REVIEW OF THE LAW OF TRUSTS

SUMMARY OF PREFERRED APPROACH
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This summary has been produced primarily for use by individuals and groups wishing to take part in the Commission’s consultation process and to make submissions on Review of the Law of Trusts: Preferred Approach paper. It includes a full list of all the proposals together with a high level summary of the contents of that paper.

SUBMISSIONS

Submissions or comments on the Preferred Approach paper should be sent to Marion Clifford, Senior Legal and Policy Adviser, by 22 February 2013.

Law Commission, PO Box 2590, Wellington 6011, DX SP 23534  
email – trusts@lawcom.govt.nz
Introduction

The review

1.1 The Law Commission is undertaking a comprehensive review of trust law and the Trustee Act 1956 (the Act) as stage one of its trusts project. In this stage we have presented a series of five Issues Papers exploring the background and context of trusts in New Zealand and raising issues regarding the areas of trust law that may be in need of reform (available on our website www.lawcom.govt.nz). Based on the comments received on those papers, further research, consultation, and expert advice we developed the concrete proposals contained in the Preferred Approach paper.

1.2 We now invite submissions on the Preferred Approach paper. Please tell us whether you think the proposals would be beneficial or whether there are any issues with how they would work in practice.

1.3 We will produce our final report on the proposals in the Preferred Approach paper during 2013. Stage two of the project will be a review of charitable trusts and the Charitable Trusts Act 1957, and purpose trusts generally. Stage three will be a review of trustee companies and the trustee companies’ legislation.

Scope of the review

1.4 The scope of the review is limited to the law that is required for trusts to be established and managed successfully. This includes the concept of a trust, the obligations of those in trust relationships, the powers and role of a trustee, the powers of the court in addressing these matters, and the processes available for resolving problems. We have considered the interaction of trusts with other areas of law and policy, such as relationship property, creditors and insolvency, taxation and government assistance, as the use made of trusts helps illuminate potential areas of concern within trust law. However, we have generally taken the position that resolving the problems that may arise in these areas due to the existence of trusts as a particular form of property holding falls beyond the scope of this review. The two areas where we have gone further and have considered options aimed at resolving problems are the use of corporate trustees (ch 9) and with relationship property (ch 17).

1.5 Stage one of the project has primarily focussed on private express trusts. The proposals in the Preferred Approach paper apply to public trusts (charitable
and other purpose trusts) as well as private trusts to the same extent as the Act currently applies. Some of our proposals address beneficiaries and so are clearly not relevant to purpose trusts, but we expect that much of the new legislation would apply to all express trusts where relevant. Where there are issues specifically affecting charitable and other purpose trusts, these will be addressed in stage two of the project.

**Objectives of the review**

1.6 We believe that trust law can be improved for the benefit of the many New Zealanders involved with trusts. The following objectives were used in analysing the options for reform and developing our preferred approach:

(a) **Modernisation** – Trust law needs to be fit for the modern context. Current legislation is outdated in its language and some of the concepts used.

(b) **Clarification** – Trust law is far from clear. Much of it is found only in complex case law. Clear legislation can help to alleviate confusion or uncertainty about the roles and requirements of participants in a trust.

(c) **A more useful trusts statute** – Many provisions of the Act are irrelevant and should be removed, and there are matters not covered by the Act that it would be helpful to include. Including general explanations and principles in a new statute would make the legislation more understandable and useful to non-lawyers, and set clear benchmarks for how a trust is to be used and managed.

(d) **Reduction of administrative difficulties and costs** – Many procedures in trust law and under the Act lead to administrative difficulties and costs. In many cases trustees must apply to the High Court regarding straightforward procedural matters. New legislation should facilitate the resolution of disputes in an efficient way.

(e) **Fairness** – The law should facilitate the fair use of trusts. It should not hinder people’s freedom to deal with their property as they choose, but should also provide ways to protect the rights of those involved in and interacting with trusts.

(f) **Fit for New Zealand context but consistent with international trust law** – Trust law should reflect the unique features of the New Zealand trust context. However, it is important for New Zealand law not to move too far out of line with internationally accepted trust law principles.

**Overview of proposals**

1.7 We have aimed to present sensible practical proposals for trust law, focusing on private express trusts. For the most part we have not tailored the proposals to particular types of other trusts, such as trusts established by statute, which rely on some of the provisions of the Act and trust law generally. We invite comment from those involved with these trusts on whether they see the proposals that are relevant in their contexts operating successfully.
A new trusts statute

1.8 We propose that there should be new legislation to replace the current Trustee Act. The language and structure of the Act are in need of modernisation. The best way to achieve a coherent, useful statute is to introduce a brand new Act.

1.9 In our view, it would be beneficial to make the new Act a Trusts Act, rather than a Trustee Act. We are proposing broadening the subject matter covered by legislation so that it would include provisions that address general trust concepts and relationships.

Not a complete codification

1.10 While the subject matter covered will be more than that covered by the Trustee Act, it is not possible to go as far as codifying all trust law. This is because of trust law’s complexity, the nuances that apply to different types of trusts, and the desire for continued development of trust law by the courts.

Inclusion of core trust principles

1.11 The new Act should restate some existing case law trust principles in general terms for the purposes of informing and educating people about trust law and clarifying trust law. This would guide the many non-lawyers who are trustees and make core trust law clear and accessible. Some of the proposals, such as those relating to the duties of trustees, are for provisions that summarise and express the case law without overriding it.

Addressing trust law rather than other areas of law

1.12 The proposals for a new Trusts Act address only core trust law. In our view the new Act is not the right place to address problems that arise solely at the point of the interaction of trusts with other policy areas. These matters are better dealt with in the individual policy areas so that different policy values can be taken into account and different solutions adopted depending on the nature of the policy area and the impact of trusts on that area. Only where the interaction of trust law and another area of law is creating problems with fundamental trust law do we suggest that reform measures may be warranted or there may be a need for a separate review of the other area of law.

Mandatory and default provisions

1.13 Like the Act, we propose that the new legislation would include both mandatory and default provisions. Some sections would apply in every trust, while others would be capable of being overridden by individual trust deeds. The new legislation should clearly identify which provisions are mandatory and which are default so that there is no room for confusion.

1.14 We propose that new legislation would go further than the current Act in making mandatory requirements clear. We think that it is essential that all
those using and interacting with trusts recognise that the existence of a trust does mean certain duties and requirements will always need to be met.

**Application to existing and new trusts**

1.15 Generally the provisions of the proposed new Act would apply to all express trusts, including existing trusts. Most of the proposals update existing provisions or restate existing judge-made law so there would be no real change to the legal position of most trusts. All trusts can benefit from the improved procedures we propose. Where there are proposals that would materially alter the terms of a trust in a way that is detrimental, these would only apply to trusts established after the commencement of the Act.

**Enhanced trustee accountability**

1.16 Our proposals take the approach of enhancing the accountability of trustees. In a trust relationship it is the beneficiaries that are owed the duties and have the ability to hold trustees to account. However, it has not always been clear what obligations trustees owe, whether trustees can avoid liability and how beneficiaries can go about enforcing their rights. Our proposals to set out in legislation trustees’ duties and the law relating to clauses exempting trustees of liability will make the relationship clearer. We are proposing that the ability of beneficiaries to apply to the court to have trustee decisions reviewed is broadened.

**Enabling trustees**

1.17 The proposed approach taken to trustee powers, including the investment powers, is to broadly empower trustees so that they have the authority to do all that they need to do, as the default position. This is a change from the current Act which limits some powers with protective restrictions and conditions as the default position. The emphasis should be on the trustees’ duties and the objects of the particular trust to control a trustee’s actions rather than on the limitations to trustees’ powers.

**Streamlined law and processes to minimise court involvement**

1.18 Where possible we make proposals that provide sufficient clarity and direction in the law so that there is less need for applications to the court. We want the court’s supervisory role to be concentrated on disputes or situations where the interests of beneficiaries or trustees are at risk. Where the court’s supervision and direction is not necessary, trustees and beneficiaries should be able to avoid a court application.

1.19 We propose to expand the role of the Public Trust. We suggest that the Public Trust can provide independent supervision and advice to trustees in certain situations, and can formalise a decision or process, where there is agreement among the parties.
Minimal new regulatory requirements and structures

1.20 The proposals do not introduce a new regulatory or supervisory body for either trustees or those providing trustee services. We do not propose that more information about individual trusts be submitted to a public body than is the case currently. This approach is based on the desire to avoid introducing unnecessary costs where a significant problem has not been identified. It also reflects the traditional private nature of trusts.
Part 1
Core trust concepts

Key proposals

The key proposals in Part 1 of the Preferred Approach paper are:

• defining an express trust, requirements for the creation of an express trust and a provision confirming no trust exists if the three certainties are not met (ch 2); and

• setting out trustees’ duties, restrictions on the use of exemption clauses and a default provision on the requirements of the duty to inform beneficiaries (ch 3).

CORE PRINCIPLES OF TRUST LAW

2.1 Chapter 2 of the Preferred Approach paper discusses how proposed new legislation should address the concept of a trust. We see value in new legislation including sections that outline what a trust is and how a trust is created. This would provide general guidance on the nature of the trust relationship.

2.2 The intention of these provisions would not be to override the traditional case law understanding of a trust in New Zealand law, but to summarise in one place the key features of trusts that it is important that people settling trusts and interacting with trusts comprehend.

2.3 We propose defining an express trust and suggest that resulting and constructive trusts should not be covered by the definition of trust or the new statute. These “trusts” are considerably different to the trusts targeted by trusts legislation. We acknowledge that in some situations the courts may continue to choose to use provisions of trusts legislation as a reference for the law applying to non-express trusts.

2.4 This chapter includes also a proposal to restate the circumstances in which a trust is created, including the three certainties. If a trust is not validly created then the legal consequences from which a settlor or beneficiary may receive an advantage, including the protection of trust assets from creditors
and ostensibly lower levels of personal assets and income, cannot apply. If the three certainties are not present when a purported trust is established the court must find that there is no trust. The consequences of a finding that any of the certainties are not fulfilled would be those available to the court under the current law.

