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**A FRAMEWORK FOR THE INCLUSION OF NON-
CHARITABLE PURPOSE TRUSTS IN NEW ZEALAND
TRUST LAW**

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I Introduction

Trusts have been popular since their inception in medieval England.¹ In New Zealand alone, “commentators have estimated that the number of trusts may range up to 400,000”.² Through the “development from century to century of the trust idea”,³ trusts have evolved from their first iteration, known then as the ‘use’,⁴ to become a “more flexible obligation”.⁵ In more recent times, new types of trusts have emerged that redefine the trust concept and modify “aspects of the traditional model”.⁶ A number of new types of trusts and other “significant developments in trust law” can be attributed to offshore jurisdictions.⁷ One such development is the offshore validation of non-charitable purpose trusts. Non-charitable purpose trusts are not currently permitted under New Zealand trust law. This research paper explores non-charitable purpose trusts and then proposes a legislative framework for the inclusion of these trusts in New Zealand.

First, this paper outlines the traditional model of a trust and discusses how purpose trusts (including non-charitable purpose trusts) differ. This includes the general rule that they are invalid and the exceptions to the general rule. Second, it considers the main conceptual challenge to non-charitable purpose trusts, the beneficiary principle, and how this can be overcome, before introducing the other validity considerations that arise from the lack of a beneficiary. Third, it discusses how offshore jurisdictions have legislated to permit non-charitable purpose trusts, including the new role of the trust enforcer. Finally, this paper proposes a legislative framework for non-charitable purpose trusts in New Zealand and discusses the wider implications of this.

¹ James P Webb “An ever-reducing core? Challenging the legal validity of offshore trusts” (2015) 21 *Trusts & Trustees* 476 at 477.

² Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at [1.13] (footnotes omitted).

³ FW Maitland *Equity* (2nd ed, Cambridge University Press, Cambridge, 1936).

⁴ Webb, above n 1, at 477.

⁵ David Hayton “Developing the obligation characteristic of the trust” (2001) 117 *LQR* 96 at 96.

⁶ Adam Hofri-Winogradow “The Stripping of the Trust: A Study in Legal Evolution” (2015) 65 *UTLJ* 1 at 3.

⁷ Rose-Marie Belle Antoine “The offshore trust: a catalyst for development” (2007) 14 *Journal of Financial Crime* 264.

II Background

A Common Law Trusts and the Beneficiary Principle

A traditional common law trust is, conceptually, a legal arrangement involving three parties; a settlor, trustee and beneficiary.⁸ In a simplistic sense, a trust is created when a settlor transfers the ownership of some specified property to a trustee, who holds the legal title to the property in trust “for fixed beneficial interests” for the beneficiary.⁹

Under the traditional model, a trust must have one or more beneficiaries (or “an identifiable class of persons”)¹⁰ with “locus standi to apply to the court to enforce the trust”.¹¹ This is known as the beneficiary principle.¹² The requirement for a trust to have a beneficiary is one of the three certainties that must be present for a trust to be valid;¹³ “there must be somebody, in whose favour the Court can decree performance”.¹⁴

B Purpose Trusts

A purpose trust differs from a traditional trust because it does not have a beneficiary. As the name suggests, a purpose trust, instead, exists to fulfil a specific purpose. As a general rule, in most common law countries, it is not possible to have a purpose trust because the “lack of beneficiaries: human beneficiaries”¹⁵ “is fatal to its validity”¹⁶ and any “attempt to create such a vehicle would fail”.¹⁷ Purpose trusts are considered to be invalid, primarily, because they run afoul of the beneficiary principle.

⁸ Paul Matthews “Trusting On Purpose: The Trusts (Amendment no: 3) (Jersey) Law 1996” (1997) 1 Jersey Law Review.

⁹ David Hayton “The future of the Anglo-Saxon trust in the age of transparency” (2015) 29 Tru LI 30 at 30.

¹⁰ Sebastien Moerman “Non-Charitable Purpose Trusts: The Mutation of Trust Law” (2000) 6 Trusts & Trustees 15 at 17.

¹¹ *Re Denley’s Trust Deed* [1969] 1 Ch 373.

¹² *Morice v Bishop of Durham* [1805] EWHC Ch J80.

¹³ *Knight v Knight* (1840) 49 ER 58; Paolo Panico “Private purpose foundations: from a classic ‘beneficiary principle’ to modern legislative creativity?” (2013) 19 Trusts & Trustees 542 at 543.

¹⁴ *Re Denley’s Trust Deed*, above n 11.

¹⁵ Moerman, above n 10, at 15.

¹⁶ David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (17th ed, LexisNexis Butterworths, London, 2006) at [1.74].

¹⁷ Paul Egerton-Vernon “Purpose Trusts” (1998) 4 Trusts & Trustees 17 at 17.

1 *Charitable trusts and anomalous exceptions to the beneficiary principle*

There are some exceptions to the general rule invalidating purpose trusts. The most recognisable exceptions are charitable purpose trusts. Purposes that are considered to be charitable are determined by statute. In New Zealand, for example, under the Charities Act 2005, charitable purpose means “every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”.¹⁸

Charitable trusts, like other purpose trusts, lack a beneficiary. While it is arguable “that ‘society’ as a whole is the beneficiary” because charity benefits the public, charitable trusts are more commonly thought of as an exception to the beneficiary principle.¹⁹ In the absence of a beneficiary, the Attorney-General “has status to enforce the trust on behalf of the charitable purposes”.²⁰

Over time, in addition to charitable trusts, other specific exceptions have been held to be valid by the courts, despite lacking beneficiaries.²¹ However, these exceptions are limited and unlikely to be extended by the English Courts because they are thought to be “troublesome, anomalous and aberrant”.²²

2 *Non-charitable purpose trusts*

On the other hand, non-charitable purpose trusts are trusts “in which property is held by trustees on trust to carry out specific purposes which do not qualify as charitable purposes”.²³

In the offshore context, trust law has developed to meet “the peculiar needs of offshore investment” with “an alternative legal system ... created purely for commercial reasons”.²⁴ It is within this environment that non-charitable purpose trusts have been validated through

¹⁸ Section 5. See also Charitable Trusts Act 1957, s 2.

¹⁹ Moerman, above n 10, at 16.

