

# A new Trusts Act for New Zealand

---

## Exposure draft of the Trusts Bill

November 2016



[New Zealand Government](#)

# Contents

- Contents..... 2
- Introduction ..... 3**
  - Overview ..... 3
  - How to have your say ..... 3
  - Next steps ..... 4
  - Personal information and confidentiality ..... 4
- Commentary on the draft Trusts Bill..... 5**
  - Title and commencement clauses ..... 5
  - Part 1 – preliminary provisions ..... 6
  - Part 2 – express trusts ..... 7
  - Part 3 – trustees’ duties and information obligations..... 8
  - Part 4 – trustees’ powers and indemnities ..... 12
  - Part 5 – appointment and discharge of trustees ..... 15
  - Part 6 – revocation and variation of trusts ..... 16
  - Part 7 – court powers and dispute resolution..... 17
  - Part 8 – miscellaneous provisions ..... 18
  - Schedule 1 – transitional, savings and related provisions..... 19
  - Schedule 2 – wholesale investment trusts..... 20
  - Schedule 3 – trusts that are taken to have the characteristics of an express trust..... 21
  - Schedule 4 – consequential amendments ..... 21
- Repealed sections of the Trustee Act 1956 ..... 22**
- Concluding general questions ..... 24**
- Appendix 1: Summary of consultation questions..... 25**

# Introduction

## Overview

The draft Trusts Bill (the Bill) has been developed in response to the Law Commission's (the Commission's) 2013 report *Review of the Law of Trusts: A Trusts Act for New Zealand* (the Commission's report). In March 2014, the Government accepted the Commission's recommendation to replace the current Trustee Act 1956 (the Act) with a new Trusts Act. The Bill adopts 48 of the Commission's 51 recommendations.<sup>1</sup>

There are specific questions we're particularly interested in your feedback on. We also welcome any other comments you may have. Your answers will inform the content of the final Bill.

We're mainly interested in whether the wording and structure of the draft Bill is sufficiently clear, or how it could be made clearer and whether anything may create unintended consequences.

The intention is that the Bill will not require existing trust deeds to be changed, because the Bill largely restates the existing law. Therefore, we are interested in feedback on how the new law will work for existing trusts.

This consultation document explains the policy objectives that the draft Bill's provisions are based on. The underlying policy decisions have been extensively canvassed by the Commission and agreed to by Cabinet, and are not likely to change at this point. Another useful source for further detail about the background to these decisions is the Commission's final report. This is available at [www.lawcom.govt.nz/our-projects/law-trusts](http://www.lawcom.govt.nz/our-projects/law-trusts).

If you have questions about the consultation, please email us at [trustlaw@justice.govt.nz](mailto:trustlaw@justice.govt.nz).

## How to have your say

- Give your feedback online at [consultations.justice.govt.nz](http://consultations.justice.govt.nz)
- Email your submission to [trustlaw@justice.govt.nz](mailto:trustlaw@justice.govt.nz)
- Post your submission to:

Trusts Bill consultation team  
Ministry of Justice  
SX10088  
Wellington  
New Zealand

**Please send us your feedback by 5pm, Wednesday, 21 December 2016.**

---

<sup>1</sup> R51 and R52, which relate to relationship property, are not being progressed in advance of the Law Commission's Review of the Property (Relationships) Act 1976, and R45 (standing of the official assignee to challenge a trust) is being progressed separately through the Regulatory Systems Amendment Bill.

## Next steps

After the consultation period, we will analyse the submissions and report to the Justice Minister. The Justice Minister may then seek Cabinet's agreement to introduce the Bill to Parliament.

It's expected a final version of the Bill will be introduced to Parliament in 2017. You will then have an opportunity to comment on the specific proposals in the Bill when it is considered by a parliamentary Select Committee.

## Personal information and confidentiality

We will hold your personal information in accordance with the Privacy Act 1993.

We accept submissions made in confidence or anonymously. Please clearly indicate if you want your submission to be treated as confidential.

We may be asked to release submissions in accordance with the Official Information Act 1982 and the Privacy Act 1993. These laws have provisions to protect sensitive information given in confidence but we can't guarantee the information can be withheld. We won't release individuals' contact details.

# Commentary on the draft Trusts Bill

The exposure draft of the Trusts Bill is available at [consultations.justice.govt.nz/policy/trusts-bill-exposure-draft](https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft).

