



Guernsey Association of Trustees

**Comments on the Policy and Resources Committee's Consultation Paper in Relation to
Transparency and Beneficial Ownership of Legal Arrangements dated 23 January 2023**

(the **Consultation Paper**)

By email only to policyandresources@gov.gg

1. INTRODUCTION AND BACKGROUND TO OUR COMMENTS

- 1.1 We have reviewed the Consultation Paper and discussed the same at a meeting of a joint GAT/STEP Technical Committee on 20 February 2023.
- 1.2 The comments below take into account the matters discussed at the meeting held at Harbour View, The Albany on 27 August 2020 (the **2020 Meeting**) which was attended by Richard Walker of P&R and representatives of the joint GAT/STEP Technical Committee.
- 1.3 This response is submitted on behalf of GAT, an industry association representing the regulated fiduciary sector in Guernsey, and represents the views of the above-mentioned joint GAT/STEP Technical Committee. As these are the views of that committee, and do not represent the views of any single individual.

2. GENERAL COMMENTS

- 2.1 We are grateful for the opportunity to provide feedback to the Consultation Paper. Please note that, as GAT is the representative body of the fiduciary industry, our comments are limited to the changes proposed in relation to trusts and trustees and this response makes no comment in respect of the changes proposed in respect of limited partnerships.
- 2.2 We note that the rationale given in the Consultation Paper for the proposed amendments focuses on a perceived need to address Recommendation 25 of the FATF Recommendations covering transparency and beneficial ownership of legal arrangements (**Recommendation 25**) in respect of which P&R/the Law Officers have identified potential gaps in the existing legislation. We understand that these gaps relate to:
 - (a) unremunerated Guernsey resident Trustees of Guernsey law trusts; and
 - (b) Trustees of Guernsey law trusts who are not resident in the Bailiwick.
- 2.3 We note also that the changes proposed in the drafts of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Amendment) Ordinance, 2023 (the **Ordinance**) and the Criminal Justice (Proceeds of Crime) (Trustees and Partners) (Amendment) Regulations, 2023 (the **Regulations**) are stated to be in line with similar provisions adopted in the Isle of Man and the Cayman Islands.

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2.4 Our general comments, which underpin our detailed responses to specific aspects of the proposals which are set out below, are as follows:

(a) Our first substantive comment relates to the extra territorial effect of the proposed Ordinance and regulations:

(i) As was raised at the 2020 meeting, we have some concerns about the apparent disconnect between Recommendation 25 and the subsequent Guidance on Transparency and Beneficial Ownership issued in 2014 (the **Guidance**) at paragraphs 53 to 68. The former requiring Countries to take measures to prevent the misuse of trusts in their jurisdiction, whilst the latter suggests that this should extend to trusts written under a Countries' law, irrespective of where it is actually administered.

(ii) The Guidance recognises specifically (at paragraph 63) that *"if a trust is created under the law of one country, but the trust is administered (and the trustee and trust assets are located) in a different country, the latter is likely to have more contact with the trust and its assets, as well as persons or entities involved in the trust. Therefore, that country should be the country responsible for the trust and implement appropriate sanctions as necessary."* We agree with this analysis.

(iii) The draft Ordinance in its current form goes further than this and seeks to regulate trustees outside of the Bailiwick simply because the trusts they administer may have been written under Guernsey law. We are concerned as to the necessity and viability of such provisions seeking to have extra-territorial effect, particularly in circumstances where the Guidance recognizes that if, for example, you have a Swiss or Singapore trustee of a Guernsey law trust it should be the Swiss or Singapore authorities who ought to have responsibility for the Trust, not those of the Bailiwick. We would also query how the GFSC and Specified Business could be expected to effectively monitor compliance with the record keeping requirements of the draft Ordinance and Regulations where a trustee is not within the jurisdiction.

(iv) The Consultation Paper suggests that the proposed changes are in line with those taken in the Isle of Man and the Cayman Islands following their recent MoneyVal inspections. We would note however that with the Cayman Islands' revisions to their Trusts Act, whilst there may be an argument that the references to "a trustee" mean any trustee, wherever based, these appear to stop short of expressly claiming that the legislation has extra-territorial effect. We consider there is real doubt on the question of whether Guernsey has the power to legislate with extra territorial effect and would prefer a solution as suggested below (and similar to Cayman) where the Ordinance stops short of purporting to do so.

(b) Our second substantive comment relates to the potential unintended consequences of the draft Ordinance for local trustees who are not acting so *"by way of business"* and might inadvertently find themselves guilty of an offence under the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the **POC Law**):

(i) We accept that there is a gap in the current regulatory regime in Guernsey which means that an unremunerated person acting as a trustee in Guernsey

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- (ii) is not subject to a requirement to obtain a license from and therefore supervision by the GFSC.
- (iii) We are concerned however that as currently drafted, the draft Ordinance is so broad as to cover activities which are specifically exempted under the Regulation of Fiduciaries, Administration Businesses and Company Directors etc. (Bailiwick of Guernsey) Law, 2020 (the **Fiduciaries Law**), specifically persons who are acting as executors of wills or trustees of will trusts for locally resident or domiciled individuals.
- (iv) These are individuals and estates who would normally be regarded as low risk from an AML/TF perspective and we are concerned that there may be individuals who have taken on such responsibility out of a sense of personal obligation who may then find themselves in breach of the POC Law.
- (v) We would therefore suggest that consideration is given as to whether the definition of "relevant trust" could specifically exclude such activities, as with the Fiduciaries law.
- (vi) If this is not deemed to be feasible we would urge the Committee to give serious consideration to undertaking a local publicity campaign to raise awareness of the proposed changes and the requirements thereunder.

3. DETAILED COMMENTS

3.1 The draft Ordinance:

- (a) Clause 1(2)(b) – We would suggest that the definition of "relevant trust" be amended by deleting the words "*established in the Bailiwick or elsewhere*" such that it reads:

*"**relevant trust**" means an express trust that is governed by or is otherwise subject to the law of any part of the Bailiwick".*

This deletion would leave the effectiveness of the definition unchanged since it would still cover all Guernsey law trusts wherever administered, however (as with the Cayman amendments) it would stop short of specifically claiming to have extra territorial effect.

- (b) Clause 1(2)(c) – We would suggest that the definition of "unregulated officer" be amended by deleting the words "*who is resident*" and the words "*that is incorporated, in the Bailiwick or elsewhere*" such that it reads:

*"**unregulated officer**" means an individual or an entity who –*

(a) is a trustee of a relevant trust or a partner of a relevant partnership (other than a limited partner in the case of a limited partnership), and

(b) in that capacity, neither holds, nor is required to hold, a fiduciary licence within the meaning of Schedule 1,".

This deletion would leave the effectiveness of the definition unchanged since it would still cover all trustees of Guernsey law trusts wherever they are based, however (as with the Cayman amendments) it would stop short of specifically claiming to have extra territorial effect.

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- (c) Schedule 6, Clause 3(2)(a) – We note that the requirement under the Guidance to retain records for a period of 5 years (at paragraph 63(b)) is specifically made for professional Trustees. We query therefore the appropriateness of such a provision as it relates to unremunerated local trustees for locally resident or domiciled individuals and refer the Committee to our comments at 2(b) above.

3.2 The Regulations: - We have no comments on the Regulations.

4. CONCLUSION

4.1 We hope the above feedback is helpful. Please do not hesitate to contact us if you have any questions or wish to discuss any aspect of our feedback further.

Submitted on 28/02/2023 by email to policyandresources@gov.gg.