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Trusts Bill consultation team  
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## Submission on the exposure draft of the Trusts Bill

The Institute of Directors (IoD) appreciates the opportunity to comment on the exposure draft of the [Trusts Bill](#) (draft Bill) which will replace the Trustee Act 1956. The IoD is committed to raising governance standards in all areas of New Zealand business and society and we welcome the draft Bill. Notwithstanding our comments here, the IoD may make further comment as the draft Bill progresses.

Trusts are important to the economy and society in New Zealand. There are an estimated 300,000 to 500,000 trusts including commercial, charitable and family trusts.

The draft Bill proposes the most significant trust reform in 60 years in New Zealand and largely reflects the Law Commission's recommendations in its review of the law of trusts. It is intended that all express trusts (ie trusts generally formed deliberately as a result of a settlor's intention to create a trust) will be governed by the draft Bill, except to the extent that some types of trusts are governed by specific legislation. In the case of charitable trusts, for example, the draft Bill will only apply where it relates to something not set out in the Charitable Trusts Act 1957.

The draft Bill is *not* an exhaustive code of the law relating to trusts. It is informed by and complements the rules of common law and equity relating to trusts.

### About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance in all areas of business and society in New Zealand. We represent a diverse membership of around 8,000 members drawn from NZX-listed corporations, private companies, small to medium enterprises, public sector organisations, not-for-profits and charities. Many of our members are trustees on commercial and non-commercial trusts.

Our chartered membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

### Summary

We generally support the draft Bill and its purpose to restate and reform New Zealand trust law. We particularly support the inclusion of mandatory and default trustee duties in the draft Bill. The duties align with other legislative developments, such as directors' duties in the Companies Act, and they should help trustees better understand their obligations.

We discuss further governance and specific trustee-related matters in our submission and have raised some concerns. We also request the Government provide guidance to trustees about their responsibilities and any new requirements under the draft Bill.

## General comments

The draft Bill sets out basic trust matters relevant to settlors, trustees and beneficiaries. It aims to improve accessibility to the law of trusts and help the above parties better understand their legal rights and obligations. The draft Bill also aims to improve the governance of trusts.

The new legislation will affect many trustees, including trustees of small family trusts and charities. It is important trustees are given clear guidance from the Government about their responsibilities and any new requirements.

We generally support the draft Bill and its purpose to restate and reform New Zealand trust law by:

- setting out the core principles of the law relating to trusts
- providing for default administrative rules for express trusts
- providing for mechanisms to resolve trust-related disputes
- enhancing access to the law of trusts.

We comment below on specific governance and trustee-related matters.

## Who may be a trustee

The draft Bill provides that the following persons are disqualified from being appointed as a trustee:

- a child (person under the age of 18)
- an undischarged bankrupt
- a person who lacks the capacity to perform the functions of a trustee
- body corporate that has entered into receivership, liquidation, statutory management, a compromise with creditors, or voluntary administration.

We support this provision as being appropriate for trusts. We note there are further trustee qualification restrictions in other trust-related legislation, for example, in the Charities Act 2005. There is also a mechanism in the draft Bill for persons holding the power to remove and appoint trustees to remove a trustee who, for instance, is convicted of a dishonesty offence. We agree with the Law Commission that given the nature of trusts (and particularly family trusts), the suitability of who may be a trustee should largely be left to the settlor rather than to legislation.

## Trustee duties

Trustee duties are central to good governance and they reflect the fiduciary nature of trustees and promote accountability.

Trustee duties are largely set out in case law and many trustees are not fully aware of their duties. The draft Bill sets out mandatory and default trustee duties.

We support the inclusion of trustee duties in the draft Bill and they should help trustees (and especially many non-professional trustees) to better understand their obligations. We comment on the duties below.

The inclusion of trustee duties aligns with legislative developments in other areas, for example, the inclusion of directors' and officers' duties in the Companies Act 1993 and draft Incorporated Societies Bill respectively.