This document is a broad overview of the Bill. The commentary generally follows the structure of the Bill, which is:

- Title and commencement clauses
- Part 1 – preliminary provisions
- Part 2 – express trusts
- Part 3 – trustees’ duties and information obligations
- Part 4 – trustees’ powers and indemnities
- Part 5 – appointment and discharge of trustees
- Part 6 – revocation and variation of trusts
- Part 7 – court powers and dispute resolution
- Part 8 – miscellaneous provisions
- Schedule 1 – transitional, savings and related provisions
- Schedule 2 – wholesale investment trusts.

In this document, the term ‘common law’ refers to both common law and equity (except in relation to clause 3, which specifically mentions equity in line with the wording used in that clause).

## **Title and commencement clauses**

Under clause (cl) 2 the Act will come into force 6 months after the date on which it receives the Royal assent.

## Part 1 – preliminary provisions

Part 1 of the Bill sets out preliminary matters such as the purpose and scope of the Bill and definitions of terms used in the Bill.

The purpose provision in cl 3 is a key aid to interpretation for the courts. It's intended to reflect the overall policy objectives of the trust law reforms and reflect the relationship between the Bill and the existing body of trust common law and equity.

The Bill isn't intended to be an exhaustive code but rather a statement of key principles and administrative rules for trusts to enhance accessibility. The Bill isn't intended to completely displace the common law or equitable rules on trusts. Clause 3(3) reflects the policy intent that common law and equity will continue to apply unless it's inconsistent with the provisions of the Bill. Common law and equity will continue to provide context when interpreting the Bill (unless to do so would be clearly inconsistent with the Bill).



1. Do the preliminary provisions set out a useful starting point for interpreting the Bill?
2. Do you have any comments about how the provisions could be improved?

## Part 2 – express trusts

Part 2 sets out the core principles governing express trusts covered by the Bill such as the characteristics of an express trust and how they must be created. An express trust under the Act must satisfy the characteristics under cl 9 and be created in accordance with cl 10.

Clause 9 provides that a trust under the Act:

- must have the fundamental characteristics specified in cl 9(1), or
- if it does not have the fundamental characteristics, but does have characteristics recognised at common law as constituting a trust, the Court may determine that the trust has the characteristics for the purposes of the Act (cl 9(2)).

Clause 10 sets out how a trust may be created under the Act. It reflects the well-accepted requirements for the creation of a trust – the 3 certainties articulated in Lord Langdale’s judgment in *Knight v Knight* (1840) 3 Beav 148; (1840) 49 ER 58. These are that the settlor:

- indicates an intention to create a trust
- identifies the beneficiaries or the permitted purpose, and
- identifies the trust property.

The 3 certainties are essential components of an express trust and should remain as a requirement in the statutory test.

These provisions aren’t intended to exclude common law rules that provide that an express trust may be invalid for other reasons. The intent is that cl 3(3) preserves the common law in this regard without express reference.

Trusts created by any means will be covered by the Bill when they meet the criteria in these key provisions. It is intended that the Bill will apply to trusts created through a will or upon intestacy under the Administration Act 1969.



3. Do these provisions set out a clear approach for the creation and characteristics of express trusts?
4. Do you have any comments about how the provisions could be improved?

## Part 3 – trustees’ duties and information obligations

### Subpart 1 – duties of trustee

Subpart 1 of Part 3 contains the mandatory and default duties of a trustee. This gives effect to R2, R3, R13, R14(2) of the Commission’s report. The intention is to improve the clarity and accessibility of a trustee’s duties by summarising and restating the current law while leaving room for the interpretation of these duties by the courts.

#### *Mandatory duties*

As outlined in cl 14, the mandatory duties must be performed and can’t be modified or excluded by the terms of the trust deed. Common law will continue to inform the content and application of those duties (cl 3(3)).

However, while the terms of the trust can’t exclude a mandatory duty, the trust deed can influence how the duty to hold or deal with trust property for the benefit of the beneficiaries or permitted purpose is applied (cl 14(2)).

#### *Default duties*

The default duties are the key common law trustee duties, which can be modified or excluded, expressly or implicitly, by the terms of a trust.

An exclusion or modification of a default duty must be consistent with the mandatory duties. Clause 15(3) clarifies that excluding one of the specified default duties is not inconsistent with the mandatory duties.

Again, the common law will continue to inform the content and application of the duties (cl 3(3)).

