

Departmental Disclosure Statement

Trusts Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

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Part One: General Policy Statement

This Bill will repeal and replace the Trustee Act 1956 and the Perpetuities Act 1964 to make trust law more accessible to everyday users. The Bill clarifies and simplifies core trust principles and essential obligations for trustees, to improve understanding about how trusts operate. Importantly it also preserves the flexibility of the common law, allowing trust law to continue to evolve through the courts. A purpose of the Bill is to be enabling and avoid prescription, to accommodate the wide range of the circumstances in which trusts are used.

The Bill achieves its policy objectives by providing—

- an explanation of the interaction of the Bill with other aspects of trust law, including the common law and equity;
- a description of the key features of an express trust;
- mandatory and default trustee duties;
- requirements for managing trust information and disclosing it to beneficiaries of the trust;
- flexible trustee powers;
- updated provisions on the exercise of trustee powers by others, such as agents and delegates;
- the circumstances when trustees must, or may, be removed, and options for removing and appointing trustees out of court;
- clear rules to assist with the variation, resettlement and revocation of trusts; and
- a description of some of the court powers that may be exercised, and where court assistance may be sought by those involved in a trust, to support the courts' general oversight of trusts.

The Bill reflects the set of recommendations by the Law Commission following its comprehensive review of general trust law from 2009 to 2013. An exposure draft Trusts Bill was released in November 2016 for public consultation. Submitters' feedback helped to improve the practical and technical aspects of the Bill.

Clear and accessible core trust principles

The Trustee Act 1956 is outdated and no longer reflects current trust practice. Many of the provisions are difficult to understand and need to be read alongside a considerable body of case law. One of the policy objectives of the Bill is to provide clear, simple and accessible trust law. The Bill sets out important principles of trust law that have been established through centuries of case law. Making trust law more accessible in this way, and thereby improving the understanding of these principles, will help to ensure trusts are administered properly. The Bill will also assist with enforcement of the terms of the trust against trustees where necessary.

Parts 1 and 2 of the Bill lay out the foundational provisions that explain—

- what an express trust is;
- how an express trust is created and how long it can exist;
- what trusts the Bill applies to; and
- how the Bill is to be interpreted and applied.

The Bill will not codify trust law in New Zealand and, with a couple of exceptions, is intended to largely capture and reflect the existing common law position. The aim of the general provisions of the Bill is to retain the ability of the courts to refer to many aspects of the common law and equity that relate to trusts, in interpreting and applying the Bill.

The Bill will apply to all express trusts, including trusts that existed before enactment. The intention is for the Bill to be a useful and effective tool for the proper management of trusts. Therefore, existing trusts should be able to benefit from the provisions. There is an 18 month transition period from the date of commencement for existing trusts, to allow those involved in trusts to review and consider the application of the Bill to their trust if they wish.

The Bill will also provide clearer and more accessible law for trustees and beneficiaries, by describing trustees' duties and powers. Currently, there is little reference to trustee duties in the Trustee Act 1956 and various administrative powers are scattered throughout the Act. Part 3 of the Bill outlines trustee duties in simple and easy to understand language. The mandatory duties will apply to trustees of all express trusts, while the default duties can be modified or excluded by the terms of the trust. Part 4 brings together the various administrative powers of trustees, including—

- general powers of trustees to manage trust property and carry out the trust;
- specific powers, such as investment powers and powers to use trust property for the beneficiary's welfare; and
- the power to delegate trustee's powers and functions in specified circumstances.

The Bill removes unnecessary restrictions and provides useful and flexible powers that are necessary for the trustees to manage trust property and carry out the trust. The intention is for trustees to still use their powers in accordance with the terms of the trust and their duties. Part 4 also explains the general principles of trustees' liability, indemnities and protections, so trustees and people who are dealing with trustees have a good understanding of their legal position.

