA and IVB

20 Repeal of Part VII

21 New sections 86 to 90

22 Repeal and re-enactment of First Schedule

23 Repeal and re-enactment of Third Schedule

24 Related amendments to Civil Law Act

25 Related and consequential amendments to other written laws

26 Savings, transitional and further consequential provisions

THE SCHEDULE Consequential Amendments to Other Written Laws

REPUBLIC OF SINGAPORE

GOVERNMENT GAZETTE

ACTS SUPPLEMENT

Published by Authority

NO. 43] FRIDAY, NOVEMBER 12 [2004

The following Act was passed by Parliament on 19th October 2004 and assented to by the President on 4th November 2004:—

TRUSTEES (AMENDMENT) ACT 2004

(No. 45 of 2004)

I assent.

S R NATHAN,
President,
4th November 2004.

Date of Commencement: 15th December 2004

An Act to amend the Trustees Act (Chapter 337 of the 1999 Revised Edition) and to make related and consequential amendments to the Civil Law Act (Chapter 43 of the 1999 Revised Edition), the Interpretation Act (Chapter 1 of the 2002 Revised Edition) and certain other written laws.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the Trustees (Amendment) Act 2004 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

Amendment of section 3

2. Section 3 of the Trustees Act is amended —

(*a*) by deleting the definitions of "approved company", "approved valuer" and "authorised unit trust scheme";

(*b*) by inserting, immediately after the definition of "debentures", the following definition:

" "general power of investment", in relation to a trustee, means the general power of investment conferred on him by section 4;";

9. Section 15(1) of the Trustees Act is amended by inserting, immediately after the word "securities,", the word "investments".

Amendment of section 16

10. Section 16(2) of the Trustees Act is amended by deleting the words "in good faith" and substituting the words "if he has or they have discharged the statutory duty of care".

Repeal and re-enactment of section 21

11. Section 21 of the Trustees Act is repealed and the following section substituted therefor:

"**Power to insure**

21.—(1) A trustee may —

(*a*) insure any property which is subject to the trust against risks of loss or damage due to any event; and

(*b*) pay the premiums out of the trust funds.

(2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries —

(*a*) that any property specified in the direction is not to be insured; or

(*b*) that any property specified in the direction is not to be insured except on such conditions as may be so specified.

(3) If a direction under subsection (2) is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 41B.

(4) For the purposes of this section —

(*a*) property is held on a bare trust if it is held on trust for —

(i) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust; or

(ii) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust; and

(*b*) "trust funds" means any income or capital funds of the trust.

(5) This section shall apply in relation to trusts whether created before, on or

after the date of commencement of the Trustees (Amendment) Act 2004.".

Amendment of section 22

12. Section 22(1) of the Trustees Act is amended by deleting the words ", subject to a trust, whether by fire or otherwise," and substituting the words "that is subject to a trust".

Repeal of section 23

13. Section 23 of the Trustees Act is repealed.

Amendment of section 24

14. Section 24 of the Trustees Act is amended —

(*a*) by deleting the words "in good faith" in the last line of subsection (1) and substituting the words "if they have discharged the statutory duty of care"; and

(*b*) by deleting the words "in good faith" in subsection (4) and substituting the words "in discharge of the statutory duty of care".

Repeal of section 25

15. Section 25 of the Trustees Act is repealed.

Repeal and re-enactment of section 27

16. Section 27 of the Trustees Act is repealed and the following section substituted therefor:

"**Delegation of trustee's functions by power of attorney**

27.—(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate the execution or exercise of all or any trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) A delegation under this section —

(*a*) shall commence as provided by the instrument creating the power or, if the instrument makes no provision as to the commencement of the delegation, on the date of the execution of the instrument by the donor; and

(*b*) shall continue for a period of 18 months or any shorter period

Ord. No. 13 of 2013
A431

Trust Law (Amendment) Ordinance 2013

Contents

Section Page

Part 1

Preliminary

1. Short title and commencement A447

Part 2

Amendments to Trustee Ordinance

2. Trustee Ordinance amended A449
3. Section 2 amended (interpretation) A449
4. Section 3 amended (application) A449
5. Part IA added A451

Part IA

Statutory Duty of Care

3A. Statutory duty of care A451

6. Section 4 amended (authorized investments) A455
7. Section 7 substituted A455

7. Retention of unauthorized investment A455

8. Section 8 repealed (investment in bearer securities) A457
9. Section 11 amended (powers supplementary to powers of investment) A457

"**Division 1—General Powers**".

13. Section 16 amended (power to do other acts)

Section 16—

Repeal

everything after "other things as to"

Substitute

"the personal representative, trustees or sole acting trustee seem expedient, without being responsible for any loss occasioned by an act or thing done under this section if the personal representative, trustees or sole acting trustee has or have discharged the statutory duty of care in doing so.".

14. Section 21 substituted

Section 21—

Repeal the section

Substitute

"**21. Power to insure**

(1) The trustee of a trust may—

(a) insure any property that is subject to the trust against loss or damage due to any event; and

(b) pay the premiums out of the trust funds.

(2) If a property is held on a bare trust, the power to insure the property is subject to any direction given by the sole beneficiary or (if more than one beneficiary) each of the beneficiaries that—

(a) the property is not to be insured; or

(b) the property is not to be insured except on the conditions specified in the direction.

(3) For the purpose of subsection (2), a property is held on a bare trust if it is held on trust for—

(a) the sole beneficiary under the trust who is absolutely entitled to the property subject to the trust and—

(i) is an individual of full age and capacity; or

(ii) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or

(b) all the beneficiaries under the trust who (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—

(i) an individual of full age and capacity; or

(ii) a body corporate whose constitution does not prohibit it from exercising the power under this section.

(4) If a direction under subsection (2) is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purpose of section 41B (power to appoint agents).".

15. Section 22 amended (application of insurance money where policy kept up under any trust, power or obligation)

Section 22(1)—

Repeal

"whether by fire or otherwise,".

Changes to legislation: *Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Trustee Act 2000

2000 CHAPTER 29

An Act to amend the law relating to trustees and persons having the investment powers of trustees; and for connected purposes. [23rd November 2000]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications etc. (not altering text)

C1 Act power to apply conferred (26.11.2008) by Pensions Act 2008 (c. 30), **ss. 68(2)**, 149(2)

C2 Act applied (5.7.2010) by The National Employment Savings Trust Order 2010 (S.I. 2010/917), arts. 1(3), **16**

PART I

THE DUTY OF CARE

1 The duty of care.

(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called "the duty of care".

(i) the estate or interest of the proprietor of the dominium utile or, in the case of land not held on feudal tenure, the estate or interest of the owner, or

(ii) a tenancy, and

(c) in relation to Northern Ireland, a legal estate in land, including land held under a fee farm grant.

(3) For the purpose of exercising his functions as a trustee, a trustee who acquires land under this section has all the powers of an absolute owner in relation to the land.

9 Restriction or exclusion of this Part etc.

The powers conferred by this Part are—

(a) in addition to powers conferred on trustees otherwise than by this Part, but

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

10 Existing trusts.

(1) This Part does not apply in relation to—

(a) a trust of property which consists of or includes land which (despite section 2 of the [M3]Trusts of Land and Appointment of Trustees Act 1996) is settled land, or

(b) a trust to which the [M4]Universities and College Estates Act 1925 applies.

(2) Subject to subsection (1), this Part applies in relation to trusts whether created before or after its commencement.

Marginal Citations

M3 1996 c. 47.

M4 1925 c. 24.

PART IV

AGENTS, NOMINEES AND CUSTODIANS

Modifications etc. (not altering text)

C10 Pt. 4 applied in part (with modifications) (2.1.2013) by The Charitable Incorporated Organisations (General) Regulations 2012 (S.I. 2012/3012), regs. 1, **33**

C11 Pt. 4 applied (with modifications) (in part) by 1956 c. lxvii, s. 5(1B)-(1D) (as substituted (10.3.2015) by The Charities (People's Dispensary for Sick Animals) Order 2015 (S.I. 2015/198), art. 1, **Sch. Scheme para. 4**)

C12 Pt. 4 applied (with modifications) by 1961 c. xxxviii, s. 9(2)(3)(a)(4) (as substituted (1.9.2017) by The Charities (Shakespeare Birthplace Trust) Order 2017 (S.I. 2017/783), art. 1, **Sch. Scheme para. 5**)

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Agents

11 Power to employ agents.

(1) Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees' delegable functions consist of any function other than—

(a) any function relating to whether or in what way any assets of the trust should be distributed,

(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,

(c) any power to appoint a person to be a trustee of the trust, or

(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) In the case of a charitable trust, the trustees' delegable functions are—

(a) any function consisting of carrying out a decision that the trustees have taken;

(b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land);

(c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;

(d) any other function prescribed by an order made by the Secretary of State.

(4) For the purposes of subsection (3)(c) a trade is an integral part of carrying out a trust's charitable purpose if, whether carried on in the United Kingdom or elsewhere, the profits are applied solely to the purposes of the trust and either—

(a) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust, or

(b) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

(5) The power to make an order under subsection (3)(d) is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

12 Persons who may act as agents.

(1) Subject to subsection (2), the persons whom the trustees may under section 11 authorise to exercise functions as their agent include one or more of their number.

(2) The trustees may not authorise two (or more) persons to exercise the same function unless they are to exercise the function jointly.

(3) The trustees may not under section 11 authorise a beneficiary to exercise any function as their agent (even if the beneficiary is also a trustee).

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(4) The trustees may under section 11 authorise a person to exercise functions as their agent even though he is also appointed to act as their nominee or custodian (whether under section 16, 17 or 18 or any other power).

13 Linked functions etc.

(1) Subject to subsections (2) and (5), a person who is authorised under section 11 to exercise a function is (whatever the terms of the agency) subject to any specific duties or restrictions attached to the function.

For example, a person who is authorised under section 11 to exercise the general power of investment is subject to the duties under section 4 in relation to that power.

(2) A person who is authorised under section 11 to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if he is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

(3) Subsections (4) and (5) apply to a trust to which section 11(1) of the [M5]Trusts of Land and Appointment of Trustees Act 1996 (duties to consult beneficiaries and give effect to their wishes) applies.

(4) The trustees may not under section 11 authorise a person to exercise any of their functions on terms that prevent them from complying with section 11(1) of the 1996 Act.

(5) A person who is authorised under section 11 to exercise any function relating to land subject to the trust is not subject to section 11(1) of the 1996 Act.

Marginal Citations
M5 1996 c. 47.

14 Terms of agency.

(1) Subject to subsection (2) and sections 15(2) and 29 to 32, the trustees may authorise a person to exercise functions as their agent on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not authorise a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

(a) a term permitting the agent to appoint a substitute;

(b) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary;

(c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

Changes to legislation: *Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

15 Asset management: special restrictions.

(1) The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in or evidenced in writing.

(2) The trustees may not authorise a person to exercise any of their asset management functions as their agent unless—

(a) they have prepared a statement that gives guidance as to how the functions should be exercised ("a policy statement"), and

(b) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with—

(i) the policy statement, or

(ii) if the policy statement is revised or replaced under section 22, the revised or replacement policy statement.

(3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust.

(4) The policy statement must be in or evidenced in writing.

(5) The asset management functions of trustees are their functions relating to—

(a) the investment of assets subject to the trust,

(b) the acquisition of property which is to be subject to the trust, and

(c) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

Nominees and custodians

16 Power to appoint nominees.

(1) Subject to the provisions of this Part, the trustees of a trust may—

(a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land), and

(b) take such steps as are necessary to secure that those assets are vested in a person so appointed.

(2) An appointment under this section must be in or evidenced in writing.

(3) This section does not apply to any trust having a custodian trustee or in relation to any assets vested in the official custodian for charities.

17 Power to appoint custodians.

(1) Subject to the provisions of this Part, the trustees of a trust may appoint a person to act as a custodian in relation to such of the assets of the trust as they may determine.

(2) For the purposes of this Act a person is a custodian in relation to assets if he undertakes the safe custody of the assets or of any documents or records concerning the assets.

(3) An appointment under this section must be in or evidenced in writing.

(4) This section does not apply to any trust having a custodian trustee or in relation to any assets vested in the official custodian for charities.

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

18 Investment in bearer securities.

(1) If trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities.

(2) Subsection (1) does not apply if the trust instrument or any enactment or provision of subordinate legislation contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian.

(3) An appointment under this section must be in or evidenced in writing.

(4) This section does not apply to any trust having a custodian trustee or in relation to any securities vested in the official custodian for charities.

19 Persons who may be appointed as nominees or custodians.

(1) A person may not be appointed under section 16, 17 or 18 as a nominee or custodian unless one of the relevant conditions is satisfied.

(2) The relevant conditions are that—

(a) the person carries on a business which consists of or includes acting as a nominee or custodian;

(b) the person is a body corporate which is controlled by the trustees;

(c) the person is a body corporate recognised under section 9 of the [M6]Administration of Justice Act 1985.

(3) The question whether a body corporate is controlled by trustees is to be determined in accordance with **[**[F3]section 1124 of the Corporation Tax Act 2010**]**.

(4) The trustees of a charitable trust which is not an exempt charity must act in accordance with any guidance given by the **[**[F4]Charity Commission**]** concerning the selection of a person for appointment as a nominee or custodian under section 16, 17 or 18.

(5) Subject to subsections (1) and (4), the persons whom the trustees may under section 16, 17 or 18 appoint as a nominee or custodian include—

(a) one of their number, if that one is a trust corporation, or

(b) two (or more) of their number, if they are to act as joint nominees or joint custodians.

(6) The trustees may under section 16 appoint a person to act as their nominee even though he is also—

(a) appointed to act as their custodian (whether under section 17 or 18 or any other power), or

(b) authorised to exercise functions as their agent (whether under section 11 or any other power).

(7) Likewise, the trustees may under section 17 or 18 appoint a person to act as their custodian even though he is also—

(a) appointed to act as their nominee (whether under section 16 or any other power), or

(b) authorised to exercise functions as their agent (whether under section 11 or any other power).

Textual Amendments

F3 Words in s. 19(3) substituted (1.4.2010 with effect in accordance with s. 1184(1)) by Corporation Tax Act 2010 (c. 4), s. 1184(1), **Sch. 1 para. 319** (with Sch. 2)

F4 Words in s. 19(4) substituted (27.2.2007) by Charities Act 2006 (c. 50), s. 79(2), **Sch. 8 para. 197**; S.I. 2007/309, art. 2, Sch.

Marginal Citations

M6 1985 c. 61.

20 Terms of appointment of nominees and custodians.

(1) Subject to subsection (2) and sections 29 to 32, the trustees may under section 16, 17 or 18 appoint a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not under section 16, 17 or 18 appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

(a) a term permitting the nominee or custodian to appoint a substitute;

(b) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary;

(c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

Review of and liability for agents, nominees and custodians etc.

21 Application of sections 22 and 23.

(1) Sections 22 and 23 apply in a case where trustees have, under section 11, 16, 17 or 18—

(a) authorised a person to exercise functions as their agent, or

(b) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), sections 22 and 23 also apply in a case where trustees have, under any power conferred on them by the trust instrument or by any enactment or any provision of subordinate legislation—

(a) authorised a person to exercise functions as their agent, or

(b) appointed a person to act as a nominee or custodian.

(3) If the application of section 22 or 23 is inconsistent with the terms of the trust instrument or the enactment or provision of subordinate legislation, the section in question does not apply.

22 Review of agents, nominees and custodians etc.

(1) While the agent, nominee or custodian continues to act for the trust, the trustees—

(a) must keep under review the arrangements under which the agent, nominee or custodian acts and how those arrangements are being put into effect,

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have, and

(c) if they consider that there is a need to exercise such a power, must do so.

(2) If the agent has been authorised to exercise asset management functions, the duty under subsection (1) includes, in particular—

(a) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 15,

(b) if they consider that there is a need to revise or replace the policy statement, a duty to do so, and

(c) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

(3) Subsections (3) and (4) of section 15 apply to the revision or replacement of a policy statement under this section as they apply to the making of a policy statement under that section.

(4) "Power of intervention" includes—

(a) a power to give directions to the agent, nominee or custodian;

(b) a power to revoke the authorisation or appointment.

23 Liability for agents, nominees and custodians etc.

(1) A trustee is not liable for any act or default of the agent, nominee or custodian unless he has failed to comply with the duty of care applicable to him, under paragraph 3 of Schedule 1—

(a) when entering into the arrangements under which the person acts as agent, nominee or custodian, or

(b) when carrying out his duties under section 22.

(2) If a trustee has agreed a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute unless he has failed to comply with the duty of care applicable to him, under paragraph 3 of Schedule 1—

(a) when agreeing that term, or

(b) when carrying out his duties under section 22 in so far as they relate to the use of the substitute.

Supplementary

24 Effect of trustees exceeding their powers.

A failure by the trustees to act within the limits of the powers conferred by this Part—

(a) in authorising a person to exercise a function of theirs as an agent, or

(b) in appointing a person to act as a nominee or custodian,

does not invalidate the authorisation or appointment.

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

25 Sole trustees.

(1) Subject to subsection (2), this Part applies in relation to a trust having a sole trustee as it applies in relation to other trusts (and references in this Part to trustees—except in sections 12(1) and (3) and 19(5)—are to be read accordingly).

(2) Section 18 does not impose a duty on a sole trustee if that trustee is a trust corporation.

26 Restriction or exclusion of this Part etc.

The powers conferred by this Part are—

(a) in addition to powers conferred on trustees otherwise than by this Act, but

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

27 Existing trusts.

This Part applies in relation to trusts whether created before or after its commencement.

PART V

REMUNERATION

28 Trustee's entitlement to payment under trust instrument.

(1) Except to the extent (if any) to which the trust instrument makes inconsistent provision, subsections (2) to (4) apply to a trustee if—

(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust, and

(b) the trustee is a trust corporation or is acting in a professional capacity.

(2) The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.

(3) Subsection (2) applies to a trustee of a charitable trust who is not a trust corporation only—

(a) if he is not a sole trustee, and

(b) to the extent that a majority of the other trustees have agreed that it should apply to him.

(4) Any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of—

(a) section 15 of the [M7]Wills Act 1837 (gifts to an attesting witness to be void), and

(b) section 34(3) of the [M8]Administration of Estates Act 1925 (order in which estate to be paid out).

(5) For the purposes of this Part, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with—

Trustees (Amendment) Act 2004
(No. 45 of 2004)

Table of Contents

Long Title

Enacting Formula

1 Short title and commencement

2 Amendment of section 3

3 New Part IA

4 Repeal and re-enactment of sections 4, 5 and 6

5 Repeal of section 8

6 Amendment of section 9

7 Amendment of section 11

8 Amendment of section 12

9 Amendment of section 15

10 Amendment of section 16

11 Repeal and re-enactment of section 21

12 Amendment of section 22

13 Repeal of section 23

14 Amendment of section 24

15 Repeal of section 25

otherwise, that in dealing with any stock or securities the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect the Depository (as defined in section 130A of the Companies Act (Cap. 50)), any person in whose books the stock inscribed or registered or the issuer of the securities with any notice of the trust.

(9) This section shall apply to a personal representative as it applies to a trustee except that subsection (4) shall apply as if it required the notice referred therein to be given to each of the other personal representatives, if any, except any executor who has renounced probate.".

Amendment of section 32

17. Section 32 of the Trustees Act is amended by deleting subsection (2).

Amendment of section 33

18. Section 33(2) of the Trustees Act is amended by deleting the words "in the way of compound interest by investing the same and the resulting income thereof" in the 3rd and 4th lines and substituting the words "by investing it, and any profits from so investing it,".

New Parts IVA and IVB

19. The Trustees Act is amended by inserting, immediately after section 41, the following Parts:

"PART IVA

AGENTS, NOMINEES AND CUSTODIANS

Application of this Part

41A.—(1) Subject to subsection (2), this Part shall apply in relation to trusts whether created before, on or after the date of commencement of the Trustees (Amendment) Act 2004.

(2) Except as otherwise provided in section 41I(4), this Part shall apply in relation to a trust having a sole trustee as it applies in relation to other trusts, and references to trustees in this Part (except in sections 41C(1) and (3) and 41J (4)) shall be read accordingly.

Agents

Power to appoint agents

41B.—(1) Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees' delegable functions consist of any function other than —

(*a*) any function relating to whether or in what way any assets of the trust should be distributed;

(*b*) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;

(*c*) any power to appoint a person to be a trustee of the trust; or

(*d*) any power conferred by any other written law or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) In the case of a charitable trust, the trustees' delegable functions are —

(*a*) any function relating to carrying out a decision that the trustees have taken;

(*b*) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land); and

(*c*) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose.

(4) For the purposes of subsection (3)(*c*), a trade is an integral part of carrying out a trust's charitable purpose if, whether carried on in Singapore or elsewhere, the profits are applied solely to the purposes of the trust and either —

(*a*) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust; or

(*b*) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

Persons who may act as agents

41C.—(1) Subject to subsection (2), the persons whom the trustees may under section 41B authorise to exercise functions as their agent include one or more of their number.

(2) The trustees may not authorise 2 or more persons to exercise the same function unless they are to exercise the function jointly.

(3) The trustees may not, under section 41B, authorise a beneficiary to exercise any function as their agent (even if the beneficiary is also a trustee).

(4) The trustees may, under section 41B, authorise a person to exercise functions as their agent even though he is also appointed to act as their nominee or custodian (whether under section 41G, 41H or 41I or any other power).

Linked functions, etc.

41D.—(1) Subject to subsection (2), a person who is authorised under section 41B to exercise any function shall, notwithstanding the terms of the agency, be subject to any specific duties or restrictions attached to the function.

Example

A person who is authorised under section 41B to exercise the general power of investment shall be subject to the duties under section 5 in relation to that power.

(2) A person who is authorised under section 41B to exercise a power which is subject to a requirement to obtain advice shall not be subject to the requirement if he is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

Terms of agency

41E.—(1) Subject to subsection (2) and sections 41F(2), 41R, 41S and 41T, the trustees may authorise a person to exercise functions as their agent on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not authorise a person to exercise functions as their agent on any of the terms set out in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms for the purposes of subsection (2) are —

(*a*) a term permitting the agent to appoint a substitute;

(*b*) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary; and

(*c*) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

Asset management — special restrictions

41F.—(1) The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in writing or evidenced in writing.

(2) The trustees may not authorise a person to exercise any of their asset management functions as their agent unless —

(*a*) the trustees have provided that person with a statement that gives guidance as to how the functions should be exercised (referred to in this Act as a policy statement); and

(*b*) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with —

(i) the policy statement; or

(ii) if the policy statement is revised or replaced under section 41M, the revised or replacement policy statement.

(3) The trustees shall formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust.

(4) The policy statement shall be in writing or evidenced in writing.

(5) For the purposes of this section, the asset management functions of trustees are their functions relating to —

(*a*) the investment of assets subject to the trust;

(*b*) the acquisition of property which is to be subject to the trust; and

(*c*) the management of property which is subject to the trust and the disposal of, or the creation or disposal of an interest in, such property.

Nominees and custodians

Power to appoint nominees

41G.—(1) Subject to the provisions of this Part, the trustees of a trust may —

(*a*) appoint a person to act as their nominee in relation to such of the assets of the trust as they may determine (other than settled land); and

(*b*) take such steps as are necessary to secure that those assets are vested in a person so appointed.

(2) An appointment under this section shall be in writing or evidenced in writing.

Power to appoint custodians

41H.—(1) Subject to the provisions of this Part, the trustees of a trust may appoint a person to act as a custodian in relation to such of the assets of the trust as the trustees may determine.

(2) For the purposes of this Act, a person is a custodian in relation to assets if he undertakes the safe custody of the assets or of any document or record concerning the assets.

(3) An appointment under this section shall be in writing or evidenced in writing.

Investment in bearer securities

41I.—(1) If trustees retain or invest in securities payable to bearer, they shall appoint a person to act as a custodian of the securities.

(2) Subsection (1) shall not apply if the trust instrument or any written law contains any provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian.

(3) An appointment under this section shall be in writing or evidenced in writing.

(4) This section shall not impose a duty on a sole trustee if that trustee is a trust corporation.

Persons who may be appointed as nominees or custodians

41J.—(1) A person may not be appointed under section 41G, 41H or 41I as a nominee or custodian or continue to act as such nominee or custodian unless —

(*a*) the person carries on a business which consists of or includes acting as a nominee or custodian; or

(*b*) the person is a body corporate which is controlled by the trustees.

(2) For the purposes of subsection (1)(*b*), a body corporate is controlled by the trustees if the trustees have power to secure —

(*a*) by means of the holding of shares or the possession of voting power in or in relation to that or any other body corporate; or

(*b*) by virtue of any powers conferred by the articles of association or other document regulating that or any other body corporate,

that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of the trustees.

(3) The trustees of a charitable trust which is registered under the Charities Act (Cap. 37) shall act in accordance with any guidance given by the Commissioner of Charities concerning the selection of a person for appointment as a nominee or custodian under section 41G, 41H or 41I.

(4) Subject to subsections (1) and (3), the persons whom the trustees may, under section 41G, 41H or 41I, appoint as a nominee or custodian include —

(*a*) one of their number, if that one is a trust corporation; or

(*b*) 2 or more of their number, if they are to act as joint nominees or joint custodians.

(5) The trustees may, under section 41G, appoint a person to act as their nominee even though he is also —

(*a*) appointed to act as their custodian (whether under section 41H or 41I or any other power); or

(*b*) authorised to exercise functions as their agent (whether under section 41B or any other power).

(6) The trustees may, under section 41H or 41I, appoint a person to act as their custodian even though he is also —

(*a*) appointed to act as their nominee (whether under section 41G or any other power); or

(*b*) authorised to exercise functions as their agent (whether under section 41B or any other power).

Terms of appointment of nominees and custodians

41K.—(1) Subject to subsection (2) and sections 41R, 41S and 41T, the trustees may, under section 41G, 41H or 41I, appoint a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not, under section 41G, 41H or 41I, appoint a person to act as a nominee or custodian on any of the terms set out in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms for the purposes of subsection (2) are —

(*a*) a term permitting the nominee or custodian to appoint a substitute;

(*b*) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary; and

(*c*) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

Review of and liability for agents, nominees and custodians, etc.

Application of sections 41M and 41N

41L.—(1) Sections 41M and 41N shall apply in a case where trustees have, under section 41B, 41G, 41H or 41I —

(*a*) authorised a person to exercise functions as their agent; or

(*b*) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), sections 41M and 41N shall also apply in a case where trustees have, under any power conferred on them by the trust instrument or by any written law —

(*a*) authorised a person to exercise functions as their agent; or

(*b*) appointed a person to act as a nominee or custodian.

(3) If the application of section 41M or 41N in a case is inconsistent with the terms of the trust instrument or any written law, that section shall not apply to that case.

Review of agents, nominees and custodians, etc.

41M.—(1) While the agent, nominee or custodian continues to act for the trust, it shall be the duty of the trustees —

(*a*) to keep under review the arrangements under which the agent, nominee or custodian acts and the manner in which such arrangements are being put into effect;

(*b*) if circumstances make it appropriate to do so, to consider whether there is a need to exercise any power of intervention that they have; and

(*c*) if they consider that there is a need to do so, to exercise the power of intervention.

(2) If the agent has been authorised to exercise asset management functions, the duty under subsection (1) shall include, in particular —

(*a*) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 41F;

(*b*) if the trustees consider that there is a need to revise or replace the policy statement, a duty to do so; and

(*c*) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

(3) Section 41F(3) and (4) shall apply to the revision or replacement of a policy statement under this section as they apply to the making of a policy statement under that section.

(4) In this section, "power of intervention" includes —

(*a*) a power to give directions to the agent, nominee or custodian; and

(*b*) a power to revoke the authorisation or appointment of the agent, nominee or custodian.

Liability for agents, nominees and custodians, etc.

41N.—(1) A trustee shall not be liable for any act or default of the agent, nominee or custodian unless he fails to comply with the statutory duty of care applicable to him under paragraph 3 of the First Schedule when —

(*a*) entering into the arrangements under which the person acts as agent, nominee or custodian; or

(*b*) carrying out his duties under section 41M.

(2) If a trustee has agreed to a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee shall not be liable for any act or default of the substitute unless he has failed to comply with the statutory duty of care applicable to him under paragraph 3 of the First Schedule —

(*a*) when agreeing to that term; or

(*b*) when carrying out his duties under section 41M in so far as they relate to the use of the substitute.

