

**Government Response to Law Commission Report on
*Review of the Law of Trusts: A Trusts Act for New Zealand***

Presented to the House of Representatives

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Introduction

The Government has considered the Law Commission's Report, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130) (the Report) presented to the House of Representatives on 11 September 2013, and responds to the Report in accordance with Cabinet Office circular CO (09) 1.

Executive Summary

The Trustee Act 1956 (the Act) and case law regulate the administration of trusts in New Zealand. The Law Commission has reviewed the core institution of the trust in New Zealand and has made 51 recommendations to modernise and clarify trust law.

The Government agrees with the Law Commission's key recommendation to replace the Act with a new Trusts Act. However, further work is required on the detail of the new Trusts Act.

Background

Trust law is a core part of New Zealand's legal system. The Report estimates that there may be between 300,000 and 500,000 trusts currently in New Zealand and that trust use here is considerably greater than that of comparable countries.

The Report has highlighted that, while trusts are widely used in New Zealand, there is widespread misunderstanding about what a trust means and the accompanying rules. These misunderstandings can lead to disputes between settlors, trustees and beneficiaries, and increase the risk to individuals of undesired legal consequences.

Trustee Act 1956

The Act is more than 50 years old, and issues with New Zealand trust law are due, in part, to the complexity and age of the Act. The Act does not reflect modern trust practice, is unnecessarily complex and difficult to understand and, in some places, simply unreadable.

Law Commission review of the Act and trusts

The Law Commission began a review of trust law in March 2009 and the Report is the product of the first of three stages of the Law Commission's wider review of trusts. The Report focuses on express private trusts, which are created by a person transferring property into a trust. Private trusts are generally created for the benefit of one or more individuals. Other types of trusts such as charitable or purpose trusts, where a trust is

created, for example, for religious or educational purposes, will be dealt with in stage 2. Corporate trustees will be reviewed in stage 3 of the Law Commission's review.

Government Response

The Government wishes to thank the Law Commission for the Report and for its work throughout its comprehensive review of trust law and the Act.

A new Trusts Act

The Law Commission recommends that a new Trusts Act, to replace the Act, be enacted. The Government agrees with this recommendation.

A new Trusts Act will modernise the law of trusts making it clearer and more user-friendly for individuals and business.

Recommendations need further analysis before a Government view is possible

Apart from the recommendation for a new Trusts Act, further analysis of the regulatory impact of the recommendations is required, including:

Broadening the scope of the legislation

The Law Commission proposes to broaden the legislation so that it would include general trust concepts and relationships imported from the case law.

Modernising the existing trusts framework

The Law Commission recommends that the new Trusts Act be designed to make the trust law rules reflect modern trust practice.

Accessibility

Much of the statute and case law is unclear, especially around the powers, roles and requirements of the participants in a trust. People don't always understand the roles and duties of trustees, especially trustees who are not legally trained. Beneficiaries don't know what they can expect from trustees. For example, the Commission recommends clearly articulating the obligation of trustees to provide information to beneficiaries.

Simplifying administration of trusts

The Law Commission identifies that the administrative machinery for trusts can be inaccessible in practice and recommends simplification.

Jurisdiction of the courts

Currently the District Court has jurisdiction to determine breach of trust claims within its monetary limit, but cannot exercise any powers under the Act. These are exercised by the High Court. The Law Commission recommends giving the District Court concurrent jurisdiction with the High Court under the new Act. The Report also recommends that the Family Court's powers be supplemented to give the court more powers to deal with trust law, allowing it to make any orders necessary to effectively deal with all issues that are properly before it.

Interface with case law

The Law Commission's recommendation for a new Trusts Act is not intended to create a complete codification of trust law. There is likely to be a complex relationship between the status of existing case law and the proposed new Trusts Act. Further analysis is needed on how such a relationship would work.

Relationship of a new Trusts Act with other statutory trusts

Further analysis is required regarding how a new Trusts Act would apply to specific legislation governing trusts, including Financial Markets legislation.

Public Trust

The Law Commission is proposing new administrative powers for the Public Trust.¹ Therefore, further work is required in this area before the Government is able to form a view.

Insolvency

The Commission is proposing a new power for the Official Assignee to be given the right to apply to the court to challenge the validity of a trust, notwithstanding that the bankrupt person would have been unable to exercise that right prior to bankruptcy².

Perpetuities

Reforming and simplifying the law by setting a "bright line" maximum duration of 150 years for the duration of a trust. Currently there is a complex set of rules under existing law as to the maximum possible duration of a trust.

¹ Recommendations 12, 21, 22, 23, 26, 43 and 44.

² Recommendation 45.

Relationship property and trusts

There are two recommendations relating to relationship property³ that require further investigation before the Government is able to form a view. These recommendations would allow trusts to be set aside and assets distributed to a partner in a relationship property claim. These recommendations will make significant changes to legislation; will have regulatory implications that are more than minor; and will have flow on effects that need to be carefully analysed.

Transitional provisions

The Law Commission's general approach is that the new Trusts Act should apply to existing as well as new trusts from the date it comes into force. There are a few provisions for which a transition period of two years is proposed. Consideration needs to be given to the identification of, and compliance costs impact on, existing trusts to make them compatible with a new Trusts Act. Comprehensive communications and guidance on any changes would also be essential.

Next Steps

The Government has directed the Ministry of Justice to analyse the Law Commission's recommendations and report back. Once this work is completed, the Government will form a final view on all of the Law Commission's recommendations. Because of the significant number of substantive recommendations, this work will take considerable project resources and the timing for the report back and a new Trusts Act will need to be balanced alongside other competing Government priorities.

³ Recommendations 50 and 51.