²⁰ Moerman, above n 10, at 16.

²¹ See J C H Morris and W Barton Leach *The rule against perpetuities* (2nd ed, Sweet & Maxwell, London, 1962).

²² *Re Endacott* [1960] Ch 232.

²³ Sebastien Moerman “Non-Charitable Purpose Trusts: The Offshore Response” (1999) 6 *Trusts & Trustees* 21, at 21.

²⁴ Antoine, above n 7, at 265.

legislation in spite of their invalidity under the traditional trust model. There was a private (and often commercial) need for a vehicle of this type in offshore jurisdictions.²⁵

Paul Egerton-Vernon lists some uses for a non-charitable purpose trust as:²⁶

- (1) off balance sheet transactions and securitisation;
- (2) division of voting and economic benefit;
- (3) investment in family companies; and
- (4) ownership of trust companies.

III Overcoming the Beneficiary Principle

As discussed in Part II of this paper, non-charitable purpose trusts lack a beneficiary and are generally considered invalid because of this. This prompts the question, does the lack of a beneficiary “stretch the trust ... beyond conceptual breaking point” and cause non-charitable purpose trusts to be conceptually unsound?²⁷ Part III of this paper submits that non-charitable purpose trusts are able to overcome the beneficiary principle. Through an examination of the nature of a beneficiary’s interest, it is arguable that this interest is not crucial to the validity of a trust.

There has been substantial academic debate on the issue of how to describe a beneficiary’s interest. Those who have considered this issue have been unable to definitively agree causing “the precise nature of this interest” to remain uncertain.²⁸ Nevertheless, two theories of trust law have emerged that are often used, together and separately, to explain the nature of a beneficiary’s interest in a trust. These theories are the proprietary and obligational theories of trust law, this paper discusses each in turn.

A The Proprietary Theory

Under the proprietary theory “both the trustee and the beneficiary are owners of the trust property, the trustee at law and the beneficiary in equity”.²⁹ The proprietary theory “is widely assumed in the textbooks and in ordinary usage” and is commonly referred to as dual or split ownership of trust property.³⁰ The beneficiary’s equitable interest in the trust

²⁵ Moerman, above n 23, at 21.

²⁶ Egerton-Vernon, above n 17, at 19.

²⁷ Webb, above n 1, at 477 (footnotes omitted).

²⁸ Ian Rowe and Simon Weil *Working with Trusts* (online looseleaf ed, Thomson Reuters, accessed 16 May 2018) at [1.2].

²⁹ Peter Jaffey “Explaining the trust” (2015) 131 LQR 377 at 386 (footnotes omitted).

³⁰ Jaffey, above n 29, at 386.

property is a “series or collection of potential rights”,³¹ “against all the world, to all the benefit of property, save for the right of control, which is given to someone else ... a trustee”.³² It is this bundle of rights that over time “became assimilated in English law to property rights”.³³

If a beneficiary does have property rights in trust property, then the lack of a beneficiary creates a conceptual hurdle for non-charitable purpose trusts because it would lead to, at least in part, ownerless trust property. However, this paper submits that the requirement for a beneficiary to be the equitable owner of trust property cannot be an absolute rule. The conceptual hurdle can be overcome by looking at examples of valid trusts where there is no equitable ownership. The first example are charitable trusts that validly exist without beneficiaries. Second, the limited list of anomalous exceptions that were discussed in the case *Re Endacott* also did not have beneficiaries.³⁴ Third, discretionary trusts “in favour of a large class which is too large to list”.³⁵ In the case of a discretionary trust, the beneficiaries cannot be said to have “any right of possession or enjoyment”³⁶ in the trust property, instead, the beneficiaries have a “mere *spes*, or hope, of obtaining the absolute ownership”,³⁷ their interest “is treated as not proprietary”.³⁸

The proprietary theory is also arguably problematic because it “all depends on what you mean by property” and massively relies on the English law notion property rights.³⁹ What constitutes a property right differs across jurisdictions. For example, what might be considered a property right in English law may not be a property right in a civil law country because “in English law the requirements for a right to be regarded as a property right are less rigorous and conceptual than they are in the civilian systems”.⁴⁰ Scotland is another example, “the beneficiary in a Scots law trust is treated merely as ... having only a right in

³¹ Paul Matthews “From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust” in David Hayton (ed) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, London, 2002) at 208.

³² Jaffey, above n 29, at 387.

³³ Matthews, above n 31, at 206 (footnotes omitted).

³⁴ *Re Endacott*, above n 22.

³⁵ Mark Pawlowski “Purpose trusts: obligations without beneficiaries? (2002) 9 *Trusts & Trustees* 10, at 10.

³⁶ Matthews, above n 31, at 211.

³⁷ Matthews, above n 31, at 211 (footnotes omitted).

³⁸ Matthews, above n 31, at 211 (footnotes omitted).

³⁹ Matthews, above n 31, at 210.

⁴⁰ Matthews, above n 31, at 209.

personam”⁴¹ because the right “belonging to the beneficiary was not – and is not – such as to qualify as ‘property’ within the meaning of the Scottish legal system”.⁴²

Given that there are examples of valid trusts where there is no equitable ownership, including discretionary trusts where beneficiaries cannot be said to have property rights and differing notions of what is meant by having a property right across jurisdictions, it follows that the use of the proprietary theory to explain a beneficiary’s interest “must be inadequate”.⁴³ Therefore, the lack of equitable owner of trust property in a non-charitable purpose trust does not stand in the way of its validity.

B The Obligational Theory

Under the obligational theory, a beneficiary’s equitable interest “is a personal right against the trustee to the performance of the trustee’s duty to hold the trust property and distribute it in accordance with the trust”.⁴⁴

This is in line with the historical origins of the trust. A trust at its inception was “founded on *conscience*, ... on *personal obligation*, owed by” the trustee to the beneficiary:⁴⁵

conscience has remained the linchpin in the trust relationship through the centuries, down to today. ... If the conscience of the owner is not affected, there can be no trust obligation owed by him to a beneficiary.

This sentiment was echoed more recently in the case *Armitage v Nurse*:⁴⁶

there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

If the “trust is no more than a series of obligations and liabilities *annexed to property*”,⁴⁷ does it matter whether the trustees have “accountability to beneficiaries ... or ... just

⁴¹ Matthews, above n 31, at 209 (footnotes omitted).