Supplementary

Effect of trustees exceeding their powers

41O. A failure by the trustees to act within the limits of the powers conferred by this Part —

(*a*) in authorising a person to exercise a function of theirs as an agent; or

(*b*) in appointing a person to act as a nominee or custodian,

shall not invalidate the authorisation or appointment.

PART IVB

REMUNERATION

Application of this Part

41P.—(1) Subject to subsection (2), sections 41Q to 41T shall apply in relation to —

(*a*) services provided to or on behalf of trusts, whenever created; or

(*b*) expenses incurred on or after the date of commencement of the Trustees (Amendment) Act 2004 on behalf of trusts, whenever

Trust Law (Amendment) Ordinance 2013

Contents

Section Page

Part 1

Preliminary

1. Short title and commencement A447

Part 2

Amendments to Trustee Ordinance

2. Trustee Ordinance amended A449
3. Section 2 amended (interpretation) A449
4. Section 3 amended (application) A449
5. Part IA added A451

Part IA

Statutory Duty of Care

3A. Statutory duty of care A451

6. Section 4 amended (authorized investments) A455
7. Section 7 substituted A455

7. Retention of unauthorized investment A455

8. Section 8 repealed (investment in bearer securities) A457
9. Section 11 amended (powers supplementary to powers of investment) A457

"the statutory power"

Substitute

"section 40 or 40A".

27. Parts IVA to IVD added

After section 41—

Add

"Part IVA

Appointment of Agents, Nominees and Custodians

Division 1—Application

41A. Application of Part IVA

(1) Except as otherwise provided in section 41I(6)—

(a) this Part applies in relation to a trust having a sole trustee in the same way as it applies to a trust that has more than one trustee; and

(b) references to trustees in this Part (except in sections 41C(1) and 41J(6)) include the sole trustee of a trust.

(2) The powers conferred by this Part are only exercisable by trustees jointly if there is more than one trustee.

Division 2—Agents

41B. Power to appoint agents

(1) Subject to the provisions of this Division, the trustees of a trust may authorize a person to exercise one or more of their delegable functions as their agent.

(2) For a trust that is not a charitable trust, the trustees' delegable functions are any functions of the trustees other than—

(a) a function relating to whether, or in what way, any assets of the trust are to be distributed;

(b) a power to decide whether any fees or other payment due to be made out of the trust funds is to be made out of income or capital of the trust;

(c) a power to appoint a person to be a trustee of the trust; or

(d) a power conferred by the instrument creating the trust or an enactment that permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) For a charitable trust, the trustees' delegable functions are—

(a) a function relating to carrying out a decision that the trustees have taken;

(b) a function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land); and

(c) a function relating to the raising of funds for the trust (otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose).

(4) For the purposes of subsection (3)(c), a trade, whether carried on in Hong Kong or elsewhere, is an integral part of carrying out a trust's charitable purpose if the profits of the trade are applied solely for the purposes of the trust and either—

(a) the trade is carried on in the course of the actual carrying out of a primary purpose of the trust; or

(b) the work in connection with the trade is mainly carried out by the beneficiaries of the trust.

41C. Persons who may act as agents

(1) Subject to subsection (2), a person whom the trustees may under section 41B authorize to exercise functions as the trustees' agent includes one or more of the trustees.

(2) The trustees may not authorize 2 or more persons to exercise the same function unless the persons are to exercise the function jointly.

(3) The trustees may under section 41B authorize a person to exercise a function as their agent even though the person is also appointed to act as the trustees' nominee or custodian (whether under section 41G, 41H or 41I or any other power).

41D. Linked functions, etc.

(1) Subject to subsection (2), a person who is authorized under section 41B to exercise a function as the trustees' agent is (whatever the terms of agency) subject to any specific duties or restrictions attached to the function.

(2) A person who is authorized under section 41B to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if the person is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

41E. Terms of agency

(1) Subject to subsection (2), section 41F(2) and Part IVB (remuneration and expenses), the trustees may under section 41B authorize a person to exercise functions as their agent on the terms as to remuneration and other matters that the trustees may determine.

(2) The trustees may not under section 41B authorize a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

(a) a term permitting the agent to sub-delegate the trustees' powers or functions to a delegate of the agent;

(b) a term restricting the liability of the agent, or a delegate of the agent, to the trustees or to any beneficiary; and

(c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

41F. Special restrictions relating to asset management

(1) The trustees may not under section 41B authorize a person to exercise any of their asset management functions as their agent except by an agreement made, or evidenced, in writing.

(2) In addition, the trustees may not under section 41B authorize a person to exercise any of their asset management functions as their agent unless—

(a) the trustees have provided that person with a statement that gives guidance as to how the functions are to be exercised (***policy statement***); and

(b) the agreement under which the agent is to act includes a term to the effect that the agent will secure compliance with—

(i) the policy statement; or

(ii) if the policy statement is revised or replaced under section 41M (review of agents), the revised or replaced policy statement.

(3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interest of the trust.

(4) A policy statement must be made, or evidenced, in writing.

(5) The asset management functions of trustees are their functions relating to—

(a) the investment of assets subject to the trust;

(b) the acquisition of property which is to be subject to the trust; and

(c) the management of property which is subject to the trust and the disposal of, or creation or disposal of an interest in, the property.

Division 3—Nominees and Custodians

41G. Power to appoint nominees

(1) Subject to the provisions of this Division, the trustees of a trust may—

(a) appoint a person to act as the trustees' nominee in relation to any of the assets of the trust as they determine; and

(b) take the steps that are necessary to ensure that those assets are vested in a person so appointed.

(2) An appointment under subsection (1)(a) must be made, or evidenced, in writing.

(3) This section does not apply to any trust having a custodian trustee.

41H. Power to appoint custodians

(1) Subject to the provisions of this Division, the trustees of a trust may appoint a person to act as a custodian in relation to any of the assets of the trust as they determine.

(2) For the purposes of this Ordinance, a person is a custodian in relation to any assets if the person undertakes the safe custody of the assets or of any documents or records concerning the assets.

(3) An appointment under subsection (1) must be made, or evidenced, in writing.

(4) This section does not apply to any trust having a custodian trustee.

41I. Investment in bearer securities

(1) Trustees may, unless expressly prohibited by the instrument creating the trust or an enactment, retain or invest in securities payable to bearer which, if not so payable, would have been authorized investments.

(2) A direction that investments must be retained or made in the name of a trustee is not an express prohibition referred to in subsection (1).

(3) If trustees retain or invest in securities payable to bearer, the trustees must appoint a person to act as a custodian of the securities.

(4) Subsection (3) does not apply if the instrument creating the trust or an enactment contains a provision that (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person as a custodian.

(5) An appointment under subsection (3) must be made, or evidenced, in writing.

(6) Subsections (3), (4) and (5) do not impose a duty on a sole trustee if that trustee is a trust corporation.

(7) Subsections (3), (4) and (5) do not apply to any trust having a custodian trustee.

41J. Persons who may be appointed as nominees or custodians

(1) A person may not be appointed under section 41G as a nominee unless one of the conditions mentioned in subsection (2) is satisfied.

(2) The conditions are—

(a) the person carries on a business that consists of, or includes, acting as a nominee;

(b) the person is a body corporate that is controlled by the trustees.

(3) A person may not be appointed under section 41H or 41I as a custodian to undertake the safe custody of the assets or of any documents of title concerning the assets unless one of the conditions mentioned in subsection (4) is satisfied.

(4) The conditions are—

(a) the person carries on a business that consists of, or includes, acting as a custodian;

(b) the person is a body corporate that is controlled by the trustees.

(5) For the purpose of subsections (2)(b) and (4)(b), a body corporate is controlled by the trustees if the trustees have the power to ensure that the affairs of the body corporate are conducted in accordance with the wishes of the trustees—

(a) by means of holding shares or possessing voting power in, or in relation to, that body corporate or any other body corporate; or

(b) because of any powers conferred by the articles of association or other document regulating that body corporate or any other body corporate.

(6) Subject to subsections (1) and (3), the persons whom the trustees may under section 41G, 41H or 41I (as the case requires) appoint as a nominee or custodian—

(a) include one of the trustees, if that one is a trust corporation; or

(b) include 2 or more of the trustees, if they are to act as joint nominees or joint custodians.

(7) The trustees may under section 41G appoint a person to act as their nominee even though the person is also—

(a) authorized to exercise functions as the trustees' agent (whether under section 41B or any other power); or

(b) appointed to act as the trustees' custodian (whether under section 41H or 41I or any other power).

(8) The trustees may under section 41H or 41I appoint a person to act as their custodian even though the person is also—

(a) authorized to exercise functions as the trustees' agent (whether under section 41B or any other power); or

(b) appointed to act as the trustees' nominee (whether under section 41G or any other power).

41K. Terms of appointment of nominees and custodians

(1) Subject to subsection (2) and Part IVB (remuneration and expenses), the trustees may under section 41G, 41H or 41I appoint a person to act as a nominee or custodian on the terms as to remuneration and other matters that the trustees may determine.

(2) The trustees may not under section 41G, 41H or 41I appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

(a) a term permitting the nominee or custodian to sub-delegate the trustees' powers or functions to a delegate of the nominee or custodian;

(b) a term restricting the liability of the nominee or custodian, or a delegate of the nominee or custodian, to the trustees or to any beneficiary; and

(c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

Division 4—Review of and Liability for Agents, Nominees and Custodians

41L. Application of sections 41M, 41N and 41O

(1) Sections 41M, 41N and 41O apply in a case where trustees have, under section 41B, 41G, 41H or 41I—

(a) authorized a person to exercise functions as their agent; or

(b) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), sections 41M, 41N and 41O also apply in a case where trustees have, under a power conferred on them by the instrument creating the trust or an enactment—

(a) authorized a person to exercise functions as their agent; or

(b) appointed a person to act as a nominee or custodian.

(3) If the application of section 41M, 41N or 41O in a case is inconsistent with the terms of the instrument creating the trust or an enactment, that section does not apply to that case.

41M. Review of agents

(1) While an agent continues to act for a trust, the trustees of the trust must—

(a) keep under review the arrangements under which the agent acts and the way in which those arrangements are being put into effect;

(b) if circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention that the trustees have; and

(c) if the trustees consider that there is a need to do so, exercise the power of intervention.

(2) If an agent has been authorized to exercise asset management functions, the duty to review under subsection (1) includes—

(a) a duty to consider whether there is a need to revise or replace the policy statement made for the purposes of section 41F;

(b) if the trustees consider that there is a need to revise or replace the policy statement, a duty to do so; and

(c) a duty to assess whether the policy statement is being complied with.

(3) The trustees must carry out the review as frequently as the circumstances of the trust may require having regard to the nature of the functions required to be exercised by the agent.

(4) Section 41F(3) and (4) applies to the revision or replacement of a policy statement under this section as it applies to the making of a policy statement under that section.

(5) For the purposes of subsection (1)—

power of intervention (干預權力) includes—

(a) a power to give directions to the agent; and

(b) a power to revoke the authorization or appointment of the agent.

41N. Review of nominees and custodians

(1) While a nominee or custodian continues to act for a trust, the trustees of the trust must—

(a) keep under review the arrangements under which the nominee or custodian acts and the way in which those arrangements are being put into effect;

(b) if circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention that the trustees have; and

(c) if the trustees consider that there is a need to do so, exercise the power of intervention.

(2) The trustees must carry out the review as frequently as the circumstances of the trust may require having regard to the nature of the functions required to be exercised by the nominee or custodian.

(3) For the purposes of subsection (1)—

power of intervention (干預權力) includes—

(a) a power to give directions to the nominee or custodian; and

(b) a power to revoke the appointment of the nominee or custodian.

41O. Liability for agents, nominees and custodians

(1) A trustee of a trust is not liable for any act or omission of an agent, nominee or custodian acting for the trust (each is a ***representative***) if the trustee has discharged the statutory duty of care applicable to the trustee under Division 2 of the Third Schedule when—

(a) entering into the arrangements under which a person acts as the representative; and

(b) carrying out the duties to review under section 41M or 41N.

(2) If a trustee has agreed to a term under which a representative is permitted to sub-delegate the trustee's powers or functions to a delegate of the representative, the trustee is not liable for any act or omission of the delegate if the trustee has discharged the statutory duty of care applicable to the trustee under Division 2 of the Third Schedule when—

(a) agreeing to that term; and

(b) carrying out the duties to review under section 41M or 41N as far as the duties relate to the use of the delegate.

41P. Effect of trustees exceeding their powers

A failure by the trustees to act within the limits of the powers conferred by this Part does not invalidate—

(a) the authorization of a person to exercise a function of the trustees as an agent; or

(b) the appointment of a person to act as a nominee or custodian.

Part IVB

Remuneration and Expenses

41Q. Application of Part IVB

This Part applies in respect of—

(a) services provided to, or on behalf of, a trust (whenever created) on or after the commencement date of this Part; or

(b) expenses incurred on behalf of a trust (whenever created) on or after the commencement date of this Part.

Changes to legislation: *Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Trustee Act 2000

2000 CHAPTER 29

An Act to amend the law relating to trustees and persons having the investment powers of trustees; and for connected purposes. [23rd November 2000]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications etc. (not altering text)

C1 Act power to apply conferred (26.11.2008) by Pensions Act 2008 (c. 30), **ss. 68(2)**, 149(2)

C2 Act applied (5.7.2010) by The National Employment Savings Trust Order 2010 (S.I. 2010/917), arts. 1(3), **16**

PART I

THE DUTY OF CARE

1 The duty of care.

(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called "the duty of care".

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

25 Sole trustees.

(1) Subject to subsection (2), this Part applies in relation to a trust having a sole trustee as it applies in relation to other trusts (and references in this Part to trustees—except in sections 12(1) and (3) and 19(5)—are to be read accordingly).

(2) Section 18 does not impose a duty on a sole trustee if that trustee is a trust corporation.

26 Restriction or exclusion of this Part etc.

The powers conferred by this Part are—

(a) in addition to powers conferred on trustees otherwise than by this Act, but

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

27 Existing trusts.

This Part applies in relation to trusts whether created before or after its commencement.

PART V

REMUNERATION

28 Trustee's entitlement to payment under trust instrument.

(1) Except to the extent (if any) to which the trust instrument makes inconsistent provision, subsections (2) to (4) apply to a trustee if—

(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust, and

(b) the trustee is a trust corporation or is acting in a professional capacity.

(2) The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.

(3) Subsection (2) applies to a trustee of a charitable trust who is not a trust corporation only—

(a) if he is not a sole trustee, and

(b) to the extent that a majority of the other trustees have agreed that it should apply to him.

(4) Any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of—

(a) section 15 of the [M7]Wills Act 1837 (gifts to an attesting witness to be void), and

(b) section 34(3) of the [M8]Administration of Estates Act 1925 (order in which estate to be paid out).

(5) For the purposes of this Part, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with—

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(a) the management or administration of trusts generally or a particular kind of trust, or

(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.

(6) For the purposes of this Part, a person acts as a lay trustee if he—

(a) is not a trust corporation, and

(b) does not act in a professional capacity.

Marginal Citations

M7 1837 c. 26.

M8 1925 c. 23.

29 Remuneration of certain trustees.

(1) Subject to subsection (5), a trustee who—

(a) is a trust corporation, but

(b) is not a trustee of a charitable trust,

is entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides to or on behalf of the trust.

(2) Subject to subsection (5), a trustee who—

(a) acts in a professional capacity, but

(b) is not a trust corporation, a trustee of a charitable trust or a sole trustee,

is entitled to receive reasonable remuneration out of the trust funds for any services that he provides to or on behalf of the trust if each other trustee has agreed in writing that he may be remunerated for the services.

(3) "Reasonable remuneration" means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee and for the purposes of subsection (1) includes, in relation to the provision of services by a trustee who is **[**F5a deposit taker**]** and provides the services in that capacity, the **[**F6deposit taker's**]** reasonable charges for the provision of such services.

[F7(3A) In subsection (3), " deposit taker " means—

(a) a person who has permission under Part 4A of the Financial Services and Markets Act 2000 to accept deposits, F8...

F8(b) . . . . . .

(3B) A reference in subsection (3A) to a person or firm with permission to accept deposits does not include a person or firm with permission to do so only for the purposes of, or in the course of, carrying on another regulated activity in accordance with that permission.

(3C) Subsections (3A) and (3B) must be read with—

(a) section 22 of the Financial Services and Markets Act 2000,

(b) any relevant order under that section, and

(c) Schedule 2 to that Act.**]**

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(4) A trustee is entitled to remuneration under this section even if the services in question are capable of being provided by a lay trustee.

(5) A trustee is not entitled to remuneration under this section if any provision about his entitlement to remuneration has been made—

(a) by the trust instrument, or

(b) by any enactment or any provision of subordinate legislation.

(6) This section applies to a trustee who has been authorised under a power conferred by Part IV or the trust instrument—

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian,

as it applies to any other trustee.

Textual Amendments

F5 Words in s. 29(3) substituted (1.4.2013) by Financial Services Act 2012 (c. 21), s. 122(3), **Sch. 18 para. 90(2)(a)** (with Sch. 20); S.I. 2013/423, art. 3, Sch.

F6 Words in s. 29(3) substituted (1.4.2013) by Financial Services Act 2012 (c. 21), s. 122(3), **Sch. 18 para. 90(2)(b)** (with Sch. 20); S.I. 2013/423, art. 3, Sch.

F7 S. 29(3A)-(3C) inserted (1.4.2013) by Financial Services Act 2012 (c. 21), s. 122(3), **Sch. 18 para. 90(3)** (with Sch. 20); S.I. 2013/423, art. 3, Sch.

F8 S. 29(3A)(b) and word omitted (31.12.2020) by virtue of The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (S.I. 2018/1149), reg. 1(3), **Sch. para. 36** (with reg. 4); 2020 c. 1, Sch. 5 para. 1(1)

30 Remuneration of trustees of charitable trusts.

(1) The Secretary of State may by regulations make provision for the remuneration of trustees of charitable trusts who are trust corporations or act in a professional capacity.

(2) The power under subsection (1) includes power to make provision for the remuneration of a trustee who has been authorised under a power conferred by Part IV or any other enactment or any provision of subordinate legislation, or by the trust instrument—

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian.

(3) Regulations under this section may—

(a) make different provision for different cases;

(b) contain such supplemental, incidental, consequential and transitional provision as the Secretary of State considers appropriate.

(4) The power to make regulations under this section is exercisable by statutory instrument, but no such instrument shall be made unless a draft of it has been laid before Parliament and approved by a resolution of each House of Parliament.

31 Trustees' expenses.

(1) A trustee—

(a) is entitled to be reimbursed from the trust funds, or

***Changes to legislation:** Trustee Act 2000 is up to date with all changes known to be in force on or before 04 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(b) may pay out of the trust funds,

expenses properly incurred by him when acting on behalf of the trust.

(2) This section applies to a trustee who has been authorised under a power conferred by Part IV or any other enactment or any provision of subordinate legislation, or by the trust instrument—

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian,

as it applies to any other trustee.

32 Remuneration and expenses of agents, nominees and custodians.

(1) This section applies if, under a power conferred by Part IV or any other enactment or any provision of subordinate legislation, or by the trust instrument, a person other than a trustee has been—

(a) authorised to exercise functions as an agent of the trustees, or

(b) appointed to act as a nominee or custodian.

(2) The trustees may remunerate the agent, nominee or custodian out of the trust funds for services if—

(a) he is engaged on terms entitling him to be remunerated for those services, and

(b) the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of those services by him to or on behalf of that trust.

(3) The trustees may reimburse the agent, nominee or custodian out of the trust funds for any expenses properly incurred by him in exercising functions as an agent, nominee or custodian.

Modifications etc. (not altering text)

C13 S. 32 applied (with modifications) (2.1.2013) by The Charitable Incorporated Organisations (General) Regulations 2012 (S.I. 2012/3012), regs. 1, **33**

C14 S. 32 applied (with modifications) by 1956 c. lxvii s. 5(1B)-(1D) (as substituted (10.3.2015) by The Charities (People's Dispensary for Sick Animals) Order 2015 (S.I. 2015/198), art. 1, **Sch. Scheme para. 4**)

C15 S. 32 applied (with modifications) by 1961 c. xxxviii, s. 9(2)(3)(b)(4) (as substituted (1.9.2017) by The Charities (Shakespeare Birthplace Trust) Order 2017 (S.I. 2017/783), art. 1, **Sch. Scheme para. 5**)

33 Application.

(1) Subject to subsection (2), sections 28, 29, 31 and 32 apply in relation to services provided to or on behalf of, or (as the case may be) expenses incurred on or after their commencement on behalf of, trusts whenever created.

(2) Nothing in section 28 or 29 is to be treated as affecting the operation of—

(a) section 15 of the [M9]Wills Act 1837, or

(b) section 34(3) of the [M10]Administration of Estates Act 1925,

in relation to any death occurring before the commencement of section 28 or (as the case may be) section 29.

Trustees (Amendment) Act 2004
(No. 45 of 2004)

Table of Contents

Long Title

Enacting Formula

1 Short title and commencement

2 Amendment of section 3

3 New Part IA

4 Repeal and re-enactment of sections 4, 5 and 6

5 Repeal of section 8

6 Amendment of section 9

7 Amendment of section 11

8 Amendment of section 12

9 Amendment of section 15

10 Amendment of section 16

11 Repeal and re-enactment of section 21

12 Amendment of section 22

13 Repeal of section 23

14 Amendment of section 24

15 Repeal of section 25

41N.—(1) A trustee shall not be liable for any act or default of the agent, nominee or custodian unless he fails to comply with the statutory duty of care applicable to him under paragraph 3 of the First Schedule when —

(*a*) entering into the arrangements under which the person acts as agent, nominee or custodian; or

(*b*) carrying out his duties under section 41M.

(2) If a trustee has agreed to a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee shall not be liable for any act or default of the substitute unless he has failed to comply with the statutory duty of care applicable to him under paragraph 3 of the First Schedule —

(*a*) when agreeing to that term; or

(*b*) when carrying out his duties under section 41M in so far as they relate to the use of the substitute.

Supplementary

Effect of trustees exceeding their powers

41O. A failure by the trustees to act within the limits of the powers conferred by this Part —

(*a*) in authorising a person to exercise a function of theirs as an agent; or

(*b*) in appointing a person to act as a nominee or custodian,

shall not invalidate the authorisation or appointment.

PART IVB

REMUNERATION

Application of this Part

41P.—(1) Subject to subsection (2), sections 41Q to 41T shall apply in relation to —

(*a*) services provided to or on behalf of trusts, whenever created; or

(*b*) expenses incurred on or after the date of commencement of the Trustees (Amendment) Act 2004 on behalf of trusts, whenever

created.

(2) Nothing in section 41Q or 41R is to be treated as affecting the operation of —

(*a*) section 57(4) of the Probate and Administration Act (Cap. 251) (Administration of assets); or

(*b*) section 10 of the Wills Act (Cap. 352) (Gifts to attesting witness or to wife or husband of attesting witness to be void),

in relation to any death occurring before the date of commencement of the Trustees (Amendment) Act 2004.

Trustee's entitlement to payment under trust instrument

41Q.—(1) Except to the extent (if any) to which the trust instrument makes an inconsistent provision, subsections (2), (3) and (4) shall apply to a trustee if —

(*a*) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust; and

(*b*) the trustee is a trust corporation or is acting in a professional capacity.

(2) The trustee shall be treated as being entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.

(3) Subsection (2) shall apply to a trustee of a charitable trust who is not a trust corporation only —

(*a*) if he is not a sole trustee; and

(*b*) to the extent that a majority of the other trustees have agreed that it should apply to him.

(4) Any payment to which the trustee is entitled in respect of services shall be treated as remuneration for services (and not as a gift) for the purposes of —

(*a*) section 57(4) of the Probate and Administration Act (Cap. 251) (Administration of assets); and

(*b*) section 10 of the Wills Act (Cap. 352) (Gifts to attesting witness or to wife or husband of attesting witness to be void).

(5) For the purposes of this Part, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with —

(*a*) the management or administration of trusts generally or a particular kind of trust; or

(*b*) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.

(6) For the purposes of this Part, a person acts as a lay trustee if he —

(*a*) is not a trust corporation; and

(*b*) does not act in a professional capacity.

Remuneration of certain trustees

41R.—(1) Subject to subsection (4), a trustee who is a trust corporation shall be entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides to or on behalf of the trust.

(2) Subject to subsection (5), a trustee who —

(*a*) acts in a professional capacity; and

(*b*) is not a trust corporation or a sole trustee,

shall be entitled to receive reasonable remuneration out of the trust funds for any services that he provides to or on behalf of the trust if each other trustee has agreed in writing that he may be remunerated for the services.

(3) A trustee shall be entitled to remuneration under this section even if the services in question are capable of being provided by a lay trustee.

(4) A trustee shall not be entitled to remuneration under this section if any provision about his entitlement to remuneration has been made —

(*a*) by the trust instrument; or

(*b*) by any written law.

(5) This section shall apply to a trustee who has been authorised under a power conferred by Part IVA or the trust instrument —

(*a*) to exercise functions as an agent of the trustees; or

(*b*) to act as a nominee or custodian,

as it applies to any other trustee.

(6) In this section, "reasonable remuneration" means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee.

Trustees' expenses

41S.—(1) A trustee —

(*a*) shall be entitled to be reimbursed from the trust funds; or

(*b*) may pay out of the trust funds,

reasonable expenses properly incurred by him when acting on behalf of the trust.

(2) This section shall apply to a trustee who has been authorised under a power conferred by Part IVA or any other written law, or by the trust instrument —

(*a*) to exercise functions as an agent of the trustees; or

(*b*) to act as a nominee or custodian,

as it applies to any other trustee.

Remuneration and expenses of agents, nominees and custodians

41T.—(1) This section shall apply if, under a power conferred by Part IVA or any other written law, or by the trust instrument, a person other than a trustee has been —

(*a*) authorised to exercise functions as an agent of the trustees; or

(*b*) appointed to act as a nominee or custodian.

(2) The trustees may remunerate the agent, nominee or custodian out of the trust funds for services if —

(*a*) he is engaged on terms entitling him to be remunerated for those services; and

(*b*) the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of those services by him to or on behalf of that trust.

Ord. No. 13 of 2013
A431

Trust Law (Amendment) Ordinance 2013

Contents

Section Page

Part 1

Preliminary

1. Short title and commencement A447

Part 2

Amendments to Trustee Ordinance

2. Trustee Ordinance amended A449
3. Section 2 amended (interpretation) A449
4. Section 3 amended (application) A449
5. Part IA added A451

Part IA

Statutory Duty of Care

3A. Statutory duty of care A451

6. Section 4 amended (authorized investments) A455
7. Section 7 substituted A455

7. Retention of unauthorized investment A455

8. Section 8 repealed (investment in bearer securities) A457
9. Section 11 amended (powers supplementary to powers of investment) A457

(b) carrying out the duties to review under section 41M or 41N as far as the duties relate to the use of the delegate.

41P. Effect of trustees exceeding their powers

A failure by the trustees to act within the limits of the powers conferred by this Part does not invalidate—

(a) the authorization of a person to exercise a function of the trustees as an agent; or

(b) the appointment of a person to act as a nominee or custodian.

Part IVB

Remuneration and Expenses

41Q. Application of Part IVB

This Part applies in respect of—

(a) services provided to, or on behalf of, a trust (whenever created) on or after the commencement date of this Part; or

(b) expenses incurred on behalf of a trust (whenever created) on or after the commencement date of this Part.

41R. Interpretation of Part IVB

(1) For the purposes of this Part, a trustee acts in a professional capacity if—

(a) the trustee acts in the course of a profession or business that consists of, or includes, the provision of services in connection with—

(i) the management or administration of trusts generally or a particular kind of trust; or

(ii) any particular aspect of the management or administration of trusts generally or a particular kind of trust; and

(b) the services that the trustee provides to, or on behalf of, the trusts fall within the description of paragraph (a).

(2) For the purposes of this Part, a person acts as a lay trustee if the person—

(a) is not a trust corporation; and

(b) does not act in a professional capacity.

41S. Remuneration of trustees under instrument creating trust

(1) Subject to subsection (2)—

(a) subsections (3) and (4) apply to a trustee who—

(i) is a trust corporation; or

(ii) is not a trust corporation, but is acting in a professional capacity as a trustee of a non-charitable trust; and

(b) subsections (3) and (4) apply to a trustee—

(i) if the trustee is not a trust corporation, but is acting in a professional capacity as a trustee, other than the sole trustee, of a charitable trust; but

(ii) only to the extent to which a majority of the other trustees of the charitable trust have agreed that those subsections apply to the trustee, subject to any inconsistent provision in the instrument creating the trust or an enactment.