### Definition and creation of a trust

P1 (1) New legislation should define “trust” for the purposes of the Act. The definition should be confined to express trusts. It should describe a trust’s core features and make it clear what types of trusts are covered by the Act. The definition should comprise the following:

(a) A trust is an equitable obligation binding a person or persons (the trustee) to deal with property (the trust property) for:

   (i) the benefit of the beneficiaries, any one of whom may enforce the obligation owed to them; or

   (ii) such purposes as are permitted at law.

(b) Trust property is held by the trustee in a way that is identifiably separate from his or her own private property.

(c) The trustee has the power and the duty, in respect of which he or she is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the duties imposed on trustees by law.

(d) A trust may take effect either within the settlor’s lifetime or upon his or her death.

(e) A trustee may have a beneficial interest in the trust property.

(f) No trust exists if the sole beneficiary is also the sole trustee.

(2) The legislation should include a provision restating the general principles of how a trust may be created, including that a trust may be created:

(a) by a person (settlor) when he or she indicates with reasonable certainty by any words or actions the following (collectively known as “the three certainties”):

   (i) the settlor’s intention to create a trust;

   (ii) the beneficiary or beneficiaries, or permitted purpose; and

   (iii) the trust property; or

(b) in accordance with any statute.

The requirements for the creation of a trust are subject to the Wills Act 2007 and the Property Law Act 2007 where applicable.

(3) The new legislation should define “trustee” and “beneficiary” broadly in a way that explains their role, for instance:

A “trustee” should include anyone who holds property under a trust.

A “beneficiary” should include anyone who has received or who will or may receive an interest in trust property under a trust in accordance with a trust deed. It should include a discretionary beneficiary, that is, a person who may
benefit under a trust at the trustee’s discretion or power of appointment, but who does not hold a fixed, vested or contingent interest in the trust property, and a trustee or settlor may also be a beneficiary.

Note: in these proposals “settlor” includes a will-maker.

Finding that no trust exists

P2 New legislation should provide that a purported trust that does not satisfy one or more of the three certainties (mentioned in P1(2)(a) above) is not a trust for the purposes of this Act or for any purpose, and is void. The provision would state that it does not limit the court’s ability to find that a trust is invalid on any other basis recognised at law.

Sham trusts

P3 It is proposed that trusts legislation should not contain any provisions relating to finding that a trust is a sham trust.

Purpose restriction

P4 New legislation should not include a provision restricting the purpose for which a private trust may be settled.

TRUSTEES’ DUTIES

2.5 Chapter 3 addresses trustee duties. The duties that a trustee owes to beneficiaries of a trust are a key facet of the trust relationship. It is difficult to understand the trust without understanding trustees’ obligations.

2.6 We consider that the scope of trusts legislation could be usefully expanded to include simplified summaries of what the duties of trustees are. This would provide a clear and accessible base from which trustees can gain an understanding of their duties. It would also give greater prominence to the duties in the law.

2.7 We propose that the duty provisions would express in general terms the case law principles about the duties trustees owe. This would not be a code of the law of trustees’ duties. The detail of how the law requires the duties to apply in practice would come from case law.

2.8 We look at which duties are a mandatory part of every trust and which can be left out in a particular case. We also consider to what extent a trustee can avoid the consequences of a breach of trust. This is integrally related to the duties as the effect of trustees being able to exclude liability for the breach of a duty may mean that the duty will have little real effect.
2.9 We propose a categorisation of duties into:

• conduct duties;
• mandatory (non-excludable) content duties; and
• default (excludable or modifiable) content duties.

2.10 Content duties, including those that can be but have not been excluded by the trust deed, must be carried out to the standard of conduct set by the conduct duties. The conduct duties are the duty of honesty and good faith and the duty of care. We propose that the duty of honesty and good faith can never be excluded from application in a trust. The duty of care in the exercise of a mandatory content duty cannot be excluded, but as it applies to every other exercise of a duty, power or discretion by a trustee, the duty of care can be excluded, or partially excluded.

2.11 The chapter also presents more detailed proposals on the obligations on trustees to inform beneficiaries and to retain information.

Duties of trustees

Overview: Our proposals are that new legislation should state the duties of trustees. The duties fall into three categories:

• conduct duties;
• mandatory (non-excludable) content duties; and
• default (excludable or modifiable) content duties.

Content duties need to be carried out with the standard of conduct set by the conduct duties. The conduct duties are the duty of honesty and good faith and the duty of care. The duty of honesty and good faith can never be excluded from application in a trust. The duty of care in the exercise of a mandatory content duty cannot be excluded, but as it applies to every other exercise of a duty, power or discretion by a trustee, the duty of care can be excluded.
Conduct duties

P5 (1) New legislation should provide that in exercising any of the duties (including those listed in P6 and P7), powers or discretions that apply to a trustee in a particular trust, the trustee must:
   (a) act honestly and in good faith for the benefit of the beneficiaries or a permitted purpose; and
   (b) exercise such care and skill as is reasonable in the circumstances, having regard in particular –
      (i) to any special knowledge or experience that the trustee has or holds himself or herself out as having; and
      (ii) if the trustee is paid for services as a trustee, to any special knowledge or experience that it is reasonable to expect of a person in that role.

(2) New legislation should provide that the conduct obligation in (1)(a) will be implied into every trust and cannot be excluded from the trust relationship.

(3) New legislation should provide that the duty of care and skill in (1)(b) applies:
   (a) to every exercise of a mandatory duty in P6(1) regardless of anything in the terms of the trust; and
   (b) to every other exercise of a duty, power or discretion only to the extent that it has not been excluded or modified by the terms of the trust.

(4) New legislation should provide that the trustee’s liability for:
   (a) any breach of trust that arises from a failure to carry out the conduct obligation in (1)(a), and
   (b) a breach of a mandatory duty listed in P6(1) that arises from failure to carry out either of the conduct obligations in (1)(a) and (1)(b),
       cannot be excluded by the terms of the trust.

Mandatory content duties

P6 (1) New legislation should provide that the following duties will be implied into every trust:
   (a) the duty to understand and adhere to the terms of the trust;
   (b) the duty to account to the beneficiaries for the trust property; and
   (c) the duty to exercise the powers of a trustee for a proper purpose.

(2) New legislation should provide that if a trust deed includes a clause that attempts to exclude the application of any of these duties to the trust, that clause will have no effect, provided that it is clear that the settlor’s overall intention was to create a trust.
Default content duties

P7 (1) New legislation should provide that unless otherwise stated in the terms of the trust, the following duties will be implied into every trust:
(a) the duty to maintain impartiality or evenhandedness between beneficiaries;
(b) the duty not to make profit from the trusteeship;
(c) the duty to act without reward;
(d) the duty to avoid a conflict of interest;
(e) the duty to be active (meaning the duty to consider the exercise of the trustees’ discretions regularly and not to fetter these discretions);
(f) the duty to act personally;
(g) the duty to act unanimously;
(h) the duty to manage the trust;
(i) the duty to invest;
(j) the duty to keep trust property separate from the trustee’s own property;
(k) the duty to keep and render accounts, and to provide information to beneficiaries; and
(l) the duty to transfer property only to beneficiaries or persons legally authorised to receive property.

(2) New legislation should provide that the duties in P7(1) may be excluded or modified by the terms of the trust. Duties P7(1)(c) and (g) may be excluded completely. With the remaining duties, the terms of the trust may modify the extent to which the duty is met, but only insofar as the mandatory duties are not breached.

(3) New legislation should provide that the terms of a trust may include additional duties for the trustee.

Avoiding the consequences of a breach of trust

P8 (1) New legislation should include a provision stating that the terms of a trust must not:
(a) limit or exclude a trustee’s liability for:
   (i) breach of a mandatory duty (listed in P6(1)) arising from the trustee’s own dishonesty, willful misconduct, recklessness or negligence; or
   (ii) any other breach of trust arising from the trustee’s own dishonesty, willful misconduct or recklessness; or
(b) grant the trustee any indemnity against the trust property in respect of liability for:
   (i) breach of a mandatory duty (listed in P6(1)) arising from the trustee’s own dishonesty, willful misconduct, recklessness or negligence; or
   (ii) any other breach of trust arising from the trustee’s own dishonesty, willful misconduct or recklessness.

(2) “Recklessness” should mean when a person knows that there is a risk that an event may result from the conduct or that a circumstance may exist, and he or she takes that risk, even though an honest and reasonable person would not in the circumstances take the risk.

(3) To the extent that any clause of a trust purports to have the effect stated in P8(1)(a) or (1)(b) new legislation should provide that the clause is invalid, provided it is clear that the settlor’s overall intention was to create a trust.

(4) Professional regulatory bodies relevant to trusts should be required to establish a rule of practice that includes the main elements of the following in order to promote settlor awareness of trustee exemption clauses:
   Any paid trustee or paid trust advisor or paid drafter of a trust who causes a settlor to include a clause in a trust deed which has the effect of limiting or excluding liability for negligence, or granting an indemnity against the trust property in respect of liability for negligence, must before the creation of the trust take such steps as are reasonable to ensure that the settlor is aware of the meaning and effect of the clause.

(5) New legislation should retain an equivalent of section 73 of the Trustee Act 1956, which gives the court the power to relieve a trustee wholly or in part from personal liability for a breach of trust if the trustee has acted honestly and reasonably, and ought fairly to be excused.

### Duty to inform

P9  (1) Duty to provide information: new legislation should provide that the duty to account in P6(1)(b) includes the obligation to make such information available to beneficiaries upon request as is reasonably necessary to enable the trust to be enforced. The duty to account is a mandatory obligation and will be implied into every trust as stated in P6.