⁴² Matthews, above n 31, at 210.

⁴³ Matthews, above n 31, at 213 (footnotes omitted).

⁴⁴ Jaffey, above n 29, at 378.

⁴⁵ Matthews, above n 31, at 205 (footnotes omitted).

⁴⁶ *Armitage v Nurse* [1998] Ch 241 at 253.

⁴⁷ Matthews, above n 31, at 216 (footnotes omitted).

accountability to someone”?⁴⁸ It is arguable that there need only be “some person intended by the settlor to have *locus standi* to enforce the trustee’s duties”.⁴⁹

It is also arguable that the person with the right of enforceability may not need to have any interest in the trust property, “the critical thing is that [the] intention of the settlor in creating the trust was to confer” the right of enforcement upon someone and “the trustee ... owed the [correlative] duty” to that person.⁵⁰ Previous trust cases that “were outside the mischief of the beneficiary principle”⁵¹ were invalid because there was no-one who had “rights enforceable against the trustees”.⁵² They lacked an express provision in the trust deed where the settlor conferred “*locus standi* on an enforcer” who could “sue to enforce the ... trust”.⁵³ Therefore, as long as the trust deed expressly provides for someone to enforce the trust, non-charitable purpose trusts may be valid.

In light of the discussion contained in Part III of this paper, it is submitted that non-charitable purpose trusts are arguably conceptually sound. The lack of a beneficiary does not stretch the trust “beyond conceptual breaking point”.⁵⁴

IV Further Validity Considerations

The road to validity does not end by overcoming the beneficiary principle. There are a number of other validity considerations that arise from the lack of a beneficiary. Part IV of this paper introduces these other considerations. These are; the rule against perpetuities, certainty of object, enforcement of the trust, and public policy.

A The Rule Against Perpetuities

The rule against perpetuities requires that “all contingent future interests not fully vested either vest or fail to vest within the lifetime of a living person plus an additional twenty-one years” to prevent trusts existing (and the trust property being alienated) indefinitely.⁵⁵

⁴⁸ Hayton, above n 5, at 98.

⁴⁹ Hayton, above n 5, at 98 (footnotes omitted).

⁵⁰ Matthews, above n 31, at 218 (footnotes omitted).

⁵¹ *Re Denley’s Trust Deed*, above n 11.

⁵² *Armitage v Nurse*, above n 46.

⁵³ Hayton, above n 5, at 99 (footnotes omitted).

⁵⁴ Webb, above n 1, at 477.

⁵⁵ Richard Ausness “Non-charitable Purpose Trusts: Past, Present and Future” (2016) 51 *Real Property, Trust and Estate Law Journal* 321, at 329 (footnotes omitted).

Interestingly, as will be seen in Part V of this paper, “a large number of states have modified the Rule ... or abolished it altogether”.⁵⁶

Without a beneficiary, there is no lifetime to use as the measure of when a trust is to come to an end. This means that there needs to be an alternative mechanism to provide for the duration of a non-charitable purpose trust. In jurisdictions where the rule against perpetuities has been abolished altogether this may not be necessary. In addition, because there are no beneficiaries, the trust property in a non-charitable purpose trust will not vest in any person at the expiry of the trust. The result of this is that, there also needs to be a mechanism to provide for the disposal of trust property at the expiry of the trust.

B Certainty of Object

In place of a beneficiary, a non-charitable purpose trust must still have certainty of object, one of the three certainties, in order to be valid.⁵⁷ This means that a non-charitable purpose trust must “not only have certainty with respect to the objectives of the trust, but also certainty that these objectives can actually be attained”.⁵⁸ So that the trust is “capable of execution”,⁵⁹ the purpose of the trust must be “sufficiently clear and definite” in both “form and substance”.⁶⁰

Closely related to certainty of object is the cy-près doctrine. The cy-près doctrine is used primarily in charitable trusts and “allows the court to apply the trust property to a purpose as close as possible to the original one” where there is uncertainty of object.⁶¹ This paper suggests that the cy-près doctrine or a variant of the doctrine should apply to non-charitable purpose trusts to enable the court to vary the terms of the trust where it otherwise would be void for uncertainty.⁶²

C Enforcement of the Trust

Following from the discussion on the obligational theory in Part III of this paper, for a non-charitable purpose trust to be valid there needs to be someone who can enforce the trust. Offshore jurisdictions, in legislating to permit non-charitable purpose trusts, have created

⁵⁶ Ausness, above n 55, at 329 (footnotes omitted).

⁵⁷ *Knight v Knight*, above n 13.

⁵⁸ Ausness, above n 55, at 330 (footnotes omitted).

⁵⁹ Ausness, above n 55, at 330.

⁶⁰ Scottish Law Commission *Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law* (DISCUSSION PAPER 148, 2011) at [12.6].

⁶¹ Johanna Niegel “Purposeful trusts and foundations?” (2012) 18 *Trusts & Trustees* 451, at 453, n 17.

⁶² Scottish Law Commission, above n 60, at [12.20].

the role of a trust enforcer. An enforcer is appointed in a non-charitable purpose trust “to oversee the trustees ... [and] ensure that the trust is administered to satisfy the purpose for which it was established”.⁶³ Examples of legislation relating to enforcers are discussed in Part V of this paper.

D Public Policy

In any jurisdiction, whether relating to non-charitable purpose trusts or trusts in general, there will always be public policy considerations. The purpose of a non-charitable purpose trust must not be contrary to public policy. In relation to public policy, legislation can place specific constraints on the purpose of a trust, examples of this are seen in the discussion of offshore legislation in Part V. Alternatively, public policy considerations may already inherently exist in trust legislation or other external regimes as a result of legislative drafting, examples of this are discussed in the New Zealand context in Part VI.