Clause 15(4) adds to what was proposed by the Commission – it requires paid trust advisers to disclose and explain the exclusion or modification of any default duty. A failure to do so won’t invalidate the terms of the trust (cl 15(5)), but may give rise to a claim against the adviser in tort or under the advisors’ rules of professional conduct.

#### *Standard of care*

The Commission’s report recommended inserting a standard of care: that when exercising a power of administration, a trustee must exercise such care and skill as is ‘reasonable in the circumstances’, taking account of any special knowledge or experience that the trustee has (R13). This is already part of the common law and can be excluded by the terms of a trust.

In giving effect to this recommendation, the Bill frames the standard of care as a general default duty of care, which may be excluded by the terms of the trust deed (cl 22).

A separate provision deals with the standard of care that applies to investment and is taken from existing section 13B of the Act (cl 23, giving effect to R14(2)). A trustee must exercise the care and skill that a prudent person of business would exercise in managing the affairs of others.

In both cases, a higher standard of care is likely to arise if a person has special knowledge or experience (cls 22(b) and 23(b)).



5. Do the provisions on duties clearly set out the basic obligations of a trustee?
6. Do you have any comments about how they could be improved?
7. Do you think 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 (see cls 64 and 65)?
8. Should there either be a different standard of care for powers of investment or is it appropriate for the general duty of care to apply in this case? Why?

## Subpart 2 – exemption and indemnity clauses

Clauses 33–36 give effect to R4 of the Commission’s report and set out rules relating to the extent to which trustees can limit or exclude their liability. Two key features of these provisions are:

- the terms of a trust can’t exclude a trustee from being liable, or indemnify a trustee, for a breach arising from dishonesty, wilful misconduct or gross negligence (cls 33 and 34), and
- paid advisors must explain the effect of any exclusion or indemnification (cl 36).



9. Do the exemption and indemnity provisions clearly set out the extent to which trustees can limit their liability?
10. Do you have any comments about the language used, or otherwise about how the provisions could be improved?
11. Should the liability of an advisor under cls 15(4) and 36 be specifically set out in the Bill or be left for development under ordinary tort principles?

## Subpart 3 – trustee’s obligations to keep and give trust information

### *Documents to be kept by trustee*

Clauses 37–40 set out basic requirements on trustees to keep specified documents, reflecting R5 of the Commission’s report. The provisions are drafted in a way that doesn’t require the information to be provided in a particular medium, so trustees can retain the information in electronic form if they wish. Clause 37 sets out a list of documents of such significance to all trusts that they must always be kept. Trustees may choose to keep other documents as well.

These provisions can’t be excluded or modified by the terms of a trust, although the terms of the trust could require additional information to be kept.

### *Giving information to beneficiaries*

Clauses 41–47 give effect to R6 of the Commission’s report. The Commission intended the general principle in *Schmidt v Rosewood Trust* [2003] UKPC 26; [2003] 2 AC 709 be codified and clarified to make trustee’s information disclosure obligations clearer. The overall effect is that a trustee must proactively disclose some trust information, so that at least one beneficiary must know about the trust, to enable the trust to be enforced.

Clauses 41–47, therefore, replace existing common law rules, preserving the Court’s supervisory role in necessary cases (cl 47).

These provisions can’t be overridden by the terms of a trust, but the terms can influence the decision about giving information to beneficiaries (cl 45(2)(c)).



12. Do these provisions clearly set out a trustee’s obligation to keep and give trust information?
13. Do you have any suggestions about how the provisions could be improved?

## Part 4 – trustees’ powers and indemnities

### Subpart 1 – powers of trustee

#### *General powers*

Subpart 1 of Part 4 sets out the powers of a trustee and is based on R7, R8, R10–12, R14–17, R27 and R28 of the Commission’s report.

In line with the Commission’s recommended approach, cl 48 of the Bill confirms that trustees have legal capacity to deal with trust property, and all the powers necessary to carry out the trust.

The trustee’s powers under this clause can be limited. The existence and extent of the powers are informed by the terms of the trust as well as by the applicable mandatory and default duties. The terms of the trust may:

- specify particular powers, or
- specifically, or by implication, exclude other powers.