(2) Subsections (3) and (4) apply to a trustee—

(a) only if there is a provision in the instrument creating the trust or an enactment entitling the trustee to receive payment out of trust funds for services provided by the trustee to, or on behalf of, the trust; and

(b) except to the extent to which any inconsistent provision is made in the instrument creating the trust or an enactment.

(3) A trustee is to be treated as being entitled under the instrument creating the trust to receive payment for services provided even if the services are capable of being provided by a lay trustee.

(4) Any payment to which a trustee is entitled for services provided is to be treated as remuneration for services (but not as a disposition of property) for the purposes of section 10 of the Wills Ordinance (Cap. 30) (avoidance of gifts to attesting witnesses and their spouses).

41T. Remuneration of trustees other than under instrument creating trust

(1) Subject to subsection (2)—

(a) subsections (3) and (4) apply to a trustee who is a trust corporation; and

(b) subsections (3) and (4) apply to a trustee who is not a trust corporation, but is acting in a professional capacity as a trustee, other than the sole trustee, of a trust if each of the other trustees of the trust has agreed in writing that the trustee may be remunerated for services provided by the trustee to, or on behalf of, the trust.

(2) Subsections (3) and (4) apply to a trustee of a charitable or non-charitable trust only if the trustee's entitlement to remuneration—

(a) is not provided by the instrument creating the trust or an enactment; and

(b) is not expressly prohibited by a term in the instrument or enactment.

(3) A trustee is entitled to receive reasonable remuneration out of trust funds for services provided by the trustee to, or on behalf of, the trust.

(4) A trustee is to be treated as being entitled under this section to receive remuneration for services provided even if the services are capable of being provided by a lay trustee.

(5) This section applies to a trustee authorized to act in another capacity as it applies to any other trustee.

(6) For the purpose of subsection (5), a trustee authorized to act in another capacity is a trustee who has been authorized, under a power conferred by Part IVA (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment—

(a) to exercise functions as a trustee's agent; or

(b) to act as a nominee or custodian.

(7) For the purposes of this section—

reasonable remuneration (合理酬金)—

(a) means, in relation to the provision of services by a trustee of a trust, the remuneration that is reasonable in the circumstances for the provision of those services by the trustee to, or on behalf of, the trust; and

(b) includes, in relation to the provision of services by a trustee who is an authorized institution under the Banking Ordinance (Cap. 155) and provides those services in the course of, or incidental to, the exercise of its function as a trustee, the institution's reasonable charges for the provision of those services.

41U. Trustee's expenses

(1) A trustee of a trust who has properly incurred expenses when acting on behalf of the trust—

(a) is entitled to be reimbursed from the trust funds for those expenses; or

(b) may pay for those expenses out of the trust funds.

(2) This section applies to a trustee authorized to act in another capacity as it applies to any other trustee.

(3) For the purpose of subsection (2), a trustee authorized to act in another capacity is a trustee who has been authorized, under a power conferred by Part IVA (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment—

(a) to exercise functions as a trustee's agent; or

(b) to act as a nominee or custodian.

Changes to legislation: *Trusts of Land and Appointment of Trustees Act 1996 is up to date with all changes known to be in force on or before 03 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Trusts of Land and Appointment of Trustees Act 1996

1996 CHAPTER 47

An Act to make new provision about trusts of land including provision phasing out the Settled Land Act 1925, abolishing the doctrine of conversion and otherwise amending the law about trusts for sale of land; to amend the law about the appointment and retirement of trustees of any trust; and for connected purposes. [24th July 1996]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extent Information

E1 Act extends to England and Wales except as mentioned in s. 27(4)

Commencement Information

I1 Act not in force at Royal Assent, see s. 27(2); Act wholly in force at 1.1.1997

PART I

TRUSTS OF LAND

Introductory

1 Meaning of "trust of land".

(1) In this Act—

(a) "trust of land" means (subject to subsection (3)) any trust of property which consists of or includes land, and

***Changes to legislation:** Trusts of Land and Appointment of Trustees Act 1996 is up to date with all changes known to be in force on or before 03 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Marginal Citations

M7 1925 c. 18.

18 Application of Part to personal representatives.

(1) The provisions of this Part relating to trustees, other than sections 10, 11 and 14, apply to personal representatives, but with appropriate modifications and without prejudice to the functions of personal representatives for the purposes of administration.

(2) The appropriate modifications include—

(a) the substitution of references to persons interested in the due administration of the estate for references to beneficiaries, and

(b) the substitution of references to the will for references to the disposition creating the trust.

(3) Section 3(1) does not apply to personal representatives if the death occurs before the commencement of this Act.

PART II

APPOINTMENT AND RETIRMENT OF TRUSTEES

19 Appointment and retirement of trustee at instance of beneficiaries.

(1) This section applies in the case of a trust where—

(a) there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, and

(b) the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

(2) The beneficiaries may give a direction or directions of either or both of the following descriptions—

(a) a written direction to a trustee or trustees to retire from the trust, and

(b) a written direction to the trustees or trustee for the time being (or, if there are none, to the personal representative of the last person who was a trustee) to appoint by writing to be a trustee or trustees the person or persons specified in the direction.

(3) Where—

(a) a trustee has been given a direction under subsection (2)(a),

(b) reasonable arrangements have been made for the protection of any rights of his in connection with the trust,

(c) after he has retired there will be either a trust corporation or at least two persons to act as trustees to perform the trust, and

(d) either another person is to be appointed to be a new trustee on his retirement (whether in compliance with a direction under subsection (2)(b) or otherwise) or the continuing trustees by deed consent to his retirement,

he shall make a deed declaring his retirement and shall be deemed to have retired and be discharged from the trust.

***Changes to legislation:** Trusts of Land and Appointment of Trustees Act 1996 is up to date with all changes known to be in force on or before 03 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(4) Where a trustee retires under subsection (3) he and the continuing trustees (together with any new trustee) shall (subject to any arrangements for the protection of his rights) do anything necessary to vest the trust property in the continuing trustees (or the continuing and new trustees).

(5) This section has effect subject to the restrictions imposed by the [M8]Trustee Act 1925 on the number of trustees.

Marginal Citations

M8 1925 c. 19.

20 [F10]Appointment of substitute for trustee who lacks capacity]

(1) This section applies where—

(a) a trustee [F11]lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise] his functions as trustee,

(b) there is no person who is both entitled and willing and able to appoint a trustee in place of him under section 36(1) of the Trustee Act 1925, and

(c) the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

(2) The beneficiaries may give to—

[F12](a) a deputy appointed for the trustee by the Court of Protection,]

(b) an attorney acting for him under the authority of [F13]an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005]

(c) a person authorised for the purpose by [F14]the Court of Protection],

a written direction to appoint by writing the person or persons specified in the direction to be a trustee or trustees in place of the incapable trustee.

Textual Amendments

F10 S. 20 title substituted (1.10.2007) by virtue of Mental Capacity Act 2005 (c. 9), s. 68(1), **Sch. 6 para. 42(3)** (with ss. 27-29, 62); S.I. 2007/1897, art. 2(1)(d)

F11 Words in s. 20(1)(a) substituted (1.10.2007) by Mental Capacity Act 2005 (c. 9), s. 68(1), **Sch. 6 para. 42(3)(a)** (with ss. 27-29, 62); S.I. 2007/1897, art. 2(1)(d)

F12 S. 20(2)(a) substituted (1.10.2007) by Mental Capacity Act 2005 (c. 9), s. 68(1), **Sch. 6 para. 42(3)(b)(i)** (with ss. 27-29, 62); S.I. 2007/1897, art. 2(1)(d)

F13 Words in s. 20(2)(b) substituted (1.10.2007) by Mental Capacity Act 2005 (c. 9), s. 68(1), **Sch. 6 para. 42(3)(b)(ii)** (with ss. 27-29, 62); S.I. 2007/1897, art. 2(1)(d)

F14 Words in s. 20(2)(c) substituted (1.10.2007) by Mental Capacity Act 2005 (c. 9), s. 68(1), **Sch. 6 para. 42(3)(b)(iii)** (with ss. 27-29, 62); S.I. 2007/1897, art. 2(1)(d)

21 Supplementary.

(1) For the purposes of section 19 or 20 a direction is given by beneficiaries if—

(a) a single direction is jointly given by all of them, or

Changes to legislation: *Trusts of Land and Appointment of Trustees Act 1996 is up to date with all changes known to be in force on or before 03 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(b) (subject to subsection (2)) a direction is given by each of them (whether solely or jointly with one or more, but not all, of the others),

and none of them by writing withdraws the direction given by him before it has been complied with.

(2) Where more than one direction is given each must specify for appointment or retirement the same person or persons.

(3) Subsection (7) of section 36 of the [M9]Trustee Act 1925 (powers of trustees appointed under that section) applies to a trustee appointed under section 19 or 20 as if he were appointed under that section.

(4) A direction under section 19 or 20 must not specify a person or persons for appointment if the appointment of that person or those persons would be in contravention of section 35(1) of the Trustee Act 1925 or section 24(1) of the [M10]Law of Property Act 1925 (requirements as to identity of trustees).

(5) Sections 19 and 20 do not apply in relation to a trust created by a disposition in so far as provision that they do not apply is made by the disposition.

(6) Sections 19 and 20 do not apply in relation to a trust created before the commencement of this Act by a disposition in so far as provision to the effect that they do not apply is made by a deed executed—

(a) in a case in which the trust was created by one person and he is of full capacity, by that person, or

(b) in a case in which the trust was created by more than one person, by such of the persons who created the trust as are alive and of full capacity.

(7) A deed executed for the purposes of subsection (6) is irrevocable.

(8) Where a deed is executed for the purposes of subsection (6)—

(a) it does not affect anything done before its execution to comply with a direction under section 19 or 20, but

(b) a direction under section 19 or 20 which has been given but not complied with before its execution shall cease to have effect.

Marginal Citations

M9 1925 c. 19.

M10 1925 c. 20.

PART III

SUPPLEMENTARY

22 Meaning of "beneficiary".

(1) In this Act "beneficiary", in relation to a trust, means any person who under the trust has an interest in property subject to the trust (including a person who has such an interest as a trustee or a personal representative).

Trust Law (Amendment) Ordinance 2013

Contents

Section Page

Part 1

Preliminary

1. Short title and commencement A447

Part 2

Amendments to Trustee Ordinance

2. Trustee Ordinance amended A449
3. Section 2 amended (interpretation) A449
4. Section 3 amended (application) A449
5. Part IA added A451

Part IA

Statutory Duty of Care

3A. Statutory duty of care A451

6. Section 4 amended (authorized investments) A455
7. Section 7 substituted A455

7. Retention of unauthorized investment A455

8. Section 8 repealed (investment in bearer securities) A457
9. Section 11 amended (powers supplementary to powers of investment) A457

24. Part III, Division 3 heading added

Before section 33—

Add

"**Division 3—Maintenance, Advancement and Protective Trusts**".

25. Sections 40A to 40D added

After section 40—

Add

"**40A. Appointment and retirement of trustees on beneficiaries' directions**

(1) This section applies in relation to a trust if—

(a) no person is nominated for the purpose of appointing new trustees by the instrument creating the trust or an enactment; and

(b) either—

(i) the sole beneficiary under the trust is absolutely entitled to the property subject to the trust and—

(A) is an individual of full age and capacity; or

(B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or

(ii) all the beneficiaries under the trust (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—

(A) an individual of full age and capacity; or

(B) a body corporate whose constitution does not prohibit it from exercising the power under this section.

(2) The sole beneficiary or all the beneficiaries may give either or both of the following directions—

(a) a written direction to a trustee directing the trustee to retire from the trust;

(b) a written direction to a sole trustee or all the trustees for the time being or, if there is none, to the personal representative of the last person who was a trustee, directing the sole trustee, trustees or the personal representative to appoint by writing a person specified in the direction as a trustee.

(3) A trustee to whom a direction under subsection (2)(a) has been given must make a deed declaring the trustee's retirement if—

(a) reasonable arrangements have been made for the protection of any rights of the trustee in connection with the trust;

(b) after the trustee has retired, there will be either a trust corporation or at least 2 persons to act as trustees of the trust; and

(c) either—

(i) another person is to be appointed as a new trustee on the trustee's retirement (whether in compliance with a direction given under subsection (2)(b) or otherwise); or

(ii) the continuing trustees by deed consent to the retirement.

(4) When the deed declaring the trustee's retirement is made—

(a) the retirement takes effect and the trustee is discharged from the trust; and

(b) the trustee and the continuing trustees (together with any new trustee) must (subject to any arrangement for the protection of the rights of the retiring trustee) do anything necessary to vest the property subject to the trust in—

(i) the continuing trustees; or

(ii) the continuing trustees and new trustees.

(5) This section has effect subject to the restrictions imposed by section 36 on the number of trustees.

40B. Appointment of substitute for incapacitated trustee

(1) This section applies in relation to a trust if—

(a) a trustee, because of mental incapacity as defined by section 2(1) of the Mental Health Ordinance (Cap. 136), is incapable of exercising the trustee's functions (***the incapacitated trustee***);

(b) no person is entitled, willing and able to appoint, under section 37(1), a new trustee in place of the incapacitated trustee; and

(c) either—

(i) the sole beneficiary under the trust is absolutely entitled to the property subject to the trust and—

(A) is an individual of full age and capacity; or

(B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or

(ii) all the beneficiaries under the trust (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—

(A) an individual of full age and capacity; or

(B) a body corporate whose constitution does not prohibit it from exercising the power under this section.

(2) Either the sole beneficiary or all the beneficiaries may give a written direction to the specified attorney or committee to appoint a person specified in the direction to be a new trustee in place of the incapacitated trustee.

(3) In subsection (2)—

(a) the specified attorney is an attorney acting for the incapacitated trustee under an enduring power of attorney; and

(b) the specified committee is a committee of the estate or other person acting for the incapacitated trustee appointed or authorized by the court under Part II of the Mental Health Ordinance (Cap. 136).

40C. Provisions supplementary to sections 40A and 40B

(1) For the purposes of sections 40A and 40B, a direction is given by all the beneficiaries if—

(a) a single direction is jointly given by all of them; or

(b) in compliance with subsection (2), a direction is given by each of them (whether solely or jointly with one or more, but not all, of the others),

and none of them by writing withdraws the direction given before it has been complied with.

(2) If more than one direction is given, each beneficiary must specify for the appointment or retirement the same person or persons.

(3) Section 37(7) (providing for the powers, authorities and discretions of new trustees) applies to a trustee appointed under section 40A or 40B as if the trustee were appointed under section 37.

40D. Application of sections 40A and 40B

(1) Sections 40A and 40B do not apply in relation to a trust if a contrary intention is expressed in the instrument creating the trust or an enactment.

(2) Sections 40A and 40B do not apply in relation to a trust created before the commencement date of those sections in so far as provision to the effect that those sections do not apply is made by a deed executed—

(a) if the trust was created by a person who is of full capacity, by that person; or

(b) if the trust was created by more than one person, by all the persons who are of full capacity.

(3) A deed executed for the purpose of subsection (2) is irrevocable.

(4) If a deed is executed for the purpose of subsection (2)—

(a) the deed does not affect anything done before its execution to comply with a direction given under section 40A or 40B; but

(b) a direction given under section 40A or 40B that has not been complied with before the execution of the deed ceases to have effect.

(5) Sections 40A and 40B do not apply to the appointment and retirement of a personal representative.".

26. Section 41 amended (vesting of trust property in new or continuing trustees)

Section 41(2)—

Repeal

Trustees (Amendment) Act 2004
(No. 45 of 2004)

Table of Contents

Long Title

Enacting Formula

1 Short title and commencement

2 Amendment of section 3

3 New Part IA

4 Repeal and re-enactment of sections 4, 5 and 6

5 Repeal of section 8

6 Amendment of section 9

7 Amendment of section 11

8 Amendment of section 12

9 Amendment of section 15

10 Amendment of section 16

11 Repeal and re-enactment of section 21

12 Amendment of section 22

13 Repeal of section 23

14 Amendment of section 24

15 Repeal of section 25

Accumulation of income for duration of trusts

88. The income arising from a trust may be accumulated for such period as is allowed under section 31 of the Civil Law Act (Cap. 43).

Perpetuity period applicable to trusts

89. For the purposes of the rule against perpetuities, the provisions of sections 32, 33 and 34 of the Civil Law Act (Cap. 43) shall apply to trusts created on or after the date of commencement of the Trustees (Amendment) Act 2004.

Validity of certain trusts

90.—(1) Subject to subsection (3), where a person creates a trust or transfers movable property to be held on an existing trust during his lifetime, he shall be deemed to have the capacity to so create the trust or transfer the property if he has capacity to do so under any of the following laws:

(*a*) the law applicable in Singapore;

(*b*) the law of his domicile or nationality; or

(*c*) the proper law of the transfer.

(2) No rule relating to inheritance or succession shall affect the validity of a trust or the transfer of any property to be held on trust if the person creating the trust or transferring the property had the capacity to do so under subsection (1).

(3) Subsection (1) —

(*a*) does not apply if, at the time of the creation of the trust or the transfer of the property to be held on trust, the person creating the trust or transferring the property is a citizen of Singapore or is domiciled in Singapore; and

(*b*) applies in relation to a trust only if the trust is expressed to be governed by Singapore law and the trustees are resident in Singapore.

(4) In subsection (1), the reference to "law" does not include any choice of law rules forming part of that law.

(5) No trust or settlement of any property on trust shall be invalid by reason only of the person creating the trust or making the settlement reserving to himself any or all powers of investment or asset management functions under the trust or settlement.".

Short title

1. This Act is the Civil Law Act 1909.

Accumulation of income

31.—(1) Income arising from a settlement or disposition of property made on or after 15 December 2004 may, subject to the terms of the settlement or disposition to the contrary, be accumulated for the duration of the settlement or disposition.

[45/2004]

(2) Except as otherwise provided in subsection (4), income arising from a settlement or disposition of property made before 15 December 2004 shall not be wholly or partially accumulated for any longer period than one of the following, namely:

(*a*) the life of the grantor or settlor;

(*b*) a term of 21 years from the death of the grantor, settlor or testator;

(*c*) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor or testator;

(*d*) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated;

(*e*) a term of 21 years from the date of the making of the disposition; or

(*f*) the duration of the minority or respective minorities of any person or persons in being at the date of the making of the disposition.

[45/2004]

(3) In every case where any accumulation is directed otherwise than in accordance with subsection (2), the direction shall, except as otherwise provided in subsection (4), be void, and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

[45/2004]

(4) Subsections (2) and (3) do not extend to any provision —

(*a*) for payment of the debts of any grantor, settlor, testator or other person; or

(*b*) for raising portions for —

(i) any child, children or remoter issue of any grantor, settlor or

testator; or

(ii) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited,

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

[45/2004]

Fixed perpetuity period of 100 years

32.—(1) In the rule against perpetuities as is applicable to any settlement or disposition of property, the perpetuity period shall be 100 years or such shorter period as may be specified in the instrument by which the settlement or disposition is made.

[45/2004]

(2) Where any instrument making any settlement or disposition of property refers to lives in being or specifies a perpetuity period that exceeds 100 years, the perpetuity period shall be deemed to be a period of 100 years.

[45/2004]

(3) This section shall apply in relation to —

(*a*) any instrument made in the exercise of a special power of appointment where the instrument creating the special power of appointment takes effect on or after 15 December 2004; and

(*b*) any other instrument taking effect on or after 15 December 2004.

[45/2004]

Powers of appointment

33.—(1) For the purposes of section 32, a power of appointment shall be treated as a special power unless —

(*a*) in the instrument creating the power it is expressed to be exercisable by one person only; and

(*b*) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

[45/2004]

(2) For the purpose of determining whether a disposition made under a power of

appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

[45/2004]

Necessity to wait and see

34.—(1) Where, apart from the provisions of this section, a disposition would be invalid as infringing the rule against perpetuities, the disposition shall be treated, until such time (if any) as it becomes certain that the vesting will occur, if at all, after the end of the perpetuity period, as if the disposition were not invalid as infringing the rule against perpetuities, and its becoming so certain shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income, or otherwise.

[45/2004]

(2) Where, apart from the provisions of this section, a disposition consisting of the conferring of a general power of appointment would be invalid as infringing the rule against perpetuities, the disposition shall be treated, until such time (if any) as it becomes certain that the power will not be exercisable within the perpetuity period, as if the disposition were not invalid as infringing the rule against perpetuities.

[45/2004]

(3) Where, apart from the provisions of this section, a disposition consisting of the conferring of any power, option, or other right would be invalid as infringing the rule against perpetuities, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not so invalid and, subject to the provisions of this section, shall be treated as invalid as infringing the rule against perpetuities only if and so far as the right is not fully exercised within that period.

[45/2004]

(4) This section shall apply only in relation to dispositions made on or after 15 December 2004.

[45/2004]

Changes to legislation: *There are currently no known outstanding effects for the Perpetuities and Accumulations Act 2009. (See end of Document for details)*

Perpetuities and Accumulations Act 2009

2009 CHAPTER 18

An Act to amend the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income. [12th November 2009]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Application of rule against perpetuities

1 Application of the rule

(1) The rule against perpetuities applies (and applies only) as provided by this section.

(2) If an instrument limits property in trust so as to create successive estates or interests the rule applies to each of the estates or interests.

(3) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests, the rule applies to the estate or interest.

(4) If an instrument limits property in trust so as to create an estate or interest subject to a condition subsequent the rule applies to—

(a) any right of re-entry exercisable if the condition is broken, or

(b) any equivalent right exercisable in the case of property other than land if the condition is broken.

(5) If an instrument which is a will limits personal property so as to create successive interests under the doctrine of executory bequests, the rule applies to each of the interests.

(6) If an instrument creates a power of appointment the rule applies to the power.

(7) For the purposes of subsection (2) an estate or interest includes an estate or interest—

Changes to legislation: *There are currently no known outstanding effects for the Perpetuities and Accumulations Act 2009. (See end of Document for details)*

(a) which arises under a right of reverter on the determination of a determinable fee simple, or

(b) which arises under a resulting trust on the determination of a determinable interest.

(8) This section has effect subject to the exceptions made by section 2 and to any exceptions made under section 3.

(9) In section 4(3) of the Law of Property Act 1925 (c. 20) (rights of entry affecting a legal estate) omit the words from "but" to the end.

Commencement Information

I1 S. 1 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

2 Exceptions to rule's application

(1) This section contains exceptions to the application of the rule against perpetuities.

(2) The rule does not apply to an estate or interest created so as to vest in a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.

(3) The rule does not apply to a right exercisable by a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.

(4) The rule does not apply to an interest or right arising under a relevant pension scheme.

(5) The exception in subsection (4) does not apply if the interest or right arises under—

(a) an instrument nominating benefits under the scheme, or

(b) an instrument made in the exercise of a power of advancement arising under the scheme.

Commencement Information

I2 S. 2 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

3 Power to specify exceptions

(1) The Lord Chancellor may by order provide that the rule against perpetuities is not to apply—

(a) in cases of a specified description, or

(b) if specified conditions are fulfilled.

(2) Different descriptions and conditions may be specified for different purposes.

(3) Any order under this section may include such supplementary, incidental, consequential or transitional provisions as appear to the Lord Chancellor to be necessary or expedient.

(4) In this section "specified" means specified in the order.

(5) The power to make an order under this section is exercisable by statutory instrument.

(6) A statutory instrument containing an order under this section may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

Commencement Information
I3 S. 3 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

4 Abolition of existing exceptions

These provisions cease to have effect—

(a) section 121(6) of the Law of Property Act 1925 (c. 20) (rule against perpetuities not to apply to certain powers and remedies);

(b) section 162 of that Act (declaration that rule does not apply in certain cases);

(c) section 163 of the Pension Schemes Act 1993 (c. 48) (rule not to apply to trusts and dispositions concerning certain pension schemes).

Commencement Information
I4 S. 4 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

Perpetuity period

5 Perpetuity period

(1) The perpetuity period is 125 years (and no other period).

(2) Subsection (1) applies whether or not the instrument referred to in section 1(2) to (6) specifies a perpetuity period; and a specification of a perpetuity period in that instrument is ineffective.

Commencement Information
I5 S. 5 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

Perpetuities: miscellaneous

6 Start of perpetuity period

(1) The perpetuity period starts when the instrument referred to in section 1(2) to (6) takes effect; but this is subject to subsections (2) and (3).

(2) If section 1(2), (3) or (4) applies and the instrument is made in the exercise of a special power of appointment the perpetuity period starts when the instrument creating the power takes effect; but this is subject to subsection (3).

(3) If section 1(2), (3) or (4) applies and—

(a) the instrument nominates benefits under a relevant pension scheme, or

(b) the instrument is made in the exercise of a power of advancement arising under a relevant pension scheme,

the perpetuity period starts when the member concerned became a member of the scheme.

(4) The member concerned is the member in respect of whose interest in the scheme the instrument is made.

Commencement Information

I6 S. 6 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

7 Wait and see rule

(1) Subsection (2) applies if (apart from this section and section 8) an estate or interest would be void on the ground that it might not become vested until too remote a time.

(2) In such a case—

(a) until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period the estate or interest must be treated as if it were not subject to the rule against perpetuities, and

(b) if it becomes so established, that does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.

(3) Subsection (4) applies if (apart from this section) any of the following would be void on the ground that it might be exercised at too remote a time—

(a) a right of re-entry exercisable if a condition subsequent is broken;

(b) an equivalent right exercisable in the case of property other than land if a condition subsequent is broken;

(c) a special power of appointment.

(4) In such a case—

(a) the right or power must be treated as regards any exercise of it within the perpetuity period as if it were not subject to the rule against perpetuities, and

(b) the right or power must be treated as void for remoteness only if and so far as it is not fully exercised within the perpetuity period.

(5) Subsection (6) applies if (apart from this section) a general power of appointment would be void on the ground that it might not become exercisable until too remote a time.

(6) Until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, it must be treated as if it were not subject to the rule against perpetuities.

Commencement Information

I7 S. 7 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

8 Exclusion of class members to avoid remoteness

(1) This section applies if—

(a) it is apparent at the time an instrument takes effect or becomes apparent at a later time that (apart from this section) the inclusion of certain persons as members of a class would cause an estate or interest to be treated as void for remoteness, and

(b) those persons are potential members of the class or unborn persons who at birth would become members or potential members of the class.

(2) From the time it is or becomes so apparent those persons must be treated for all the purposes of the instrument as excluded from the class unless their exclusion would exhaust the class.

(3) If this section applies in relation to an estate or interest to which section 7 applies, this section does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.

(4) For the purposes of this section—

(a) a person is a member of a class if in that person's case all the conditions identifying a member of the class are satisfied, and

(b) a person is a potential member of a class if in that person's case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

Commencement Information

I8 S. 8 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

9 Saving and acceleration of expectant interests

(1) An estate or interest is not void for remoteness by reason only that it is ulterior to and dependent on an estate or interest which is so void.

(2) The vesting of an estate or interest is not prevented from being accelerated on the failure of a prior estate or interest by reason only that the failure arises because of remoteness.

Commencement Information

I9 S. 9 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

10 Determinable interests becoming absolute

(1) If an estate arising under a right of reverter on the determination of a determinable fee simple is void for remoteness the determinable fee simple becomes absolute.

(2) If an interest arising under a resulting trust on the determination of a determinable interest is void for remoteness the determinable interest becomes absolute.

Commencement Information

I10 S. 10 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

11 Powers of appointment

(1) Subsection (2) applies to a power of appointment exercisable otherwise than by will (whether or not it is also exercisable by will).

(2) For the purposes of the rule against perpetuities the power is a special power unless—

(a) the instrument creating it expresses it to be exercisable by one person only, and

(b) at all times during its currency when that person is of full age and capacity it could be exercised by that person so as immediately to transfer to that person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition (ignoring a formal condition relating only to the mode of exercise of the power).

(3) Subsection (4) applies to a power of appointment exercisable by will (whether or not it is also exercisable otherwise than by will).

(4) For the purposes of the rule against perpetuities the power is a special power unless—

(a) the instrument creating it expresses it to be exercisable by one person only, and

(b) that person could exercise it so as to transfer to that person's personal representatives the whole of the estate or interest to which it relates.

(5) Subsection (6) applies to a power of appointment exercisable by will or otherwise.

(6) If for the purposes of the rule against perpetuities the power would be a special power under one but not both of subsections (2) and (4), for the purposes of the rule it is a special power.