E Conclusion

It is submitted that non-charitable purpose trusts can be consistent with the all of these considerations so long as the terms of the trust are “drafted in sufficiently definite form” and in a way that complies with the trust legislation of the jurisdiction where the trust is created.⁶⁴

V Offshore Legislation

A number of offshore jurisdictions have enacted legislation to permit non-charitable purpose trusts. Non-charitable purpose trusts were first validated by legislation in 1926 in Liechtenstein. Over the subsequent decades, other jurisdictions followed suit.⁶⁵ Beyond these jurisdictions, the argument for validation of non-charitable purpose trusts is gaining international traction. Significantly, The Hague Convention on the Law Applicable to Trusts acknowledges trusts for a ‘specified purpose’ as valid trusts.⁶⁶ Additionally, in Scotland, the Scottish Law Commissions have recommended, after considering their validity at length, that their legislation “should provide for the existence of” non-charitable purpose trusts.⁶⁷ Part V of this paper considers examples of existing offshore legislation,

⁶³ Tsun Hang Tey “The Duties of a Trust Enforcer” (2010) 22 SAclJ 363 at 365.

⁶⁴ Scottish Law Commission, above n 60, at [12.6].

⁶⁵ Moerman, above n 23, at 21.

⁶⁶ Convention on the Law Applicable to Trusts and on their Recognition 1664 UNTS 311 (concluded 1 July 1985, entered into force 1 January 1992), art 2.

⁶⁷ Scottish Law Commission *Report on Trust Law* (SCOT LAW COM No 239, 2014) at [14.40].

that permit non-charitable purpose trusts, from the Cook Islands, Jersey, and the Cayman Islands.

A The Cook Islands

Offshore trusts in the Cook Islands are governed by the International Trusts Act 1984 (Cook Islands). While this legislation retains “the familiar fundamentals of the ... trust concept” from English common law it also gives “increased flexibility ... to meet the specific requirements” of settlors through a variety of different trust types, including non-charitable purpose trusts.⁶⁸

The Cook Islands’ legislation, provides that:⁶⁹

... a trust ... shall not be void ... by virtue of the fact that the trust fund shall be held for a purpose or purposes ... and any trust so created shall be enforceable on the terms set out in the trust instrument by the person or persons ... appointed to enforce the trust.

The person appointed by the trust deed to enforce the trust cannot also be a beneficiary under the trust.⁷⁰ The legislation, however, is silent on whether the enforcer can also be the settlor or a trustee of the trust. The enforcer of the trust can resign, be removed or be replaced in accordance with the trust deed or if that is not possible by application of the trustees to the court “for directions or for another person ... to be appointed by the Court to enforce the trust”.⁷¹

In the Cook Islands the rule against perpetuities has “no application to an international trust” but provisions can be made in the trust deed to provide for the termination of the trust.⁷² If the “terms relating to termination of the trust” cause the trust to be void for uncertainty and the “uncertainty would be removed by imposing a date for termination ... then the trust shall terminate ... 100 years from the date of creation of the trust”.⁷³ The legislation does not provide guidance for how assets are to be disposed of on the termination of a non-charitable purpose trust.

⁶⁸ Ronnie Summers “Cook Islands” (2007) 13 *Trusts & Trustees* 356, at 356.

⁶⁹ Section 12(2).

⁷⁰ Section 12(2).

⁷¹ Sections 12(3) and 12(4).

⁷² Section 6(1).

⁷³ Section 6(3).

Interestingly, in comparison to the other jurisdictions discussed below, the Cook Islands' legislation does not include any further provisions specifically for non-charitable purpose trusts. The legislation does not provide any restriction on the purpose of the trust nor does it contain a provision specifying that the purpose of the trust must be consistent with public policy

B Jersey

Much like the Cook Islands International Trust Act, the Trusts (Jersey) Law 1984 (Jersey) has its roots in the principles of English law but as an innovative piece of legislation, that was “designed for the offshore environment”, has “departed from English legal principles in a number of respects” including the recognition of non-charitable purpose trusts.⁷⁴

In Jersey, “a trust shall be valid and enforceable in accordance” with its terms.⁷⁵ Where a trust is “created for a purpose in relation to which there is no beneficiary, not being a charitable purpose”⁷⁶ (in other words, a non-charitable purpose trust), it will be invalid unless:⁷⁷

the terms of the trust provide for the appointment of an enforcer in relation to its non-charitable purposes, and for the appointment of a new enforcer at any time when there is none.

An enforcer is under a duty to enforce the purposes of the trust and cannot also be a trustee (the legislation does not specify whether the enforcer of the trust can also be the settlor).⁷⁸ An enforcer will cease to hold their position in a non-charitable purpose trust if they resign from their office, by removal from office by the court, by effect of a provision in the trust deed whereby the enforcer ceases to hold office or if they are appointed as a trustee.⁷⁹ At any time there is no enforcer of a non-charitable purpose trust, the trustee is required to take “such steps as may be necessary to secure the appointment of a new enforcer”.⁸⁰ Where the trustee of a non-charitable purpose trust:⁸¹

⁷⁴ Edward Devenport and Simon Gould “The Trusts (Jersey) Law, 1984: a Model Trust Statute that is Moving with the Times” (1996) 2 *Trusts & Trustees* 6, at 6.

⁷⁵ Article 11(1).

⁷⁶ Article 11(2)(a)(iv).

⁷⁷ Article 12.

⁷⁸ Articles 13(1) and 13(2).

⁷⁹ Article 14.

⁸⁰ Article 21(7).

⁸¹ Article 21(8).

has reason to believe that the enforcer ... is unwilling or refuses to act, or is unfit to act or incapable of acting, the trustee shall apply to the court for the removal of the enforcer and the appointment of a replacement.

In addition, an enforcer, unless permitted by legislation or as expressly provided by the terms of the trust, cannot directly or indirectly personally profit as a result of their appointment as enforcer.⁸²

The other legislative requirements for a non-charitable purpose trust in Jersey are relatively straight forward (but arguably more substantial in places than those in the Cook Islands). First, the rule against perpetuities has been abolished so a trust “may continue in existence for an unlimited period of time”, unless otherwise stated in the trust deed.⁸³ Second, in contrast to the Cook Islands legislation, the purpose of a non-charitable purpose trust must not be “... contrary to the law of Jersey”, “immoral or contrary to public policy”.⁸⁴ Third, also in contrast to the Cook Islands legislation, a non-charitable purpose trust will be valid unless “the terms of the trust are so uncertain that its performance is rendered impossible”, in other words, the terms of the trust must simply be possible of fulfilment.⁸⁵

In situations where the purpose of the non-charitable purpose trust has been fulfilled, ceased to exist, is no longer applicable or where the purpose cannot be carried out according to the directions given by the settlor, the court has a number of powers.⁸⁶ For example, the power to:⁸⁷

declare that the property or the remainder of the property ... shall be held for such other charitable or non-charitable purpose ... as the court considers to be consistent with the original intention of the settlor.