We note that the terms of the trust may impose additional duties on trustees.

The mandatory and default trustee duties are discussed separately below.

#### *Mandatory duties*

The mandatory trustee duties are as follows:

- the duty to know the terms of the trust
- the duty to act in accordance with the terms of the trust
- the duty to act honestly and in good faith
- the duty to hold or deal with trust property, and otherwise act, for the benefit of the beneficiaries or for the permitted purpose
- the duty to exercise the powers of a trustee for a proper purpose.

We agree that these duties should be mandatory.

The consultation paper on the draft Bill asks whether there should be an additional mandatory duty for the trustee to act personally in order to clarify how the trustee's ability to give powers to other people operates. Trustees as decision-makers can delegate in only limited circumstances. We consider that the suggested clarification should be helpful for trustees.

#### *Default duties*

The default trustee duties are as follows:

- the general duty of care
- the duty to invest prudently
- the duty not to exercise any power directly or indirectly for the trustee's own benefit
- the duty to actively and regularly consider the exercise of the trustee's powers
- the duty not to fetter the future exercise of the powers of trustees of the trust
- the duty to avoid a conflict of interest
- the duty to keep proper accounts
- the duty of impartiality
- the duty not to make a profit from the trustee's position as trustee
- the duty to act for no reward
- the duty to act unanimously.

*Default duties apply unless they are modified or excluded.* They may be modified or excluded by the terms of the trust, but only to the extent that the modification or exclusion is consistent with the mandatory duties.

A key issue for some trusts will be ensuring that the default duties are modified or excluded in the terms of the trust so they do not automatically apply. We are aware that certain trusts (eg commercial trusts) may have issues amending trust deeds (because of restrictions in the deeds) and will need court assistance to modify or exclude the default duties. There may be considerable costs and uncertainty involved in this solution.

#### *Duty to consider the settlor's wishes*

We suggest the Ministry consider including a default duty that trustees, in administering the trust, should consider any letter or memorandum of wishes from the settlor. This would support case law that trustees should take into account the settlor's intentions/wishes in these documents.

#### *General duty of care*

As a default duty, the duty of care can be modified or excluded. We understand that the duty of care in law is generally excludable and is not considered to be fundamental to a trust. Some aspects of

what is likely to be covered by the duty of care will also fall under the mandatory duties (and therefore cannot be excluded).

The general duty of care essentially provides that a trustee, when exercising a power of administration, must exercise the care and skill that is reasonable in the circumstances having regard in particular:

- to any special knowledge or experience that the trustee has or holds themselves out as having
- if the person acts as a trustee in the course of business or profession, to any special knowledge or experience that is reasonable to expect of a person acting in the course of that kind of business or profession.

This clearly sets out the standard of conduct required for professional and non-professional trustees. We support the inclusion of this duty in the draft Bill.

#### *Duty to invest prudently*

We support the current standard of care for powers of investment (ie the prudent person principle) which is generally considered to be working well. This duty should be separate from the general duty of care.

#### *Breach of trust and limitation of liability*

The draft Bill provides that the terms of a trust must not:

- limit or exclude a trustee's liability for any breach of trust arising from dishonesty, wilful misconduct or gross negligence or
- grant a trustee any indemnity against the trust property in respect of liability for breach of trust arising from the trustee's dishonesty, wilful misconduct or gross negligence.

We support this high conduct threshold for exemption and indemnity clauses.

The draft trust bill retains the court's ability to relieve a trustee who is or may be personally liable for any breach of trust from personal liability for the breach. This applies if it appears to the court that the trustee has acted honestly and reasonably and the trustee ought fairly to be excused for the breach of trust. We support the retention of this clause.