Commencement Information

I11 S. 11 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

12 Pre-commencement instruments: period difficult to ascertain

(1) If—

(a) an instrument specifies for the purposes of property limited in trust a perpetuity period by reference to the lives of persons in being when the instrument takes effect,

(b) the trustees believe that it is difficult or not reasonably practicable for them to ascertain whether the lives have ended and therefore whether the perpetuity period has ended, and

(c) they execute a deed stating that they so believe and that subsection (2) is to apply to the instrument,

that subsection applies to the instrument.

(2) If this subsection applies to an instrument—

(a) the instrument has effect as if it specified a perpetuity period of 100 years (and no other period);

(b) the rule against perpetuities has effect as if the only perpetuity period applicable to the instrument were 100 years;

(c) sections 6 to 11 of this Act are to be treated as if they applied (and always applied) in relation to the instrument;

(d) sections 1 to 12 of the Perpetuities and Accumulations Act 1964 (c. 55) are to be treated as if they did not apply (and never applied) in relation to the instrument.

(3) A deed executed under this section cannot be revoked.

Commencement Information

I12 S. 12 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

Accumulations

13 Abolition of restrictions

These provisions cease to have effect—

(a) sections 164 to 166 of the Law of Property Act 1925 (c. 20) (which impose restrictions on accumulating income, subject to qualifications);

(b) section 13 of the Perpetuities and Accumulations Act 1964 (which amends section 164 of the 1925 Act).

Commencement Information

I13 S. 13 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

14 Restriction on accumulation for charitable trusts

(1) This section applies to an instrument to the extent that it provides for property to be held on trust for charitable purposes.

(2) But it does not apply where the provision is made by a court or the Charity Commission for England and Wales.

(3) If the instrument imposes or confers on the trustees a duty or power to accumulate income, and apart from this section the duty or power would last beyond the end of the statutory period, it ceases to have effect at the end of that period unless subsection (5) applies.

(4) The statutory period is a period of 21 years starting with the first day when the income must or may be accumulated (as the case may be).

(5) This subsection applies if the instrument provides for the duty or power to cease to have effect—

(a) on the death of the settlor, or

(b) on the death of one of the settlors, determined by name or by the order of their deaths.

(6) If a duty or power ceases to have effect under this section the income to which the duty or power would have applied apart from this section must—

(a) go to the person who would have been entitled to it if there had been no duty or power to accumulate, or

(b) be applied for the purposes for which it would have had to be applied if there had been no such duty or power.

(7) This section applies whether or not the duty or power to accumulate extends to income produced by the investment of income previously accumulated.

Commencement Information

I14 S. 14 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

Application of statutory provisions

15 Application of this Act

(1) Sections 1, 2, 4 to 11, 13 and 14 apply in relation to an instrument taking effect on or after the commencement day, except that—

(a) those sections do not apply in relation to a will executed before that day, and

(b) those sections apply in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that day.

(2) Section 12 applies (except as provided by subsection (3)) in relation to—

(a) a will executed before the commencement day (whether or not it takes effect before that day);

(b) an instrument, other than a will, taking effect before that day.

(3) Section 12 does not apply if—

(a) the terms of the trust were exhausted before the commencement day, or

(b) before that day the property became held on trust for charitable purposes by way of a final disposition of the property.

(4) The commencement day is the day appointed under section 22(2).

Commencement Information

I15 S. 15 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

16 Limitation of 1964 Act to existing instruments

In section 15 of the Perpetuities and Accumulations Act 1964 (c. 55) the following subsections are inserted after subsection (5) (which makes provision as to the instruments to which the Act applies)—

"(5A) The foregoing sections of this Act shall not apply in relation to an instrument taking effect on or after the day appointed under section 22(2) of the

Perpetuities and Accumulations Act 2009 (commencement), but this shall not prevent those sections applying in relation to an instrument so taking effect if—

(a) it is a will executed before that day, or

(b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that day.

(5B) Subsection (5A) above shall not affect the operation of sections 4(6) and 11(2) above."

Commencement Information

I16 S. 16 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

General

17 The Crown

(1) This Act does not extend the application of the rule against perpetuities in relation to the Crown.

(2) Subject to that, this Act binds the Crown.

Commencement Information

I17 S. 17 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

18 Rule as to duration not affected

This Act does not affect the rule of law which limits the duration of non-charitable purpose trusts.

Commencement Information

I18 S. 18 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

19 Provision made otherwise than by instrument

If provision is made in relation to property otherwise than by an instrument, this Act applies as if the provision were contained in an instrument taking effect on the making of the provision.

Commencement Information

I19 S. 19 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

20 Interpretation

(1) For the purposes of this Act this section contains provisions relating to the interpretation of these expressions—

(a) power of appointment, general power of appointment and special power of appointment;

(b) relevant pension scheme;

(c) taking effect (in relation to a will);

(d) will.

(2) A power of appointment includes—

(a) a discretionary power to create a beneficial interest in property without the provision of valuable consideration;

(b) a discretionary power to transfer a beneficial interest in property without the provision of valuable consideration.

(3) Section 11 applies to interpret references to a general or special power of appointment.

(4) Each of these is a relevant pension scheme—

(a) an occupational pension scheme;

(b) a personal pension scheme;

(c) a public service pension scheme.

(5) The expressions in subsection (4)(a) to (c) have the meanings given by sections 1 and 181(1) of the Pension Schemes Act 1993 (c. 48).

(6) An instrument which is a will takes effect at the testator's death.

(7) A reference to a will includes a reference to a codicil.

Commencement Information

I20 S. 20 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

21 Repeals

The enactments mentioned in the Schedule are repealed to the extent specified, but subject to the provision at the end of the Schedule.

Commencement Information

I21 S. 21 in force at 6.4.2010 by S.I. 2010/37, **art. 2**

22 Commencement

(1) This section and sections 23 and 24 come into force on the day on which this Act is passed.

(2) The other provisions of this Act come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument.

23 Extent

This Act extends to England and Wales only.

24 Short title

This Act may be cited as the Perpetuities and Accumulations Act 2009.

Section 21

SCHEDULE
REPEALS

Commencement Information

I22 Sch. in force at 6.4.2010 by S.I. 2010/37, **art. 2**

Short title and chapter	*Extent of repeal*
Law of Property Act 1925 (c. 20)	In section 4(3), the words from "but" to the end.
	Section 121(6).
	Section 162.
	Sections 164 to 166.
Perpetuities and Accumulations Act 1964 (c. 55)	Section 13.
Pension Schemes Act 1993 (c. 48)	Section 163.

These repeals have effect in accordance with section 15 of this Act.

Changes to legislation:
There are currently no known outstanding effects for the Perpetuities and Accumulations Act 2009.

To modify the law relating to the avoidance of future interests in property on grounds of remoteness and governing accumulations of income from property.

[13 March 1970]
(Format changes—E.R. 2 of 2014)

(Cross-heading repealed 13 of 2013 s. 43)

Part 1

Preliminary and General

(Added 13 of 2013 s. 44)

1. Short title

This Ordinance may be cited as the Perpetuities and Accumulations Ordinance.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—

2013 amending Ordinance (《2013年修訂條例》) means the Trust Law (Amendment) Ordinance 2013 (13 of 2013); *(Added 13 of 2013 s. 45)*

disposition (產權處置) includes the conferring of a power of appointment and any other disposition of an interest in or right over property, and references to the interest disposed of shall be construed accordingly;

in being (在世的) means living or en ventre sa mere;

power of appointment (指定受益的權力) includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration;

will (遺囑) includes a codicil.

(2) For the purposes of this Ordinance a disposition contained in a will shall be deemed to be made at the death of the testator.

(3) For the purposes of this Ordinance a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and shall be treated as a potential member if in his case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

[cf. 1964 c. 55 s. 15(2) & (3) U.K.]

3. Application

(1A) Part 2 applies in relation to an instrument taking effect on or after the commencement date* of the 2013 amending Ordinance, except that—

(a) Part 2 does not apply in relation to a will executed before that date; and

3B. Restriction on accumulations for charitable trusts

(1) This section applies to an instrument to the extent to which its terms (other than a term of a court order) provide for property to be held on trust for charitable purposes.

(2) If—

(a) the terms of the instrument impose or confer on the trustees a duty or power to accumulate income; and

(b) apart from this section the duty or power would last beyond the end of a period of 21 years beginning on the first day when the income must or may be accumulated,

then subject to subsection (3), the duty or power ceases to have effect at the end of that 21-year period.

(3) Subsection (2) does not have effect in relation to the instrument if its terms provide for the duty or power to accumulate income to cease to have effect—

(a) on the death of the settlor; or

(b) on the death of one of the settlors, as determined by name or by the order of their deaths.

(4) If a duty or power to accumulate income ceases to have effect under subsection (2), the income to which the duty or power would have applied apart from this section must—

(a) go to the person who would have been entitled to it if there had been no duty or power to accumulate income; or

(b) be applied for the purposes for which it would have had to be applied if there had been no such duty or power to accumulate income.

(5) This section applies whether or not the duty or power to accumulate income extends to income produced by the investment of income previously accumulated.

3C. Rule as to duration of non-charitable purpose trust not affected

This Part does not affect any rule of law that limits the duration of non-charitable purpose trusts.

Editorial Note:

* Commencement date: 1 December 2013.

Part 3

Provisions Applicable to Instruments Taking Effect before Commencement Date* of 2013 Amending Ordinance

(Added 13 of 2013 s. 49)

Division 1—Perpetuities

(Added 13 of 2013 s. 49)

(Cross-heading repealed 13 of 2013 s. 48)

4. Abolition of the double possibility rule

(b) Part 2 applies in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that date. *(Added 13 of 2013 s. 46)*

(1) Part 3 does not affect the operation of the rule of law rendering void for remoteness certain dispositions under which property is limited to be applied for purposes other than the benefit of any person or class of persons in cases where the property may be so applied after the end of the perpetuity period.

(2) Subject to subsection (2A), Part 3 applies (except as provided in subsection (2) of section 13 and section 18) only in relation to instruments taking effect on and after 13 March 1970, and in the case of an instrument made in the exercise of special power of appointment applies only where the instrument creating the power takes effect on and after that date: *(Amended 13 of 2013 s. 46)*

Provided that section 12 applies in all cases for construing the foregoing reference to a special power of appointment.

(2A) Part 3 does not apply in relation to an instrument taking effect on or after the commencement date* of the 2013 amending Ordinance but Part 3 still applies in relation to an instrument so taking effect if—

(a) it is a will executed before that date; or

(b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that date. *(Added 13 of 2013 s. 46)*

(3) This Ordinance applies in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.

(4) This Ordinance binds the Crown.

(Amended 13 of 2013 s. 46)
[cf. 1964 c. 55 s. 15(4)-(7) U.K.]

Editorial Note:
* Commencement date: 1 December 2013.

Part 2

Provisions Applicable to Instruments Taking Effect on or after Commencement Date* of 2013 Amending Ordinance

(Part 2 added 13 of 2013 s. 47)

3A. Rule against perpetuities etc. have no effect

(1) The rule against perpetuities (or remoteness of vesting) and the rule against excessive accumulations have no effect in relation to an instrument to which this Part applies (as provided in section 3(1A)).

(2) A trust (whether created by an instrument or otherwise) may continue in existence for an unlimited period unless the terms of the trust provide to the contrary.

The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.

[cf. 1925 c. 20 s. 161 U.K.]

5. Restrictions on the perpetuity rule

For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied—

(a) to any power to distrain on or to take possession of land or the income thereof given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or

(b) to any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of—

(i) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon;

(ii) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

[cf. 1925 c. 20 s. 162 U.K.]

6. Power to specify perpetuity period

(1) Subject to subsection (2) of section 14 and subsection (2) of this section, where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.

(2) Subsection (1) shall not have effect where the disposition is made in exercise of a special power of appointment, but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.

[cf. 1964 c. 55 s. 1 U.K.]

7. Presumptions and evidence as to future parenthood

(1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the ability of a person to have a child at some future time, then—

(a) subject to paragraph (b), it shall be presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child at the time in question.

(2) Where any such question is decided by treating a person as unable to have a child at a particular time, and he or she does so, the Court of First Instance may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided. *(Amended 92 of 1975 s. 59; 25 of 1998 s. 2)*

(3) Subject to subsection (2), where any such question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child, but those provisions (except paragraph (b) of subsection (1)) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her ability at that time to beget or give birth to a child.

[cf. 1964 c. 55 s. 2 U.K.]

8. Uncertainty as to remoteness

(1) Where, apart from the provisions of this section and sections 9 and 10, a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

(2) Where, apart from the said provisions, a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, as if the disposition were not subject to the rule against perpetuities.

(3) Where, apart from the said provisions, a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities, and, subject to the said provisions, shall be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period.

(4) Where this section applies to a disposition and the duration of the perpetuity period is not determined by virtue of section 6 or subsection (2) of section 14, it shall be determined as follows—

(a) where any persons falling within subsection (5) are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) or (c) of that subsection shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor;

(b) where there are no lives under paragraph (a) the period shall be twenty-one years.

(5) The said persons are as follows—

(a) the person by whom the disposition was made;

(b) a person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of any power, option or other right, the person on whom the right is conferred;

(c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b), or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within those sub-paragraphs;

(d) any person on the failure or determination of whose prior interest the disposition is limited to take effect.

[cf. 1964 c. 55 s. 3 U.K.]

9. Reduction of age and exclusion of class members to avoid remoteness

(1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—

(a) that the disposition would, apart from this section, be void for remoteness; but

(b) that it would not be so void if the specified age had been twenty-one years,

the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had

been limited by reference to the age nearest to that age which would, if specified instead, have prevented the disposition from being so void.

(2) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons —

(a) the reference in paragraph (b) of subsection (1) to the specified age shall be construed as a reference to all the specified ages; and

(b) that subsection shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

(3) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents the foregoing provisions of this section from operating to save a disposition from being void for remoteness, those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class, and the said provisions shall thereupon have effect accordingly.

(4) Where, in the case of a disposition to which subsection (3) does not apply, it is apparent at the time the disposition is made or becomes apparent at a subsequent time, that apart from this subsection, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons shall, unless their exclusion would exhaust the class, thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

(5) Where this section has effect in relation to a disposition to which section 8 applies, the operation of this section shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

[cf. 1964 c. 55 s. 4 U.K.]

10. Condition relating to death of surviving spouse

Where a disposition is limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes, where to do so would save it from being void for remoteness, as if it had instead been limited by reference to the time immediately before the end of that period.

[cf. 1964 c. 55 s. 5 U.K.]

11. Saving and acceleration of expectant interests

A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

[cf. 1964 c. 55 s. 6 U.K.]

12. Powers of appointment

For the purposes of the rule against perpetuities, a power of appointment shall be treated as a special power unless—

(a) in the instrument creating the power it is expressed to be exercisable by one person only; and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power:

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

[cf. 1964 c. 55 s. 7 U.K.]

13. Administrative powers of trustees

(1) The rule against perpetuities shall not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution) of any property, and shall not prevent the payment to trustees or other persons of reasonable remuneration for their services.

(2) Subsection (1) shall apply for the purpose of enabling a power to be exercised at any time on or after 13 March 1970 notwithstanding that the power is conferred by an instrument which took effect before that date. *(Amended 13 of 2013 s. 50)*

[cf. 1964 c. 55 s. 8 U.K.]

14. Options relating to land

(1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if—

(a) the option is exercisable only by the lessee or his successors in title; and

(b) it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

This subsection shall apply in relation to an agreement for a lease as it applies in relation to a lease, and ***lessee*** (承租人) shall be construed accordingly.

(2) In the case of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities shall be twenty-one years, and section 6 shall not apply.

[cf. 1964 c. 55 s. 9 U.K.]

15. Avoidance of contractual and other rights in cases of remoteness

Where a disposition inter vivos would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy shall lie in

contract or otherwise for giving effect to it or making restitution for its lack of effect.

[cf. 1964 c. 55 s. 10 U.K.]

16. Possibilities of resulting trust, conditions subsequent, exceptions and reservations

(1) In the case of a possibility of a resulting trust on the determination of any determinable interest in property, the rule against perpetuities shall apply in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise, on breach thereof, to a right of re-entry or an equivalent right in the case of property other than land, and where the provision falls to be treated as void for remoteness the determinable interest shall become an absolute interest.

(2) Where a disposition is subject to any such provision, or to any such condition subsequent, or to any exception or reservation, the disposition shall be treated for the purposes of this Part as including a separate disposition of any rights arising by virtue of the provision, condition subsequent, exception or reservation. *(Amended 13 of 2013 s. 51)*

[cf. 1964 c. 55 s. 12 U.K.]

(Cross-heading repealed 13 of 2013 s. 52)

Division 2—Accumulations

(Added 13 of 2013 s. 53)

17. General restrictions on accumulations of income

(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely—

(a) the life of the grantor or settlor; or

(b) a term of twenty-one years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities of any person in being at the death of the grantor, settlor or testator; or

(d) the duration of the minority or respective minorities only of any person who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated; or

(e) a term of twenty-one years from the date of the making of the disposition; or

(f) the duration of the minority or respective minorities of any person or persons in being at the date of the making of the disposition.

(2) In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person who would have been entitled thereto if such accumulation had not been directed.

(3) The restrictions imposed by subsection (1) apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and they apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.

(4) This section does not extend to any provision—

(a) for payment of the debts of any grantor, settlor, testator or other person;

(b) for raising portions for—

(i) any child or remoter issue of any grantor, settlor or testator; or

(ii) any child or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited,

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

[cf. 1925 c. 20 s. 164 U.K.; 1964 c. 55 s. 13 U.K.]

18. Qualification of restrictions on accumulation

Where accumulations of surplus income are made during a minority under any Ordinance or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations were made before, on or after 13 March 1970) to be taken into account in determining the periods for which accumulations are permitted to be made by section 17, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority.

(Amended 13 of 2013 s. 54)
[cf. 1925 c. 20 s. 165 U.K.]

19. Restriction on accumulation for the purchase of land

No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

[cf. 1925 c. 20 s. 166 U.K.]

20. Right to stop accumulations

Section 7 shall apply to any question as to the right of beneficiaries to put an end to accumulations of income under any disposition as it applies to questions arising on the rule against perpetuities.

[cf. 1964 c. 55 s. 14 U.K.]

Editorial Note:
* Commencement date: 1 December 2013.

Variation of Trusts Act 1958

1958 CHAPTER 53

An Act to extend the jurisdiction of courts of law to vary trusts in the interests of beneficiaries and sanction dealings with trust property. [23rd July 1958]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Jurisdiction of courts to vary trusts.

(1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of" assenting, or

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or

(c) any person unborn, or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) In the foregoing subsection " protective trusts " means the trusts specified in paragraphs (i) and (ii) of subsection (1) of section thirty-three of the Trustee Act, 1925, or any like trusts, " the principal beneficiary " has the same meaning as in the said subsection (1) and " discretionary interest" means an interest arising under the trust specified in paragraph (ii) of the said subsection (1) or any like trust.

(3) Subject as hereinafter provided the jurisdiction conferred by subsection (1) of this section shall be exercisable by the High Court, except that the question whether the carrying out of any arrangement would be for the benefit of a person falling within paragraph (a) of the said subsection (1) shall be determined by order of the Judge or Master in Lunacy if a committee has been appointed of that person's estate or a receiver has been appointed of his income.

(4) In section fifty-two of the County Courts Act, 1934 (which confers equity jurisdiction on county courts) in paragraph (b) of subsection (1) after the word " subsists " there shall be inserted the words " or proceedings under section one of the Variation of Trusts Act, 1958, being (in any case) proceedings " ; but section fifty-three of that Act (which enables jurisdiction to be conferred on the county court by agreement between the parties, irrespective of the sum involved) shall not apply to proceedings under this section.

(5) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.

(6) Nothing in this section shall be taken to limit the powers conferred by section sixty-four of the Settled Land Act, 1925, section fifty-seven of the Trustee Act, 1925, or section one hundred and seventy-one of the Law of Property Act, 1925, or the powers of the Judge in Lunacy.

2 Extent and provisions as to Northern Ireland.

(1) This Act shall not extend to Scotland.

(2) The foregoing section shall not extend to Northern Ireland, but, notwithstanding anything in the Government of Ireland Act, 1920, the Parliament of Northern Ireland shall have power to make laws for purposes similar to any of the purposes of the foregoing section.

3 Short title.

This Act may be cited as the Variation of Trusts Act, 1958.

To extend the jurisdiction of courts of law to vary trusts in the interests of the beneficiaries and to sanction dealings with trust property.

[4 December 1964]
(Format changes—E.R. 5 of 2018)

1. Short title

This Ordinance may be cited as the Variation of Trusts Ordinance.

2. Interpretation

In this Ordinance, unless the context otherwise requires—

discretionary interest (酌情權益) means an interest arising under the trust specified in section 35(1)(b) of the Trustee Ordinance (Cap. 29) or any like trust;

principal beneficiary (主要受益人) has the same meaning as in section 35 of the Trustee Ordinance (Cap. 29);

protective trusts (保護信託) means the trusts specified in section 35 of the Trustee Ordinance (Cap. 29) or any like trusts.

[cf. 1958 c. 53 s. 1(2) U.K.]

3. Jurisdiction of courts to vary trusts

(1) Where property is held on trusts arising, whether before or after the commencement* of this Ordinance, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or

(b) any person (whether ascertained or not) who may be or may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court; or

(c) any person unborn; or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) Subject to the provisions of section 37(1)(b) of the District Court Ordinance (Cap. 336), the jurisdiction conferred by subsection (1) of this section shall be exercisable by the Court of First Instance. *(Amended 25 of 1998 s. 2)*

(3) Nothing in this section shall apply to trusts affecting property settled by Ordinance.

(4) Nothing in this section shall be taken to limit the powers conferred by section 12(2) of the High Court Ordinance (Cap. 4) or by section 56 of the Trustee Ordinance (Cap. 29). *(Amended 92 of 1975 s. 58; 25 of 1998 s. 2)*

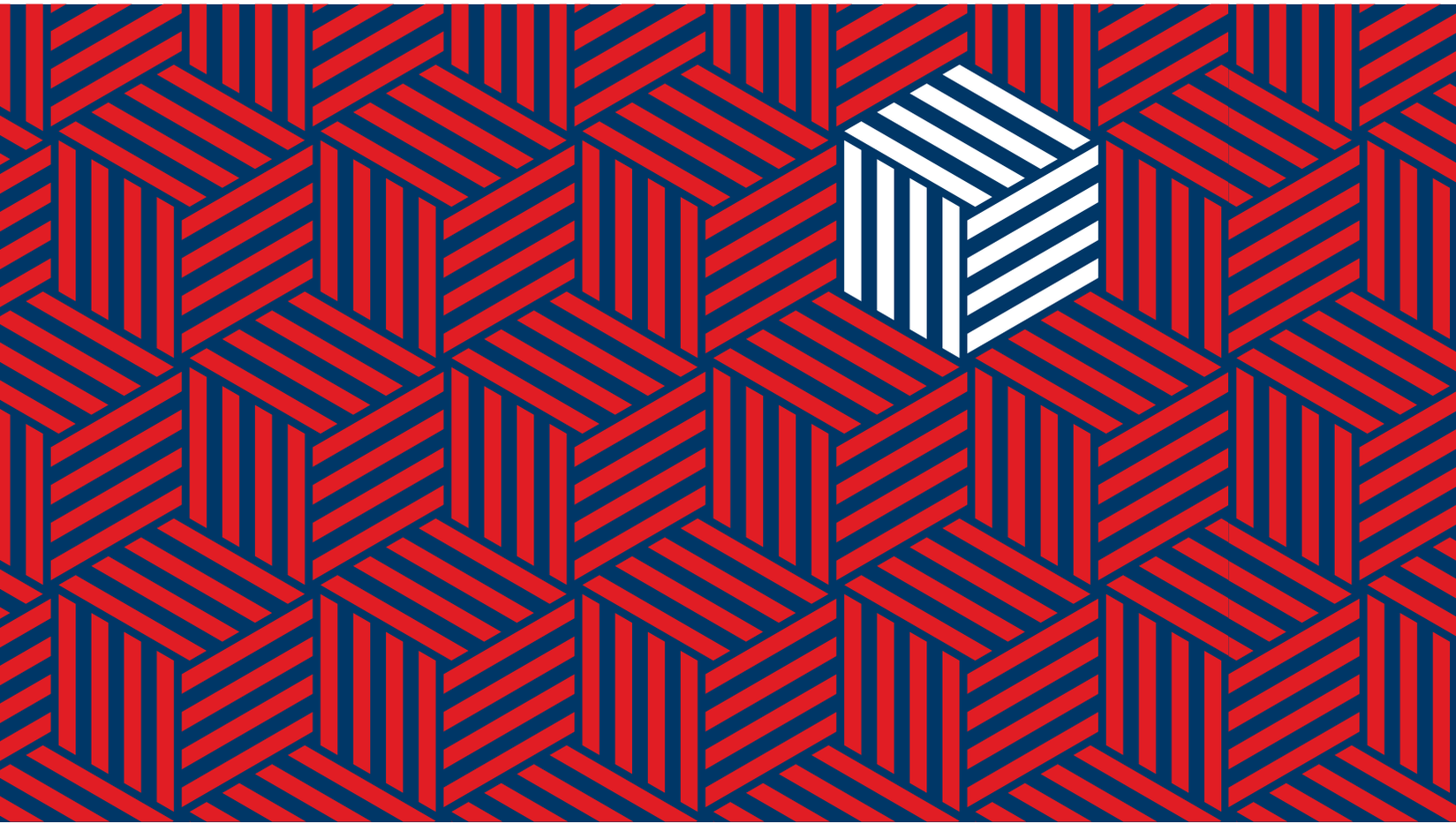
[cf. 1958 c. 53 s. 1 U.K.]

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Singapore Academy of Law
Law Reform Committee

Report on Introducing a Statutory Variation of Trusts Jurisdiction

April 2019



SAL SINGAPORE ACADEMY OF LAW

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY **1**
Recommendation 1 1
Recommendation 2 1
Recommendation 3 1
Recommendation 4 1
Recommendation 5 2
Recommendation 6 2
Recommendation 7 2
Recommendation 8 2
Recommendation 9 2
Recommendation 10 3
Recommendation 11 3
Recommendation 12 3
Recommendation 13 3
Recommendation 14 3
Recommendation 15 4

CHAPTER 1 INTRODUCTION **5**

CHAPTER 2 THE GAP TO BE FILLED **6**

CHAPTER 3 THE ADVANTAGES OF THE REFORM OVER ALTERNATIVE SOLUTIONS **10**

CHAPTER 4 THE NEED FOR REFORM **12**

CHAPTER 5 MODIFYING THE ENGLISH MODEL **15**
A. No requirement for agreement before application 16
B. Whether variation or revocation should include resettlement 17
C. Whether variation should include restricting powers of management or administration 17
D. Whether to unify variation of trusts under a single act 18
E. Principle of benefit to guide the court's approval 21
F. Designated persons on whose behalf the court may consent – unborn and unascertained beneficiaries 24
G. Designated persons on whose behalf the court may consent – persons who may become entitled to an interest 24
H. The special case of protective trust beneficiaries 27

CHAPTER 6 WHETHER JURISDICTION IN DISTRICT COURT 30

CHAPTER 7 COSTS AND SEPARATE REPRESENTATION FOR BENEFICIARIES ON WHOSE BEHALF THE COURT'S APPROVAL IS SOUGHT 32

CHAPTER 8 ALTERNATIVE METHOD OF OBTAINING CONSENT OF INFANT OR INCAPACITATED ADULT BENEFICIARY 33

CHAPTER 9 QUALIFICATION FOR OFFSHORE TRUSTS 34

CHAPTER 10 NON-CONSENSUAL JUDICIAL VARIATION – AN EPILOGUE..... 36

APPENDIX DRAFT VARIATION OF TRUSTS ACT..... 39

EXECUTIVE SUMMARY

1 A Variation of Trusts Act modelled on the United Kingdom's Variation of Trusts Act 1958 (6 & 7 Eliz II, c 53) should be enacted to confer jurisdiction on the High Court to approve consensual variations of trusts where these will benefit beneficiaries who are unable to consent to the variation. The UK statute has been replicated widely and the proposed enactment will fill a needful gap in the Singapore law. Its adoption will also modernise the law of trusts and make Singapore a more attractive trust jurisdiction. Experience with similar legislation in the Commonwealth has shown that certain modifications to the statute will enhance its efficacy and we therefore recommend adoption of the UK statute with modifications.

RECOMMENDATION 1

2 The settlor should not be given a power to veto a variation of trust nor should the Act expressly require that his or her wishes in respect of the variation be taken into consideration. It is sufficient that the courts in practice take the settlor's wishes into consideration, particularly when considering whether the variation is beneficial to the persons on whose behalf the court is concerned to give its approval.