#### *Specific default powers set out in the Bill*

The remainder of subpart 1 in Part 4 of the Bill provides specific default powers, in line with the Commission’s recommendations. It is necessary to provide these powers in statute, despite the breadth of cl 48, because there may be some doubt about their existence if not included in the Bill (for example, the mandatory duties might be seen as precluding the ability for other persons to exercise trustee powers). The powers in these provisions are default so will be read into each trust, but can be modified or excluded expressly or by implication by the terms of the trust.

The Bill specifically includes:

- powers regarding investment (cls 51–55)
- powers regarding the application of trust property for maintenance, education, and advancement (cls 56–63)
- a power to appoint others to act in relation to the trust (cls 64–65)
- a power to delegate the trustee’s powers if a person is temporarily unable to perform the role of a trustee for one of a number of specified reasons (for example, temporary mental incapacity) (cls 66–69)
- a power to appoint a special trust advisor (cls 70–72)
- a power to distribute trust property without regard to claims of which the trustee doesn’t have notice (cl 75).

#### *Exercise of trustee powers and functions by others*

Clauses 64 and 65 reflect R10, R11, R17 and R27 of the Commission’s report, relating to the appointment of agents, nominees and custodians, and investment managers, but in a simplified form. This clarifies the obligations of a trustee and removes any overlap if the different types of

appointment are dealt with separately. These provisions are all exceptions to the general principle that a trustee must act personally.

Under cls 64 and 65 the ability to appoint others to act in relation to the trusts is default (the terms of a trust can exclude or modify the power), but it's mandatory for a trustee who does exercise this ability to keep the arrangement under review, and consider whether they need to intervene at any point. The general standard of care will always apply to that obligation. We consider that where a trustee is allowing another party to make trustee decisions or exercise a trustee function, the trustee must retain some oversight of that individual.



14. Do you think subpart 1 of Part 4 clearly sets out the powers of a trustee?
15. Do you have any comments about how the provisions could be improved?
16. R14(3) of the Commission's report recommended clarifying a trustee can consider the objectives or purpose of a trust when deciding how to manage trust property. Is this achieved by including the objectives or permitted purpose of the trust as a matter to have regard to in exercise a power of investment?
17. If not, how could the Bill implement this recommendation?
18. Do you think the Bill needs to specifically provide that people engaged to act on behalf of a trustee can be paid, considering that the default duty is for a trustee not to be paid?

## Subpart 2 – trustees’ indemnities

Clauses 76–79 replicate the well-understood principles relating to trustees’ liability for expenses, other liabilities, and their right to indemnity in respect of these matters, giving effect to R47 and R48 of the Commission’s report. These provisions can’t be excluded or modified by the terms of the trust. Clauses 80–85 replicate specific provisions from the Act that deal with particular instances of trustee liability or indemnity.



19. Does subpart 2 of Part 4 appropriately set out the rules around a trustee’s liability or indemnity arrangements?
20. Do you have any comments about how the provisions could be improved?

## Part 5 – appointment and discharge of trustees

Part 5 sets out the provisions related to the appointment and removal of trustees, and transfer of trust property to new trustees. These provisions are based on R18–R26 of the Commission’s report, as well as certain sections of the Act not considered by the Commission.

The aim of the policy is to provide a clear and comprehensive statutory framework for appointing and removing trustees and transferring trust property. Part 5 updates and clarifies provisions from the Act, ensuring there’s clear guidance about when and how a trustee can be removed. The provisions incorporate aspects of the common law, such as the duties that apply to people exercising the power to appoint and remove trustees.

Part 5 alters the current position in some areas to provide further clarity and to ensure the process is simple, flexible and doesn’t require recourse to the courts in non-contentious cases. For example, the provisions provide a mechanism for transferring registered trust property when the departing trustee doesn’t, or can’t, complete the transfer documentation, which doesn’t require recourse to the court.

The Bill includes some minor departures from the Commission’s recommendations. Clauses 96 and 97 allow the trustee who is being removed to apply to the court and object to the removal, which will ensure the power of removal is only used in appropriate cases.

Clauses 102–106 don’t adopt the Commission’s recommendations in relation to supervision by the Public Trust over the removal and replacement of trustees in certain situations and over the transfer of registered trust property. This oversight would create extra work and costs for trustees without a clear benefit in risk reduction. The oversight of the courts will be retained in appropriate cases.



21. Do the provisions create a clear and workable framework for appointing and removing trustees and transfer of trust property?
22. Do you have any comments about how the provisions could be improved?
23. Clause 88(1) sets out the people who may remove a trustee – should this include the receiver of a company in receivership?