More efficient and less expensive administration of trusts

The Bill seeks to make day-to-day administration of trusts easier by providing guidance on matters that are currently unclear. For example, Part 3 of the Bill includes provisions on trustees' obligation to keep and give trust information. It sets out—

- what core documents must be kept by trustees;
- how long core documents must be kept for;
- a presumption that trustees must provide basic information to beneficiaries; and
- what factors to consider when deciding whether to give beneficiaries information or withhold it, and the procedure to follow when trust information is to be withheld.

Part 2 of the Bill abolishes the common law rule known as the rule against perpetuities and repeals the Perpetuities Act 1964, which are archaic and extremely complex. Instead, the Bill sets out a clear-cut maximum duration period of 125 years for trusts.

Part 5 of the Bill provides more comprehensive and clearer processes around the appointment and discharge of trustees, including—

- who may be appointed as a trustee and how trustees may be appointed;

- how to accept or reject an appointment as a trustee;
- what happens when a trustee retires or dies;
- compulsory and optional grounds for a trustee's removal;
- how a trustee can challenge the removal; and
- the process for transferring ownership of trust property when there is a change of trustee.

These provisions are intended to minimise unnecessary and costly applications to court for straightforward or uncontested changes of trustee appointments.

The courts continue to have oversight of trusts, and the Bill has no impact on the High Court's inherent jurisdiction to ensure the proper administration of trusts. Part 7 of the Bill outlines specific powers of the court to aid its administrative oversight function, including the power to—

- review a trustee's act, omission or decision; and
- assist trustees in various aspects of their role, such as giving direction orders, varying or extending trustees' powers, or ordering the payment of a fee to a trustee.

The use of alternative dispute resolution (ADR) processes to resolve internal and external trust disputes is made generally available under the Bill, including for trustees where the terms of their trusts are silent. The purpose is to support the greater use of ADR for trust disputes. The Bill sets out what matters can be referred to ADR, the court's oversight over an ADR process if there is any unascertained or incapacitated beneficiaries, and the court's power to order an ADR process.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<ul style="list-style-type: none"> <i>Review of the Law of Trusts: A Trusts Act for New Zealand</i>, New Zealand Law Commission, (NZLC R130, 2016). http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R130.pdf <i>Government Response to Law Commission Report on Review of the Law of Trusts: A Trusts Act for New Zealand</i>, The Government, March 2014. https://www.justice.govt.nz/assets/Documents/Publications/government-response-to-law-commission-report.pdf 	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<i>Regulatory Impact Statement: A New Trusts Act</i> , Ministry of Justice, April 2016, can be found at http://www.treasury.govt.nz/publications/informationreleases/ris .	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p><i>Regulatory Impact Statement: A new Trusts Act</i></p> <p>“The Regulatory Impact Analysis Team (RIAT) at the Treasury has reviewed the Regulatory Impact Statement (RIS) prepared by Ministry of Justice and associated supporting material, and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.</p> <p>The policy proposals largely implement the Law Commission’s recommendations following its review of trust law. While the overall problems are well described, the timeframes for seeking decisions have not allowed for full consideration of some concerns raised by the Finance Industry. However, RIAT notes there appears to be net benefits in implementing the preferred options.”</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	YES
<p>At the time of the Regulatory Impact Statement that informed the policy decisions for the Bill, the Ministry was aware that some of the aspects of the policy may not be suited to the way capital market trusts are formed and operated.</p> <p>The Ministry continued to work with those involved in the capital markets and others using commercial trusts to test whether some or all of policy could work for these types of trusts, and received submissions on an exposure draft Bill on the issues.</p> <p>The Ministry has further analysed the policy in the Bill, based on the Law Commission recommendations, as applied to commercial and financial trusts.</p> <p>A supplementary RIS is available that assesses the impact of changing the status quo for commercial and financial trusts by applying the Law Commission's recommendations.</p> <p><i>Supplementary Regulatory Impact Statement: A New Trusts Act - Commercial and Financial Trusts</i>, Ministry of Justice, July 2017 can be found at http://www.treasury.govt.nz/publications/informationreleases/ris.</p> <p><i>RIA Team opinion</i></p> <p>"The Regulatory Impact Analysis Team (RIAT) at the Treasury has reviewed the supplementary RIS produced by the Ministry of Justice. The reviewers consider that the information and analysis summarised in the supplementary RIS meets the quality assurance criteria.</p> <p>It makes the case that applying some of the Law Commission recommendations on family trusts to commercial and financial trusts is unnecessary, will disrupt current practice and impose unnecessary compliance costs for no correlating benefit."</p>	