(2) New legislation should include provisions setting out how the duty and discretions regarding the provision of information to beneficiaries are to be exercised, including the following:
   (a) a presumption that trust information will be given to a beneficiary upon request unless there is good reason for withholding the information;
   (b) in exercising the discretion to find that there is good reason for withholding trust information, a trustee:
(i) is subject to the general principle from Schmidt v Rosewood that all beneficiaries are entitled to receive the information that will allow them to hold trustees to account in the circumstances of the particular trust; and

(ii) may take into account the following factors:

- whether there are issues of personal or commercial confidentiality;
- the nature of the interests held by the beneficiaries, including the degree and extent of a beneficiary’s interests or a beneficiary’s likely prospects of receiving trust property in the future;
- the impact on the trustees, other beneficiaries, and third parties;
- whether some or all of the documents can be disclosed in full or in redacted form;
- whether safeguards can be imposed on the use of the documents (for example, undertakings, professional inspection);
- whether, in the case of a family trust, disclosure or non-disclosure may embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole.

(3) New legislation should include a default provision that trustees make reasonable efforts to actively notify a qualifying beneficiary or the parent, guardian or property manager of a minor or incapable qualifying beneficiary of the following information:

(a) that the qualifying beneficiary is a beneficiary of the relevant trust;
(b) the names and contact details of the trustees;
(c) that the qualifying beneficiary has the right to make a request and be provided with a copy of the terms of the trust, including any amendments to the terms of the trust; and
(d) that the qualifying beneficiary has the right to make a request to be provided with other trust information.

(4) New legislation should define “qualifying beneficiary” as:

(a) a beneficiary with a vested or contingent interest; or
(b) a beneficiary who trustees reasonably consider has or may have in the future real prospects of receiving trust property.

(5) New legislation should provide that subject to the duty in P9(1), the default provision in P9(3) may be overridden or modified by the terms of a trust.

(6) New legislation should define “trust information” as any information regarding:

(a) the terms of the trust;
(b) the administration of the trust; or
(c) the trust assets.

(7) New legislation should include provision for the terms of a trust to expressly require a trustee to give trust information to a beneficiary.

(8) New legislation should include provision for a beneficiary to be charged for the reasonable costs of being provided with the trust information.

(9) New legislation should include provision for a trustee or any beneficiary to apply to court for an order that the trustees supply trust information. The court would be able to review the exercise of the trustees’ discretion and merits of the trustees’ decision.

(10) New legislation should include provision for trustees and beneficiaries to seek advice from the Public Trust about the information that trustees are required to release. Trustees would be protected from liability if they act in reliance on the Public Trust’s advice. It would continue to be open for trustees and beneficiaries to seek an order from the court regarding the release of information by trustees. The Public Trust would have the power to charge for carrying out this service.

### Retaining information

<table>
<thead>
<tr>
<th>P10</th>
<th>New legislation should provide that in exercising the mandatory duties of a trustee, a current trustee is required, so far as is reasonable, to retain a copy of the following documents:</th>
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<tbody>
<tr>
<td></td>
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<tr>
<td>(a)</td>
<td>the trust deed;</td>
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<tr>
<td>(b)</td>
<td>any variations made to the trust deed or trust;</td>
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<tr>
<td>(c)</td>
<td>a list of all of the assets currently held as trust property;</td>
</tr>
<tr>
<td>(d)</td>
<td>any records of trustee decisions made during that trustee’s trusteeship if they exist;</td>
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<tr>
<td>(e)</td>
<td>any written contracts entered into during that trustee’s trusteeship; and</td>
</tr>
<tr>
<td>(f)</td>
<td>any accounting records and financial statements prepared during that trustee’s trusteeship.</td>
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Part 2
Trustees

Key proposals

The key proposals in Part 2 of the Preferred Approach paper are:

- giving a trustee the same powers in relation to trust property that the trustee would have if the property was vested in the trustee absolutely;

- giving trustees the power to determine what is income and capital for the purposes of distribution to allow them to invest trust assets without regard to whether the return is of and income or capital nature (ch 5);

- giving the Public Trust a role in carrying out official administrative procedures and providing advice, including to issue vesting certificates, confirm the removal of an incapacitated trustee, and oversee the retirement and replacement of a sole trustee (ch 6); and

- confirming that a trustee’s indemnity cannot be limited or excluded by a trust deed; requiring companies, when acting as trustees, to clearly describe their status in all communications and contracts; making directors of companies acting as trustees directly liable for trust liabilities in some circumstances; and requiring directors of a corporate acting as a trustee to have the same obligation to the beneficiaries as they would have had if they and not the company had been the trustees (ch 8).

TRUSTEES’ POWERS

3.1 A significant proportion of the Act is made up of sections that provide trustees with powers to manage trust property. These sections set out the default position and are capable of being overridden by the trust deed.

3.2 The proposals in chapter 4 of the Preferred Approach paper take the general approach of removing the unnecessary restrictions on powers that are in the current provisions of the Act and instead relying on clear statements of the duties of trustees to guard against inappropriate use of powers by trustees. Our view is that this approach is better at making sure the default powers
provisions in the new Act are sufficiently flexible and suitable to the majority of trusts. The broader default powers ensure that trustees can do their job. The interests of beneficiaries or the trust’s purpose will be protected by the duties a trustee must adhere to in making any decision or exercising any power as trustee.

**Administrative powers**

P11 1 The administrative powers of trustees, including business-related powers, in the Trustee Act 1956 (ss 14–21, 24, 32–33 and 42A, 42B and 42D) should be replaced by a general provision giving trustees the same powers in relation to trust property that the trustee would have if the property were vested in the trustee absolutely and for the trustee’s own use. The provision should state that while the trustee has competence to do all that a natural person can do with his or her own property, the trustee is subject to the trustees’ duties and objects of the trust.

2 The new legislation should include a schedule which sets out a list of commonly used powers that a trustee has under the new provision. The schedule should be prefaced by wording such as “for the avoidance of doubt, the powers of a trustee granted under [the general powers provision proposed above] include, but are not limited to, the following: ...”. The powers listed in the schedule should include those covered by the following sections of the Act, but state them in general terms and without the restrictions that currently apply:

- s 14 (including the powers to sell, exchange, let, partition, postpone, lease, purchase, build a house);
- s 15 (including the powers to spend money repairing, maintaining, or developing; subdivide; grant easements; pay rates, insurance and other outgoings; vary a mortgage);
- s 16 (including the powers to sell by auction or tender);
- s 17 (including the power to sell by deferred payment);
- s 18 (power to sell subject to depreciatory conditions);
- s 19 (power to give receipts);
- s 20 (power to compound liabilities);
- s 21 (power to raise money by sale, conversion, calling in or mortgage);
- s 24 (power to insure and recover the costs of premiums);
- s 32 (powers to carry on a business, trade or occupation; purchase stock, machinery, implements and chattels for the purposes of the business; employ people in the business; enter into a partnership agreement);
- s 32A (power to acquire or retain shares in any co-operative company);
- s 33 (powers to convert or join in converting any business into a company; promote a company for taking over the business; sell or transfer the business to a company);
Powers of distribution to beneficiaries

P12 New legislation should include a provision to replace section 40 that gives trustees the power to pay out the income of any vested or contingent entitlement to or for a minor beneficiary for the beneficiary’s maintenance, education, advancement or benefit that re-enacts the current provision, with the following reforms:

(a) define the phrase “maintenance, education, advancement or benefit” in the legislation in a way that ensures they are interpreted broadly and include the concepts of “comfort” and “wellbeing”;

(b) remove the current test for the exercise of power, “as may, in all the circumstances, be reasonable”;

(c) remove the requirement to take into account other trust funds to which a beneficiary may have access; and

(d) reduce the age of majority in the provision to 18 years old.

P13 New legislation should include a provision to replace section 41 that gives trustees the power to pay out the capital of any vested or contingent entitlement to or for a beneficiary for the beneficiary’s maintenance, education, advancement or benefit that re-enacts the current provision, with the following reforms:

(a) define the phrase “maintenance, education, advancement or benefit” as in P12 above;

(b) remove the limits on the amount of the advancement (currently limited to the greater of $7,500 or half of that beneficiary’s total entitlement); and

(c) clarify that those who hold contingent interests under a double contingency are not eligible.
Age of majority

P14 New legislation should reduce the age of majority for the purposes of trusts legislation and trust law generally (including wills) from 20 to 18 years. This would include changing the default age at which a beneficiary can give a full discharge to a trustee from 20 to 18 years.

Power to appoint agents

P15 New legislation should adopt the approach taken in the Select Committee version of the Trustee Amendment Bill 2007, which proposed new sections 29 to 29E to replace section 29 of the Act. The new provision would:

(a) allow a trustee to appoint an agent to exercise a trustee’s “administrative functions”. “Administrative functions” would be defined as any function other than a “trustee function”. The provision would define a “trustee function” as:

(i) a function related to a decision regarding the distribution, use, possession, or other beneficial enjoyment of trust property;

(ii) a power to decide whether any fees should be paid or other payment should be made out of income or capital;

(iii) a power to decide whether payments received should be appropriated to income or capital;

(iv) a power to appoint a person to be, or to remove, a trustee of the trust;

(v) a power of appointment (including a power to appoint a person to be, or to remove, a beneficiary);

(vi) a power to appoint or change the distribution date of trust funds;

(vii) a power to resettle the trust, or to amend, revoke, or revoke and replace terms or provisions of a trust deed;

(viii) a right conferred by this Act to apply to the court;

(ix) the power to authorise another person to perform any of the functions of the trustees or trustee.

(b) require trustees to keep under review the agency arrangements and the way the arrangements are being put into effect, to consider whether to intervene, and to intervene if necessary. In reviewing the agency and actions of the agent, the trustee must consider whether a trustee exercising reasonable care, diligence and skill would intervene and intervene if such a trustee would consider it necessary to do so.

(c) provide that trustees are not liable to a beneficiary for the acts or defaults of an agent, unless the appointment was not made in good faith and with reasonable care, diligence and skill, or the trustee failed to review the agency and agent’s actions, or an intervention by the trustee was not made in good faith and with reasonable care, diligence and skill.
(d) make clear what fees and charges the trustee may pay the agent and what the trustee may be paid for employing the agent and reviewing the arrangement.