#### *Retention of core trust documents*

The draft Bill provides that a trustee must keep (so far as reasonable) copies of the following:

- the trust deed and any other document that contains terms of the trust
- any variations made to the trust deed or trust
- a list of all the assets that comprise trust property and of all the liabilities of the trust
- any records of trustee decisions made during the trustee's trusteeship
- any written contracts entered into during that trustee's trusteeship
- any accounting records and financial statements prepared during that trustee's trusteeship
- documents of appointment, removal, and discharge of trustees (including any court orders appointing or removing trustees)
- any letter or memorandum of wishes from the settlor
- any documents referred to above that were kept by a former trustee during that person's trusteeship and passed on to the current trustee.

Where there is more than one trustee, each trustee must hold copies of the trust deed and any variations and be satisfied that at least one trustee holds copies of the other documents specified above and that these will be made available to the other trustees. Trustees may keep other documents as well.

There is no specified medium in which documents should be retained. While it may be implied that trustees can retain information in electronic form, we encourage the Ministry to include an express provision clarifying this.

We agree with the requirement for trustees to retain the above documents/information, which should lead to better administrative practices such as recording keeping and documentation and thereby help support good governance and accountability.

### Providing information to beneficiaries

The draft Bill reforms the provision of information to beneficiaries. To be able to hold trustees to account, beneficiaries need to know that they are beneficiaries of the relevant trust. Under the draft Bill, a trustee must make available to a sufficient number of beneficiaries sufficient trust information to enable the terms of the trust to be enforced against trustees.

There is a presumption that trustees *must* give the following basic trust information to beneficiaries:

- the fact that a person is a beneficiary of the trust
- the name and contact details of the trustee
- the occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs
- the right of the beneficiary to request a copy of the terms of the trust or trust information.

We support basic trust information being made available. However, we note trustees may face practical difficulties in trying to provide basic trust information to beneficiaries (eg they may not be able to locate some qualifying beneficiaries). We encourage the Ministry to consider amending the provision so that trustees will be compliant where they have made reasonable steps to provide basic trust information.

Beneficiaries may also request information:

- regarding the terms of the trust, the administration of the trust or the trust property and
- information that is reasonably necessary for the beneficiaries to have to enable the trust to be enforced.

There is a presumption that this information will be provided.

In all cases, trustees can decide against providing information having regard to a number of factors including, for example, whether the information is subject to personal or commercial confidentiality.

We note there are arguably different principles for providing information to beneficiaries of express trusts and potential beneficiaries under charitable trusts. We encourage the Ministry to consider whether the different principles for each type of trust should be addressed in the draft Bill.

### Appointment and removal of trustees

The appointment and removal of trustees can cause issues in practice. The draft Bill reforms this area of trusts and sets out who may appoint and remove trustees.

Under the draft Bill, a person with the power to remove and appoint trustees *must* remove a trustee if a trustee becomes disqualified (eg they lose mental capacity) and they have not delegated their powers. A person with the power to remove and appoint trustees *may* remove a trustee if it is desirable for the proper execution of the trust and one or more of the following grounds are met:

- the trustee repeatedly refuses or fails to act as a trustee
- the trustee becomes an undischarged bankrupt
- the trustee is a corporate trustee that enters into receivership, liquidation, a compromise with creditors, statutory management, or voluntary administration or that ceases to carry on business, is dissolved, or does not satisfy the solvency test in section 4 of the Companies Act 1993
- the trustee is no longer suitable to hold office as trustee because of the trustee's conduct and circumstances – this includes the following:
  - the trustee is convicted of a dishonesty offence
  - the whereabouts of the trustee is unknown and the trustee cannot be contacted
  - the trustee is prohibited from being a director or promotor of, or being concerned or taking part in the management of:
    - a company under the Companies Act 1993
    - an incorporated or unincorporated body under the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.

We agree with the Law Commission that the threshold for removing a trustee is appropriate.

### Alternative disputes resolution

The draft Bill sets out an alternative dispute resolution process (eg mediation) for all trusts. The benefits of alternative disputes resolution are well known and we support this in the context of trusts. It would also be beneficial if this process included internal disputes between trustees.

We appreciate the opportunity to comment on behalf of our members and would be happy to discuss this with you.

Yours sincerely



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