## Part 6 – revocation and variation of trusts

The clauses in Part 6 of the Bill give effect to R29, 30 and 31 of the Commission’s report. Clauses 108–110 are intended to reflect and replace the rule in *Saunders v Vautier* (1841) Cr & Ph 240, (1841) 41 ER 482 (Ch) which provides that, if the beneficiaries of the trust are all adults with full legal competence and they’re in agreement, they can require the trustees to terminate or vary the trust. The provisions also replace sections 64 and 64A of the Act, as explained by the Commission.

The provisions also provide for certain powers of the court in relation to revocation and variation. Under the Bill, the court can:

- approve a revocation, variation, or resettlement under clauses 108 or 109 on behalf of a minor, incapacitated or unborn beneficiary (under the current law, the rule in *Saunders v Vautier* can’t be used in this situation) (cl 111)
- waive the requirement for consent of beneficiaries (cl 112), and
- vary or extend the powers of trustees in relation to property transactions in certain circumstances (cl 113).



24. Do these provisions set out a clear process for the revocation or variation of trusts in limited circumstances?
25. Do you have any comments about how the provisions could be improved?

## Part 7 – court powers and dispute resolution

Part 7 of the Bill sets out certain powers of the court in relation to trusts, including jurisdiction of the Family Court and facilitating the use of alternative dispute resolution. It implements R4(3), R14 (in part), R32–R36, R41, R42 and R46 of the Commission’s report.

Court powers aren’t intended to replace the High Court’s inherent supervisory jurisdiction, but set out certain specific powers of the court. For example, cls 114 and 115 set out a new procedure for the court to review a trustee’s act, omission or decision, on application of a beneficiary, replacing section 68 of the Act.

Clauses 132–138 implement R42 of the Commission’s report and aim to facilitate the use of alternative dispute resolution when there are disputes involving trusts.



26. Does Part 7 clearly set out the appropriate powers of the court?
27. Do you have any comments about how the provisions could be improved?
28. Will the provisions facilitate the use of alternative dispute resolution when there are disputes in relation to trusts?
29. Do you have any other comments about how Part 7 could be improved?

## Part 8 – miscellaneous provisions

Part 8 sets out a number of miscellaneous provisions including:

- provisions relating to the transfer of certain trust property to the Crown (which implements R37 of the Commission's report)
- provisions about the audit of accounts of trust property (R44 of the Commission's report)
- a provision giving a life tenant the powers of a trustee (re-enacting section 88 of the Act).

Part 8 also has provisions about transitional matters (dealt with in schedule 1, see below), consequential amendments and repeals.



30. Do you have any comments about Part 8?

## Schedule 1 – transitional, savings and related provisions

Schedule 1 of the Bill covers the main transitional provisions likely to be needed. We're also interested in your feedback about whether other specific transitional provisions are required in the Bill.



31. Do you have any comments on the transitional provisions in schedule 1?
32. Are other specific transitional provisions required?

## Schedule 2 – wholesale investment trusts

Capital markets use trusts to structure the large scale raising of capital. Trusts are a key wholesale (that is, not public or retail) market mechanism banks and corporations use to borrow money and structure their debt. Wholesale investment trusts are structured in a way that is different to typical family trusts. For example, in wholesale finance trusts it is creditors or investors and not beneficiaries that are the main focus. Such trusts are used as part of highly negotiated transactions, involving participants with a high degree of knowledge about the nature of the arrangement.

Schedule 2 of the draft Bill modifies how certain provisions of the Bill will apply to wholesale investment trusts. The modifications are intended to remove obligations that are not relevant to the context in which wholesale investment trusts operate. The definition of wholesale investment trust has been developed to align with the Financial Markets Conduct Act 2013. We're aware that there may be other interface issues between the Bill and that Act. We will work to ensure that both Acts operate together in a way that minimises compliance costs for trusts governed by both pieces of legislation.

In considering any modifications required, the objective has been to maintain coherent and principled trust law that applies to all trusts in New Zealand where possible, while allowing some modifications in its application to trusts used in wholesale investment where appropriate.



33. Do you have comments about the treatment of wholesale investment trusts in schedule 2?

### **Schedule 3 – trusts that are taken to have the characteristics of an express trust**

It's possible that a trust created under an existing statute may not clearly fulfil cl 9, but from a policy point of view, should be considered an express trust for the purposes of the Trusts Act. We're therefore considering listing in this schedule all current statutes under which trusts are created to ensure that they're covered by the Trusts Act.