(e) differ from the Select Committee’s version of the Bill by:
   (i) removing the list of example professionals that may be appointed as agents;
   (ii) not stating the duty of care, diligence and skill that applies to professional trustees;
   (iii) adding a non-exhaustive list of criteria that a trustee must consider when appointing an agent, including:
       • whether the intended agent has the appropriate skills, expertise and experience to carry out the task; and
       • whether employing the intended agent is a cost-effective option.

Power to delegate

P16 New legislation should include a new provision on delegating a trustee’s powers, duties and discretions by power of attorney. The provision should:

(a) add temporary mental incapacity to absence from New Zealand and temporary physical incapability as the circumstances in which the power of delegation can be exercised;

(b) restrict the duration that a delegation may be in force to a mandatory maximum of 12 months, with the possibility of one extension of up to an additional 12 months. The delegation should only be able to be extended by the trustee;

(c) require trustees delegating their power to notify any co-trustees and any person with a power to appoint and remove trustees;

(d) retain the current position that the trustee is only liable to beneficiaries for the actions or default of the delegate if he or she did not exercise good faith and reasonable care in the appointment of the delegate;

(e) clarify that the default position is that a delegate may exercise the power to resign on behalf of a trustee who has delegated his or her powers;

(f) retain the current position of allowing delegation to a sole co-trustee only if that co-trustee is a statutory trustee corporation;

(g) require sole trustees who are delegating to notify any person with the power to appoint and remove beneficiaries, or if none, all adult vested beneficiaries (where it is reasonable to do so) or a reasonably representative sample of beneficiaries;

(h) allow for a co-trustee or a beneficiary to apply to the Public Trust for the Public Trust to consent to become the delegate for a trustee who is unavailable to make a decision, and cannot be contacted for any reason, and there is no delegation in place; and
INVESTMENT POWERS

3.3 Chapter 5 considers what amendments should be made to the current investment provisions in the Act. It also puts forward proposals for addressing issues that have arisen over:

- the distinction between capital and income;
- the apportionment of receipts and outgoings between capital and income; and
- the appointment of investment managers by trustees.

3.4 The Commission has proceeded on the basis that the prudent person principle, enacted in Part 2 of the Act, ought to be retained. It is generally considered to be working well, and we have not been made aware of any significant problems with it. There has been some concern that the current provisions are not sufficiently clear that the power to invest (section 13A) and the duty to do so prudently (section 13B) do not preclude trustees from taking account of other relevant matters when deciding how to manage a trust fund. We propose that new legislation should clarify that trustees may, where it is appropriate to give effect to the objectives or purposes of a trust, purchase or retain property for purposes other than investment.

3.5 Other proposals in chapter 5 include a default provision that better supports trustees adopting a total return investment policy and moves away from the current default obligation of selecting investments with regard to their legal category rather than overall return. Within the parameters of their duty of prudence, trustees would then be able to maximise the gain to the trust portfolio. The key principle here is that investment decision-making should be separated from distributional issues.

3.6 The chapter proposes replacing the current rules on the apportionment of receipts and expenses on the basis of whether they are classified as income or capital also. Determining the correct apportionment in some situations under current rules is difficult and can require complex calculations of very small sums of money. Again our approach is to give trustees a broad discretion to apportion receipts and outgoings and to rely on their underlying duties to maintain a fair balance between the interests of all beneficiaries.

3.7 Finally, the chapter proposes introducing new provisions that would enable trustees to appoint investment managers and give them authority to make investment decisions. Our research indicates that most modern trust deeds now permit delegation of decision-making in this area. The range of potential
investment products and combinations is now immense and investment has become far more complex as a result. It is not realistic to require trustees to undertake this function personally. When appointing investment managers trustees would be required to comply with a number of legislative safeguards.

**Investment powers**

P17 (1) New legislation should retain, largely unchanged, the prudent person principle in Part 2 of the Trustee Act 1956. The replacement provision should provide that:

(a) a trustee may invest any trust funds in any property;

(b) when investing, a trustee should be required to exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others; and

(c) where a trustee has any special knowledge or experience or holds himself or herself out as having special knowledge or experience, he or she must exercise the level of care, diligence, and skill that it is reasonable to expect of a person with that special knowledge or experience.

(2) The obligations in P17(1) should apply in every trust to the extent they are not overridden or excluded by the trust deed.

(3) The new legislation should make the following changes to the provisions in Part 2 of the Trustee Act 1956:

(a) clarify that the power to invest does not preclude a trustee from taking account of other relevant matters when deciding how to manage a trust fund. A trustee may, where it is appropriate to give effect to the objectives or purpose of the trust, purchase or retain property for purposes other than investment;

(b) clarify that the higher standard of prudence imposed on a professional trustee applies to any trustee who has any special knowledge or experience or holds himself or herself out as having special knowledge or experience;

(c) repeal section 13G and include the requirement that a trustee comply with the provisions of the trust in section 13D (which already provides for the terms of the trust to modify or exclude the default duties in respect of investment);

(d) retain the power of the court (in section 13Q) to set off gains and losses in an action for breach of trust and also clarify that the rule of general trust law that requires the assessment of the decisions of a trustee on an investment by investment basis if the decisions are called into question (the anti-netting rule) has been abolished;

(e) add the additional factors that the court may take account of in section 13M to the list of matters trustees may have regard to when exercising their powers of investment in section 13E. Trustees would then have regard to their overall investment strategy and whether trust
investments have been diversified (as is currently the case under section 13M); and

(f) repeal sections 13I, 13J, 13K, 13L, 13N, 13O and 13P on the basis that these provisions are now either outdated or unnecessary.

### Distinction between capital and income

P18 The default provisions should give trustees a power to determine what is capital and income for the purposes of distribution to allow them to invest trust assets without regard to whether the return is of an income or capital nature. Trustees would be required to act reasonably and in the best interests of the beneficiaries overall. Where there are defined classes of beneficiaries trustees should ensure a reasonable level of income is made available for the income beneficiaries. In such cases trustees would have to adopt a suitable mechanism to determine how much of the total should be distributed to the income beneficiaries.

### Apportionment of receipts and outgoings between capital and income

P19 Apportionment clause

1. New legislation should provide that a trustee may:
   - (a) apportion any receipt or outgoing in respect of any period of time between the income and capital accounts, or charge any outgoing or credit any receipt exclusively to or from either income or capital as the trustee considers to be just and equitable in all the circumstances and in accordance with accepted business practice;
   - (b) transfer funds between capital and income accounts to recover or reimburse an outgoing previously charged to the account that is to receive the funds where such corrections are fair and reasonable and are undertaken in accordance with accepted business practice;
   - (c) transfer funds between capital and income accounts to recover or deduct any receipt previously credited to the account from which the funds are to be recovered where such corrections are fair and reasonable and are undertaken in accordance with accepted business practice; and
   - (d) deduct from income an amount that is fair and reasonable to meet the cost of depreciation, and add the amount to capital, in accordance with accepted business practice.

2. New legislation should provide that:
   - (a) if a trust deed includes a clause that attempts to exclude P19(1) then that clause is of no effect; and;
   - (b) any clause in a trust deed is invalid to the extent that it is inconsistent with P19(1).
Appointing investment managers

P20  (1) New legislation should authorise trustees to appoint investment managers and give them authority to make investment decisions.

(2) The appointment of investment managers should be subject to the following legislative safeguards:

(a) trustees must act honestly and in good faith and exercise reasonable care when appointing an investment manager, and must review the investment manager’s performance periodically;

(b) trustees must create a written policy statement that gives guidance as to how investment functions are to be exercised by an investment manager setting out the general investment objectives, and require investment managers to agree to comply with the policy statement; and

(c) trustees are liable for any default of the investment manager where the trustees have failed to act honestly and in good faith and exercise reasonable care when making the appointment of a manager or monitoring the investment manager’s performance.

APPPOINTING AND REMOVING A TRUSTEE

3.8 Chapter 6 addresses topics relating to the appointment and removal of trustees. We have been advised that these areas cause problems in the day to day administration of trusts due to a lack of clarity in statutory default provisions or processes, or an out-dated approach that no longer meets the needs of modern trust practice.

3.9 Our preferred approach is to modernise the statutory defaults for these areas of trust administration, and to provide more robust guiding principles and mechanisms for appointment and removal, and the transfer of trust property. For this reason the proposals in this chapter are more detailed and technical than others in the paper.

3.10 Some of the proposed new statutory defaults will include mandatory aspects, such as the requirement that trustees be over the age of 18 years. We also propose the legislation give the Public Trust certain administrative roles in relation to the appointment and removal of trustees.

3.11 Although our proposals are separated into a number of topics, they have been designed to work together and are best read as an overall package.
Acceptance and rejection of trusteeship

P21 New legislation should:
- clarify that if a trustee does not accept the trusteeship within three months of receiving notice of his or her appointment, he or she will be deemed to have disclaimed the trusteeship;
- provide that disclaimer of trusteeship need not be in writing, but must be communicated to the appropriate person (for instance, the settlor or appointer, as the case may be under the trust deed) in clear and unambiguous terms;
- provide that acceptance may be implied through conduct;
- allow this default provision to be varied by the trust deed;
- provide that if a trustee disclaims, the property vests in the remaining trustees, or if there are no other trustees, reverts to the settlor on the terms of the trust; and
- use plain English terminology and refer to “rejecting” rather than “disclaiming” the trusteeship.

Who may be appointed as a trustee?

P22 (1) New legislation should restrict appointment based on capacity to be a trustee. The following categories of persons will be precluded from appointment as a trustee:
- a person under 18 years of age;
- an undischarged bankrupt;
- a person who is subject to a property order made under section 31 of the Protection of Personal and Property Rights Act 1988 or a person for whom a trustee corporation is acting as manager under section 32 or 33 of that Act; and
- a corporation which is in receivership or in liquidation; and
(2) provide that any natural person or body corporate may be a trustee unless one of the grounds above applies.