RECOMMENDATION 2

3 The Act should not authorise the court to override the refusal of any adult and consenting beneficiary (*ie*, a beneficiary capable of giving his or her consent) to consent to the variation.

RECOMMENDATION 3

4 The Act should not authorise the court to give its approval to a variation only if the applicant for variation has obtained consent from all consenting beneficiaries or after service is made on all consenting beneficiaries.

RECOMMENDATION 4

5 The Act should authorise the court to approve a variation in the widest sense, including a revocation of the trust or a resettlement which is essentially a new trust from the original trusts.

RECOMMENDATION 5

6 The Act should authorise the court to approve not only an enlargement but also a restriction, deletion or termination of any power of a trustee to manage or administer any property subject to the trusts.

RECOMMENDATION 6

7 We do not recommend that statutory trusts and charitable trusts be excluded from the Act. A charitable trust can be varied under the Act where it is for the benefit of non-consenting beneficiaries. The court can also be asked to give its consent on behalf of a charitable trust which is a beneficiary under a trust that is itself being varied where the charity trustees have no capacity to give their own consent to the variation.

8 We do not, however, recommend that the Act should include a *cy-près* power to vary a public but non-charitable trust. Likewise, we do not recommend that the Act extend to the *waqf* or *wakaf*.

RECOMMENDATION 7

9 Under the Act, the court should only give its approval on behalf of a designated person to a variation of beneficial interests if and only if the variation is for the benefit of that person. This means that where designated persons form a class, every member of the class must benefit from the variation though it is not required that every member must benefit in the same manner and to the same extent.

10 In the case of a variation of the powers of the trustee to manage or administer any property subject to the trusts, the Act should authorise the court to act if and only if the variation will benefit the designated persons as a whole.

RECOMMENDATION 8

11 The definition of benefit in the Act should not be restricted to financial benefit but should include educational and other social benefits.

RECOMMENDATION 9

12 The designated persons on whose behalf the court may approve a variation should include missing persons and persons whose whereabouts cannot be ascertained despite reasonable measures having being taken to locate them.

RECOMMENDATION 10

13 The Act should authorise the court to approve a variation on behalf of persons who may become entitled to an interest under the trusts whether or not they have become presumptively entitled at the time of application for approval to a variation.

14 However, we do not recommend that persons who may become entitled to interests under perpetuitous trusts be included as designated persons who may become entitled to a contingent interest under trusts to be varied.

RECOMMENDATION 11

15 The Act should authorise the court to approve a variation on behalf of a person a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the court. This recommendation extends the scope of the corresponding provisions in the UK statute in respect of protective trusts beneficiaries.

RECOMMENDATION 12

16 The Act should provide that the jurisdiction to approve a variation on behalf of designated persons is to be exercised by the High Court.

17 We do not recommend for the time being that a District Court should have concurrent jurisdiction to approve a variation in respect of trusts subject to its monetary limit. The possibility of concurrent jurisdiction in a District Court should be reconsidered at a more opportune time.

RECOMMENDATION 13

18 The Act should not provide that persons on whose behalf the court is asked to approve a variation should be separately represented by legal representatives.

RECOMMENDATION 14

19 Consent given by the court on behalf of infant beneficiaries and incapable adult beneficiaries should not be an exclusive means of obtaining their consent to a variation. It should be open for such consent to be obtained by other alternative means available under the law.

RECOMMENDATION 15

20 The Act should provide expressly that the High Court may consent to a variation of a trust whatever the law governing it may be, unless an order of the court consenting to the variation is prohibited under the foreign governing law.

CHAPTER 1

INTRODUCTION

1.1 This report is prepared as part of the reform of trust capital and income allocation rules, in turn part of an ongoing process to modernise the Singapore law of trusts in order to make it more responsive to current needs and circumstances.

1.2 In this report, we recommend, and explain why we recommend, introduction of variation of trusts legislation in Singapore, and highlight the salient features that the legislation should contain. The reform is not novel. Its English precursor dates back to 1958.[1] Since then the English Act has been replicated in whole or in large part in more than 15 common law states.[2] Its application over the course of more than four or five decades has mainly been trouble-free and the variation of trusts legislation has been applied thousands of times without needing to involve courts in serious difficulties of construction.[3] This is remarkable testimony of its enduring efficacy.

1.3 As there is no lack of materials for consideration, this report will not dwell at length on the merits of the reform but concentrate on explaining where there ought to be modifications to adapt to the country's circumstances and conditions.

1.4 We are pleased to add that we were able to consult the Singapore Trustees Association ('STA') on the proposed reform contained in this report. In their response, for which we are particularly grateful given the tight deadlines, the STA expressed strong support for the reform. They agreed with all the recommendations we made save one. We explain the modified recommendation the STA would support as well as our final response at paragraph 6.2 below.

1.5 The draft Bill which implements our recommendations is set out in the Appendix.

---

1 The Variation of Trusts Act 1958 (6 & 7 Eliz II, c 53).

2 For example, the Trusts (Scotland) Act 1961, s 1; the Trustee (Northern Ireland) Act 1958, s 1; the Trustee Act 1956 (NZ), s 64A; the Trusts Act 1973 (Qld), s 95; the Trustee Act 1958 (Vic), s 63A; the Trustees Act 1962 (WA), s 90; the Trustee Act 1955 (Alberta), s 31A; the Variation of Trusts Act 1968 (BC); the Trustee Act 1952 (New Brunswick), s 29A; the Variation of Trusts Ordinance 1963 (Northwest Territories); the Variation of Trusts Act 1967 (Nova Scotia); the Trustee Act 1954 (Manitoba), ss 63(6)–(8); the Variation of Trusts Act 1959 (Ontario); the Variation of Trusts Act 1963 (Prince Edward Island); the Variation of Trusts Act 1969 (Saskatchewan); and the Variation of Trusts Ordinance 1971 (Yukon Territory).

3 *Goulding v James* [1997] 2 All ER 239 at 241, CA (England & Wales).

CHAPTER 2

THE GAP TO BE FILLED

2.1 The law of trust posits as a cornerstone that a settlor's express intentions to benefit his or her beneficiaries by way of a trust are sacrosanct. These intentions are to be respected under all circumstances. The courts will not rewrite the trust instrument. Nor will they supplement or augment its terms even if the result would be a better trust; likewise although the modified trust would be one that the settlor himself or herself would have created had he or she been better advised or had superior foresight of the unfolding circumstances.

2.2 Short of rewriting the trust, the courts do have inherent jurisdiction to approve or sanction an urgent course of action by trustees which would otherwise be a breach of trust where this would avert significant unforeseen or perhaps unforeseeable damage or prejudice to the trust beneficiaries.[4] Since 1925 in Singapore, the inherent jurisdiction has existed concurrently with the statutory jurisdiction conferred by section 56 of the Trustees Act.[5] This statutory jurisdiction, copied from section 57 of the UK Trustee Act 1925,[6] is wider than the inherent jurisdiction in that it does not predicate the existence of an urgent situation or an emergency. It merely requires that the course of action to be pursued by the trustees should be expedient in the management and administration of any property vested in the trustees and for the benefit of the trust as a whole. It is also a general jurisdiction unlike that provided in the Settled Estates Act.[7] The latter is a more circumscribed statutory jurisdiction to order a sale of property subject to a settlement if considered proper and consistent with due regard for all parties entitled under the settlement.[8]

2.3 Both the inherent and section 56 jurisdiction are *ad hoc* in nature and subject to two important limitations. By *ad hoc* it is meant that the courts exercising the jurisdiction will approve if at all a proposed course of action only in the circumstances and for the specific purposes of the application. Nothing in the trust instrument is altered. Neither jurisdiction, however, can be invoked to overcome a prohibited course of action. In *Rajabali Jumabhoy*

4 Variously described as an emergency or salvage jurisdiction: see *Re Jackson* (1882) 21 Ch D 786 HC (England & Wales).

5 Cap 337, 2005 Rev Ed.

6 15 & 16 Geo V, c 19 (UK).

7 Cap 293, 2013 Rev Ed.

8 Section 4(1). See *British & Malayan Trustees Ltd v Abdul Jalil bin Ahmad* [1990] 2 SLR(R) 449, HC (Singapore), which was concerned with the former provision which required the court to have "due regard to the interests of the beneficiaries and provided and to the extent not prohibited by the settlement".

v Ameerali R Jumabhoy,[9] it was held in the Court of Appeal that the jurisdiction predicates that "the same [*ie*, the act or transaction] cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument".[10] It was held to be not available, as it was the case with the inherent jurisdiction, where the trust deed prohibited investment in Singapore securities.[11]

2.4 More importantly for the present purposes, neither jurisdiction can be invoked to adjust or vary beneficial interests by way of rewriting, remoulding or rearranging the trust.[12] There are only three exceptions to this limitation against altering the beneficial interests. By judicial development, the courts accept that there is jurisdiction to recognise compromises reasonably and legitimately reached between *sui juris* beneficiaries and trustees in relation to beneficial dispositions which are ambiguous and need to be interpreted, or between contesting heirs and trust beneficiaries. The court may consent to such compromises to a genuine and *bona fide* dispute on behalf of infant beneficiaries and possible after-born beneficiaries.[13]

2.5 The courts also accept that there is power to authorise trustees to pay an infant beneficiary in need of income despite a direction to accumulate income in his or her favour, on the presumptive basis that the settlor would have intended this if the infant beneficiary was in need of money.[14]

2.6 Third, a few scattered relevant statutory *ad hoc* jurisdictions exist. A notable *ad hoc* statutory provision which authorises the courts to affect the beneficial interests in restrictive circumstances is section 46 of the Trustees Act. It stipulates that "[w]here any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into

9 [1998] 2 SLR(R) 434, CA (Singapore).

10 *Ibid* at [84].

11 There is also authority that it cannot be used to modify a charitable trust. See *Baptist Union of New Zealand v Attorney-General* [1973] 1 NZLR 42, SC (NZ).

12 *Jumabhoy*, above, n 9 at [83]. See also *Re Downshire Settled Estates* [1953] Ch 218 at 248, CA (England & Wales); *Chapman v Chapman* [1954] AC 429, HL (UK); *Sutton v England* [2009] EWHC 3270 (Ch), HC (England & Wales); and *Re Dion Investments Pty Ltd* [2013] NSWSC 1941, SC (NSW).

13 *Chapman v Chapman*, *ibid*. It is well known that this decision provided the rationale for the English reform. See *Golding v James* [1997] 2 All ER 239, CA (England & Wales), and also English Law Reform Committee, *Sixth Report (Court's Power to Sanction Variation of Trusts)* (Cmnd 310) (London: Her Majesty's Stationery Office, 1957) at [16].

14 Identified as one of four exceptions to the inherent jurisdiction in *Chapman v Chapman*, *ibid*. The first two exceptions were mentioned in paras 2.4 and 2.5. The other two exceptions where the court has jurisdiction to vary a trust where there are unborn or minor beneficiaries are cases where the court effects changes in the nature of the infant's property or allows trustees of settled property to enter into some business transaction which was not authorised by the settlement. See also s 33 of the Trustees Act, above, n 5.

existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land." Another is section 34 of the Trustees Act which confers powers on trustees to make an advancement of capital money subject to a trust to a capital infant or minor beneficiary in the limited circumstances there prescribed.[15]

2.7 Against this backdrop, the proposed reform is significant in allowing adjustments or variations to be made to beneficial interests in accordance with its terms. Unlike the *ad hoc* provisions mentioned in paragraph 2.6, the proposed reform is also universal. The reform will overlap with the *ad hoc* provisions to an extent. As we explain shortly, the reform is conditional on the court consenting to a proposed variation beneficial to and on behalf of any beneficiary who cannot consent for himself or herself. If the beneficiaries who are *sui juris* also happen to agree to a course of action covered by the *ad hoc* provisions, application may be made under the proposed legislation for the court to consent to the variation on behalf of beneficiaries who are unable to so consent. The *ad hoc* provisions are distinguished in that they give the court jurisdiction to direct the course of action in question without the need to obtain the consent of beneficiaries who are *sui juris*, provided only that the course of action is specific to the provisions and beneficial to the trust. **In the specific circumstances which the *ad hoc* provisions delineate, the courts should continue to have jurisdiction to intervene to protect the trust without needing to act on the consent of all *sui juris* beneficiaries. The merits of such specific and limited non-consensual variation are well recognised. We do not recommend that these provisions be replaced by or subsumed under the proposed consensual variation of trusts reform.**

2.8 For the sake of being comprehensive, we note that there are two notable omissions to provide for non-consensual alterations in the beneficial interest where such provisions might be expedient. Although the courts have jurisdiction to divide matrimonial assets between divorcing spouses and order a lump sum or capital transfer from one to the other spouse, no written law provides expressly that they may vary the beneficial interests of either divorcing spouse under any nuptial settlement. Section 112 of the Women's Charter[16] will most probably not allow such variation although it empowers the court "when granting or subsequent to

15 Any payment may be ordered notwithstanding that the interest of the capital beneficiary is liable to be defeated or diminished. Strictly speaking, without altering the beneficial interests, section 34 allows trustees to anticipate the enjoyment of those beneficial interests. However, as was decided in *Pilkington v Inland Revenue Commissioners* [1964] AC 612, HL (UK), in appropriate circumstances an advancement may be made by way of resettlement of trust property affecting only the beneficial interests of the advancees.

16 Cap 353, 2009 Rev Ed.

the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable." This matter is discussed more extensively at paragraphs 10.1 to 10.3 below.

2.9 Another noteworthy omission is that the Inheritance (Family Provision) Act[17] makes no provision for varying non-consensually a testamentary trust which disposes of the property of the decedent. The Act empowers the court to intervene where the disposition of the deceased's estate effected by his or her will, or the law relating to intestacy, or the combination of his or her will and that law, does not make reasonable provision for the maintenance of a dependant. In these circumstances, the court may order reasonable provision be made out of the deceased's net estate for the maintenance of the dependant. There is, however, presently no power to rewrite a testamentary trust to make such reasonable provision for the maintenance of 'deserving' members of the decedent's family. This matter is also discussed separately at paragraph 10.4 below.

2.10 In relation to the two instances of omissions mentioned in paragraphs 2.8 and 2.9, any reform will require a court-ordered variation which goes beyond the proposed consensual variation of trust legislation. **As the changes will predicate extensions of the existing principles of spousal property division and personal succession, as the case may be, we explain in our paper why such extensions are worthy of further and separate consideration. We do not however make any recommendations as they fall strictly speaking outside the remit of this paper.**

17 Cap 138, 1985 Rev Ed.

CHAPTER 3

THE ADVANTAGES OF THE REFORM OVER ALTERNATIVE SOLUTIONS

3.1 There are a number of ways whereby alteration of beneficial interests without judicial intervention can be achieved. Each of them suffers from one or another shortcoming. The proposed reform will overcome all such shortcomings.

3.2 In a well-drafted trust instrument, the settlor will confer on his or her trustees or reserve for himself or herself a power of amendment or variation of the terms of the trust. This power will be available for the purposes of rewriting the trust so as to make it more responsive to changed circumstances. The same objective can be achieved to a lesser extent by the settlor giving the trustees dispositive powers such as powers to add or remove beneficiaries or powers of appointment or to invade capital or income. Trusts containing such powers will not be in need of variation in varying degrees, unless in exceptional circumstances the powers cannot be exercised or the trustees refuse to exercise them.

3.3 Where the settlor of a trust has not or insufficiently anticipated the need to vary the trusts he or she has created, all the beneficiaries, being *sui juris* and consenting, can acting in concert terminate the trust. Under the rule in *Saunders v Vautier*[18] such agreement is fully effective to terminate the trust, in whole or in part. The trustees cannot insist on continuing with the trust on the ground that the settlor's purposes will be frustrated as a result of termination. It is commonly thought that if the beneficiaries so direct and the trustees are willing to do so, they need not terminate the trust but can continue it on such modified terms as the beneficiaries so direct (*ie*, that they can vary the trust).[19] The courts should permit the beneficiaries to accomplish in one step what would otherwise require two, namely termination followed by conveyance to the beneficiaries and then a reconveyance to the trustee on the modified trust. It is less clear whether the rule also permits the consensual termination of the trust and immediate creation of completely new trusts to be administered by the same trustees ('resettlement' in this paper).

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18 (1841) 4 Beav 115, 41 ER 482, Ct of Chancery (England & Wales). See also *Green v Spicer* (1830) 1 R & M 395, 39 ER 153, Ct of Chancery (England & Wales).

19 There is no decision to this effect but it is supported by *obiter dicta*. See *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 at 101, HC (NZ). See also British Columbia Law Institute, *Report on the Termination and Variation of Trusts* (BCLI Report No 25) (Vancouver: British Columbia Law Institute, 2003) at n 11, and *Inland Revenue Commissioners v Holmden* [1968] AC 685 at 713, HL (UK), *per* Lord Wilberforce: "If all the beneficiaries under the settlement had been sui juris, they could, in my opinion, have joined together with the trustees and declared different trusts which would supersede those originally contained in the settlement".

3.4 Both the settlor-driven and beneficiary-driven devices to vary a trust come with limitations. A power of amendment or appointment must be conferred or reserved at the onset of the trust. The courts have no jurisdiction to add a new power in the course of the trust at the behest of the settlor however desirable that may be and notwithstanding this may have the consent of the beneficiaries. The rule in *Saunders v Vautier*, on the other hand, cannot avail if there are contingent beneficiaries or future unborn beneficiaries who are unable to consent, or the whereabouts of a fully capacitated beneficiary cannot be ascertained.[20]

3.5 While it is of course open to all beneficiaries tacitly to agree in a course of action which is not in accordance with the trust instrument, no trustee will likely undertake such course of action without an indemnity against liability for breach of trust. A variation of trusts statute will therefore have at the least a distinct practical advantage of avoiding the need for recourse to partial or unstable or transient devices to alter beneficial interests. It will also provide immediate clarity in an area where litigation is uncommon and hence where opportunities for judicial development are slow to develop.[21]

20 This limitation in turn has led to difficult litigation over how the trust instrument should be construed between those who wish to rely on the rule to 'vary' the trust and those who do not.

21 See Law Reform Commission of Ireland, *Report on the Variation of Trusts* (LRC 63-2000) (Dublin: The Commission, 2000) at 7.

CHAPTER 4

THE NEED FOR REFORM

4.1 Variation of trusts legislation may be and has traditionally been invoked to relieve beneficiaries of restrictions on their beneficial interests, or allow beneficiaries to receive their benefits free of the trust or on improved terms beyond those imposed by the settlor which avert the impact of unforeseen changes in their circumstances. It has more exceptionally served to delay the falling in of the beneficial interest (by extending the duration of the trust, for example), where this is beneficial to all trust beneficiaries.

4.2 Admittedly, the frequently invoked and primary rationale for judicial variation of trust in many trust jurisdictions is to facilitate alterations of the beneficial interests for the sake of avoiding or minimising unforeseen tax burdens.[22] This tax-mitigation need is less urgent in the case of modern trust instruments which contain powers expedient for operation of the trust in a tax-efficient manner.[23] If suitable powers exist, recourse to variation of trusts legislation would not be necessary in order to relieve beneficiaries' tax burdens. Older trust instruments, however, will very likely have been created under very different tax conditions. Trustees and beneficiaries can only expect to benefit from tax reduction alterations to the trust if there is access to judicial variation of trusts.

4.3 We recognise that the minimisation of unforeseen tax liability is an important consideration,[24] although alone it will not justify judicial variation.[25] We also recognise that the tax laws in this country do not posit a pressing need for a variation of trusts jurisdiction. There have been no dramatic changes in the tax laws or escalations in tax burdens which might provide a strong impetus to extend the life of the trust or convert income interests into capital interests and *vice versa*. The tax laws are also favourable or not inimical to offshore trusts which are locally administered, as pointed out by Mr Michael Hwang, SC.[26] The question, however, is whether there is a need for judicial variation for the sake of offshore trusts which are governed by foreign law but administered in Singapore for the

22 See *Re Druce's Settlement Trusts* [1962] 1 WLR 363, HC (England & Wales); *Re Sainsbury's Settlement* [1967] 1 WLR 476, HC (England & Wales); *Gibbon v Mitchell* [1990] 1 WLR 1304, HC (England & Wales). This was also the original rationale for the English Act, so that income would not be absorbed by large taxes and capital depleted by estate duty.

23 That is, which post-date World War II.

24 See *Re Clitheroe's Settlement Trusts* [1959] 1 WLR 1159, HC (England & Wales).

25 See *Re Weston's Settlements* [1969] 1 Ch 223, CA (England & Wales).

26 Michael Hwang & Nicholas Thio "Why Does Singapore not have a Variation of Trusts Act?" (2011) 23 Sing Acad LJ 58.

benefit of non-resident beneficiaries. If this is right, there will be a need at minimum to afford the same facility which is likely to be available under the governing law of the trust. We believe it is right. It is expedient if not necessary to ensure that the Singapore law of trusts is in step with the laws of trusts which apply elsewhere so that settlors of new trusts or migrating trusts will not be disadvantaged by the lack of a variation of trusts legislation in Singapore.

4.4 The proposed reform will also accommodate a greater need for variation of trusts in the wake of the reform of the 'rule against perpetuities' which was introduced in 2004.[27] As a result of implementation of the statutory principle to wait and see if in certainty of fact the trust will become too remote before invalidating it, there will be a number of trusts which will not be void at the outset for being perpetuitous. Such trusts which become valid within the statutory perpetuities period of 100 years can benefit from the availability of variation of trusts legislation.

4.5 Although it is not an advantage we would stress, the variation of trusts legislation has perhaps unexpectedly afforded contingent beneficiaries some respite from the strictures of public policy which evolve over time. It has permitted the court to uphold a varied trust where the trust unaltered would fail for being contrary to public policy in the wake of changes in public policy over time. Where a trust is not contrary to public policy at its inception but will become so in time, the court can also consent to a variation which would remove the terms which will have the effect of violating changing public policy.[28]

4.6 Finally, while the 2004 amendments to the Trustees Act have impressively enlarged the administrative powers of trustees, they make it clear that such enlargement shall not be effective against a contrary intention in the trust instrument. A prime example of such contrary intention is a prohibition or mandatory abridgment on trustee powers. Against such terms, both the inherent and statutory jurisdiction of the courts are powerless. In our view, there is a need to be able in appropriate cases to vary a trust by superseding a prohibition or mandatory abridgment imposed by the settlor.

4.7 In summary, a variation of trusts legislation will equiparate the variation of both the domestic and offshore trust, and enable the courts to facilitate changes in beneficial interests or administrative powers which are beneficial to all beneficiaries, especially when trusts of long duration become unsuitable or inexpedient over time. We recognise that there is no single compelling reason for the proposed reform. The cumulative

27 See the Civil Law Act (Cap 43, 1990 Rev Ed), ss 32 and 34; and the Trustees Act, above, n 5, s 89.

28 See *Re Remnant's Settlement Trusts* [1970] Ch 560, HC (England & Wales), where the court agreed to the deletion of a forfeiture clause which defeated the interests of beneficiaries who practised Roman Catholicism or married a Roman Catholic.

advantages of judicial variation of trusts, however, support the proposed reform. We agree with the conclusions reached by Mr Michael Hwang, SC, that the absence of variation of trusts legislation is "a significant gap" because the "[the] various practical and legal workarounds to this problem […] do not allow for the adjustment of beneficial interests in unforeseen circumstances".[29]

29 Hwang & Thio, above, n 26 at 72–73.

CHAPTER 5

MODIFYING THE ENGLISH MODEL

5.1 It is sufficient to highlight salient features of the English Variation of Trusts Act 1958 which has been copied or has inspired similar legislation in numerous countries. In theory, any contradiction between upholding the settlor's intention and varying the beneficial dispositions he or she has decreed is explained away on the basis that the legislation is merely a statutory extension of the rule in *Saunders v Vautier*.[30] Once the settlor has created the trust, he or she has placed the beneficial owners above himself or herself and they can at any time collectively override his or her wishes and terminate the trust if they so wish and if not under any legal incapacity. The only difference between the rule and the legislation is that the court in exercising the jurisdiction gives consent on behalf of those who cannot do so (the specified or designated beneficiaries). The English model therefore will not allow the settlor to veto the variation of trust although he or she is permitted to object with reasons and this will be taken into account where relevant. Nor will it justify the court overriding the refusal of any non-specified or non-designated beneficiary to consent to the proposed variation. We note that there are trust jurisdictions which may place more emphasis on the settlor's intention in order to assure settlors that the terms of their trusts will be enforced and thereby encourage accumulation of wealth.[31]

5.2 **In recommending adoption of the English model and its consensual basis, we do not recommend that the settlor be given the power to veto a proposed variation. Nor would we recommend that the legislation should state expressly that the settlor's wishes are an important consideration and should be considered in all cases.** The recent case law on the English model clearly establishes that the settlor's intention, wishes, and the purposes of his or her trust will not be disregarded but will be given proper consideration to the extent they bear on whether there is benefit to the persons for whom the court supplies its

30 *Per* Mummery LJ in *Goulding v James*, above, n 3 at 247: "The 1958 Act has thus been viewed by the courts as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*."

31 As in Jersey: see *Re the Y Trust and the Z Trust* (2017) JRC 100 where the Royal Jersey Court regarded the upholding of a settlor's intentions as a consideration of public policy relevant to the court's discretion to vary a trust. See also *Re Irving* (1975) 66 DLR (3d) 387, HC (Ont), where Pennell J said: "The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flaunted arbitrarily. It can never be pretended that the Court has the power to make a new will in the guise of approving an arrangement under the Variation of Trusts Act." This was rejected in *Sandwell & Co v Royal Trust Corp of Canada* (1985) 17 DLR (4th) 337 at 342, CA (BC).

assent.[32] We think that this strikes an appropriate balance between maximising efficient use of trust property and upholding the settlor's wishes on use of trust property. **Moreover, if a beneficiary is a 'consenting' beneficiary but refuses to give his or her consent, we agree that the model should not enable the court to override his or her refusal no matter how beneficial that would be.** The rule in *Saunders v Vautier* will only permit the court to decree partial termination if the non-consenting beneficiaries' interests will not be prejudiced or affected.[33] Likewise, the variation of trusts legislation.

A. NO REQUIREMENT FOR AGREEMENT BEFORE APPLICATION

5.3 Under the English model, there is no requirement that such beneficiaries as might consent to a proposed variation should have done so prior to application to the court for judicial variation of trust. The English Act provides that "the court may if it thinks fit by order approve […] any *arrangement* […] varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the properties subject to the trusts […]".[34] In *Re Steed's Will Trusts*, Lord Evershed MR said that the term *arrangement* was "deliberately used in the widest possible sense to cover any proposal which any person may put forward for varying or revoking a trust."[35] The term is not restricted to an *inter partes* arrangement or even one "which two or more people have worked out".[36] Nor is it restricted to arrangements proposed by the trustees or with the agreement of the trustees, though the court in deciding whether to approve of the variation will take into account the trustees' views and the grounds for their views.[37]

5.4 The English model is further notable in not requiring applications for variation to be made only after the applicant has obtained consent from consenting beneficiaries or after service is made on all beneficiaries capable of giving their consent to the proposed variation. An application may be made for the court to approve a variation on behalf of a beneficiary incapable of giving his or her consent whether or not there are other consenting beneficiaries.[38] Where such consent has been given by the court, trustees may nevertheless not treat the trust as varied without

32 See *Goulding v James*, above, n 3, and *Pemberton v Pemberton* [2016] EWHC 2345 (Ch), HC (England & Wales); especially the former explaining the peculiar circumstances in *Re Steed's Will Trusts* [1960] Ch 407, CA (England & Wales), which led the court to place importance on the settlor's intentions and wishes.

33 See *Re Radcliffe* [1982] 1 Ch 227, CA (England & Wales).

34 Variation of Trusts Act (UK), above, n 1, s 1(1).

35 [1960] Ch 407, CA (England & Wales).

36 *Id* at 419.

37 *Id* at 420.

38 *Perpetual Trustees Victoria Ltd v Barns* (2012) 34 VR 387, CA (Vic).

seeking the consent of all other beneficiaries who have not been served with notice of the application.