The court can also approve any arrangement that varies or revokes the purposes of the trust that is consistent with the original intention of the settlor,⁸⁸ in a way similar to the English

⁸² Article 21(4)(b).

⁸³ Articles 15(1) and 15(2).

⁸⁴ Articles 11(2)(a)(i)- (iii) and 11(2)(b)(ii).

⁸⁵ Article 11(2)(b)(iii).

⁸⁶ Article 47A(2).

⁸⁷ Article 47A(1).

⁸⁸ Article 47A(3).

cy-près doctrine.⁸⁹ Beyond this, the legislation does not provide further guidance as to the termination of the trust or the disposal of trust assets.

C Cayman Islands

In 1997, “the Cayman Islands enacted a Special Trusts (Alternative Regime)” to permit a type of purpose trust that is abbreviated and referred to as a STAR trust.⁹⁰ While the Cayman Islands inherited their trust law from England, the STAR trust legislation, “rather than fiddling with the English version” established an alternate regime within their existing trust law.⁹¹ The creation of the STAR trust regime has “generally been regarded as the paradigm”⁹² in the development of non-charitable purpose trust legislation and has been described as “the most sophisticated trust vehicle in the world”.⁹³

To create a special trust under this legislation, the trust deed must expressly provide that the alternate STAR regime is to apply.⁹⁴ STAR trusts incorporate “as much of the inherited trust law as possible” by providing that the “law relating to special trusts ... is the same in every respect as the law relating to ordinary trusts ... save as provided” by the special regime.⁹⁵ A STAR trust differs from other non-charitable purpose trusts because it allows “the objects of a special trust ... [to] be persons or purposes or both”.⁹⁶ Much like non-charitable purpose trusts in Jersey, the purpose of a STAR trust may be of any kind “provided that they are lawful and not contrary to public policy”.⁹⁷

To enforce a STAR trust, only persons who are appointed as enforcers, by way of the trust deed or by order of the court (where required, the court has the ability to appoint an enforcer, on the application of a trustee or an enforcer),⁹⁸ “have standing to enforce the trust”.⁹⁹ This means that where the object of a STAR trust is both persons and purposes, or

⁸⁹ Moerman, above n 23, at 29.

⁹⁰ Scottish Law Commission, above n 60, at [12.1].

⁹¹ Antony Duckworth “Star trusts” (2013) 19 *Trusts & Trustees* 215, at 223.

⁹² Scottish Law Commission, above n 60, at [12.1] (footnotes omitted).

⁹³ David Hayton “STAR Trusts” (1998) 8 *The Offshore Tax Review* 43.

⁹⁴ *Trusts Law (2017 Revision) (Cayman Islands)*, s 96(1)(b).

⁹⁵ Section 98.

⁹⁶ Section 99(1).

⁹⁷ Section 99(3).

⁹⁸ Section 100(4).

⁹⁹ Section 100(2).

just persons, the beneficiary of the trust will not automatically “have standing to enforce the trust”.¹⁰⁰

The enforcer role in a STAR trust is broader than found in other jurisdictions. A STAR trust enforcer has the same rights as a beneficiary would under an ordinary trust “to bring administrative and other actions and make applications to the court, concerning the trust” as well as the right “to be informed of the terms of the trust, to receive information concerning the trust and its administration ... and to inspect and take copies of trust documents”.¹⁰¹ In addition, when carrying out their role, an enforcer is not only under a duty to enforce the trust but is also under a fiduciary duty to act responsibly in carrying out their duties.¹⁰²

A STAR trust cannot be “rendered void by uncertainty” in relation to its object.¹⁰³ Where there is uncertainty, the trustee has the power to resolve this uncertainty in accordance with the terms of the trust.¹⁰⁴ If the uncertainty cannot be resolved by the trustee, the court has the power to resolve the uncertainty by reforming the trust or by any other way the court sees fit.¹⁰⁵ The legislation also retains the *cy-près* doctrine in a similar way to the Jersey legislation. If the execution of a STAR trust becomes impossible or impractical, unlawful or contrary to public policy or obsolete in that it fails to achieve the intention of the settlor the trust can be reformed under the terms of the trust deed and if this cannot be achieved, the court can reform the trust in a way that is consistent with the intention of the settlor.¹⁰⁶

In the Cayman Islands, the rule against perpetuities does not apply to non-charitable purpose trusts.¹⁰⁷ The legislation does not provide for the termination of the trust nor for the disposal of trust property where a STAR trust has come to an end.¹⁰⁸

D Conclusion

The offshore legislation can be thought of as a spectrum that ranges from the broad approach in the Cook Islands to the more prescriptive approach in the Cayman Islands,

¹⁰⁰ Section 100(1).

¹⁰¹ Section 102(a).

¹⁰² Sections 100(3) and 101(2).

¹⁰³ Section 103(1).

¹⁰⁴ Section 103(2).

¹⁰⁵ Section 103(4).

¹⁰⁶ Section 104(1).

¹⁰⁷ Duckworth, above n 91, at 217.

¹⁰⁸ Moerman, above n 23, at 29.

with Jersey in between. The examples show that while there are variations in the legislation, there are some commonalities. All three of the examples permit non-charitable purpose trusts, provide for their enforcement and deal with the rule against perpetuities. In Jersey and the Cayman Islands, the legislation also provides a public policy requirement and retains a form of the *cy-près* doctrine. It is submitted that these examples demonstrate that non-charitable purpose trusts can be legislated for in a way that is administratively workable under a variety of approaches.

VI Non-Charitable Purpose Trusts in the New Zealand Context

In 2009, the Law Commission began a review of the Trustee Act 1956 and trust law in New Zealand generally. This review resulted in the Trusts Bill 2017 that is, at the time of writing, currently before parliament. The Trusts Bill proposes to replace the Trustee Act and the Perpetuities Act 1964.

