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Committee Secretariat
Justice Committee
Parliament Buildings
Wellington

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Submission on the Trusts Bill

The Institute of Directors (IoD) appreciates the opportunity to comment on the [Trusts Bill](#) (the Bill) which will replace the Trustee Act 1956. The IoD submitted to the Ministry of Justice on the exposure draft of the Trust Bill and comments in this submission are consistent with our previous comments.

The IoD is committed to raising governance standards in all areas of New Zealand business and society and we welcome the Bill.

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

The 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 Bill, except to the extent that some types of trusts are governed by specific legislation. In the case of charitable trusts, for example, the Bill will only apply where it relates to something not set out in the Charitable Trusts Act 1957.

The Bill is *not* an exhaustive code of the law relating to trusts. It is informed by and largely 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. We represent a diverse membership of over 8,500 members drawn from listed issuers, large private organisations, small and medium enterprises, public sector organisations, not-for-profits and charities. Many of our members are trustees.

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 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 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 made some suggestions for the Committee's consideration. We also request that the Government provide guidance to trustees about their responsibilities and any new requirements under the Bill.

General comments

The 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 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 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
- making the law of trusts more accessible.

An 18 month transitional period is proposed, during which time trustees can consider the application of the Act to their existing trusts and make changes if necessary. We believe that 18 months is too short and we suggest that it should be at least two years.

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

Who may be a trustee

The 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 (unless appointed with consent of the court)
- a person who lacks the capacity to perform the functions of a trustee
- body corporate that is subject to an insolvency event.

We support this provision as being appropriate for trusts. We note that 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 Bill for persons holding the power to remove trustees to remove a trustee who, for instance, is convicted of a dishonesty offence. 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 Bill sets out mandatory and default trustee duties.

We support the inclusion of trustee duties in the 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 exposure draft of the 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.

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 bind or commit trustees to future exercise of discretion
- the duty to avoid a conflict of interest
- the duty of impartiality
- the duty not to make a profit from the trusteeship of a trust
- the duty to act for no reward
- the duty to act unanimously.

Default duties apply *unless* they are modified or excluded by the terms of the trust. For example, the duty to act for no reward can be modified in the trust deed by allowing professional trustees to be paid for their services. We suggest that the payment of trustees for services should be highlighted and clarified in any government guidance on the Act.

The duty to avoid a conflict of interests should also include *managing* conflicts of interest to cover, for instance, where the trustees of a family trust are also beneficiaries. For more information on managing conflicts see the IoD's [Conflicts of Interest Practice Guide](#).

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. We encourage the Committee to consider including a deeming provision for such trusts which incorporates a power to amend the default duties (but preserves the mandatory duties and substratum of the trust).

Duty to consider the settlor's wishes

We suggest the Committee 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 Bill.

Breach of trust and limitation of liability

The 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. It would be helpful to have guidance on what amounts to "gross negligence".

The 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 provision.

Retention of core trust documents

The Bill provides that each trustee must keep (so far as is reasonable) the following:

- the trust deed and any other document that contains terms of the trust
- any variations made to the trust deed or trust
- records of the trust property that identify the assets, liabilities, income and expenses of the trust and that are appropriate to the value and complexity of the trust property
- 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 other documents necessary for the administration of the trust
- 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 on request. Trustees may keep other documents as well.

We agree that it is appropriate that trustees have oversight of the core trust documents. This should lead to better administrative practices such as record keeping and documentation and thereby help support good governance and accountability. However, we suggest there should be greater flexibility so that it is not mandatory for trustees to hold the records personally. Many trustees employ others (such as solicitors) to hold trust documents on their behalf. This should still be permitted, provided that the trustees are able to obtain access on request. In some trusts (eg certain trading trusts and charitable trusts) it may not be practicable for the trustees to personally retain the records. To accommodate such trusts, records could be retained by a senior officer of the trust or at the registered office for example.

There is no specified medium in which records should be retained. While it may be implied that such records may be retained in electronic form, we encourage the Committee to include an express provision clarifying this.

Providing information to beneficiaries

The Bill reforms the provision of information to beneficiaries with the purpose being to ensure beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees.

There are two parts (1) presumption that trustees must notify beneficiaries of "basic trust information" and (2) presumption that trustees must give "trust information" on request.

(1) Presumption that trustees must notify basic trust information

There is a presumption that trustees *must* make available to every beneficiary "basic trust information" which is defined as follows:

- 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 Committee to consider amending the provision so that trustees will be compliant where they have made reasonable steps to provide basic trust information.

Trustees may also face difficulties in providing information to some classes of beneficiaries especially in the context of family trusts. We encourage the Committee to consider distinguishing between different classes of beneficiaries and their right to receive information (eg distinguish between beneficiaries with a vested interest and discretionary beneficiaries).

(2) Presumption that trustees must give trust information on request

Beneficiaries may also request "trust information" which is defined as information:

- regarding the terms of the trust, the administration of the trust or the trust property
- 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. The phrase in the second bullet is arguably too wide as it may require trustees to disclose a significant amount of information to enable the trust to be enforced. We encourage the Committee to provide further guidance around what information trustees can be expected to disclose.

Procedure for deciding whether a presumption applies

The Bill sets out a procedure under which trustees can decide against providing information. There are a number of factors they *must* consider including:

- the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust
- whether the information is subject to personal or commercial confidentiality
- the expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the beneficiary in particular would be given information
- the age and circumstances of the beneficiary
- the effect on the beneficiary of giving the information.

At least in the initial years following the enactment of the Bill, there is likely to be uncertainty around whether trustees have acted properly and in accordance with the law when they have decided *not* to provide information. We are concerned about this uncertainty and believe it is essential that greater clarification and guidance is provided to enable trustees to discharge their information obligations.

Charitable trusts and trusts established for a permitted purpose that do not have beneficiaries have been excluded from the above information requirements and we agree with this exclusion.

Removal of trustees

The removal of trustees can cause issues in practice and the Bill reforms this area of trusts. Under the Bill, a person with the power to remove trustees *must* remove a trustee if that person loses the capacity to perform the functions of a trustee (eg they lose mental capacity) and they have not lawfully delegated their powers. A person with the power to remove 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 is subject to an insolvency event
- 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 promoter 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 consider that the threshold for removing a trustee is appropriate.

Alternative dispute resolution

The Bill sets out an alternative dispute resolution process (eg mediation and arbitration) for all trusts. The benefits of alternative dispute resolution are well known and we support this in the context of trusts. The Bill includes a process for resolving an “internal matter”, which is defined as meaning a matter to which the parties are a trustee and one or more beneficiaries. It would be useful if this process extended to disputes *between* trustees.

In conclusion, we reiterate our support for the Bill and appreciate the opportunity to comment on behalf of our members.

Yours sincerely

A handwritten signature in black ink that reads "Felicity Caird". The signature is written in a cursive, flowing style.

Felicity Caird
General Manager, Governance Leadership Centre
Institute of Directors