Removal of a trustee

P23 (1) New legislation should impose a duty on persons with the power to appoint and remove trustees to remove a trustee when the trustee is incapacitated and becomes subject to either an enduring power of attorney in relation to property or a property order, or has a trustee corporation appointed to act as a manager under the Protection of Personal and Property Rights Act 1988.
(2) New legislation should provide that the court, or those with the power to appoint and remove trustees may, if it is desirable for the proper functioning of the trust, remove a trustee and appoint a replacement in the following circumstances:

(a) the trustee refuses to act, fails to act, or wishes to be discharged from office;

(b) the trustee, being a corporate trustee, enters into receivership, enters into liquidation, ceases to carry out business, is dissolved, enters into a compromise with creditors under Part 14 of the Companies Act 1993, enters into voluntary administration under Part 15A of that Act, or does not satisfy the solvency test as defined in section 4 of the Companies Act;

(c) the trustee is no longer suitable to continue to hold office as a trustee because of circumstance or conduct, including but not limited to when the following occurs:

(i) the whereabouts of the trustee becomes unknown and the trustee cannot be contacted;

(ii) the trustee is not capable of fulfilling his or her duties by reason of sickness or injury;

(iii) the trustee is adjudged bankrupt;

(iv) the trustee is convicted of a dishonesty offence;

(v) the trustee becomes precluded from serving as a director under the Companies Act 1993 because of a breach of that Act or the Securities Act 1978;

(vi) the trustee is held by the court to have misconducted himself or herself in the administration of the trust; or

(vii) the trustee, being a lawyer, accountant or financial adviser, is found to have materially breached the applicable ethical standards of that profession.

(3) New legislation should retain the court’s general discretion to remove trustees if expedient, in order to capture circumstances which may not be foreseen and may not be included in the grounds for removal above.
Retirement

New legislation should provide that:

1. if a trustee wishes to be discharged from office, he or she may be removed by deed by those with the power to do so.

2. if a trustee wishes to be discharged from office but those with the power to remove and appoint trustees explicitly refuse to execute the removal document, the trustee must apply to the court.

3. if a sole trustee wishes to be discharged from office and there is no-one with the power to remove and appoint trustees under the trust deed, the following process for retirement will apply:
   a. the trustee who wishes to retire will first select one or more suitable persons as a replacement trustee(s) and notify all adult vested beneficiaries (where it is reasonable to do so), or a reasonably representative sample of beneficiaries, of the person(s) selected;
   b. beneficiaries notified will have 20 working days in which to object to the replacement chosen;
   c. if no beneficiaries object, the trustee who wishes to retire will then apply to the Public Trust to confirm that beneficiaries have been given due notice of the replacement selected, and that the trust accounts are in order;
   d. if due notice has been given and the accounts are in order, the retiring trustee may be discharged and the replacement appointed through a deed executed jointly by the trustee being removed and the trustee being appointed;
   e. if the beneficiaries object to the replacement selected or if the accounts are in disarray, removal by deed will not be available and an application to the court will be necessary.

4. The legislation should authorise the Public Trust to set reasonable costs for the services provided.

Who may remove a trustee and appoint a replacement?

New legislation should:

1. provide a hierarchy of persons with the power to remove and appoint trustees by deed when the grounds under the legislation are met:
   a. the person nominated for the purpose of appointing new trustees by the deed creating the trust; or if none, or if unavailable or unwilling to make a decision;
   b. the surviving or continuing trustees; or if none, or if unavailable or unwilling to make a decision;
   c. the personal representative of the trustee being removed;
(2) define “personal representative of the trustee being removed” to include the following persons:

(a) the executor or administrator of a trustee who died while in office;
(b) a property manager appointed over the trustee under the Protection of Personal and Property Rights Act 1988;
(c) the holder of an enduring power of attorney over property of an incapacitated trustee; and
(d) the liquidator of a corporate trustee who enters into liquidation;

(3) provide that if the personal representative of the trustee being removed is undertaking the removal, the following process for removal will apply:

(a) the personal representative will select one or more suitable persons as a replacement trustee(s) and notify all adult vested beneficiaries (where it is reasonable to do so), or a reasonably representative sample of beneficiaries, of the person(s) selected;
(b) beneficiaries notified will have 20 working days in which to object to the replacement chosen;
(c) if no beneficiaries object, the personal representative will then apply to the Public Trust to confirm that beneficiaries have been given due notice of the replacement selected, and that the trust accounts are in order;
(d) if due notice has been given and the accounts are in order, the trustee may be discharged and the replacement appointed through a deed executed by the personal representative;
(e) if the beneficiaries object to the replacement selected or if the accounts are in disarray, removal by deed will not be available and the personal representative will be required to apply to the court to remove the trustee and appoint a replacement. The court will be able to make any other necessary directions about the management of the trust;

(4) empower the Public Trust to provide the personal representative or liquidator of the trustee being removed with advice as to the process for the selection of a replacement, and enable the Public Trust to set reasonable costs for the services provided.

**Exercise of power to appoint trustees**

New legislation should:

(1) impose a duty of good faith and honesty on those exercising a power to remove and appoint trustees, whether the power is exercised under statute or under the trust deed. This will apply to the decision to remove a trustee, and the selection of a replacement or the decision not to replace the trustee, as the case may be;
(2) provide that the court may remove and replace someone with the power to appoint trustees under the trust deed if that person breached the duty of good faith, or if that person has been removed in their capacity as a trustee, or if otherwise expedient; and

(3) provide that a person with the power to appoint trustees would be entitled to apply to the court for directions in the exercise of that power, for example if there was a perceived conflict of interest.

**Numbers of trustees**

P27 New legislation should:

1. allow trustees to be removed without being replaced provided that this is in the best interests of the trust, taking account of the suitability of remaining trustee(s), and other relevant circumstances;
2. leave minimum number provisions to the trust deed, rather than including a statutory default;
3. provide that a sole trustee may be appointed at the outset and that if a sole trustee is removed or dies in office, he or she must be replaced, and may be replaced with more than one replacement trustee unless the trust deed provides otherwise; and
4. prevent the circumventing of the rules on minimum numbers of trustees contained in a trust deed by providing that as a matter of interpretation, a trust deed which requires two or more trustees will be taken to mean two or more persons exercising independent judgement. For the avoidance of doubt, the legislation could provide that any two natural persons will be considered to be exercising independent judgement.

**Transfer of trust property**

P28 New legislation should:

1. impose a duty on a departing trustee to transfer property to the continuing trustee;
2. provide that a trustee shall be divested of all trust property if validly removed from office (including through death or voluntary discharge), and provide that the trust property shall vest in the continuing trustee(s);
3. empower the Public Trust to issue a statutory certificate of vesting confirming that the deeds which remove the departing trustee and appoint the continuing trustee(s) have been validly executed, if trust property has not been otherwise transferred by the departing trustee;
4. provide that the statutory certificate of vesting shall be sufficient and complete proof of change of ownership of property, and:
(a) must be accepted as complete documentation under section 99A of the Land Transfer Act 1952; and
(b) must be accepted as proof of transfer of any other registered interest recorded in a register under New Zealand law;
(5) require that after the deed of removal has been executed, 20 working days’ notice must be given to the departing trustee from whom title is being transferred before the statutory certificate of vesting may be issued. If the departing trustee objects to the issuing of a certificate within the 20 day period the Public Trust will not be able to issue the vesting certificate and the continuing trustees must instead apply to the court. However, a vesting certificate that has been issued will not be ineffective for failure of the notice provisions;
(6) provide that the departing trustee must be given the documents demonstrating that the property is no longer in his or her name once transfer and registration have been completed (for example, a copy of the certificate of title);
(7) provide that a registry that transfers property in reliance on a statutory vesting certificate is not liable for any loss caused as a result of the transfer of property;
(8) provide that the Public Trust may refuse to grant a vesting certificate when the property arrangement is complex or it is not clear whether the trustee was properly removed, in which case the continuing trustee(s) must apply to the court for a transfer order; and
(9) enable the Public Trust to set reasonable costs for issuing a statutory vesting certificate.

CUSTODIAN AND ADVISORY TRUSTEES

3.12 Chapter 7 addresses possible reforms to the provisions relating to advisory and custodian trusteeship. These two mechanisms allow for an arrangement in which there are two types of trustee with different roles and powers. Our proposals aim to make the law clearer and ensure the roles fit sensibly within the scheme of a new Act.

3.13 Our preferred approach is to spell out the role of custodian trusteeship in new legislation. This includes clarifying that custodian trusteeship is essentially an administrative role, and imposing duties and grounds for liability. We do not propose to change the nature of the custodian trustee’s role. However, we propose explicitly providing that a custodian trustee is entitled to indemnity from the trust fund, as this is necessary for custodian trustees to efficiently deal with property, and to provide clarity.

3.14 Our proposals in respect of advisory trustees, who are not actually trustees but are advisors to trustees, are of a clarifying nature.
Custodian trustees

P29 New legislation should:

(a) provide that the appointment of a custodian trustee must be in writing;
(b) retain an equivalent of section 50(2)(c) providing that the role of the custodian trustee is to hold the trust property, invest funds, and dispose of the assets as the managing trustee shall direct;
(c) provide that a custodian trustee has all the administrative powers of a trustee but none of the discretionary powers;
(d) provide that the custodian trustee has the power to execute any documents or perform any administrative action directed by the managing trustee;
(e) provide that the custodian trustee has a duty to act on the instructions of the managing trustee and is liable for loss caused by:
   (i) failing to execute the instructions of the managing trustee; or
   (ii) acting without the authority of the managing trustee;
(f) provide that a custodian trustee shall not be liable for executing instructions of the managing trustee where the managing trustee is in breach of trust;
(g) provide that a custodian trustee may apply to the court for directions if they receive instructions from the managing trustee that are suspected to be in breach of trust, but shall not be liable for a failure to do so;
(h) provide that a custodian trustee has the benefit of the right of indemnity in respect of costs incurred by the custodian trustee;
(i) provide that a custodian trustee may be appointed over part of the trust fund (such as, the share portfolio only); and
(j) provide that one or more natural persons or body corporates may be appointed as a custodian trustee (or joint custodian trustees), unless the trust deed precludes this. This would bring the new legislation into line with the custodian trust provisions under Te Ture Whenua Māori Act.