As part of the review, the Law Commission intended to consider non-charitable purpose trusts.¹⁰⁹ While the Commission's reports do touch on non-charitable purpose trusts in places, a full review is still to happen. In the interim, the Trusts Bill does apply to trusts for a permitted purpose but is currently limited to trusts for "a charitable purpose and any other purpose for a trust that is permitted at law".¹¹⁰ It is submitted that, while this definition does not currently permit non-charitable purpose trusts in New Zealand, it shows a clear intent by the Commission and the Government to include purpose trusts in New Zealand trust law.¹¹¹ It is arguable that the inclusion of purpose trusts in the Trusts Bill has left the door open for the law to be amended in the future in a way that would provide for purpose trusts more generally.

In light of this and the preceding discussion in this paper it is submitted that non-charitable purpose trusts should be permitted in New Zealand. Part VI of this paper proposes a legislative framework for the inclusion of non-charitable purpose trusts in New Zealand (the Framework), an explanation of the Framework follows. Part VI also looks at the interaction between non-charitable purpose trusts and public policy as well as external legislative regimes.

The Framework is based on the provisions contained in the Trusts Bill. This paper assumes that the Trusts Bill will be enacted so is referred to in the Framework as the Trusts Act (and

¹⁰⁹ Law Commission, above n 2, at [1.8].

¹¹⁰ Trusts Bill 2017 (290-1), cl 9.

¹¹¹ Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [2.13].

the clauses of the Trusts Bill are referred to as sections). The Framework is presented in the form of an amendment bill. It is submitted that, rather than building on existing, outdated, New Zealand trust legislation it is more appropriate to use the Trusts Bill. This means that the Framework can take advantage of the work done, to date, by the Law Commission and the Government to reform trust law in New Zealand.

A Proposed Legislative Framework

Trusts (Non-Charitable Purpose Trusts) Amendment Bill [Date]

Explanatory note

A Bill to amend the Trusts Act [Date] to permit non-charitable purpose trusts in New Zealand and to provide for their enforcement.

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Trusts (Non-Charitable Purpose Trusts) Amendment Act [Date]

Amendments to principal Act

2 Section 5 is amended

(1) Section 5(3) is amended by the insertion of the following:

(c) **Schedule 3A** provides that the application of certain provisions of this Act is or may be modified or excluded in relation to non-charitable purpose trusts.

(2) Section 5 is amended by the insertion of the following:

(17A) **Schedule 3A** provides that, in relation to non-charitable purpose trusts, the application of certain provisions of the Act do not apply or apply with modifications.

3 Section 9 is amended (Definitions)

(1) Section 9 is amended by the insertion of the following, in their appropriate alphabetical order:

enforcer means a person or persons appointed under the terms of a non-charitable purpose trust who is under a duty to enforce the terms of a non-charitable purpose trust against the trustees

non-charitable purpose means a purpose that is not charitable

non-charitable purpose trust means an express trust (within the meaning of **section 12**) the purpose of which is a non-charitable purpose that is enforceable on its terms by an enforcer.

(2) Section 9 is amended by the replacement of the definition of **permitted purpose** with:

permitted purpose, in relation to a trust, means a charitable purpose, a non-charitable purpose or any other purpose for a trust that is permitted at law and specified in the terms of the trust.

4 Section 46 is amended

Section 46, subsection (2) is replaced by:

(2) **Sections 47 to 51** do not apply to charitable trusts, to non-charitable purpose trusts or to trusts established for a permitted purpose that do not have beneficiaries except as provided for in **Schedule 3A**.

New Schedule 3A inserted into principal Act

Schedule 3A

Non-charitable purpose trusts

1 Appointment of enforcer

- (1) The terms of a non-charitable purpose trust must provide for the appointment of an enforcer.
- (2) The person appointed as an enforcer may not also be a trustee of the non-charitable purpose trust.

2 Person with power to remove or appoint enforcer

The terms of a non-charitable purpose trust must nominate a person who has the power to remove an enforcer in accordance with **clause 4**, to appoint a replacement enforcer where an enforcer has been removed or appoint a new enforcer at any time when there is none.

3 Person with power to remove or appoint replacement enforcer may apply to court for directions

As well as applying to the removal or appointment of a trustee, **sections 87** applies to non-charitable purpose trusts as if the references to a trustee in **section 87** were references to an enforcer.

4 Duty to exercise power to remove or appoint enforcer honestly and for proper purpose

Section 88 applies to non-charitable purpose trusts as if the reference to trustee in **section 88** were a reference to an enforcer.

5 Removal of enforcer

As well as applying to the removal of a trustee, **sections 97 to 100** and **sections 103 to 104** will apply to non-charitable purpose trusts as if the references to a trustee in these sections were references to an enforcer.

6 Retirement of enforcer

An enforcer who expresses in writing a wish to retire may be discharged in writing by the trustee(s).

7 Distribution of trust property on expiry of non-charitable purpose trust

- (1) When a non-charitable purpose trust expires, all trust property must be distributed in accordance with **section 18**.
- (2) If it is not possible to determine under **section 18** the manner in which the property should be distributed, a trustee must apply for directions under **section 125**.

8 Power of court to approve termination, variation, or resettlement of trust

- (1) The court may approve the termination, variation, or resettlement of a non-charitable purpose trust.
- (2) **Subclause 1** of this clause will apply, but is not limited to, situations where the purpose or purposes of the trust become impossible or impracticable of fulfilment.
- (3) An application for an order of approval may be made by the trustees or any one of them.
- (4) On an application for an order of approval, the court must take into account the intentions of the settlor of the trust in settling the trust if it is practicable to ascertain those intentions.

9 Certain provisions modified or excluded in relation to non-charitable purpose trust

- (1) The following provisions do not apply to a non-charitable purpose trust:
 - (a) **Section 14**
 - (b) **Section 33**
 - (c) **Section 49(a), (d)-(f), (h)-(i)**
 - (d) **Section 51**
 - (e) **Sections 58 to 62**
 - (f) **Section 78**
 - (g) **Sections 83 to 84**
 - (h) **Section 89**
 - (i) **Section 113 to 117**
 - (j) **Section 124**
 - (k) **Section 128**
 - (l) **Section 139**
- (2) The following provisions will apply to a non-charitable purpose trust with the interpretations indicated:
 - (a) **Sections 47 to 50** apply to non-charitable purpose trusts, except as expressly provided in **subclause 1** in respect of **section 49**, as if the references to,—
 - (i) representative of beneficiary and classes of beneficiary were omitted;
 - (ii) a beneficiary were references to an enforcer; and
 - (b) **Section 79(2)(c)** as if the reference to a beneficiary in this section were a reference to an enforcer.