5.5 **This is an expedient and practical result and we recommend the same wide scope for the Act in Singapore.**

B. WHETHER VARIATION OR REVOCATION SHOULD INCLUDE RESETTLEMENT

5.6 There is a significant theoretical and practical difference between varying an existing trust and re-creating a new trust by terminating the pre-existing trust and resettling the trust property on a new trust. The orthodox construction of the English Act is that the jurisdiction to consent on behalf of beneficiaries unable to consent or object to variation (*ie*, designated persons) is limited to modifying an existing trust or revoking it in whole or in part. Resettlement is impossible under the Act since it would involve both revoking the former trust and creating (not modifying) a new trust. Whilst accepting this as a valid difference in *Re Ball's Settlement*,[39] Megarry J added a qualification that whether a proposed variation went beyond variation to resettlement is one of substance and not form. Megarry J said: "But if an arrangement, while leaving the substratum effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed."[40]

5.7 **Resettlement, in short, is the creation of a new trust for purposes which diverge from the purposes of the original trust. We recommend that variation should include resettlement with consent of the trustees. This will not preclude the court from consenting to a resettlement on terms as to payment of costs but will be salutary in avoiding splitting hairs over fine distinctions between variation and resettlement when the benefits which will accrue are obvious.**

C. WHETHER VARIATION SHOULD INCLUDE RESTRICTING POWERS OF MANAGEMENT OR ADMINISTRATION

5.8 Despite the ambivalent phraseology of limb one of the primary variation provision in the English Act, it is commonly acknowledged that there are two categories of variation; namely, variation (or revocation) of beneficial interests and enlarging powers of management or administration. Past cases have tended to involve enlargement of powers. For reasons of history, it was more common for trust instruments to be restrictively drafted in the past; hence the greater need for enlargement of powers.

39 [1968] 1 WLR 899, HC (England & Wales).
40 *Id* at 906.

Drafting conventions, however, have changed and trust instruments are now more likely to contain an abundance of administrative powers including trustee powers to act in positions of conflict of interest and duty. Just as trusts have been varied in order to impose restrictions on beneficial interests or to delay the falling in of such interests, there is similarly no reason for limiting the variation of administrative powers to enlarging them. **For this reason, we recommend that the Singapore Act should clarify that variation includes restricting (as well as deleting or terminating) the powers (such as the powers to act in positions of conflict) conferred by the trust.**

5.9 **It should also be clarified that the court is not bound to agree or disagree to an arrangement to vary the beneficial interests as being mutually exclusive of any arrangement to vary the administrative powers. In appropriate cases, the court may invite the parties to agree to vary the administrative powers instead of the beneficial interests.**

D. WHETHER TO UNIFY VARIATION OF TRUSTS UNDER A SINGLE ACT

5.10 The English Act applies to any trusts arising "under any will, settlement or other disposition," without differentiating between type such as pension and non-pension; or revocable and irrevocable; or statutory and voluntary; or charitable and non-charitable trusts. It is clear that the need for judicial variation varies among these various types of trust. Pension fund trusts, for example, are very likely to contain powers of amendment to keep the trust dynamic and flexible and recourse to judicial variation will seldom be necessary.[41]

5.11 We considered whether the legislation should exclude statutory and public (both charitable and non-charitable) trusts. Statutory trusts which arise upon intestacy in favour of infant or minor children of the deceased will 'benefit' from recourse to variation of trusts legislation where proposals to vary are made to advance more than the statutory one-half limit on the size of advancement of capital money imposed by section 34 of the Trustees Act. Moreover, recourse to the legislation will be necessary in order to preserve the beneficial interests of such children where they are to be adopted and the legal consequence is that they will cease to be the children of the deceased upon adoption. Presently, there is nothing in the Adoption of Children Act[42] that preserves the beneficial interests of children who are adopted. **We therefore do not recommend exclusion of statutory trusts from the proposed reform.**

41 Compare *Bentall Corp v Canada Trust Co* [1997] 4 WWR 414, SC (BC).
42 Cap 4, 1985 Rev Ed.

5.12 Charitable trusts notably are subject to the court's inherent or general charitable jurisdiction as enlarged by the statutory jurisdiction contained in sections 21 and 22 of the Charities Act[43] to direct a scheme or order a *cy-près* application of the trust property.[44] Despite this, in *Re Roberts' Settlement Trusts*,[45] Vaisey J held in effect that the UK Variation of Trusts Act 1958[46] also conferred concurrent jurisdiction to approve variations to the terms of charitable trusts. The settlor had established charitable trusts under a settlement for the benefit of employees of certain companies, and his wife was a potential future beneficiary since she might become an employee of one of the companies. The proposed variation to exclude the settlor and his wife from the class of beneficiaries was approved by the court on behalf of the potential wife because the settlor undertook to pay any future spouse of his a sum certain for her life.

5.13 Comparisons between the *cy-près* jurisdiction and the variation of trusts jurisdiction show that the co-existence of multiple jurisdictions is not a matter of serious concern or a source of real confusion or conflict. In many instances, recourse to the general inherent jurisdiction to direct a scheme or the general and statutory *cy-près* jurisdiction would be preferred. We note, however, that if in a case such as *Re Roberts' Settlement Trusts*[47] charity trustees do not seek to vary the original purposes of the charitable trust but only to add administrative powers which they do not have under the trust deed constituting the trust, but which it would be expedient that they should have, judicial variation would be preferred to application of the *cy-près* jurisdiction given that jurisdiction's relatively more stringent requirements.

5.14 In the view of the Law Reform Commission of Ireland ('Irish Law Commission'), the two main instances of overlap between the *cy-près* jurisdiction and the variation of trusts jurisdiction are "where there is a gift to a charity *and* a gift to a person who falls within one of the categories on whose behalf the court is empowered by Variation of Trusts legislation to consent […] [and] where the charity's interest in the trust property is contingent".[48] The Commission perceived that these would be marginal cases.[49] Anticipating that giving to charity will take on more sophisticated

43 Cap 37, 2010 Rev Ed.

44 Generally, the court's inherent jurisdiction may be invoked where a charitable trust is created without specifying the means whereby the purpose is to be carried out, where there is initial failure of a charitable disposition, and where there is subsequent failure of a charitable disposition (*ie*, after the disposition has taken effect). See also *Re Royal Society Charitable Trust* [1956] Ch 87, HC (England & Wales).

45 Re Roberts' Settlement Trusts (unreported, 26 February 1959) *per* Vaisey J, HC (England & Wales), *The Times* (London; 27 February 1959).

46 Above, n 1.

47 Above, n 45.

48 *Report on the Variation of Trusts*, above, n 21 at [6.20].

49 Another instance is where the charity's interest is a remainder interest following on prior dispositions of the life interest to individuals. The variation legislation will be apposite if the charity trustees have, in fact, no legal capacity to consent to a

(*cont'd on the next page*)

forms, we think that increasing recourse to contingent remainder charitable trusts as a way of making charitable donations will set the stage for greater recourse to a variation of trusts legislation. Many offshore trusts are already structured as discretionary trusts with a gift over to charity or in default of exercise of any appointment. Judicial variation will enable the court to cover such trusts.

5.15 The Irish Law Commission was particularly concerned that in view of the technicalities of charity law, the exclusion of all charitable trusts from the reach of variation of trusts legislation could be unfair to "those charitable trusts which fall [outside the *cy-près* jurisdiction by reason of want of general charitable intent and which] will be unjustifiably left without any solution when difficulties arise".[50] We agree. We note additionally that if charity trustees do not seek to vary the original purposes of the charitable trust but only to add administrative powers which they do not have under the trust deed constituting the trust, but which it would be expedient that they should have, judicial variation would be preferred to application of the *cy-près* jurisdiction given that jurisdiction's relatively more stringent requirements.

5.16 From a procedural viewpoint, given that the variation of the terms of a charitable trust implicates the performance of the charity's objectives and hence the public interest, our view is that any such variation ought not to be carried out without public notification and participation of the Attorney-General or the Commissioner of Charities. **We recommend that where judicial variation of trusts is sought under the proposed reform and a charitable trust is implicated, the Attorney-General or Commissioner of Charities should be served as if application had been brought for a scheme or *cy-près* application.**

5.17 The other question is whether there should be additional provisions to cater to the categories of anomalous purpose trusts which exist in Singapore as well as the many social and philanthropic trusts ('public trusts' hereafter) which are popularly acknowledged to be valid in Singapore. The variation of trusts model contained in the English Act predicates that the trusts to be varied are primarily private beneficiary trusts. Its language may not be apposite where the sole beneficiary is, as it were, a non-charitable purpose and judicial variation is sought. Moreover, judicial variation of public trusts requires more specific treatment to ensure that the court will be mindful of the need to moderate between present achievement of the relevant public objectives and the settlor's historic intention. The court's inherent or common law *cy-près* jurisdiction covers

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variation and the court is asked to approve on its behalf. A charitable corporation or trust can give consent for purposes of the rule in *Saunders v Vautier*: see *Wharton v Masterman* [1895] AC 186, HL (UK). An unincorporated charity, however, may not have full legal capacity to consent to a variation as a consenting beneficiary.

50 *Id* at [6.22].

such public trusts[51] and the Executive probably retains its Executive prerogative to modify or vary some public trusts. However, it is highly doubtful whether the enlarged statutory *cy-près* jurisdiction is available. A gap clearly exists and the need to fill this gap by being able to vary public trusts may have become palpable with the lengthening of the perpetuities period from 21 years to 100 years.[52] **We do not however recommend that the variation of trusts legislation should contain provisions similar to those of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.**[53] **These provisions basically replicate the statutory *cy-près* jurisdiction for public trusts and empower the court to reorganise public trusts in order that the resources of the trust can be put to more effective and suitable use having regard to the spirit of the documents constituting the trust. In our view, the merits of any such extension should be considered in the context of charity law reform so as to ensure that it is appropriate in the light of and in a manner comparable to the statutory *cy-près* jurisdiction as it applies to charities.**

5.18 **For the avoidance of doubt, we also do not recommend that the variation of trust legislation should be extended to the *waqf* or *wakaf*.** In *Mohamed Shariff Valibhoy v Arif Valibhoy*,[54] it was held that the High Court does not have jurisdiction under the Trustees Act to remove and appoint trustees of and to a *wakaf*. The court gave two reasons for this conclusion. First, subject matter jurisdiction in respect of the *wakaf* rested exclusively in the Majlis Ugama Islam Singapura (MUIS; the Islamic Religious Council of Singapore), and second, the *wakaf* being a Muslim law juridical creature could not be equated to an English law trust. These reasons are of a general character and go beyond the particular question decided in the case. They apply equally to a jurisdiction to vary a trust and explain why it would be inappropriate to extend the legislation to a *wakaf*.

E. PRINCIPLE OF BENEFIT TO GUIDE THE COURT'S APPROVAL

5.19 Under the English model, which substantially extends the *Saunders v Vautier* rule, the court's role is limited to acting on behalf of the specified or designated beneficiaries. This is a passive role. The arrangement varying the trust will be drawn up proactively by those who seek to vary the trusts and the court will evaluate the proposal for benefit to the designated persons on whose behalf it is requested and authorised to act. It does not appear that the passive role of the court when directing a scheme or application of charity funds *cy-près* is materially different in this respect.

51 See *Re Trustees of the R S MacDonald Charitable Trust* [2008] CSOH 116, Outer House, Court of Session (Scotland).

52 Trustees Act, above, n 5, s 89.

53 1990 c 40.

54 [2016] 2 SLR 301, HC (Singapore).

The court similarly acts upon an application by the trustees or an interested person *ex relatione* the Attorney-General.

5.20 The cardinal principle is that the variation must also be for the benefit of all and each of the persons on whose behalf the court gives its consent. As provided in English variation of trusts model, with one exception, the Court "shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit *of that person*".[55] Construing those provisions, the courts have held that the court is not to consider intra-class comparisons or motives but must be satisfied that the carrying out of the variation to be approved is for the benefit of every person on whose behalf the court is concerned to approve.[56] Further, it must not approve a variation with unjustifiable differential effects across designated persons and consenting beneficiaries but must be satisfied that the variation is in its nature a fair and proper one.[57] Nor is it enjoined to ensure parsimonious variation so that it must only consent to such variation as is necessary to achieve the explicit purposes of the application for variation. But the court will ask if the persons on whose behalf consent is to be given were competent and reasonable, the bargain is one that they would enter.[58]

5.21 We considered whether the principle of benefit should be relaxed, giving the courts greater flexibility to consent to variation although the benefits are not uniform across various classes of beneficiaries. One option is to have the courts consider the likelihood of the contingent or future interest materialising and to factor in this likelihood when assessing the benefit to the pertinent type of designated beneficiary of the proposed arrangement. The courts would be permitted to consent to variations which confer greater benefit on the consenting beneficiaries if the likelihood of the future interest materialising and vesting in the designated persons is small. The objection to this option is that it would be wrong to ignore the value at stake since a small likelihood of the interest materialising is a sizeable loss where the value of the interest is large. In our view, any refinements to provide greater flexibility will not be simple. Variation proceedings, as we explain below, must be open court hearings and giving the courts greater flexibility to operate the principle of benefit will mean raising costs to be defrayed out of the trust estate. **We do not think that is a good idea and therefore recommend adhering to the principle of benefit embodied in the English Act. However, there should be slight modifications as follows.**

55 Variation of Trusts Act 1958 (UK), above, n 1, proviso to s 1(1) (emphasis added).

56 See *Re Remnant's Settlement Trusts*, above, n 28 at 565; *Re Tinker's Settlement* [1960] 1 WLR 1011, HC (England & Wales).

57 See *Re Remnant's Settlement Trusts*, *ibid*.

58 *Re Van Gruisen's Will Trusts* [1964] 1 WLR 449 at 449–450, HC (England & Wales).

5.22 **If the designated persons form a class, such as the unborn children of a named person, we recommend that when varying the beneficial interest the court should only consent if all members of the class will benefit from it, though it is not essential that each member's benefit should be identical to another's.** The English wording is apt to produce this result since approval must not be given unless the variation would be for the benefit of "that person". This is consonant with the principle that a beneficiary ought not to be deprived of his or her interest unless it is for his or her benefit. **So far as variation of powers is concerned, we recommend that the legislation should clarify that the requirement of benefit shall be deemed to be met if benefit will accrue to the class considered as a whole.** This will ensure that a variation of powers will not be frustrated by reason only that it may have differential impact among members of the designated class where trustees have discretion in exercising those powers.

5.23 **We do not recommend limiting the meaning of 'benefit' to financial benefit.** The most famous of the cases which adopt a non-technical interpretation are *Re Remnant's Settlement Trusts*[59] and *Re Weston's Settlements*.[60] In the first-mentioned case, the court considered that removal of the forfeiture clause would be beneficial in promoting free choice of a Catholic spouse and in minimising the possibility of family dissension over matters of religion. In the second-mentioned, the court refused to approve a variation which would involve migration of the English settlement of which the settlor's unborn grandchildren were beneficiaries to Jersey. The court considered that for the unborn grandchildren the educational and social benefits of an English residence outweighed the fiscal advantages of such migration. In numerous cases, the courts have considered that tax minimisation or avoidance is a benefit[61] and we have also explained why this is right. The fact that benefit is not limited to financial benefit will expose the court to the problem of weighing up and balancing non-commensurate financial and non-financial benefits (such as educational and social benefits).[62] This problem has been described as "a legal minefield".[63] Our view is that the difficult exercise is not likely to be a common occurrence since those who support variation in terms of non-financial benefit will have to provide cogent evidence of it, while those who assert that the court should be unimpressed by the financial benefits accruing from the variation will have to provide cogent evidence that the non-financial prejudice outweighs the financial benefits. The burden of proof in either case will not be easily discharged.

5.24 Our recommendation is not intended to, and will not, alter the effect of the case law on the nature of the principle of benefit. As we mentioned in

59 Above, n 28.
60 Above, n 25.
61 See, *eg*, *Re Weston's Settlements*, *ibid*.
62 Hwang & Thio, above, n 26 at 73.
63 *Id* at 72–73.

paragraph 5.20, notwithstanding the proposed variation is beneficial to the pertinent designated persons, it must in addition be fair and just in its nature so that it is proper in all the circumstances to approve it.[64] This means *inter alia* approaching the proposed variation "in a practical and business-like manner" having regard to "the total amounts of the advantages which various parties obtain and their bargaining strength".[65]

F. DESIGNATED PERSONS ON WHOSE BEHALF THE COURT MAY CONSENT – UNBORN AND UNASCERTAINED BENEFICIARIES

5.25 The English model enumerates three categories of persons on whose behalf the court is authorised to approve a variation of trust. These are persons (1) unable to give consent (by reason of non-existence such as unborn beneficiaries or legal incapacity); (2) who may become entitled to beneficial interests such as persons with contingent interests and are not presumptively beneficiaries at the date of application for variation; or (3) with discretionary interests under protective trusts where the interest of the principal beneficiary has not failed or determined.

5.26 The first category is self-explanatory but **we recommend that the category be extended to cover missing persons as well as persons whose whereabouts cannot be ascertained despite reasonable measures being taken. Such extension would be useful to allow the jurisdiction to be exercised in the case of more mobile beneficiaries who move around frequently without maintaining contact and whose absence could delay a beneficial variation requiring urgent approval. In our view, a requirement that such persons cannot be ascertained without inordinate expense or difficulty would set too high a standard and be detrimental to a trust with a modest corpus. The amount of trust funds available for distribution ought not unduly to be depleted by expenditure of trust resources in attempting to locate missing persons for the purposes of seeking their actual consent.**

G. DESIGNATED PERSONS ON WHOSE BEHALF THE COURT MAY CONSENT – PERSONS WHO MAY BECOME ENTITLED TO AN INTEREST

5.27 The second category designates particular potential or contingent beneficiaries of a trust who "may become entitled to an interest" if relevant future events occur. Suppose a trust for the benefit of X and his or her (future) spouse. If X is not yet married or his or her marriage has been

64 *Re Remnant's Settlement Trusts*, above, n 28 at 565.

65 *Re Van Gruisen's Will Trusts*, above, n 58 at 450 *per* Ungoed-Thomas J, approved in *Goulding v James*, above, n 3 at 249. For the court's approach to risk of the benefit not materialising, see *Re Cohen's Will Trusts* [1959] 1 WLR 865 at 868, HC (England & Wales).

dissolved, his or her future spouse is a potential beneficiary and is a person on whose behalf the court may approve a variation. The designation of such a category enjoys wide support. In respect and on behalf of contingent beneficiaries, the courts ought to have and are given the power to decide whether to approve a variation. The question is to what extent the court ought to have power to override the wishes of such persons if they happen to be presumptively ascertained at the time of application to vary the trust.

5.28 The English Act adopts a restrictive approach to this question by excluding from the designated class those potential beneficiaries who are presumptively entitled to an interest at the time of application for variation (the exclusion proviso). In *Knocker v Youle*,[66] the contingent beneficiaries under the ultimate trust (the issue of the settlor's sisters) had interests contingent upon (1) failure or determination of exercise of a power of appointment vested in the life tenant, the settlor's daughter, as well as (2) failure or determination of exercise of a similar power vested in the settlor's son in turn. At the time of application for approval by the court of the proposed variation of trust, some contingent beneficiaries were in existence but their whereabouts were unknown. The court held, dismissing the application by the life tenant and the settlor's son to vary the trust, that it had no jurisdiction to approve the variation on behalf of the fully capacitated contingent beneficiaries whose whereabouts were unknown. Being in existence they were presumptively entitled to an interest and their consent had to be obtained. The court could not give consent in their stead. The court reasoned that if the pertinent future events (namely the deaths of both the life tenant and her brother without exercise of their respective powers of appointment) had occurred, the existing issue of the settlor's sisters would be persons with an interest in the trust property. They would not be persons who "may become entitled to an interest" but persons who have an interest. Such persons are entitled to decide for themselves and have in effect a power to veto the variation if they refuse consent.

5.29 In other words, the exclusion proviso excludes from the designated class of contingent beneficiaries any such person who is presumptively ascertained (*ie*, in existence) at the date of application. In a case like *Knocker v Youle*, the court could only approve a variation on behalf of future, yet unascertained, issue of the settlor's sisters. To further illustrate the operation of the proviso, suppose that a trust has been created under which income is payable to A for life, and on A's death the principal is payable to B unless A has appointed it by will to trustees for the benefit of C's children giving them discretion to appoint to such children and in such amount as they should think fit. Suppose further that, at the time of application for judicial variation, A is alive and has yet to exercise his or her power of appointment. Persons who are objects of a possible discretionary trust are clearly persons on whose behalf judicial consent can be given

66 [1986] 1 WLR 934, HC (England & Wales).

since they are persons "who may become entitled" to an interest. C's children, therefore, are persons who may become entitled to a beneficial interest. Even so, according to the proviso, if F and G are C's children at the time of application for variation, they would presumptively have an interest in the trust, if the event that would render them beneficiaries, *ie*, the exercise of the power by A had in fact occurred at the date of application to the court. The effect of the proviso is that the court cannot give consent on behalf of F and G who are already in being or ascertained at the date of application for judicial variation. The court can only consent on behalf of the yet unascertainable children of C.

5.30 The exclusion proviso was dropped in the Canadian provinces when the model contained in the English Act was adopted. The effect of this omission was considered in a prominent case. In *Bentall Corporation v Canada Trust Co*,[67] the Ontario counterpart of the English Act which omits the proviso fell to be considered. Under the trust constituted by the Bentall Corporation Retirement Plan, 276 employees were beneficiaries with actual vested interests in the pension benefits of the plan and contingent interests in the surplus fund. The proposed variation was intended to deal with the surplus fund and would not affect the actual vested interests. Seven employees refused to consent to the proposal. It was held that the court had jurisdiction to approve the proposal despite the absence of unanimous assent of all employees who might become entitled to the surplus fund. The court could approve it on behalf of all contingent beneficiaries so long as the actual interests of the seven refusing employees were not adversely affected, which was the case.

5.31 **In line with the Canadian approach, we recommend that the Singapore legislation should drop the proviso and retain only the first limb of section 1(1)(b) of the UK Variation of Trusts Act 1958. Persons with contingent interests who are ascertained at the time of proposed variation ought not to be allowed unreasonably to hold the rest of the beneficiaries who desire and consent to variation to ransom where the court is able to form the opinion that the variation is beneficial to yet unascertained contingent beneficiaries as well as for the benefit of the objecting presumptively entitled contingent beneficiaries. The views of presumptively entitled contingent beneficiaries should be considered but they should not have a power of veto.**

5.32 It will be necessary to clarify that contingent beneficiaries under trusts, otherwise void at common law for perpetuities but which are not invalidated under the statutory principle of wait and see, should not be regarded as contingent beneficiaries for the purposes of judicial variation. This clarification will ensure that the relaxation of the rule against perpetuities does not have the effect of widening the number of contingent beneficiaries beyond those originally contemplated prior to the

67 Above, n 41.

introduction of wait and see. When the rule was enforced strictly (prior to the introduction of wait and see in 1964), remote contingent interests were nullified and such trusts as passed the scrutiny of the perpetuities rule were bound to contain only non-remote contingent interests which would vest, if at all, within the prescribed period. In the light of the amendments to the perpetuities rule, a trust in favour of potentially remote contingent beneficiaries will not be void *ab initio* but will only be void if and when it has become certain that their interests will never vest within the period of 100 years. **We recommend that such persons should not be regarded as persons who may become entitled to an interest. The courts should not be obliged to consider on their behalf whether a variation of the trust would be of benefit to them.**

H. THE SPECIAL CASE OF PROTECTIVE TRUST BENEFICIARIES

5.33 We considered whether the statutory protective trust should be accommodated within the proposed legislation. The English model deals with the protective trust in two respects. First, it provides for an exception to the principle of benefit where the court is to give consent on behalf of persons who are mere possible objects of a future discretionary trust in relation to a statutory protective trust.[68] A statutory protective trust protects the primary beneficiary by substituting when certain protective events materialise the primary trust with a secondary discretionary trust for the benefit of the primary beneficiary and related persons of his or her family. Where the primary interest has not failed or determined, the protective discretionary trust is a future trust and its objects are merely persons with a contingent interest. An exception which relaxes the principle of benefit is recognised so as to permit the court to consent more readily to variation of the primary trust. After all, the secondary trust is intended to benefit the primary beneficiary too. However, the protective trust will protect two mutually exclusive groups of the primary beneficiary's family. First, where the unmarried principal beneficiary who is without children, his or her next-of-kin is the secondary discretionary trust beneficiary. Second, where the principal beneficiary is married or has children, the secondary beneficiaries are members of his or her immediate family. As between them, the first group of the primary beneficiary's next of kin does not compel the same attention as the second group. This should make a difference in the way the principle of benefit is relaxed in the case of a statutory protective trust. **We recommend that the legislation should clarify that the requirement of benefit shall be deemed to be met as long as the variation will not prejudice a possible object of a future discretionary trust**. Application of the lower test of benefit which is recommended will likely lead to a further difference. Where the principal beneficiary of a statutory protective trust is unmarried and without children, the court will only need to guard against the very unlikely or small

68 See the proviso to the Variation of Trusts Act 1958 (UK), above, n 1, s 1(1)(b).

prospects of prejudice to his or her next-of-kin. In any other case, the court will consider any likely prospects of prejudice to his or her immediate family of the proposed variation. **We do not however recommend that this matter of degree in application of the requirement of benefit be elaborated in the proposed legislation.**

5.34 It is already obvious from paragraph 5.33 that the English model specifies the objects of a possible future discretionary trust arising upon failure of the primary beneficiary statutory protective trust as designated persons. Whether we should likewise specify such persons is a more controversial question. There is considerable doubt whether protective trusts are practically meaningful in Singapore and thus whether a third category of such designated persons will serve a useful purpose. As prescribed by section 35 of the Trustees Act, the two determining events which will cause failure or determination of the primary beneficial interest are the beneficiary's bankruptcy and alienation by a married woman of property left in trust for her separate use. The principal or primary beneficiary's interest cannot be reached by his or her creditors or any alienee from him or her. If he or she becomes bankrupt or purports to alienate as a married woman, as the case may be, persons specified under section 35 are conferred discretionary interests and can be appointed to the trust property. These persons include the bankrupt, his or her spouse, or issue; or, if the bankrupt is unmarried, the bankrupt and the persons who would, if he or she were actually dead, be entitled to the trust property (*ie*, the next-of-kin).

5.35 There are two reasons that the secondary beneficiaries are designated persons when the protective trust has not yet determined under the English model. The first is that the primary beneficiary cannot be a consenting beneficiary since once the beneficial interest with restraint on alienation of the interest has been accepted, the beneficiary ceases to be able to release it.[69] On the happening of the event of bankruptcy his or her interest under the protective trust will fail or determine, and persons with discretionary interests will be the relevant beneficiaries to consent, if at all. It follows that where that interest has not yet failed or determined, the persons with discretionary interests which include the primary beneficiary are designated persons on whose behalf the court can give consent to a judicial variation. Likewise in the case of a protective trust which has yet to determine because there has yet to be an alienation by a married woman of her separate beneficial interest – having accepted the restraint on her beneficial interest, she would have no effective consent to now release it.

5.36 The problem is that the need for protection by a statutory protective trust is not very relevant under present conditions. Protective trusts which protect a profligate life tenant from his or her financial weaknesses do not seem to be commonly utilised. The second type of protective trusts which

69 See, *eg*, *Re Steed's Will Trusts* [1960] Ch 407, CA (England & Wales).

protect a married woman's property from dissipation by her husband made sense in an earlier age when a married woman ceded control of her property to her husband. This protection is no longer realistically needed. In the light of the very limited use of protective trusts in Singapore, we do not think there are strong reasons for recommending the replication of the statutory protective trust provisions in the proposed legislation. One option is to recommend this replication only for the sake of recognising that as section 35 of the Trustees Act has not been abrogated, there is a residual need to address the peculiar problems which impede judicial variation of the protective trust.

5.37 Another option is to provide for judicial variation of the statutory protective trust but also include other kinds of protective trusts. The statutory protective trust converts the interest into discretionary interests upon the determining event. Another kind of protective trust provides that any attempt to assign the protected interest will operate to cause the interest to cease and the trust to be administered as if the beneficiary had died at the termination of his or her interest. A third kind imposes solvency as a condition precedent to the vesting of the interest. The second option which is more inclusive can be implemented along the lines of section 13(3)(d) of the Tasmanian Variation of Trusts Act 1994[70] which refers to "a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the Court". **We recommend adoption of the second option**.

70 No 52 of 1994 (Tas).

CHAPTER 6

WHETHER JURISDICTION IN DISTRICT COURT

6.1 We recognised that court involvement is an inevitable price to pay for flexibility in variation of trust. Consistent with the grave nature of any order varying the trust, open court hearings with representation by counsel (including the appointment of *amicus curiae* to oppose the variation if necessary) should be the norm while chamber dispositions should be exceptional. This was recently acknowledged as settled practice in England and described as a general principle, necessary for the sake of ensuring uniformity of practice in a serious matter.[71] We agree.