Advisory trustees

P30 (1) The new legislation should continue to provide for the appointment of an advisory trustee and for a trustee to act with an advisory trustee, although the position should be renamed to remove the term “trustee”. The role of an advisory trustee should continue to be to provide advice to the trustee on any matter relating to the trust.

(2) The new provision should clarify that the trustee is not liable for anything done or omitted by him or her by reason of following the advisory trustee’s advice or direction unless the trustee knew or ought to have known that the advice was unlawful, contrary to the terms of the trust or trustees’ duties, or was advice that no reasonable advisory trustee would have given.
CORPORATE TRUSTEES AND INSOLVENT TRUSTS

Chapter 8 looks at issues that arise in trusts that have a corporate acting as trustee, instead of a natural person. A particular feature of such arrangements is commonly that the corporate trustee holds few or no assets in its own right, with the assets instead held on trust for the beneficiaries. The proposals in this chapter aim to enhance the fairness of the law of trusts by improving transparency and allowing for clearer and more direct liability of directors of corporate trustees.

We propose including principles about a trustee’s personal liability and right to indemnity in legislation in order to clarify the law and resolve any uncertainty. These would apply to all trustees, not only corporate trustees. Where corporate trustees are used, there appear to be problems arising from creditors and other parties not being aware that the company they are dealing with is acting in the capacity of a trustee and therefore the extent of the assets that are available to creditors is very limited. To address this we propose requiring a company when acting as a trustee to describe its status as a trustee in all communications and contracts.

In order to sheet home responsibility to directors of corporate trustees we propose that a provision be introduced that makes directors liable to discharge a debt incurred by the company acting as a trustee. To similarly enhance the fairness of trusts where a corporate trustee is in place, we propose that legislation should require that directors have the same obligations to beneficiaries as they would if they were personally the trustees.

We consider it would be beneficial to clarify in trusts legislation that the court can appoint a receiver to deal with a trust and trust fund, and to provide that a liquidator is also an option. Finally, to provide greater certainty, we propose that the Ministry of Business, Innovation and Employment should address certain issues relating to insolvent corporate trustees.

Definition and scope of reforms

P31 Proposals in this chapter should apply to any corporate acting as a trustee of a trust, including the statutory trustee companies, unless expressly exempted. Legislation should not include a definition of a “trading trust”.

Liability of trustees and rights of indemnity

P32 New legislation should restate the following principles:
   (a) A trustee assumes personal liability unless there is an express limitation to the contrary in the contract.
   (b) A trustee has the right to indemnity out of trust assets (in a modernised form of section 38).
   (c) A trustee’s indemnity cannot be limited or excluded by the trust deed.
(d) A trustee’s right to indemnity is available to a former trustee in respect of actions taken by them as trustee.

Disclosure of trustee status

P33 It is proposed that section 25 of the Companies Act 1993 should be amended to require a company, when acting as a trustee of a trust, to clearly describe its status as such in all communications and contracts, in the form “X Ltd acting as trustee for Y trust”.

Liability of directors for trust liabilities

P34 There should be an amendment to the Companies Act 1993 to provide for the liability of directors of companies acting as trustees for trust liabilities, based on section 197 of the Corporations Act 2001 (Cth), which provides:

Directors liable for debts and other obligations incurred by corporation as trustee

(1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:

(a) has not discharged, and cannot discharge, the liability or that part of it; and

(b) is not entitled to be fully indemnified against the liability out of trust assets solely because of one or more of the following:

(i) a breach of trust by the corporation;

(ii) the corporation’s acting outside the scope of its powers as trustee;

(iii) a term of the trust denying, or limiting, the corporation’s right to be indemnified against the liability.

The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

Note: The person will not be liable under this subsection merely because there are insufficient trust assets out of which the corporation can be indemnified.

(2) The person is not liable under subsection (1) if the person would be entitled to have been fully indemnified by one of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred.
Appointment of a liquidator or receiver of a trust

P35 New trusts legislation should provide for a mechanism for the appointment of a liquidator/receiver of a trust, who could manage or liquidate the trust fund. This would apply generally, not only to trusts with corporate trustees.

Liability of directors to beneficiaries

P36 It is proposed that legislation should require that directors (or equivalent) of a corporate acting as a trustee have the same obligations to the beneficiaries of the trust as they would have had if they and not the company had been the trustees.

Insolvent corporate trustees

P37 It is proposed that the Ministry of Business, Innovation and Employment should review and clarify the following areas in insolvency legislation:
   (a) whether an insolvent corporate trustee should be liquidated;
   (b) whether liquidators are entitled to claim fees and expenses from trust assets;
   (c) the distribution of assets and priority of creditors on liquidation.
Part 3
Court powers and jurisdiction

Key proposals

The key proposals in Part 3 of the Preferred Approach paper are:

- statutory restatement of the rule in *Saunders v Vautier* regarding revocation and variation by beneficiaries, and a power of the court, following consideration of specified factors, to waive the requirement for consent of any person and approve a revocation, variation or resettlement or change to the scope or nature of trustees’ powers (ch 9);

- extending the power of the court to review the exercise of a trustee’s discretion to a decision made under a power in trusts legislation or a trust deed (ch 10);

- extending the District Court’s jurisdiction under new trusts legislation to determine any proceeding where the amount claimed or value of the property in issue is $500,000 or less, subject to the right of any party to give notice objecting to the proceeding being determined in that court and to have the proceeding transferred to the High Court (ch 12); and

- extending the Family Court’s jurisdiction to make any orders and give any directions under new trusts legislation where the orders or directions are necessary to give effect to a determination of other proceedings properly before it (ch 12).

REVOCATION AND VARIATION OF TRUSTS

4.1 Chapter 9 of the *Preferred Approach* paper discusses the ways that changes may be made to a trust once it has been established. While the general rule is that trusts, once established, cannot be varied, changes in law, taxation rules and family circumstances can mean that trust deeds need to be modified to enable the trust property to be dealt with or the trust administered in a different way. The law has long recognised that there are circumstances...
where, notwithstanding the general rule, trusts should be able to be varied, brought to an end (revoked) or even resettled onto new trusts.

4.2 The proposals here, which would bring greater clarity and certainty to the law, are:

- statutory restatement of the rule in *Saunders v Vautier* regarding revocation and variation by beneficiaries;
- a power of the court, following consideration of specified factors, to waive the requirement for consent of any person and approve a revocation, variation or resettlement or change to the scope or nature of trustees’ powers; and
- a power of the court to make amendments to the non-distributive administrative provisions of any trust deed where necessary to enable the trustees to efficiently manage trust property.

### Revocation and variation by beneficiaries

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<tr>
<td>(a)</td>
<td>state the common law rule (known as the rule in <em>Saunders v Vautier</em>) which provides that where they are in agreement, consenting, legally capable adult beneficiaries may act together to revoke a trust;</td>
</tr>
<tr>
<td>(b)</td>
<td>clarify that where they are in agreement, and with the agreement of the trustees, legally capable adult beneficiaries may act together to confer new powers upon trustees or deviate from, or vary, the terms of the trust; and</td>
</tr>
<tr>
<td>(c)</td>
<td>clarify that legally capable adult beneficiaries may consent to a resettlement of a trust, as well as a variation or revocation.</td>
</tr>
</tbody>
</table>

### Revocation and variation by the High Court on behalf of certain beneficiaries

<table>
<thead>
<tr>
<th>P39</th>
<th>New legislation should:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>provide the court with discretionary powers to:</td>
</tr>
<tr>
<td>(a)</td>
<td>approve any revocation, variation or resettlement of a trust or any change to the scope or nature of the powers of the trustees to manage or administer the trusts on behalf of the following:</td>
</tr>
<tr>
<td>(i)</td>
<td>minors (currently section 64A(1)(a));</td>
</tr>
<tr>
<td>(ii)</td>
<td>incapacitated persons (currently section 64A(1)(a));</td>
</tr>
<tr>
<td>(iii)</td>
<td>persons who may become entitled at a future date or on the happening of a future event or once they become a member of a certain class (currently section 64A(1)(b));</td>
</tr>
<tr>
<td>(iv)</td>
<td>unborn persons (currently section 64A(1)(c)); and</td>
</tr>
<tr>
<td>(v)</td>
<td>beneficiaries under protective trusts (currently section 64A(1)(d));</td>
</tr>
</tbody>
</table>
(b) waive the requirement for the consent of any other person and approve any revocation, variation or resettlement of a trust or any change to the scope or nature of the powers of the trustees to manage or administer the trusts;

(2) set out the following factors for the court to have regard to when exercising its discretion under P39(1)(a) or (b) of the provision:

(a) the nature of any person’s interest and the effect any proposed varying arrangement may have on that interest;

(b) the benefit or detriment to any person that may result from the court approving any proposed varying arrangement;

(c) the benefit or detriment to any person that may result from the court declining to approve any proposed varying arrangement; and

(d) the intentions of the settlor to the extent these can be ascertained;

(3) remove the current requirement that any varying arrangement must not be to the detriment of those beneficiaries on behalf of whom the court provides consent under P39(1)(a). The court should instead be required to consider the broader range of factors set out in P39(2) when deciding whether to approve a varying arrangement;

(4) provide that the court must not use its discretionary power under P39(1)(a) or (b) of the proposed provision to reduce or remove any vested interest or any other property rights held by a beneficiary.

Extension of trustees’ powers by the High Court

P40 The court should have the power to make amendments to the non-distributive administrative provisions of any trust deed where necessary to enable the trustees to efficiently manage trust property. The court should be able to amend a trust deed to enlarge on an ongoing basis the scope of the powers available to the trustees’ for administering or managing trust property. The court should not, however, be able to alter the beneficial interests under the trust under this provision.