B Explanation of the Framework

1 Bringing non-charitable purpose trusts within the scope of the legislation

To permit non-charitable purpose trusts, they must be brought within the scope of New Zealand trust legislation. The Framework achieves this by creating a new schedule within the Trusts Bill to provide specifically for non-charitable purpose trusts. A schedule is used so the provisions relating solely to non-charitable purpose trusts can be found in one place. This is similar to the way the Trusts Bill provides for specified commercial trusts, another

type of trust that requires specific provisions.¹¹² This approach allows the main body of the legislation to deal with trusts generally without becoming convoluted.

In addition, definitions relating to non-charitable purpose trusts must be included. First, the Framework inserts a definition, based on the offshore legislation Part V, for enforcer.¹¹³ An enforcer is “vital in these trusts, for monitoring trustees and remedying fraud and fault”.¹¹⁴ To this end, the Framework imposes a duty on enforcers to enforce the terms of the trust to ensure that trustees can be held to account. It may be prudent to include other duties over time, for example, “a fiduciary duty to act responsibly with a view to the proper execution of the trust” as in the Cayman Islands or even expand the enforcer’s duties to mirror the mandatory duties of a trustee as provided in the Trusts Bill.¹¹⁵ However, it is submitted that, that at the very least, an enforcer must be under a duty to enforce the terms of the trust; the definition provides for this core duty. Second, the Framework inserts a definition for non-charitable purpose to provide for trust purposes that do not fall within the definition of charitable purpose.¹¹⁶ Third, the Framework inserts a definition for non-charitable purpose trusts. This definition brings non-charitable purpose trusts within the meaning of an express trust under the Trusts Bill and specifies that it is a trust established for a non-charitable purpose to be enforceable by an enforcer. Finally, the definition for permitted purpose is amended to include non-charitable purpose trusts. The reference to other purposes permitted at law is retained to cover any other anomalous purpose trusts held valid by the courts, for example, those in *Re Endacott*.¹¹⁷

2 Provisions relating to enforcers

The Framework provides a number of clauses relating to enforcers. First, the Framework stipulates that the terms of the trust must provide for the appointment of an enforcer for the trust to be valid. This is consistent with the offshore examples discussed in Part V. Second, clauses are included that require the terms of the trust to nominate a person who has the power to remove or appoint an enforcer (honestly, in good faith and for a proper purpose) at any time, with the direction of the court where applicable.¹¹⁸ The circumstances in which an enforcer can be removed mirror the provisions in the Trusts Bill in relation to the

¹¹² See Trusts Bill, sch 3.

¹¹³ International Trusts Act 1984 (Cook Islands), s 12(2); Trusts (Jersey) Law 1984 (Jersey), art 13(1); Trusts Law (2017 Revision) (Cayman Islands), s 100(3).

¹¹⁴ Law Commission, above n 2, at [2.63] (footnotes omitted).

¹¹⁵ Trusts Law (2017 Revision) (Cayman Islands), s 101(2); Trusts Bill, cls 22- 26.

¹¹⁶ Trusts Bill, cl 9.

¹¹⁷ *Re Endacott*, above n 22.

¹¹⁸ See Trusts Bill, cl 87; see Trusts Bill, cl 88.

removal of a trustee.¹¹⁹ It is submitted that this is the most appropriate approach because it ensures consistency of process between the removal and appointment of enforcers and trustees. Third, a clause is included that specifies that an enforcer may not also be a trustee of a non-charitable purpose trust, as in the Jersey legislation.¹²⁰ If an enforcer could also be a trustee a conflict of duties would arise. Finally, a clause is included to provide for the retirement of an enforcer, based on the Jersey legislation.¹²¹

The Framework proposes that the provisions in the Trusts Bill in relation to a trustee's duty to provide information to a beneficiary should apply to an enforcer of a non-charitable purpose trust. It proposes that clauses 47 to 50 of the Trusts Bill should apply as though the references in these sections to a beneficiary were references to an enforcer. It is submitted that for an enforcer to carry out their duty to enforce the trust they must be able to access trust information for example, a copy of the terms of the trust. This is similar to the Cayman Islands legislation where an enforcer has the same rights as a beneficiary of an ordinary trust to be informed of, amongst other things, the terms of the trust.¹²²

3 *Duration of trust and trust property distribution on expiry of trust*

The maximum duration of an express trust under clause 16 of the Trusts Bill is 125 years.¹²³ It is submitted that non-charitable purpose trusts should not be able to continue indefinitely and the maximum duration for a trust under clause 16 should apply to non-charitable purpose trusts. This approach is in line with the Law Commission's view that "there are strong policy reasons to retain some form of limit on the duration of private trusts".¹²⁴ In addition to this, clause 18 of the Trusts Bill provides that on the expiration of a trust, the trust property must be distributed in accordance with the terms of the trust or where the terms of the trust have not expressly provided for this, in a manner consistent with the objectives of the trust.¹²⁵ The Framework expressly provides that clause 18 will apply to non-charitable purpose trusts but adds that if the distribution of trust property on expiry of a non-charitable purpose trust is not possible then clause 125 will apply. Clause 125 provides that a trustee may apply to the court for directions about the trust property and the

¹¹⁹ See Trusts Bill, cls 97- 100; see Trusts Bill, cls 103- 104.

¹²⁰ Trusts (Jersey) Law 1984 (Jersey), art 13(2).

¹²¹ Trusts (Jersey) Law 1984 (Jersey), arts 14(1) and 14(2).

¹²² Trusts Law (2017 Revision) (Cayman Islands), s 102(a).

¹²³ Trusts Bill, cls 16(1) and 16(2).

¹²⁴ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [17.8].

¹²⁵ Trusts Bill, cl 18(1).

court may give any direction it thinks fit.¹²⁶ It is submitted that under this clause the court would have the ability to direct the trustee as to how to distribute trust property on expiry of a non-charitable purpose trust.