6.2 This means that variation of trust applications will be costly and we considered whether conferring concurrent jurisdiction on the District Court and, if necessary, raising the limits of the District Court's jurisdiction with respect to judicial variation of trust, could be a way to keep costs down. This could be desirable since it is the relatively smaller trusts which typically are most in need of variation. This point is forcefully made by the Singapore Trustees Association ('STA') in their response to our earlier recommendation contained in this paragraph in draft (which was that nevertheless only the High Court should have jurisdiction to approve a variation of trust under the proposed reform). In making that recommendation, we relied on external evidence that the costs of open court judicial variation hearings would be manageable. In Scotland, this experience was described as follows by the Scottish Law Commission: "Hearings normally take the form of ex parte applications in which the court proceeds on the basis of the documents lodged and the statements of fact made in the petition and by counsel at the bar. The procedure is reasonably expeditious and hearings normally last less than an hour."[72] We also thought it important that no beneficiary ought to be deprived of his or her interest except upon the fullest consideration by a superior court. We had in our draft report recommended therefore that only the High Court should have jurisdiction to approve a variation of trust.

6.3 In the wake of the STA's comments, we reconsidered the merits of giving concurrent jurisdiction to the District Court, raising the limits of its jurisdiction if necessary. We noted that the Irish Law Commission was in

71 *V v T* [2014] EWHC 3432 (Ch), HC (England & Wales), citing *Re Chapman's Settlement Trusts (No 2)* and *Re Rouse's Will Trusts*, reported together as a Practice Note at [1959] 2 All ER 47n, [1959] 1 WLR 372 at 375, HC (England & Wales). Applications may be heard in chambers if there is a special reason to avoid publicity such as a need to preserve and protect confidential facts relating to a ward of court.

72 Scottish Law Commission, *Discussion Paper on Variation and Termination of Trusts* (Discussion Paper No 129) (Edinburgh: The Stationery Office, 2005) at [2.20].

favour of concurrent jurisdiction, pointing out that although "the English legislation originally confined jurisdiction to the High Court, it was amended by the *County Courts Act 1984, section 23 (b)* so as to confer jurisdiction on the county courts."[73] The New Zealand Law Commission in its comprehensive examination of trust law reform likewise favoured concurrency but importantly thought that the question was part of a larger question whether the High Court should continue to have exclusive jurisdiction to make orders under the Trustees Act.[74] In this country, the equity jurisdiction of the District Court is provided by section 26(b) of the State Courts Act.[75] In the same manner as pointed out by the New Zealand Law Commission for the position in New Zealand, a serious limitation on the court's equity jurisdiction is that the court cannot exercise any of the powers under the Trustees Act. The Act confers exclusive jurisdiction on the High Court. We agree that the time is opportune to re-examine the equity jurisdiction of the District Court in a comprehensive manner, and that a proposal for concurrent jurisdiction to vary trusts cannot and should not be ruled out for the future. It would presently be incongruous to give the District Court concurrent jurisdiction to vary a trust when it does not yet have jurisdiction to exercise somewhat related jurisdictions such as the section 56 jurisdiction and, more generally, the jurisdictions under the Trustees Act to remove or appoint trustees or make other orders affecting trustees. The concurrent jurisdiction, however, should be considered as part of a comprehensive reform of the equity jurisdiction and we would modify our earlier recommendation to make it clear that in our view there is no countervailing policy against this extension. **For the time being, we recommend that the jurisdiction should be exclusive to the High Court in order that authoritative and more concrete guidance as to how the jurisdiction should be exercised may be developed by the judges of the Supreme Court and be available for future reference and application in the District Court.**

73 *Report on the Variation of Trusts*, above, n 21 at [7.01] (emphasis original); see also [7.02].

74 Law Commission (New Zealand), *Review of the Law of Trusts: Preferred Approach Paper* (Issues Paper 31) (Wellington: Law Commission, 2012), ch 12.

75 Cap 321, 2007 Rev Ed.

CHAPTER 7

COSTS AND SEPARATE REPRESENTATION FOR BENEFICIARIES ON WHOSE BEHALF THE COURT'S APPROVAL IS SOUGHT

7.1 We did not consider that special rules of costs are necessary in order to facilitate proceedings to vary a trust under the proposed jurisdiction. Ordinarily, trustees should and will adopt a neutral position and the applicant for a variation order will bear the costs of and incidental to the application if the order is denied. The applicant may be allowed to defray the costs of the proceedings from the trust estate if the order is granted since the proceedings will have been for the benefit of the trust to be varied and all interested parties. It should be possible, however, for the court to exercise its discretion to order the successful applicant to bear the costs of the application in an appropriate case.

7.2 We do not recommend that separate representation by counsel for the beneficiaries on whose behalf the court is asked to approve the proposed variation should as a rule be required. Although the jurisdiction is not conditional on the participation of all interested persons, the applicant in practice will have good reason to obtain the consent of all consenting beneficiaries before beginning proceedings to obtain the court's approval on behalf of identified designated persons. The applicant bears the onus of proof that variation will be beneficial to these beneficiaries, and, if the variation will result in giving up an interest, should of course provide details including actuarial reports as to how the interest will be replaced by an equivalent substitute of at least the same value. In practice, accordingly, proceedings will be non-contentious if there are no divergent interests and disputed facts or factors relevant to the variation, and the only question is one for the court to determine, namely, whether the court should approve the proposed variation.[76] We think that in all other cases it is sufficient that the court should have discretion to order separate representation by counsel when it is of opinion that the benefit cannot be determined without proper representation in order to inform the court of all factors relevant to the variation, or having regard to the lack of substantial similarity of interests between the consenting and non-consenting beneficiaries.

76 See, *eg*, *Ridgwell v Ridgwell* [2007] EWHC 2666 (Ch), HC (England & Wales).

CHAPTER 8

ALTERNATIVE METHOD OF OBTAINING CONSENT OF INFANT OR INCAPACITATED ADULT BENEFICIARY

8.1 The English Act specifies infants and incapable adults as designated persons on whose behalf the court may give consent to a variation of trust. **We agree with this subject to one qualification.** There are presently alternative ways of obtaining a valid consent from an infant or incapable adult who is actually vested in interest. A guardian may be appointed on behalf of an infant to act on its behalf in relation to its property.[77] A donee may be authorised by a lasting power of attorney to act on behalf of the donor who has become incapable in relation to the donor's property.[78] The qualification therefore is that **we do not recommend that judicial variation should be the exclusive means of obtaining the consent of infant beneficiaries or incapable adult beneficiaries.** Rather, it should be open to the parties seeking a variation to procure the consent of an infant beneficiary or incapable adult beneficiary given by the legal representative without the need for an application under the variation of trusts legislation. Understandably, if there will have to be a prior court application to obtain the guardianship order or appointment of a donee, it may be considered more advantageous to obtain the court's consent directly in a variation of trusts application.

77 But there are severe restrictions on the guardian's powers to deal with the infant's property. See the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), ss 11 and 12.

78 See the Mental Capacity Act (Cap 177A, 2010 Rev Ed), s 11, and also s 12.

CHAPTER 9

QUALIFICATION FOR OFFSHORE TRUSTS

9.1 We mentioned earlier that the variation of trusts legislation should extend to foreign trusts. The English Act and indeed its Australian counterparts are silent on this matter. But the courts have not thought it problematic. They have acted on the basis that there being no contrary indication of any such limitation, foreign trusts, meaning trusts not governed by the *lex fori*, also come within the legislation.[79] Among other things, there is good sense and policy in giving coverage to foreign trusts which are administered or whose beneficiaries reside in this country. Their inclusion, moreover, seems perfectly sensible where variation is permissible under the foreign governing law on similar principles and it ought not to matter in which jurisdiction the variation is considered and approved. This much is uncontroversial from the case law.[80]

9.2 This case law might be thought sufficient affirmation, obviating any need for express provision in the legislation to the effect that foreign trusts should be as amenable to judicial variation as local trusts. However, we considered that express provision should be made so as to impose a condition by way of prerequisite that variation of a foreign trust should not be prohibited by the foreign governing law of the trust. Such qualification has not yet been affirmed in the case law. It is nonetheless an important prerequisite because it will minimise forum shopping for the purposes of judicial variation. The courts undoubtedly could deal with blatant forum shopping by recourse to the doctrine of *forum non conveniens*.[81] Nevertheless, an express provision that variation of foreign trusts will not be entertained in these circumstances gives more commensurate weight to considerations of comity of nations. It ensures that any judicial variation will not place trustees in a dilemma as to whether to comply and be sued for breach of trust in the country of the governing law, or not to comply and be in contempt of the forum court. It additionally helps to avoid defensive or retaliatory firewall legislation in the country of the governing law of the trust forbidding trustees to give effect to the judicial variation. **We therefore support imposition of the above-mentioned condition in relation to the variation of foreign trusts, and recommend that the High Court should have jurisdiction to vary a trust whatever the law**

79 See *Re Ker's Settlement Trusts* [1963] 1 Ch 553, HC (England & Wales).

80 Note, however, the difficulties in the more recent English case law over whether Art 8 of the Hague Trusts Convention (the Convention on the Law Applicable to Trusts and on Their Recognition, concluded 1 July 1985), which is part of English law, is a qualification on the unlimited jurisdiction under the 1958 Act. See *C v C* [2015] EWHC 2699 (Ch), HC (England & Wales).

81 See *Re Paget's Settlement* [1965] 1 WLR 1046, HC (England & Wales).

governing it might be but that there should be no jurisdiction to make any order that would be prohibited by the foreign governing law.

CHAPTER 10

NON-CONSENSUAL JUDICIAL VARIATION – AN EPILOGUE

10.1 The proposed jurisdiction will not authorise the courts to write a new will for the testator who has created a testamentary trust for the benefit of some but not all of his or her children. No more will it authorise a rewriting of any ante-nuptial or post-nuptial settlement deed as between divorcing spouses. However, in both areas of property division on divorce or separation and judicial provision of maintenance of disinherited children or dependents, the courts have already been empowered to intervene in respect of a spouse's or a testator's estate by making property adjustment or maintenance orders in relation to matrimonial assets or the estate, as the case may be. The question is whether these property adjustment or maintenance orders should include judicial variation of beneficial interests of divorcing spouses where the spousal assets are beneficial interests as well as where the testator's trust dispositions leave out dependents who are otherwise entitled to statutory provision of maintenance. If so, consequential amendments will be needed to the Inheritance (Family Provision) Act[82] and the Women's Charter.[83]

10.2 There appears to be considerable merit in clarifying that the court has jurisdiction to intervene with respect to the beneficial interests of spouses upon their separation or divorce.[84] Any such clarification that the divisible property on separation or divorce includes beneficial interests under ante-nuptial and post-nuptial settlements can only be helpful. This would not involve any alteration of the beneficial interest affecting other non-immediate beneficiaries since only a spouse's interest or that of the children of the marriage would be altered. The particular context of property division on divorce, moreover, implies that judicial variation imposed for the purposes of such property adjustments would be limited to the management and size of the beneficial interests in question.

10.3 As a matter of principle, it is wrong to leave out a spouse's beneficial interest when all other assets are subject to division under section 112 of the Women's Charter. In some cases, the inability to divide the beneficial interests of one spouse can be taken into account by giving the other spouse a greater share of the remaining assets. In other cases, this will not

82 Above, n 17.

83 Above, n 16.

84 See Hang Wu Tang, "Let's Call the Whole Thing Off: Divorce and Trusts in Singapore" (2011) 17 Trusts & Trustees 855. He writes at 858 that "whether the Singapore court will regard a trust as part of the matrimonial assets of the divorcing couple is an unresolved issue". At 860, he points out that there are no written laws that allow the court to vary a nuptial trust.

be possible where the beneficial interests are the only substantial assets that can be divided as between the spouses. To be sure, there are a few thorny issues to be resolved. If English precedents are followed, there will be no room for choice of law. Singapore law will be applied and foreign governing law ignored.[85] This disregard of governing law in the UK has provoked offshore trust jurisdictions to enact retaliatory (defensive) firewall legislation against foreign property adjustment orders.[86] So the question must be answered.

10.4 The case for judicial alterations of beneficial interests under a testamentary trust or a statutory trust on intestacy so as to provide relief for the disinherited or children or dependants is fairly similar, albeit less considerable on the merits. The Inheritance (Family Provision) Act allows the court to make lump sum transfers for the maintenance of disinherited children or dependants. This measure of relief is in theory unavailable where the bulk of the estate is settled on a trust created by the will of the testator. In practice, the court may deduct the sum to be transferred for maintenance from the sum an executor should transfer to the trustees. However, there are jurisprudential issues when the transfer on trust has taken effect as to whether the Act allows a clawback. There will also be instances where it may be more appropriate to include by way of judicial variation of the testamentary trust the disinherited children or dependants as beneficiaries. Where there are difficulties in predicting the amount of maintenance which will be needed over the years of minority, inclusion of the disinherited children under the trust will afford a much closer and more accurate approximation of the true maintenance needs and requirements which should be provided.

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85 See, *eg*, *Mubarak v Mubarik* [2009] 1 FLR 664, Royal Court (Jersey).

86 See, *eg*, the Trusts (Guernsey) Law 2007 (No III of 2008) (Guernsey).

APPENDIX

DRAFT VARIATION OF TRUSTS ACT

Variation of Trusts Act

Bill No. / .

Read the first time on .

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Jurisdiction of courts to vary trusts
3. Persons who may apply for variation
4. Trusts for charitable purposes and wakaf

A BILL

i n t i t u l e d

An Act to extend the jurisdiction of the courts to vary trusts in the interests of beneficiaries and sanction dealings with trust property.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act is the Variation of Trusts Act 2019 and comes into operation on a date that the Minister appoints by notification in the *Gazette*.

Jurisdiction of courts to vary trusts

2.—(1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve any arrangement mentioned in subsection (2) on behalf of —

(*a*) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting;

(*b*) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;

(*c*) any person unborn;

(*d*) any person whose identity, existence or whereabouts cannot be established by taking reasonable measures; or

(*e*) any person in respect of any discretionary interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the court.

(2) An arrangement for the purposes of subsection (1), is any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting to the arrangement) varying, resettling or revoking all or any of the trusts, or enlarging, adding to, restricting or terminating the powers of the trustees of managing or administering any of the property subject to the trusts.

(3) To avoid doubt, a person who may become entitled, directly or indirectly, to an interest under the trusts excludes a contingent beneficiary under a trust that would be invalid as infringing the rule against perpetuities (as applied to trusts by section 89 of the Trustees Act (Cap. 337)).

(4) Where the court's approval is sought for an arrangement mentioned in subsection (2) —

(*a*) which will affect the beneficial interests of any person mentioned in —

(i) subsection (1)(*a*), (*b*), (*c*) or (*d*), the court must not approve the arrangement, unless the carrying out of the arrangement would be for the benefit of that person; or

(ii) subsection (1)(*e*), the court must not approve the arrangement, where the carrying out of the arrangement would prejudice that person; or

(*b*) in any other case on behalf of any person mentioned in subsection (1) (*a*), (*b*), (*c*) or (*e*), the court must not approve the

arrangement unless the carrying out of the arrangement would be for the benefit of the whole class of persons to which that person belongs.

Explanation — Where the court does not approve an arrangement which is sought for, the court may consider and if it thinks fit propose any modified or alternative arrangement which would be for the benefit of persons on whose behalf the court's approval for the arrangement is sought.

(5) Subject to subsection (6), the jurisdiction conferred by subsection (1) is exercisable by the High Court and the High Court has such jurisdiction in relation to any trust if —

(*a*) any settlor or any beneficiary of the trust is –

(i) an individual who is a citizen of Singapore or resident in Singapore;

(ii) a body corporate which is incorporated or formed in Singapore; or

(iii) an unincorporated associated or a partnership which is formed or registered in Singapore;

(*b*) the trust is governed by the laws of Singapore; or

(*c*) any property subject to the trust is administered or managed in Singapore.

(6) The High Court must not exercise the jurisdiction to make an order under subsection (1) which would be prohibited by the law governing the trust.

(7) Nothing in this section limits the powers of the High Court or the Family Court under any written law.

(8) In this section, "discretionary interest" means an interest arising under the trust specified in section 35(1)(b) of the Trustees Act (Cap. 337) or any like trust.

Persons who may apply for variation

3. Any or any combination of the following persons may apply for, or appear and be heard at an application for, an order under section 2:

(*a*) any trustee under the will, settlement or other disposition;

(*b*) any beneficiary under the will, settlement or other disposition;

(*c*) such other person as the court thinks fit.

Trusts for charitable purposes and wakaf

4.—(1) The High Court must not exercise its jurisdiction under section 2 in relation to a trust established for charitable purposes as defined in section 2 of the Charities Act (Cap. 37) without considering the submission or representation, if any, of the Attorney-General or the Commissioner of Charities appointed under section 3 of that Act.

(2) To avoid doubt, nothing in section 2 applies to a wakaf as defined in section 2 of the Administration of Muslim Law Act (Cap. 3).

EXPLANATORY STATEMENT

This Bill implements the recommendations of the Law Reform Committee of the Singapore Academy of Law in its "Report on Introducing a Statutory Variation of Trusts Jurisdiction", 2019 ("Report"). The Bill seeks to extend the jurisdiction of courts of law to vary trusts in the interests of beneficiaries and sanction dealings with trust property. The absence currently of such legislation is a "significant gap" because the various practical and legal workarounds to this "gap" do not allow for the adjustment of beneficial interests in unforeseen circumstances. The Bill will equiparate the variation of both the domestic and offshore trust, and enable the High Court to facilitate changes in beneficial interests or administrative powers which are beneficial to all beneficiaries. This is especially when trusts of long duration have become unsuitable or inexpedient over time (see [4.7], Report). The Report recommended the adoption of the UK Variation of Trusts Act 1958 with certain variations (see [5.1], Report).

Clause 1 relates to the short title and commencement.

Clause 2(1) implements the recommendation that the Bill confer on the High Court the same wide scope for variation as the UK Act. (see [5.3], Report). The settlor will not be given the power to veto a proposed variation. The Court cannot override the refusal of a beneficiary to give his consent. The word "arrangement" is used in the widest possible sense (see [5.2], Report).

Clause 2(1)(a) provides that the High Court is authorised to approve a variation of trust on behalf of the category of persons unable to give consent by reason of legal incapacity.

Clause 2(1)(b) provides that the High Court is authorised to approve a variation of trust on behalf of the category of potential or contingent beneficiaries of a trust who may become entitled to an interest if a relevant future event occurs. This provision differs from the UK Act in that it does not exclude from the category of contingent beneficiaries, persons who are presumptively ascertained (i.e. in existence) at the date of the application to the Court. This implements the recommendation in [5.28] of the Report.

Clause 2(1)(c) provides that the High Court is authorised to approve a variation of trust on behalf of persons unable to give consent by reason of non-existence i.e. unborn beneficiaries.

Clause 2(1)(d) implements the recommendation that the category of persons unable to give consent be extended to cover missing persons and persons whose whereabouts cannot be ascertained (see [5.23], Report).

Clause 2(1)(e) implements the recommendation that judicial variation of statutory protective trusts be extended to other kinds of protective trusts (see [5.34], Report). The language is adopted from section 13(3)(d) of the Tasmania Variation of Trusts Act 1994.

Clause 2(2) implements the recommendation that the High Court's power to vary the turst includes resettlement (creation of a new trust for purposes which diverge from those of the original trust) (see [5.5], Report). Clause 2(2) also implements the recommendation that the Bill should clarify that variation includes restricting as well as deleting or terminating the powers (such as the powers to act in positions of conflict) conferred by the trust (see [5.6], Report).

Clause 2(3) implements the recommendation that contingent beneficiaries under trusts otherwise void at common law for perpetuities but which are not invalidated under the statutory principle of wait and see should not be regarded as contingent beneficiaries for the purposes of judicial variation. The High Court should not need to consider on their behalf whether a variation of the trust would be of benefit to them (see [5.29], Report).

Clause 2(4) implements the recommendation that the Bill adhere to the principle of benefit embodied in the UK Act with slight modifications (see [5.19], Report) and that the meaning of benefit should not be limited (see [5.21], Report).

Clause 2(4)(a)(i) implements the recommendation that the Bill clarify that the requirement of benefit in relation to a proposed variation of beneficial interests will be

deemed to be met if benefit will accrue to every member of the class where the beneficiaries form a class. There is no requirement that every member of the class must benefit in the same way (see [5.20], Report).

Clause 2(4)(a)(ii) implements the recommendation in relation to statutory protective trusts and other kinds of protective trusts that the Bill clarify the requirement of benefit in relation to a proposed variation of beneficial interests will be deemed to be met as long as the variation will not prejudice a future object of a future discretionary trust (see [5.30], Report).

Clause 2(4)(b) provides that in cases that will not affect beneficial interests such as the variation of administrative powers, the requirement of benefit will be deemed to be met if benefit will accrue to the class considered as a whole (see [5.18], Report).

The Explanation clarifies that the court's powers to approve the variation of beneficial interests and administrative powers are flexible despite the distinction between the requirements for the variation of beneficial interests and administrative powers (see [5.7], Report). If the court does not approve an arrangement for variation, it may consider and if it thinks fit approve any modified or alternative arrangement which would be for the benefit of the persons on whose behalf the court's approval is sought.

Clause 2(5) implements the recommendation that the jurisdiction must be exercised by the High Court (see [6.1], Report). and that the Bill should extend to foreign trusts (meaning trusts not governed by the *lex fori*). (see [8.1], [8.2], Report).

Clause 2(6) implements the recommendation that although the High Court should have jurisdiction to vary a trust whatever the law governing it might be, the Court will not have jurisdiction to make an order that would be prohibited by the foreign governing law (see [8.2], Report). The language is adopted from *Re Ker's Settlement Trusts* [1963] 1 Ch 553.

Clause 2(7) implements the recommendation that the statutory powers of the High Court under other legislation such as the Charities Act (Cap. 37) and the Women's Charter will not be limited by this Bill.

Clause 2(8) defines "discretionary interest". Section 35 of the Trustees Act is similar to section 33(1) of the UK Trustee Act 1925 s 33(1).

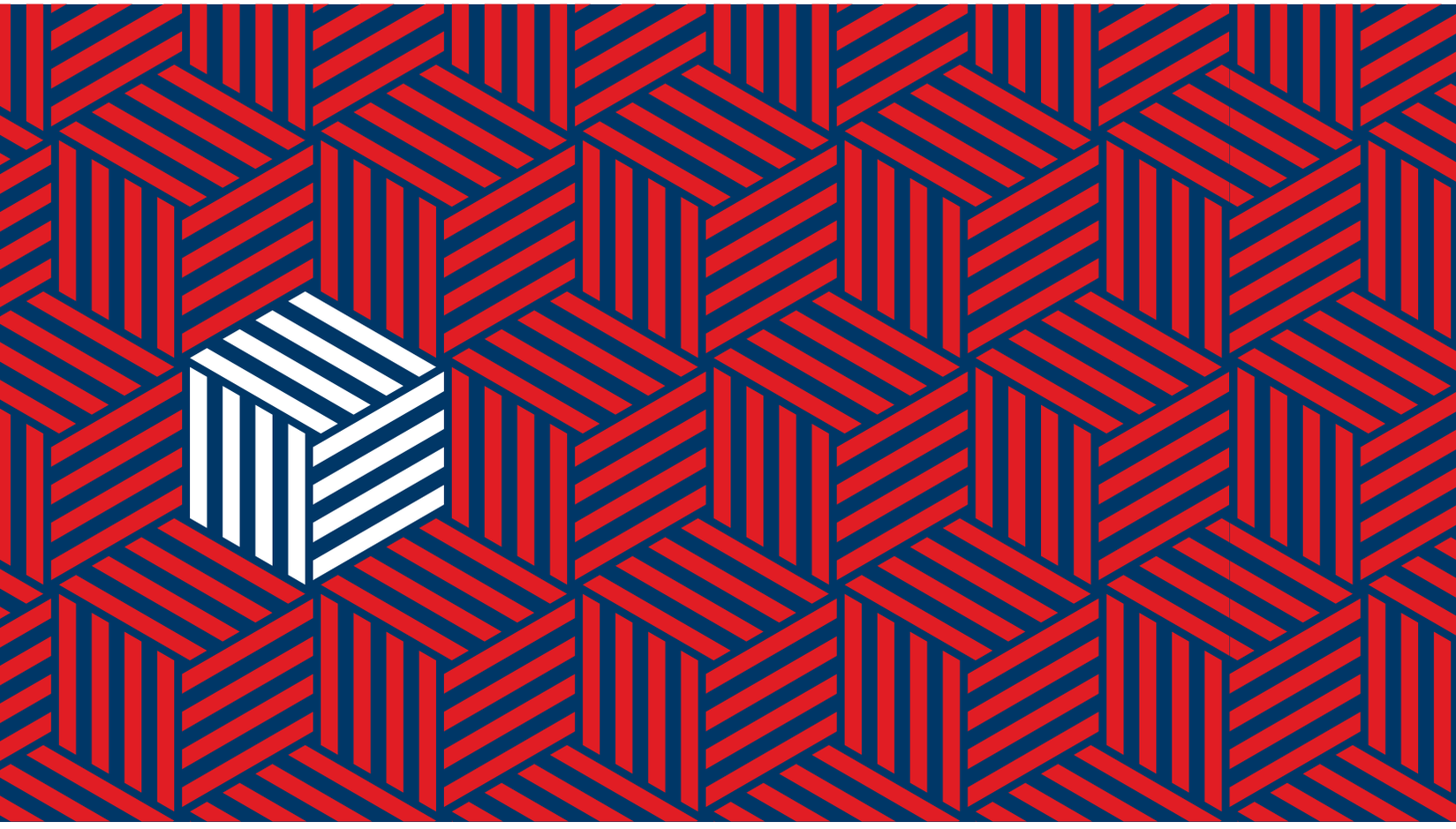
Clause 3 provides that the application for an order for variation may be made not only by a trustee or beneficiary but also by such other persons as the Court may think fit. A charitable trust for charitable purposes may not have any trustee or beneficiary.

Charitable trusts are subject to the High Court's inherent or general jurisdiction as enlarged by the statutory jurisdiction conferred by sections 21 and 22 of the Charities Act (Cap. 37). The Bill will confer concurrent jurisdiction to approve variations of charitable trusts (see [5.10], Report). Clause 4(1) implements the recommendation that where judicial variation of trusts is sought under the proposed reform and a charitable trust is implicated, the Attorney-General or the Commissioner of Charities should be served and heard as if an application had been brought for a scheme or cy-press (see [5.14], Report).

Clause 4(2) implements the recommendation that the Bill should not be extended to the wakaf under Muslim Law (see [5.16], Report).

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.



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Amendments to the Federal Constitution of Malaysia
(in relation to the citizenship being conferred on children born overseas to Malaysian mothers)

Executive Summary

Position of the Bar:

Malaysia's gender-discriminatory citizenship provisions under its Federal Constitution ("FC") deny women the equal right, as their male counterparts, to confer citizenship on their overseas-born children.

It is the Malaysian Bar's position that the provisions within the Federal Constitution must reflect the equality and non-discrimination clause guaranteed in Article 8, FC.

It is proposed for amendments to be made within Part II of the Second Schedule of the FC to include the rights of both Malaysian fathers and mothers to confer citizenship to overseas-born children so Malaysian mothers are put on equal footing as their male counterparts.

I. Introduction

1. Citizenship provisions are covered in Part III of the FC. The current position of the FC provides that children born overseas to Malaysian women are not entitled to automatic citizenship as the FC only provides for citizenship to be conferred through Malaysian fathers. Malaysia is one of 25 countries that does not provide mothers and fathers equal rights under the country's citizenship legislation.

2. The relevant law for consideration is the word "*father*" in Article 14(1)(b) Second Schedule, Part II Section 1(b) and Section 1(c), FC:-

> *(b) every person born outside the Federation whose **father** is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State*

*(c) every person born outside the Federation whose **father** is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government*

3. This issue of the entitlement of Malaysian mothers to confer citizenship to their overseas-born children was brought prominently to light in September 2021 in *Suriani Kempe & Ors v Government of Malaysia & Ors*, a case brought by Family Frontiers.

4. In *Suriani Kempe,* six Malaysian mothers who had children born overseas to foreign fathers sought a declaration from the High Court that their children were citizens of Malaysia. In a landmark majority decision, the High Court ruled in their favour deciding that the word "*father*" in those provisions should be read as representative of both parents. This was in consideration of Article 8(2) which states that there should be no discrimination, including gender-based discrimination, against any Malaysian citizen.