Variation pursuant to a trust deed

P41 New legislation should continue the status quo and have no statutory provision regarding variation clauses under a trust deed.

REVIEWING THE EXERCISE OF TRUSTEE DISCRETION

4.3 Chapter 10 considers whether the statutory review procedure under section 68 of the Act for reviewing the exercise of a trustee’s discretion should be retained and, if so, what reforms should be made to that procedure.
4.4 We are proposing extending the power of the court to review the exercise of a trustee’s discretion to a decision made under the trust deed as well as trusts legislation. The proposed provision broadens the ability to have trustees’ decisions reviewed, although this is subject to a clear threshold of evidence that is needed before an application is considered by the courts. We consider that this reform is beneficial for beneficiaries in that it provides a clear and workable mechanism for holding trustees to account. On balance we also favour specifying the standard against which the court will review trustees’ decisions. If the new provision is silent there will be continued uncertainty about the standard expected of trustees when exercising their powers.

4.5 We also propose broadening the class of persons who may apply under this provision so that it includes all beneficiaries, representatives of beneficiaries who lack capacity and settlors, as they each have an interest in ensuring trustees powers are exercised properly.

### Statutory review of trustees

P42 (1) A new mandatory (non-excludable) statutory review procedure should replace section 68. Under the new provision there would be a two stage process:

(a) an applicant would be required to put forward evidence that raises an issue as to whether or not a trustee has exercised a power lawfully or that shows reasonable grounds to anticipate an issue as to whether or not a trustee would exercise a power lawfully (first stage);

(b) the court would then review the exercise of the trustee’s power, with the onus on the trustee to substantiate and uphold the grounds of the act, omission or decision that is being reviewed (second stage).

(2) The ground on which the court may review a trustee’s act, omission or decision under the provision would be whether it was one that was not reasonably open to the trustee in the circumstances.

(3) In the second stage of the procedure, the trustee can be required to appear before the court to substantiate his or her decision.

(4) A trustee’s act, omission or decision under a power either in the new Act or the trust deed would be subject to review.

(5) An “applicant” would include:

(a) any beneficiary, including anyone who might potentially, at some time, benefit under the terms of a trust or anyone who is the object of a power of appointment;
(b) any personal representative of a beneficiary who lacks capacity (such as a parent or guardian of a minor beneficiary, and a property manager or holder of an enduring power of attorney for an incapacitated beneficiary); and

(c) a settlor.

(6) Where the court finds the trustee’s act, omission or decision was one that was not reasonably open to the trustee, the court may make any orders it considers necessary in the circumstances, except that the court may not disturb any distribution of trust property that has been made without a breach of trust before the trustee was aware of the application to the court. The court may not affect any right acquired by a person in good faith and for value.

**OTHER POWERS OF THE COURT UNDER THE TRUSTEE ACT**

4.6 A wide variety of unrelated powers are conferred on the court by different sections of the Act. Chapter 11 deals with the issues raised by these remaining provisions and proposes approaches that modernise and clarify the law. The proposals in this chapter are intended to address specific practical issues.

**Section 66 – Power of court to give directions**

P43 New legislation should:

(a) retain the power to apply to the court for directions;

(b) codify the case law principle that as far as possible trustees should present a proposed course of action regarding the matter on which they seek directions;

(c) provide that the power to apply for directions can only be exercised by current trustees of the trust;

(d) provide that for the avoidance of doubt, the statutory power to apply to the court for directions does not restrict the ability of the trustee to apply to the court for a declaration as to the interpretation of the trust deed.

**Section 72 – Payment of a commission to a trustee**

P44 (1) New legislation should retain the provision in section 72 of the Trustee Act 1956 under which the court may authorise payment of a reasonable fee or remuneration to a trustee out of trust property.

(2) New legislation should retain the list of factors for determining what, if any, payment would be just and reasonable, with the factor in section 72(1A)(g) being amended so that it allows consideration of whether any payment that might otherwise have been allowed should be refused or reduced due to the conduct of the trustee in the administration of the trust.
(3) Payment under this provision is one of the exceptions to a trustee’s duty to act gratuitously and the court should only authorise payment under the provision where the trustee has provided services above and beyond what would normally be expected from a trustee.

Section 74 – Beneficiary indemnity for breach of trust

P45  (1) New legislation should retain without substantive amendment the beneficiary indemnity for breach of trust contained in section 74 of the Trustees Act 1956.

(2) The proviso concerning “married women restrained from anticipation” should be repealed.

Section 75 – Barring claims and future claims

P46  (1) New legislation should retain the provision in section 75 of the Trustee Act 1956 under which a trustee may give notice to any claimant or potential claimant requiring him or her to take legal proceedings (within three months from the date of service) or to enforce his or her claim through court proceedings. Where a potential claimant on whom notice has been served fails to take proceedings, or fails to enforce his or her claim through the courts, the trustee would be able to apply to the court to have the claim barred.

(2) Where the value of a potential claim is $15,000 or less, and the trustee has given the potential claimant notice, and no proceedings have been commenced by the potential claimant at the expiry of the notice period, the trustee should be able to apply to the Public Trust under a new provision for a certificate barring the bringing of the claim.

Sections 77 to 79 – Payments to the Crown

P47  New legislation should retain with the following changes the provisions in sections 77–79 of the Trustee Act 1956 under which trustees may pay unclaimed monies over to the Crown where they are unable to find beneficiaries and distribute it:

(a) The requirement for trustees to file an affidavit should be abolished and trustees should be required to give the Secretary to the Treasury information about the trust and beneficiaries (such as a copy of the trust deed and a statement of accounts).
(b) The Secretary to the Treasury should have a power to refuse to accept money where he or she is not given the required information about the trust and its beneficiaries.

(c) The obligation on the Secretary to the Treasury to publish a statement of all money held annually in the Gazette should be replaced by a more general requirement that he or she make that information publicly available in a manner that is likely to bring it to the attention of potential claimants. The obligation could in practice be fulfilled by putting the information into an online directory of unclaimed funds on a website.

(d) There should be no requirement on the Crown to pay any interest to claimants on any of the funds held under the provisions.

(e) The Crown should have a power to deduct any reasonable costs and expenses before making payment to any claimant.

Section 76 – Distribution of shares of missing beneficiaries

New legislation should retain the provision in section 76 of the Trustee Act 1956 under which the court has broad powers to approve distributions by trustees where beneficiaries cannot be traced.

The following changes should be made to the requirements concerning advertising for potential beneficiaries:

(a) Trustees should be required to give notice advertising for potential beneficiaries in a manner that is likely to bring the notice to the attention of potential beneficiaries.

(b) Trustees may seek advice from the Public Trust and rely on that advice where there is doubt as to what notice advertising for potential beneficiaries is appropriate.

(c) Trustees may seek directions from the court, as an alternative to seeking advice from the Public Trust, where the trustee is uncertain about what notice advertising for potential beneficiaries is necessary.

Section 35 – Protection against creditors by means of advertising

New legislation should retain the provision in section 35 of the Trustee Act 1956 that protects trustees from liability where they advertise and give notice to potential creditors before distributing property under a trust. The following changes should be made to the advertising requirements in the provision:

(a) Trustees should be required to give notice advertising for claims in a manner that is likely to bring the notice to the attention of potential claimants.

(b) Trustees may seek advice from the Public Trust and rely on that advice where there is doubt as to what notice advertising for claims is appropriate.
(c) Trustees may seek directions from the court, as an alternative to seeking advice from the Public Trust, where they are uncertain about what notice advertising for claims is necessary.

JURISDICTION OF THE COURTS

4.7 Chapter 12 considers whether the District Court should have concurrent jurisdiction with the High Court to exercise some or all of the powers under new trusts legislation. We propose that the District Court should have concurrent jurisdiction to determine any proceeding under trusts legislation where the amount claimed or the value of the property at issue is within its jurisdiction level. Although this level is currently $200,000, we treat it as $500,000 in our proposal, given forthcoming Law Commission proposals to increase it generally to this level. The District Court would also be able to determine proceedings where there are no claims for money or property, although any party should be able to give notice requesting that they are transferred to the High Court. We consider that expanding the District Court’s jurisdiction in this way would improve access to justice because it gives potential parties a greater range of litigation options. It would resolve the procedural inconsistencies with the District Court’s current trusts jurisdiction.

4.8 We also look at whether the Family Court should have jurisdiction to exercise any powers under new trusts legislation where matters involving trusts are otherwise before that court. We propose that the Family Court should have this additional jurisdiction. This is a sensible and practical extension to the Family Court’s jurisdiction to allow it to resolve matters properly before it.

District Court’s jurisdiction

P50 (1) The High Court should have jurisdiction to hear any matter and make any order under new trusts legislation. It should retain exclusive jurisdiction to determine any proceeding under new trusts legislation where the amount claimed or the value of the property claimed or in issue is more than [$500,000].

(2) The District Court should have jurisdiction under new trusts legislation to determine any proceeding where the amount claimed or the value of the property claimed or in issue is [$500,000] or less.

(3) The District Court should also have jurisdiction to determine any proceedings or applications (such as those to appoint or remove a trustee) not involving claims for money or property.

(4) Section 43 of the District Courts Act 1947 (dealing with the rights of defendant to object to proceedings being tried in the District Court) should apply to proceedings involving any claim for money or any claim or issue
over property. Where proceedings commenced in a District Court do not involve any claim for money or property any party to those proceedings should be able to give notice objecting to the proceeding being determined in that court and should have the right to have the proceeding transferred to the High Court.

Family Court’s jurisdiction

In addition to P50 it is proposed that:

1. The Family Court should have jurisdiction to make any orders and give any directions under new trusts legislation where this is necessary to give effect to any determination of other proceedings that are properly before the Family Court.

2. The Family Court’s jurisdiction should not be subject to the upper threshold of $500,000 that has been set in P50 for proceeding in the District Court. Instead, regardless of the value of the claim, the Family Court should have jurisdiction to exercise powers under new trusts legislation where the proceedings (such as proceedings under the Family Protection Act or Property (Relationships) Act) in which such orders will be made are within its jurisdiction.