4 *Inclusion of a variation of the cy-près doctrine*

The Framework also provides power to the court to approve termination, variation or resettlement of a non-charitable purpose trust. This clause operates in a way similar to the English cy-près doctrine and was based on a recommendation of the Scottish Law Commission from their consideration of non-charitable purpose trusts.¹²⁷

5 *Deliberate exclusion of a public policy provision*

The Framework does not include a provision that limits the purpose of a non-charitable purpose trust, nor does it include a provision stating that the purpose must not be unlawful, immoral or contrary to public policy. This is because the Law Commission in their consideration of trust law in New Zealand were of the opinion that a provision of this type would lead to uncertainty.¹²⁸ In addition, the Law Commission highlighted that the courts “have already made it clear that trusts cannot be used for illegal purposes and having ... this in the legislation would risk misrepresenting the current legal position”.¹²⁹

C *Wider Implications*

The 2013 Panama Papers leak exposed the extent to which offshore trusts have been used for the perpetration of criminal acts such as tax evasion, money laundering and fraud.¹³⁰ It follows that, in relation to permitting non-charitable purpose trusts in New Zealand, it is important to consider the wider implications that this may have. In particular, whether this is against public policy or would frustrate any external legislative regimes that seek to minimise the use of trusts as an avoidance mechanism or for illegal purposes.

The first consideration is the potential for non-charitable purpose trusts to be used by a settlor to avoid, for example, their obligations to pay tax, to creditors or to a spouse. The Law Commission considered the interaction between trusts and specific external legislative

¹²⁶ Trusts Bill, cl 125.

¹²⁷ Scottish Law Commission, above n 60, at [12.20].

¹²⁸ Law Commission, above n 111, at [2.50].

¹²⁹ Law Commission, above n 111, at [2.50].

¹³⁰ Bastian Obermayer and Frederik Obermayer *The Panama Papers: Breaking the Story of How the Rich & Powerful Hide Their Money* (Oneworld Publications, London, 2016) at 302; Gerard Ryle and others “Secret Files Expose Offshore’s Global Impact” (2 April 2013) International Consortium of Investigative Journalists <www.icij.org>.

regimes in their review of trusts.¹³¹ In particular, they considered the operation of ‘look through’ provisions in these regimes that have the effect of setting aside transactions and “certain dispositions of property”¹³² (or finding that a transaction is of no effect)¹³³ where a person has used that transaction or disposition to prejudice creditors, avoid tax or to “defeat the claim or rights of any person”.¹³⁴ It is submitted that non-charitable purpose trusts do not pose any new risk in this regard because, like other trusts, they would be subject to these ‘look through’ provisions. These provisions would provide recourse to a wronged party should a settlor use a non-charitable purpose trust to avoid their obligations.

Second, because many offshore trusts give settlors “larger powers of ... control” the use of offshore legislation as a basis for non-charitable purpose trusts in New Zealand arguably creates a risk that non-charitable purpose trusts could be used by settlors to retain effective control over their assets despite having disposed of them into a trust.¹³⁵ It is submitted that while trusts in New Zealand have long been used by settlors for asset protection (and in fact since their beginnings as the ‘use’, trusts were used to protect land while “those holding tenure were fighting in the crusades”),¹³⁶ the New Zealand legal system will act as a check on the use of non-charitable purpose trusts by a settlor to dispose of but retain control over their assets.¹³⁷ To reign in settlor control, the New Zealand courts have the ability to find the trust a ‘sham’ when it can be shown that the intention of the parties involved was to give the appearance of creating a valid trust but the reality was that this was a “mask, cloak or façade of the true position between the parties”.¹³⁸ Alternatively, the court may find the trust ‘illusory’ where the settlor “retains such control that the proper construction is that he did not intend to give or part with control over the property sufficient to create a trust”¹³⁹ with the effect that “no trust was created”.¹⁴⁰

Third, there is always a risk that trusts may be used for money laundering or the financing of terrorism. It is submitted that non-charitable purpose trusts will not frustrate New Zealand’s anti-money laundering and countering of financial terrorism (AML and CFT)

¹³¹ Law Commission *Some Issues with the Use of Trusts in New Zealand* (NZLC IP20, 2010) at [3.1]- [3.3].

¹³² Law Commission, above n 131, at [3.4] (footnotes omitted).

¹³³ Law Commission, above n 131, at [3.77].

¹³⁴ Law Commission, above n 131, at [5.15] (footnotes omitted).

¹³⁵ Law Commission, above n 2, at [2.48].

¹³⁶ Webb, above n 1, at 477 (footnotes omitted).

¹³⁷ Law Commission, above n 2, at [2.77].

¹³⁸ Law Commission, above n 131, at [4.8] (footnotes omitted).

¹³⁹ *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, 1 NZLR 55 at [119].

¹⁴⁰ *Clayton v Clayton*, above n 139, at [129].

objectives.¹⁴¹ The ‘beneficial owner’ of a non-charitable purpose trust for the purposes of AML and CFT requirements can still be ascertained by understanding who has effective control over the trust and any trust transactions.¹⁴²

The Law Commission in conclusion on a number of public policy issues were of the opinion that “the interface between the principles of trust law and other public policy considerations needs to be addressed on an issue by issue basis within the individual legislative schemes”.¹⁴³ In addition, the finding of “sham or something similar applies independently of the legislation” and will be left to the courts if they “consider this ... applicable and necessary”.¹⁴⁴

It is submitted that, non-charitable purpose trusts do not pose any new issues for external legislative regimes or public policy. If issues did arise, the Law Commission have made it clear that those issues would be dealt with at that point in time.

VII Conclusion

First, this paper outlined the traditional trust model. Second, it discussed the validity of non-charitable purpose trusts and concluded that they are arguably conceptually sound. Third, this paper looked at examples of offshore legislation permitting non-charitable purpose trusts. Finally, this paper submitted that non-charitable purpose trusts should be permitted in New Zealand and proposed a Framework for non-charitable purpose trusts to this effect. This paper also considered the wider implications of permitting non-charitable purpose trusts on external legislative regimes and public policy.

¹⁴¹ Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 3.

¹⁴² Department of Internal Affairs *Beneficial Ownership Guideline* (December 2012).

¹⁴³ Law Commission, above n 124, at [4.15] (footnotes omitted).

¹⁴⁴ Law Commission, above n 124, at [4.15].