5. However, the Attorney General's Chambers appealed this decision and on 5th August 2022, the Court of Appeal overturned the High Court's decision. The appellate court ruled that children born overseas to Malaysian women were not entitled to automatic citizenship as the Federal Constitution only provided for citizenship through fathers.

6. The majority of the Court of Appeal took the view that the word "father" in the FC under the Second Schedule, Part II, Section 1(b) cannot extend to "mothers". The Honourable Court took the position that only the Parliament can rewrite the Constitution and the Court cannot in its own whim and fancy change the Constitution.

7. *Suriani Kempe* is currently on appeal to the Federal Court where leave was granted on 14th December 2022.

II. Problems

8. For decades, Malaysian women with foreign spouses have not been able to confer citizenship on their children due to the outdated provisions of the FC. Mothers have had to rely on Article 15(2) FC – which allows those under the age of 21 to apply for Malaysian citizenship – as long as one parent is Malaysian.

9. The provisions pertaining to citizenship rights under the FC, namely Article 14(1)(b) read together with Part II of the Second Schedule causes discrimination on the basis of gender which directly violates Article 8(2).

10. It must be noted that the word "*gender*" was only included in Article 8 (equality) in 2001 which was clearly directed at fulfilling Malaysia's *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) obligations. Hence, all provisions in the FC must be read harmoniously with Article 8(2).

III. Solutions

11. Necessary amendment(s) to the Federal Constitution of Malaysia.

12. The word '*father*' of the relevant provisions in the Second Schedule of the FC shall be replaced by "*parents*" or "*either parent*" (citizens by operation of law).

IV. Conclusion

13. The ability of mothers to confer citizenship on their children is a critical aspect of a mature democracy and this right must be championed at all costs. With the promise of constitutional amendments that would give both fathers and mothers the right to confer citizenship to their children included in the election manifestos of Pakatan Harapan[1] and Barisan Nasional[2], the Malaysian Bar hopes that this promise will be translated into immediate action make the necessary amendments in the Federal Constitution.

14. We humbly state that citizenship by operation of law is a fundamental and constitutional right. The FC is a living piece of legislation that reigns supreme at all

[1] 'Kita Boleh! Tawaran Harapan PRU15'. October 2022. *Pakatan Harapan*. pg. 28
[2] 'Perancangan Amal dan Usaha: Pilihan Raya Umum Ke-15'. (n.d.) *Barisan Nasional.* pg. 32, Paragraph 67

times and its provision must be construed broadly and not in a pedantic way. The FC is the only document that provides Malaysia's citizenship laws and hence these amendments are vital to reflect a gender-equality nation when it comes to conferring citizenship.

15. Unequal gender laws impede the empowerment of women and negatively affect their participation in society. In this case, it is not just the women who are affected — it is the children as well. The consequential far-reaching impact on the denial of Malaysian citizenship for these children will cause the children to be denied access to a whole range of social institutions and legal rights, including education, healthcare, employment opportunities, and other types of fundamental rights, such as access to justice.

16. This Executive Summary is submitted in support of the announcement from the Minister in the Prime Minister's Department (Law and Institutional Reform), Datuk Seri Azalina Othman Said on January 5th, 2023 that a memorandum on the amendments to the constitution concerning the issue of citizenship would be put forward.

Reform of Malaysian Contracts Law

Executive Summary

Position of the Bar:

The Malaysian law of contracts being a major part of commercial transactions and dispute is ripe for a major reform. Practitioners both at the Commercial Bar and also Litigation is compelled to navigate through a morass of common law decisions both from the Commonwealth (with emphasis from the English law) and Malaysian judicial decisions. There is a minefield of case authorities and relating and reconciling the same to the provisions of Malaysian Contracts Act 1950 (Act 136) (Revised 1974) ("**CA 1950**") is a complex and formidable task.

I. Introduction

The CA 1950 has its antecedents from the Contract Ordinance 1950 which in turn its ancestor parentage is the Indian Contract Act 1872. A succinct history of this is sketched in Visu Sinnadurai, assisted by Philip TN Koh, (1979), *The Law of Contract in Malaysia and Singapore:* Cas*es and Commentary*, Oxford University Press (and subsequent editions). In substance, the Indian Contract Act 1872 was as a whole transplanted onto the then Federated Malay States by way of the Contract Enactment 1899. The CA 1950, being an act that is wholly in substance a 19th century legislation in colonised India, its provisions is anachronistic, archaic and the courts and arbitral tribunals have been strained in construing its provisions in the light of contemporary developments in contract law in the 20th and now 21st century society.

The provisions of Sections 3 and 5 of the Malaysian Civil Law Act 1956 which provides for application of English law give rise to contesting applicability of the provisions of contract law as may be applicable to specific contracts, e.g. partnership law (See *Tan Mooi Liang v Lim Soon Seng & Ors [1974] 2 MLJ 60*). The different dates of cut off for continuous reception of English law in realm of contract have also birthed much analytical difficulties both for courts and legal counsels.

Singapore, which shared our colonial history, has enacted the Application of English Law Act 1993 (Act 35 of 1993) which deals specifically with the uncertainties resulting from reception of English law via the Singaporean Civil Law Act: see Andrew Phang & Ors., (2012), *The Law of Contract in Singapore*, Academy Publishing (now in second Edition 2022).

II. Key Reasons

The key points, inter alia (a more extensive proposal) proposed by the Malaysian Bar in respect to reform of Malaysian law of contract are as follows:

(a) The CA 1950 is ripe for a major reform and whilst a case may be made for amendments to key provisions it is our conviction that piecemeal amendments will be unsatisfactory;

(b) Contracts with transnational parties that refer to applicable law being the Malaysian law inexorably draws a question as to what is the law of contract in Malaysia? If the answer is that it is governed by a 19th century Act, it will lead to a decision that the law and jurisdiction of that relevant agreement is made to be the common law of England and Singapore and dispute resolution to be under the Singapore International Arbitration Centre instead of the Malaysian Asian International Arbitration Centre ("**AIAC**").

III. Framework of new Contracts Act

There are model Contracts Codes and Restatement on Contract Law which may assist to frame the new Contracts Act. Examples are the McGregor, Harvey, (1993), *Contract Code: Drawn Up on Behalf of the English Law Commission*, A. Giuffre Editore (Sweet & Maxwell); New Zealand Contract and Commercial Law Act 2017; The American Law Institute, (1981), *Restatement of the Law (Second)*, The American Law Institute; and Andrew Burrows assisted by an Advisory Group of Academics, Judges and Practitioners, (2016), *A Restatement of The English Law of Contract*, Oxford University Press. See also Chapter 8 IV Law of Obligations of Andrew Burrows, (2007), *English Private Law* (2nd Ed), Oxford University Press. See also UNIDROIT Principles of International Commercial Contracts (3rd Ed).

Applicable rules and norms governing market economy demands clarity and certainty. Enormous transaction costs arise with uncertainty besetting the core and fundamental law governing contractual obligations and its disputes.

IV. Areas of Reform

The reform of private law of which law of contract is a prime example is urgent and any law commission that is being anticipated should address areas of private law reform.

The Malaysian Bar has set up a Contract Law Sub-Committee which has met and has charted out working groups that will draft an outline of reform needed for the Contract law under various headings:

(a) Definitions and Interpretations
(b) Formation & Capacity
(c) Voidability and Void Contracts: Mistake, Undue Influence, Coercion (Duress), Misrepresentation and Illegality
(d) Performance & Non-Performance: Frustration
(e) Remedies: Damages and Specific Performance
(f) Unjust Enrichment: Restitution & Quasi-Contracts

V. Solution

Therefore, it is proposed that a Special Taskforce comprising of the relevant Stakeholders including the Judiciary, legal and academic fraternity, the Attorney General's Chambers and other relevant parties be established to draft the new Contracts Act.

Decriminalisation of Suicide

Executive Summary

Position of the Bar: That Section 309 of the Penal Code be repealed.

I. Introduction

1. The act of attempting to commit suicide is a crime punishable by law under Section 309 of the Penal Code. The punishment provided is a term of imprisonment of one year or fine or both.

2. Many of the common law countries including United Kingdom (1961), India (2014), Hong Kong (1967), Sri Lanka (1998), and Singapore (2020) have repealed or have modified versions of Section 309.

3. According to the World Health Organisation (WHO), Malaysia is one of the 25 countries still having specific laws and punishment for attempted suicide – out of 192 countries and territories.

4. In ASEAN, only 3 countries criminalise suicide – Malaysia, Brunei and Myanmar.

II. Issues Pertaining to Attempted Suicide

5. Studies globally have shown that:-
    a. Suicide legislation does not have a deterrent effect.
    b. Suicide rates are neither higher nor lower when suicide is criminalised.
    c. No data suggest that decriminalisation increase suicide. (data from Canada & New Zealand)
    d. Suicide rates tend to decline after decriminalisation of suicide.[1]

[1] Yin Ping, Ng; Rao Panirselvam, Ravivarma. The Endgame of Section 309? An Appeal for Decriminalisation of Suicide. *Malaysian Journal Of Psychiatry.* 28(1):p 1-6, June 2019.

III. Recommendation

6. The recommendations are as below:-

i. To expeditiously table the relevant legislation in Parliament to decriminalise suicide;

ii. To withdraw all pending charges under Section 309 of the Penal Code (Act 574);

iii. To impose a moratorium and not prefer any charges under Section 309 of the Penal Code (Act 574);

iv. During the moratorium period, to instead utilise the provisions under section 10 and 11 of the Mental Health Act 2001 (Act 615) which empowers the police, social welfare officers and the family to bring a person who attempted suicide to undergo a psychiatric evaluation at a hospital;

v. Provide for compassionate care-based approach in risk assessment, management and provide compassionate based care and support mechanism for those facing mental health issue; and

vi. To collaborate with mental health professionals and service providers to manage suicide risks.

Proposed Amendment To Regulation 7 of the Employees' Provident Fund Regulations 2001

Executive Summary

Position of the Bar:

Regulation 7 of the Employee's Provident Fund Regulations 2001 ("EPF Regulations") should be amended to cover situations where the EPF account holder has failed to change his/her nominee after he/she contracts a marriage or subsequent marriage.

I. Introduction

1. A member of the Fund may nominate any natural person to receive his credit due to him at his death [Regulation 6]. Regulation 7, however, provides for several instances on the cessation of nominations, including:
   a) upon the death of the nominee, or, where there is more than one nominee, upon the death of all the nominees, during the lifetime of the member;
   b) by written notice of revocation made in Form EPF 4A; or
   c) by any subsequent nomination in Form EPF 4.

   Provided that a nomination may not be revoked by any will or by any other act, event or means whatsoever.

2. Where a Muslim member dies having made a nomination, the nominee(s) shall receive the credit of such deceased person as an executor and not solely as a beneficiary and shall distribute the credit in accordance with the Islamic law [Regulation 9(2)(a)(ii)].

3. Where a non–Muslim member dies having made a nomination, the credit of the deceased member shall be paid according to the directions of the nomination [Regulation 9(1)].

4. Therefore, a nomination made by a non-Muslim stands unrevoked by his or her marriage.

II. Problems

5. These nominations are usually made by the member at the outset of their working life and many years before they subsequently marry. In the event that a non-Muslim member does not, after his or her marriage, revoke his or her earlier nomination by a subsequent nomination, the credit in his or her account will be paid to the nominee.

6. A non-Muslim member may die without leaving any substantial movable or immovable property (save and expect for his or her EPF credit) to make reasonable provision for maintenance of his dependants [as interpreted by Regulation 2 of the EPF Regulations or by section 3, Inheritance (Family Provision) Act 1971]. And if that non-Muslim member had nominated a person who is not a dependant and who is not inclined to making reasonable provision for maintenance of the deceased member's dependants, then the dependants may be left destitute and in dire straits. In such a situation, the dependants will not be able to obtain an order under the Inheritance (Family Provision) Act 1971 for reasonable provision for their maintenance to be made out of the deceased member's credit in the EPF. The dependants will be left with no legal recourse even though the EPF credit of the deceased member may be substantial.

7. This situation may be compared with the position of a non-Muslim who made a will before his or her marriage. That person subsequently marries and starts a family and neglects to make a new will. Under section 12, Wills Act 1959 (Act 346), a will made by a non-Muslim shall be revoked by his or her marriage save in certain circumstances. [The Wills Act. 1959 does not apply to wills of Muslims – see Section 2(2)]. In the event that person dies, his or her estate will be distributed in accordance with the Distribution Act 1958 wherein provisions are made for the maintenance of the deceased person's dependants, i.e., surviving spouse, children. (see section 6, Distribution Act 1958 as amended).

8. In order to prepare for the contingency described in paragraph 6 above, it is accordingly proposed that Regulation 7 be amended so that insofar as a non-Muslim member is concerned, his or her nomination shall be revoked by his or her marriage. In so doing, his or her EPF credit will be dealt with as if no nomination has been made (see Regulation 8) so that the credit of the deceased number will be paid out to the dependants in

accordance with the Distribution Act 1958. The anomaly described in paragraphs 5 and 6 above can be addressed and the plight of dependants alleviated.

9. As the non-Muslim members retains the power to revoke his or her earlier nomination and/or make a subsequent nomination, the proposed amendment should not prejudice the non-Muslim member's interest or at all.

III. Solutions

10. That the nomination will automatically be revoked upon marriage, without prejudice to the EPF account holder to make a new nomination.

11. Therefore, Regulation 7 of the EPF Regulations be amended by the inclusion of a new subsection 7(e) [in bold] as stated herein:

"7. Cessation of nominations

(1) A nomination shall cease to have effect—

(a) upon the death of the nominee, or, where there is more than one nominee, upon the death of all the nominees, during the lifetime of the member;

(aa) upon the winding up or dissolution of the nominated institution;

(b) by written notice of revocation made in Form EPF 4A;

(c) by any subsequent nomination in Form EPF 4;

(d) for a Muslim member, if –

(i) the nominee has not attained the age of eighteen years when the withdrawal application under paragraph 54(1)(a) of the Act is made by such nominee or his heir; or

(ii) no withdrawal application under paragraph 54(1)(a) of the Act is made by the nominee within one year from the date of the member's death;

(e) upon the marriage and where applicable, upon each and every subsequent marriage of the member without prejudice to the member to make any subsequent re-nomination or nomination in the prescribed form and this regulation shall be applicable with immediate effect save and except for any payments already made by the Board.

(2) The nomination mentioned in subregulation (1) shall not be revoked by any will or by any other act, event or means."

IV. Conclusion

The Proposed amendment as proposed in Regulation 7(e) of the EPF Regulations 2001 will protect the right of the Dependants of the EPF Account Holder after marriage or a subsequent marriage.

Proposed Mental Capacity Act

Executive Summary

Position of the Bar:

That there is a need for a Mental Capacity Act (currently not existing) and amendments to related laws to address serious and growing needs of the rakyat of Malaysia.

The Malaysian Bar proposes that a Mental Capacity Act be legislated in tandem with regulations and a system of supervision and effective dispute resolution to ensure that all stakeholders in the management of care of those with diminished mental capacity have the power to seek the appropriate assistance when required.

I. Introduction

A. Overview

1. Malaysians are living longer and often owning more assets than any other time in history including assets overseas or cyber assets and businesses. Malaysians with impaired mental capacity for any reason (whether temporary, gradual, permanent or similar) require assistance from the law and clear protocols of appropriate steps and action to be taken by trusted individuals with accountability to the law — to ensure among others:-
    a) recognized steps to undertake the mantle of trustee/deputyship over a person with diminished mental capacity
    b) proper medical decision making in such individuals' best interests;
    c) proper management of their funds and assets; and
    d) to ensure those who misuse the privilege of access to person/assets of such Malaysians are called to account.

2. Lifespan and healthspan regrettably are not aligned and many Malaysians are currently in vulnerable positions (including the elderly, impaired, persons with disabilities, persons awarded sizeable judgment sums) where they may be open to neglect or financial abuse unless their diminished mental capacity is recognized by the law and trusted individuals who are answerable to the law are recognized and put in place.

3. The concept of deputyships is one that should be considered and the appropriate system of accountability established under the law.

B. Mental Health vs Mental Capacity

4. Mental health awareness and rights in Malaysia is still in its infancy.

5. There is a significant increase in the adult population of Malaysia being diagnosed with age related diseases eg Alzheimer's and Dementia as well as those with intellectual disabilities which affect their **mental capacity and ability to make decisions**.

6. Mental **Capacity** is distinguished from Mental **Health** in that **Mental Capacity** refers to the ability of a person to make informed decisions in their best interest and to protect themselves from those who may have poor intentions for their well-being.

7. Those with diminished Mental Capacity – may or may not have mental health issues – but nevertheless have cognitive impairments which makes them unable or unsuitable to making decisions for themselves.

C. Mental Capacity Legislation Elsewhere

8. UK & Singapore have introduced a Mental Capacity Act over a decade ago which allows the residents of the countries to plan for the time they are mentally incapacitated (whether permanently or temporarily due to medical treatment, accident or trauma). Such wishes are drafted into a Lasting Power of Attorney filed in the Registry of the Court of Protection and activated only when and if the needs arises due to mental incapacity.

9. The Malaysian Bar believes the time is ripe for Malaysia to have such an Act.

10. Different states in Australia have also established registries and protocols for Enduring Powers of Attorney to assist able adults plan their financial and healthcare futures. The certainty of knowing that asset management has been duly entrusted to someone who may be statutory obliged to act in the best interests of the person to whom they have undertaken obligations, would be reflective of a mature civil society where autonomy

is granted to individuals to self-determine the preferred course of their care and not rely on the discretion of blood relations by default which appears to be the current approach in Malaysia.

II. Problems

11. Malaysia's existing legislation in this area ie the Mental Health Act 2001 ("**MHA**") is inadequate.

12. The current MHA only addresses those who have a mental disorder (or unsoundness of mind) which essentially omits those born with a spectrum of cognitive impairments or neurodivergence (eg autism) or those with temporary or permanent medical conditions (eg stroke, addictions) which cause an inability to make decisions on account of an accident or illness.

13. The MHA does not provide for autonomy or allow any Malaysian to plan ahead by a Lasting Power of Attorney on who will be appointed manage his/her health, finances and care at the time of incapacity.

14. When a person loses Mental capacity, the only option open is to apply to the High Court and seek a declaration under the MHA that the "*Person is mentally disordered and incapable of managing his/her own affairs*". Following the order under the MHA, the Court will appoint a Committee to manage the affairs of the person declared mentally disordered. The Court will have no input on what the wishes of the mentally incapacitated person are.

15. It is time to allow Malaysians and residents of Malaysia to plan for such situations. This will also be a forward looking Act if the country intends to welcome non-Malaysians to consider Malaysia as home (eg MM2H).

16. **Issues relevant to healthcare and the medical community:**

    Currently, medical doctors deal with "family members" when addressing the needs of a person who is unable to give instructions on his medical treatment and care.

a) This system is less than ideal as there may be Malaysians whose kinship with blood relatives are not close and/or who have ideas about their own care which were not articulated to family.

b) Compounding this, complicated family structures abound in Malaysia as in any other country and Malaysians ought to have a formal structure where (i) they may identify whose voice may speak for them at a time they are unable to speak for themselves and/or (ii) they may formally articulate their wishes in recognized written statements, without fear of their views being reframed without their agreement.

c) The current system places too much power in the hands of family members who may put a person with diminished mental capacity at potential peril.

17. **Issues relevant to legal and banking community:**

The current system also is inadequate for the purposes of cognitively impaired accident victims/victims of medical negligence who are unable to make decisions about their needs by placing trust monies into the hands of third parties (including family members) without follow up supervision.

a) Order 76 of the Rules of Court does not require an account of expenses for mentally impaired or disabled parties and there is no current law requiring any stakeholder to provide accounts or accountability for how monies given under a judgement in favour of a person with diminished capacity should be managed.

b) The assumption for example that parents will act in the best interest of a child with diminished mental capacity is naïve as the assumption does not take into consideration the parent's own personal burdens and inter-parent tensions. On the ground, it is widely recognized that parents with a child with diminished mental capacity can have troubled marriages as they grapple over the challenges they face.

c) Similarly, for elderly with funds to meet their financial medical care needs, the state of mental incapacity eg due to Alzheimiers/ Dementia creates difficulties for family members to access those funds to ensure that the elderly receive the care they can afford.

d) The banking industry would benefit from appropriate legislation and guidelines as currently issues arise where access to a person's money is hampered and /or bank accounts rendered dormant cannot be resurrected easily on account of the account holder's mental incapacity and/or inability to physically present themselves to the financial institution.

III. Solutions

18. A snapshot of the segments of society who will benefit from robust provisions of a Mental Capacity Act would include cognitively impaired adults; dementia patients, stroke patients who have limited cognitive abilities; temporarily impaired adults; autistic adults among many others. A first cut list of issues and stakeholders who would benefit from a Mental Capacity Act is attached herewith.

(See, Annexure: Preliminary List of Issues and Stakeholders)

19. The Malaysian Bar's vision for a Mental Capacity Act includes a mechanism for the appointment of deputies and guardians together with judicial scrutiny and/or oversight. This would be an essential tool and aid in an aging society as well as provide a road map for those who want to protect the assets of vulnerable adults in the community.

20. A formal framework would enable cognitively aware adults to also pre-plan the appropriate steps to be taken by their preferred deputies/guardians at a time they have diminished capacity and are at risk of becoming victims of neglect, fraud or improper motives (to be monitored under the supervision of the Court of Protection to be set up under a Public Guardian).

21. At the same time, the healthcare and banking community can be motivated to formulate corresponding guidelines and SOPs to handle some of the more challenging end-of-life issues that often arise at the bedside of incapacitated individuals.

22. Naturally, in considering a Mental Capacity Act, other related legislation would need to be looked at for amendment and/or fortification eg Powers of Attorney Act, Companies Act, Child's Act, Disability Act (when it is legislated).

IV. Conclusion

23. Justice, fairness, opportunity and equality are central values in the law which should be reflected in the establishment of a Mental Capacity Act which addresses the members of society who need assistance and protection.

24. Accountability and Supervision of trust relationships established in favour of persons with diminished mental capacity should become mainstream.

List of Issues / Considerations / Parties and Stakeholders Involved (Preliminary) which should be addressed by a robust Mental Capacity Act

1. **Eldercare (Legal)**
   - Ombudsman/ Government Mediation Centre
   - Senior citizen rights/ care/ decision-making protection

   Issues to be looked at

   - Financial abuse
   - Capacity to make decisions
   - Independent living and support services
   - Supervision of nursing home
   - Consent
   - Physical and emotional abuse

2. **Eldercare (Medico-Legal)**
   - Consent taking
   - End of Life issues
   - Surrogate Decision-Making
   - Guidelines for content of court reports from a psychiatrist /geriatrician /neurologist

3. **Disabled (cognitive impairment)**
   PWD – Persons with Disabilities

4. **Deputyship and Lasting Powers of Attorney Protocols** (which covers the whole system) – what would work in Malaysia
   - Legislation which is required
   - Cross-border deputyship / authority
   - MM2H

5. **Tribunal for Alternate Dispute Resolution**
   Tribunal for the Care of Parents/ Impaired Dependants of an Estate
   Mediation/Adjudication (Ombudsman)

6. **Muslim Estates**
   - Mental Capacity and decision making issues in relation to Muslim estates and family dynamics. *Are there fatwas? Implication of Faraid principles.*
   - Mental Capacity and decision making issues in relation to Muslim converts with no muslim next of kin.
   - How would the Lasting Powers of Attorney work in these contexts.

7. **Motor Accident and Medical Negligence Victims** who are represented by next friends/next of kin –
   - Statutory duties to account for damages received
   - Authority for public trustee to scrutinize expenses made on behalf of victims.

8. **Care Organisations** – what they require from the law or society
   - Dementia carers (general caregivers)-
     - *Aging experience*
     - *Voice of the Aged*
     - *Voice of the Carers*
     - *Aging preparation*

   - Policy on care giving/access & legal implications
   - Policy grievance
   - Interfacing with authorities /caregiving

9. **Prison Systems and the Criminal Justice System** – what should be provided in the Mental Capacity Act to address this.

10. **Refugees / Asylum seekers**
    - Those who have mental capacity issues
    - Who has the right to speak on their behalf (if at all) – Human Rights issue.

National Security Council Act 2016

Executive Summary

Position of the Bar: Repeal the National Security Council Act 2016 ("NSC Act")

I. Introduction

1. The NSC Act poses a serious threat to the current system of a constitutional government.

2. It is a security law that arms the Executive with vast powers and impedes on fundamental rights under Articles 5, 9, 10 and 13.

3. It allows the Government to restrict movement of its people, abandon civil liberties, and administer areas centrally and directly, bypassing state and local government. It avoids public scrutiny and proper accountability, and promotes unfettered discretion and an environment of impunity.

4. While the NSC Act was amended in 2020 [National Security Council (Amendment) Act 2020] replacing some of the roles of the Prime Minister with the Yang di-Pertuan Agong, concerns remain regarding the vesting and concentration of enormous executive and emergency-like powers in the National Security Council ("NSC") and the security forces.

II. Problems with the NSC Act

5. Generally –

   5.1 There is an absence of any reference to relevant provisions of the Federal Constitution such as Article 149 (Legislation against subversion, organized violence, and acts and crimes prejudicial to the public) or Article 150 (Emergency Powers) of the Federal Constitution in the preamble to the Act despite the wide powers on matters concerning national security and, further, the provisions for the exercise of emergency-like powers.

6. Specific provisions –

6.1 <u>The unbridled power given to the NSC under the s 5 of NSC Act to "control" and "issue directives" to the Government entities even without declaration of an area as a "security area"</u>

i. The functions of the NSC include "*to perform any other functions relating to national security for the proper implementation of this Act"* (see s. 4(d)).

ii. The NSC also has the power to *"control*" and "*issue directives*" to "*any ministry, department, office, agency, authority, commission, committee, board or council of the Federal Government, or of any of the State Governments, established under any written law or otherwise"* on operations or matters concerning national security (see s. 2 and 5). This section appears to operate even in the absence of a declaration of a security area under s. 18.

iii. A whole host of instrumentalities of the Federal Government or State Governments — which could include Bank Negara Malaysia, Securities Commission and the Malaysian Anti-Corruption Commission — could possibly be made subservient to the NSC. The independence of these entities could be irreversibly compromised or undermined.

iv. This appears to be an unprecedented conferment of executive powers on a statutory body by Parliament, and these enormous powers are available to the NSC even where the conditions for the declaration of a security area are not met.

v. Further, s. 17 empowers the NSC to demand that all government entities transmit national security-related information or intelligence to it immediately, making the NSC the sole intelligence coordinating agency of the country.

6.2 <u>Vast powers of the security forces</u>

i. S. 26 of the NSC Act states that any member of the security forces *"may, without warrant, arrest any person found committing, alleged to have committed or reasonably suspected of having committed any offence under any written laws in the security area"*.

ii. The security forces also have powers to *stop and search individuals*; use of reasonable and necessary *force; enter and search any premises*; and *take possession* of any land, building or movable property (such as cars) in a security area (see ss 25 to 34).

iii. As such the NSC Act allows for the military to be deployed for an internal security operation other than armed conflict.

iv. These wide and sweeping powers are unprecedented and is further exacerbated by the absence of any requirement of accountability and transparency in decision-making processes throughout the NSC Act.

6.3 Violation of constitutional guarantees and fundamental rights of citizens

All constitutional guarantees and fundamental rights of citizens in respect of arrest, search and seizure of property in ss 25 to 30 violates the constitutional guarantees and fundamental rights of citizens enshrined in the Federal Constitution.

6.4 Power to dispense with inquests

i. S. 35 of the NSC Act allows a Magistrate or a coroner to dispense with inquests in respect of members of the security forces and persons killed within the security area, as long as the Magistrate or coroner *"is satisfied that the person has been killed in the security area as a result of operations undertaken by the Security Forces for the purpose of enforcing any written laws"*.

ii. *"Written laws"* are not defined, and could well include laws in respect of minor offences. Thus, this provision permits security forces to use disproportionate force that could result in the loss of lives, with impunity, and, coupled with the dispensation of inquests, may severely curtail redress for the victims of human rights violations.

III. Solution

7. Repeal the NSC Act.

IV. Conclusion

8. The NSC Act is a potent security law that confers sweeping and wide-ranging emergency-like powers on the NSC, as well as on the Director of Operations and security forces upon the declaration of a security area.

9. The NSC Act permits serious violations of fundamental liberties guaranteed under Articles 5, 9, 10 and 13.

10. It ought to be repealed.