### **Schedule 4 – consequential amendments**

This schedule will be completed after further consultation and development of the Bill.

# Repealed sections of the Trustee Act 1956

Some sections in the Act aren't replicated in the Bill. This is because the section will be covered by other more general sections in the Act or in other legislation, or because the provision is out of date and no longer needed. This part of the document sets out sections, which were not considered as part of the Commission's report, but that we don't think are required in the Bill.

**Table 1: Trustee Act sections not replicated in the draft Trusts Bill**

Section	Reason
Section 27 – Reversionary interest	Covered by cl 48 – General Powers
Section 28 – Valuations	Covered by cl 48 – General Powers
Section 30 – Power to concur with others	Covered by cl 48 – General Powers
Section 37 – Exoneration of trustees in respect of certain powers of attorney	General rules regarding powers of attorney in s 20 of the Property Law Act 2007 apply
Section 39 – Protection of trustee who pays trust money to bankrupt in good faith and without knowledge of bankruptcy	Not needed – trustee can undertake a simple (free-of-charge) online search of bankruptcy notices before making the payment
Section 42 – Protective trusts	Do not need a statutory basis
Section 42C – Matters to be taken into consideration when exercising powers	Clause 53 applies and requires a trustee to ensure that a reasonable level of income is available for income beneficiaries
Section 44 – Evidence as to vacancy in a trust	Under Land Transfer Act 1952, trusts cannot be entered on the title and principle of indefeasibility of title means that a registered title cannot be set aside, subject to exceptions and limitations (such as fraud)
Section 53 – Orders as to contingent rights of unborn persons	Clause 118 allows trusts with unborn beneficiaries to be revoked, varied, or resettled in certain circumstances
Section 54 – Vesting order in place of conveyance by infant mortgagee.	General provisions in the Minors' Contracts Act 1969 apply

Section 60 – Vesting orders in respect of shares in ships and industrial property	General process for transferring property in cls 102–106 applies
Section 61 – Vesting orders of charity property	The Charitable Trusts Act 1957 or general process in cls 102–106 applies
Section 62 – Orders made upon certain allegations to be conclusive evidence	General process for transferring property in cls 102–106 applies
Section 64B – Power of court to authorise variations of trust	Bill does not prescribe a distinction between capital and income
Section 76A – Service of notices, etc, under sections 75 and 76	The Court rules for service will apply
Section 80 – Indemnity to banks and others	Do not need to provide that people are bound to follow a court order and indemnified if they do
Section 81 – Operation on bank account of trustees	No statutory basis is required to allow trustees to operate and open bank accounts
Section 86 – Fees and commission deemed a testamentary expense	Clause 54 gives trustees the broad power to allocate or apportion receipts and outgoings, which should include testamentary expenses
Section 87 – Costs of inquiring regarding beneficiaries	Covered by cl 48 – General Powers



34. Do you agree that the proposed repealed sections aren't needed in the Bill?
35. If not, which sections do you think are still required in the Bill?

## Concluding general questions



36. The new Trusts Act is intended to work alongside other statutes that involve trusts. Do you see any issues with the way in which the new Act will interact with any such existing statutes?
37. Do you think the Bill sets out key rules relating to trusts in a way that can be easily understood and applied by everyday people who use trusts?
38. Do you have any suggestions about how the Bill could be improved for everyday people who use trusts?
39. Do you think the changes in the Bill will address problems related to the complexity and expense of administering trusts?
40. If not, how could the Bill further facilitate the administration of trusts?
41. The intention is that the Bill would not require existing trust deeds to be changed. Do you agree that this is the case?
42. If not, what areas of the Bill would require existing trust deeds to be changed?
43. Could any of the terms in the Bill be clearer or more modern?
44. Do you have any suggestions about how to clarify or modernise the terms used in the Bill?
45. Do you have any other comments about how the Bill could be improved?

# Appendix 1: Summary of consultation questions

## **Part 1 – preliminary provisions**

1. Do the preliminary provisions set out a useful starting point for interpreting the Bill?
2. Do you have any comments about how the provisions could be improved?

## **Part 2 – express trusts**

3. Do these provisions set out a clear approach for the creation and characteristics of express trusts?
4. Do you have any comments about how the provisions could be improved?