RESOLVING DISPUTES OUTSIDE OF THE COURTS

Chapter 13 discusses the options for providing methods for resolving disputes in trusts outside of a court. It considers whether there are any advantages to introducing a new mechanism for dispute resolution and decision-making, such as an ombudsman, tribunal or commission. We conclude that there are not such strong factors in their favour or such a strong need for an alternative mechanism that serious concerns about their cost and value could be overcome.

In this chapter we discuss the approach throughout the Preferred Approach paper of proposing an administrative and supervisory role for the Public Trust in particular circumstances. This approach would be more efficient and cost effective than current processes in the Act.

We also look at whether provisions are needed to enable the use of alternative dispute resolution techniques as a way of reducing the need for trust disputes to be determined by a court. We make several proposals to facilitate the use of alternative dispute resolution.

Alternative mechanisms for dispute resolution

New legislation should not introduce a new mechanism for dispute resolution.
The use of alternative dispute resolution

New legislation should:

(a) give trustees a power to use alternative dispute resolution (ADR) to settle an internal dispute (between trustees and beneficiaries) or an external dispute (between trustees and third parties), where none is given by a trust deed;

(b) give trustees a specific power to give future assurances of action that have been agreed to as a part of an ADR settlement;

(c) provide that trustees will not be liable to other parties to an ADR settlement for agreeing to the settlement if they acted honestly and in good faith while doing so;

(d) provide that a beneficiary can make a request to the court that mediation be used to resolve a dispute rather than continuing with court proceedings and that the court can require mediation to be used. It should be open to the court to allow the costs of the mediation to be paid from the trust assets;

(e) provide that the court can appoint representatives of unascertained and incapacitated beneficiaries, who may be other beneficiaries, who can agree to an ADR settlement on behalf of the unascertained and incapacitated beneficiaries, subject to the court’s approval of the settlement; and

(f) provide that parties to a dispute can request that the Public Trust appoint a mediator or arbitrator. The Public Trust would be able to charge a fee to cover reasonable costs for carrying out this service.
Part 4
General trust issues

Key proposals

The key proposals in Part 4 of the Preferred Approach paper are:

• replacing the Perpetuities Act 1964 and the rules against perpetuities and remoteness of vesting with a rule limiting the duration of trusts to 150 years (ch 14);

• the Official Assignee should have standing to challenge a trust regardless of whether the bankrupt could have done so prior to the bankruptcy (ch 16); and

• amending section 182 of the Family Proceedings Act 1980 so that it covers de facto relationships in addition to marriages and civil unions (ch 17).

REMOteness OF VESTING AND THE DURATION OF TRUSTS

5.1 The rules of the courts of common law and equity to encourage the free alienability of property, including the rules against perpetuities and remoteness of vesting, are discussed in chapter 14 of the Preferred Approach paper. We suggest proposals for reform to simplify and modernise this law by replacing the current common law and statutory rules with a bright-line maximum duration rule for trusts of 150 years.

5.2 The new law would be much easier to understand and would improve certainty in trust dealings. The 150 year period allows a high degree of flexibility for settlors to dispose of property as they choose. We consider that extending the maximum duration of trusts is more appropriate than abolishing the perpetuity period altogether as it continues to prevent perpetual trusts, which could create problems for trust administration and undermine the interests of the current generation of beneficiaries.
Remoteness of vesting and duration of trusts

New legislation should:

(a) repeal the Perpetuities Act 1964 and provide that the common law rule against perpetuities / remoteness of vesting is of no application in New Zealand;

(b) provide a default duration of 150 years for all trusts (a shorter period may be specified in the trust deed);

(c) provide that at the expiry of 150 years from the date of the establishment of a trust, all trust property is to be vested in accordance with the provisions contained in the trust deed, or if the trust deed is silent, is to be vested in all surviving beneficiaries in equal shares;

(d) provide that trusts which include a mechanism to calculate the vesting date rather than specifying a duration shall continue until the earlier of the date resulting from the calculation, or 150 years from the establishment of the trust;

(e) provide that, notwithstanding these reforms, distributions which were valid under the Perpetuities Act 1964 at the date they occurred remain valid;

(f) update section 59 of the Property Law Act 2007 to reflect the abolition of the rule against perpetuities / remoteness of vesting;

(g) update the rule against accumulations to reflect the abolition of the rule against perpetuities / remoteness of vesting and provide a fixed accumulations period;

(h) carry over the existing exceptions allowing certain trusts to continue indefinitely despite the rule against perpetuities and apply these exceptions to the rule limiting the duration of trusts;

(i) establish a new exception to allow unit trusts to continue indefinitely (existing trusts will need to apply to the court for an extension);

(j) establish a new exception to allow energy consumer trusts to continue indefinitely (existing trusts will need to apply to the court for an extension).

REGULATION

5.3 In chapter 15 we consider whether the case can be made for trusts to be registered and for additional regulation of individuals and companies that provide services to settlors establishing trusts or to trustees administering and managing trusts.

5.4 We concluded that neither a register of trusts nor regulation of trust service providers is necessary.

Registration

P55 A system of registration for trusts should not be introduced.
Regulation of trust service providers

Further regulation of individuals and companies providing services to settlors establishing trusts, or to trustees administering and managing trusts, should not be introduced at this stage.

INTERACTION OF TRUSTS WITH OTHER POLICY AREAS

5.5 In chapter 16 we examine a range of legislative responses to the use of trusts, which allow trust assets to continue to be treated as the settlor’s assets or to continue to be subject to the claims of third parties. We discuss submitters’ views on whether the current legislative provisions are adequate, and if they are considered inadequate, whether the solution is to strengthen the current provisions or whether a stronger, more uniform solution is called for.

5.6 We also focus on a specific area of possible reform in relation to the standing of the Official Assignee when challenging a trust. Our preferred approach here is to amend the position through legislation to provide that the Official Assignee has standing to challenge a trust regardless of whether the bankrupt could have done so prior to the bankruptcy. The provision could be effected as part of trusts legislation, or as a separate amendment to the Insolvency Act.

Interaction with other policy areas

It is proposed that trusts should continue to be addressed in individual legislative schemes, rather than in a uniform “look-through” provision in trusts legislation.

Standing of the Official Assignee

Legislation should provide that the Official Assignee has standing to challenge a trust regardless of whether the bankrupt could have done so prior to the bankruptcy.

RELATIONSHIP PROPERTY AND TRUSTS

Chapter 17 addresses relationship property. We include a separate discussion on relationship property because submitters identified the look-through provisions in the Property (Relationships) Act 1976 (PRA) as those most in need of review and reform. The chapter discusses the issues that have been raised around the effectiveness and reach of the current provisions. The two main issues considered are:

• whether there are circumstances (not currently addressed by the PRA) where dispositions to trusts should be set aside to better give effect to the equal sharing regime in that Act; and
• whether the reach of section 182 of the Family Proceedings Act 1980 (FPA) should be extended to also apply to de facto relationships.

5.8 After canvassing the issues that have been raised over the effectiveness of the current look-through provisions in the PRA, our conclusion is that a review of the PRA may be needed to properly address these matters. The overall approach taken in this review is to address matters of core trust law rather than problems that arise solely at the point where trust law interacts with other policy areas.

5.9 We are cautious about proposing changes to provisions in the PRA and FPA. It is beyond the scope of this review of trust law to fully analyse problems and issues arising over the use of trusts in the relationship property area. However, despite these concerns we have identified two possible amendments that might reasonably be advanced as part of our review to address some of the issues identified by submitters.

5.10 Firstly, we propose amending section 182 of the FPA to address the disparity in treatment between de facto couples and other couples. Although our proposal affects all nuptial property settlements, including any that are not trusts, we consider the proposed amendment to be relatively straightforward and to address what has now become an unfair anomaly.

5.11 Secondly, we put forward for comment the option of amending section 44C(2)(c) of the PRA to give the court broader powers to require the trustees of a trust to which relationship assets have been transferred to compensate the spouse or partner whose claim or right has been defeated by the disposition to the trust. We consider that this option has merit and that it would address a number of the issues with the current provision. We are therefore seeking submissions on whether it would be desirable to pursue this reform, or whether a fuller review of the PRA should instead be recommended to the Government.

### Relationship property proposals

**P59** It is proposed that section 182 of the Family Proceedings Act 1980 (under which the courts may vary the terms of ante- and post-nuptial settlements, including trusts, when a marriage or civil union is dissolved) be amended to also cover de facto relationships. The following changes should be made to the jurisdictional requirements of section 182:

(a) the terms de facto partner and de facto relationship should have the same meaning as these terms have in sections 2C and 2D of the Property (Relationships) Act 1976;

(b) the triggering event that allows an application to be made to the court, or the court to make an order varying any qualifying settlement, should be changed from when a marriage or civil union is dissolved to when the parties to a relationship separate; and
(c) an application to the court should be able to be made in respect of relationship settlements rather than nuptial settlements. The term relationship settlement may need to be defined.

OPTIONS FOR COMMENT
Which, if either, of the following options do you favour for the Property Relationship Act 1976, and why?

Option (1)
Amend section 44C(2)(c) of the Property (Relationships) Act 1976 to give the court a broader power to require the trustees of a trust to which relationship assets have been transferred to compensate the spouse or partner whose claim or right has been defeated by the disposition to that trust. Section 44C(2)(c) should be amended as follows:

(c) an order requiring the trustees of the trust to pay to one spouse or partner the whole or part of the income of the trust, either for a specified period or until a specified amount has been paid, any specified amount or to transfer any property of the trust.

Section 44C should otherwise remain unchanged.

OR

Option (2)
A review of the Property (Relationships) Act 1976 should be undertaken to determine whether there are circumstances (not currently addressed by the provisions of the PRA) where dispositions to trusts should be set aside, to better give effect to the equal sharing regime in that Act.
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