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
See page 49 of the Regulatory Impact Statement referred to in 2.3 above.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
See pages 51–52 of the Regulatory Impact Statement referred to in 2.3 above.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

New Zealand does not have international obligations to comply with in this area.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Trusts are commonly used for the ownership of Māori land. The Te Ture Whenua Māori Act 1993 is the primary legislation governing Māori land trusts, providing the Māori Land Court with jurisdiction over creating these trusts. The Te Ture Whenua Māori Act 1993 is likely to be repealed and replaced with Te Ture Whenua Māori Bill, which maintains the jurisdiction of the Māori Land Court.

The objectives of the Bill noted in the General Policy Statement also apply to trusts that hold Māori land and other assets.

Consultation on the Bill has occurred with Te Puni Kōkiri, some members of the judiciary from the Māori Land Court, and legal practitioners with expertise in Māori land trusts.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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Advice provided to the Attorney-General by Crown Law, or a Bill of Rights Act 1990 section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon the Bill's introduction at:

http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
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The Trustee Act 1956 will be repealed by the Bill, which contained an offence in section 83B(9). This offence is no longer considered necessary.

Under section 136 the Bill expands the jurisdiction of the Family Court to make orders or directions under the Bill where it hears and determines proceedings under the Family Court Act 1980.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Sections 41–44 set out basic requirements on trustees to keep specified documents in relation to a trust. Section 41 sets out a list of documents of such significance to all trusts that they must always be kept, such as the trust deed, records of trust property and any written contacts, so the documents are likely to include some personal information. These provisions cannot be excluded or modified by the terms of a trust, although the terms of a trust could require additional information to be kept.</p> <p>Sections 45–51 require a trustee to proactively disclose some basic trust information, so that at least one beneficiary will know about the trust to enable it to be enforced. To decide what further information should be disclosed to beneficiaries, factors should be taken into account under section 49. These factors include the nature of the interests in the trust, whether the information is subject to personal or commercial confidentiality, the age and other circumstances of the beneficiary and the effect of giving the information on the trustees and beneficiaries of the trust. These factors will ensure that person does not disclose personal information about trustees or beneficiaries without consideration of the effect of disclosing that information.</p> <p>Sections 45–51 cannot be excluded or modified by the terms of a trust, but the terms can influence the decision about giving information to beneficiaries.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The draft Bill was provided to the Office of the Privacy Commissioner for comment, and no concerns were raised.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The policy and the Bill have been extensively consulted on. See page 50 the Regulatory Impact Statement referred to in 2.3 above</p> <p>Participants from the financial sectors were consulted from May to June 2016 on the application of the Bill to the trusts in the financial markets, and a targeted group were consulted on aspects of the Bill subsequent to submissions on the exposure draft Bill.</p> <p>An exposure draft of the Bill was released in November 2016 for 6 weeks public consultation. A consultation document accompanied the exposure draft explaining the policy objectives that the Bill's provisions were based on. Forty-six submissions were received from lawyers, law firms, representative bodies (particularly in the financial sector) and individuals. The submissions provided useful technical feedback for the Bill and informed amendments to the introduction version of the Bill.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
With some exceptions, the Bill will apply to existing express trusts. However the rights and obligations are not retrospective and will only apply upon commencement.	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Section 153 provides the power to make regulations providing for transitional matters by Order in Council.</p> <p>The regulations will provide for transitional and saving provisions concerning the coming into force of the Act that may be additional to, or in place of, the transitional and savings provisions in Schedule 1.</p> <p>The regulations will also provide for any other matters necessary for facilitating or ensuring an orderly transition from the provisions of any enactments replaced by this Act to the provisions of this Act.</p> <p>The regulations may only be made or continue in force for two years after the commencement of this section.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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