## **Part 3 – trustees’ duties and information obligations**

### *Subpart 1 – duties of trustee*

5. Do the provisions on duties clearly set out the basic obligations of a trustee?
6. Do you have any comments about how they could be improved?
7. Do you think 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 (see cls 64 and 65)?
8. Should there either be a different standard of care for powers of investment or is it appropriate for the general duty of care to apply in this case? Why?

### *Subpart 2 – exemption and indemnity clauses*

9. Do the exemption and indemnity provisions clearly set out the extent to which trustees can limit their liability?
10. Do you have any comments about the language used, or otherwise about how the provisions could be improved?
11. Should the liability of an advisor under cls 15(4) and 36 be specifically set out in the Bill or be left for development under ordinary tort principles?

### *Subpart 3 – trustee’s obligations to keep and give trust information*

12. Do these provisions clearly set out a trustee’s obligation to keep and give trust information?
13. Do you have any suggestions about how the provisions could be improved?

## **Part 4 – trustees’ powers and indemnities**

### *Subpart 1 – powers of trustee*

14. Do you think subpart 1 of Part 4 clearly sets out the powers of a trustee?
15. Do you have any comments about how the provisions could be improved?
16. R14(3) of the Commission’s report recommended clarifying a trustee can consider the objectives or purpose of a trust when deciding how to manage trust property. Is this achieved by including the objectives or permitted purpose of the trust as a matter to have regard to in exercise a power of investment?
17. If not, how could the Bill implement this recommendation?
18. Do you think the Bill needs to specifically provide that people engaged to act on behalf of a trustee can be paid, considering that the default duty is for a trustee not to be paid?

### *Subpart 2 – trustees’ indemnities*

19. Does subpart 2 of Part 4 appropriately set out the rules around a trustee’s liability or indemnity arrangements?
20. Do you have any comments about how the provisions could be improved?

## **Part 5 – appointment and discharge of trustees**

21. Do the provisions create a clear and workable framework for appointing and removing trustees and transfer of trust property?
22. Do you have any comments about how the provisions could be improved?
23. Clause 88(1) sets out the people who may remove a trustee – should this include the receiver of a company in receivership?

## **Part 6 – revocation and variation of trusts**

24. Do these provisions set out a clear process for the revocation or variation of trusts in limited circumstances?
25. Do you have any comments about how the provisions could be improved?

## **Part 7 – court powers and dispute resolution**

26. Does Part 7 clearly set out the appropriate powers of the court?
27. Do you have any comments about how the provisions could be improved?
28. Will the provisions facilitate the use of alternative dispute resolution when there are disputes in relation to trusts?
29. Do you have any other comments about how Part 7 could be improved?

## **Part 8 – miscellaneous provisions**

30. Do you have any comments about Part 8?

## **Schedule 1 – transitional, savings and related provisions**

31. Do you have any comments on the transitional provisions in schedule 1?
32. Are other specific transitional provisions required?

## **Schedule 2 – wholesale investment trusts**

33. Do you have comments about the treatment of wholesale investment trusts in schedule 2?

## **Repealed sections of the Trustee Act 1956**

34. Do you agree that the proposed repealed sections aren't needed in the Bill?
35. If not, which sections do you think are still required in the Bill?

## **Concluding general questions**

36. The new Trusts Act is intended to work alongside other statutes that involve trusts. Do you see any issues with the way in which the new Act will interact with any such existing statutes?
37. Do you think the Bill sets out key rules relating to trusts in a way that can be easily understood and applied by everyday people who use trusts?
38. Do you have any suggestions about how the Bill could be improved for everyday people who use trusts?
39. Do you think the changes in the Bill will address problems related to the complexity and expense of administering trusts?
40. If not, how could the Bill further facilitate the administration of trusts?
41. The intention is that the Bill would not require existing trust deeds to be changed. Do you agree that this is the case?
42. If not, what areas of the Bill would require existing trust deeds to be changed?
43. Could any of the terms in the Bill be clearer or more modern?
44. Do you have any suggestions about how to clarify or modernise the terms used in the Bill?
45. Do you have any other comments about how the Bill could be improved?

**Ministry of Justice**  
**Tāhū o te Ture**

**justice.govt.nz**

info@justice.govt.nz

0800 COURTS  
0800 268 787

National Office  
Justice Centre | 19 Aitken St  
SX10088 | Wellington | New Zealand



New Zealand Government

November 2016