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Exposure Draft of the Trusts Bill

Introduction

1. The New Zealand Law Society welcomes the opportunity to consider and comment on the exposure draft of the Trusts Bill ('exposure draft Bill'). The Law Society notes, however, that the time frame for submissions on the exposure draft Bill was too short, given the subject matter and complexity of the issues. The Law Society appreciates that there will be another opportunity to make submissions once the Bill is introduced, but it would have been preferable to have had sufficient time to make full and complete submissions on the exposure draft, which could then have been taken into account before the Bill is introduced.

2. The Law Society supports the policy objective of the exposure draft Bill, which is to update the Trustee Act 1956 and introduce plain language legislation that simplifies the drafting of trust deeds, facilitates the efficient operation and administration of trusts and the resolution of trust-related disputes. The Act in part codifies a number of common law principles, which the Law Society considers will make trust law more accessible to settlors, trustees and beneficiaries.

Balance between clarity and flexibility

3. The Law Society agrees with the policy objectives, but notes there is a risk that efforts to restate existing statute and common law in the new Act may result in the legislation being too prescriptive. A hallmark of trust law is its flexibility and ability to cater to a wide range of circumstances and requirements. Overly prescriptive provisions may impact on how the common law (developed incrementally by judges) continues to develop in the area of trusts in New Zealand. A balance needs to be struck between flexibility (allowing the law to evolve as necessary) and reducing complexity (promoted by clear rules) for settlors, trustees and beneficiaries.

Consequential amendments and cost of those changes

4. The Ministry of Justice commentary on the exposure draft Bill assumes that "the Bill will not require existing trust deeds to be changed because the Bill largely restates the existing law". The Law Society notes that if, contrary to the Ministry's assumption, there is a need to amend older trust instruments, this could cause difficulties. This is because many older trust instruments do not include a power of amendment. The only way to change the nature of

those trusts is to bring the trust to an end and distribute to one of the beneficiaries who immediately gifts everything onto the new trust in a modern form. When this technique is followed, there is a completely new trust and completely new settlement of property on that trust. Therefore, there is likely to be some cost associated with the changes to the law.

Part 1 – Preliminary provisions

Q1: Do the preliminary provisions set out a useful starting point for interpreting the Bill?

Q2: Do you have any comments about how the provisions could be improved?

Purpose and scope

5. The Law Society agrees that setting out "the core principles of the law relating to trusts" would enhance "access to the law of trusts" by providing a clear set of provisions to follow. However, a key feature of trust law is flexibility and the ability of the courts to adapt trust law to meet a wide range of circumstances. As noted above, a balance needs to be struck between flexibility (allowing the law to evolve as necessary) and reducing complexity (promoted by clear rules) for settlors, trustees and beneficiaries.

6. The key purpose of the legislation should be to modernise the law of express trusts by setting out default administrative rules and removing or modifying certain restrictions (such as the rule against delegation).

7. The Law Society recommends that the purpose of the Bill be redrafted as follows:

> 3 Purpose and Scope
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> (1) The purpose of this Act is to restate and reform New Zealand trust law by:
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> (a) making trust law clearer while maintaining the flexible nature of trust law; and
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> (b) setting out mandatory and default duties of trustees; ~~Setting out the core principles of the law relating to trusts~~; and
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> (c) providing for default administrative rules for express trusts; and
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> (d) providing for mechanisms to resolve trust-related disputes; and
>
> (e) enhancing access to the law of trusts.

8. The rationale for removing the purpose of "setting out the core principles of the law relating to trusts" is that the law of trusts needs to retain its flexibility. If the Bill is held out as stating the "core principles" this may lead to rigidity and stifle the evolution of the law. The Law Society believes the Bill should focus on providing default rules which can be followed (or not, as suits the trust), with a limited number of mandatory rules.

Interpretation

9. Definition of "beneficiary": The Law Society considers that this definition is too wide. It could include persons who are entitled to receive benefits under trusts but who would not normally be understood to be a beneficiary. For example, a director of a trustee company who is given an express indemnity under a trust instrument could be "a person who has received, or who will or may receive, a benefit under a trust". The Law Society recommends that the Bill defines

a beneficiary as “a person who is beneficially interested under a trust” and then expands the meaning to expressly include a person who is an object of a discretionary trust or an object of a power of appointment in respect of property held under a trust.

10. Definition of “discretionary beneficiary”: If the change to the definition of “beneficiary” recommended above is made, there would be no need for “discretionary beneficiary” to be defined. In any event, the current definition of “discretionary beneficiary” is inaccurate as it excludes a person who has “a fixed, vested, or contingent interest in trust property”. Often a discretionary beneficiary will have an interest in a trust as an object of a discretionary trust or as an object of a power of appointment but will also have an interest as a default beneficiary (typically a determinable contingent interest in the trust property). Merely because that person holds an interest as a default beneficiary does not mean that he or she should not be regarded as a discretionary beneficiary. Further, it is noted that the definition of “discretionary beneficiary” does not appear to be used elsewhere in the exposure draft Bill so it is recommended that this definition is deleted.

11. Definition of "permitted purpose": This ought to take into account the possibility of a purpose being not only "specified" in the terms of the trust but also purposes which are "inferred" under the trust.

12. The Law Society recommends that a definition (in clause 4) of “trust property” (for clause 9 and other purposes) would be a helpful addition since it is a central concept in clause 9 and for other purposes in the Act.

13. Definition of “trustee”: The Law Society makes two points in relation to this definition:

    (a) The definition of “trustee” appears to include an agent, as an agent may be someone who “deals with property under a trust”. The Law Society recommends that “trustee” be defined as “a person who holds or is entitled to hold property under a trust as the owner on behalf of the beneficiaries”.

    (b) In relation to sub-clause (c), it is stated that “in relation to a decision, application, notice, direction, consent or agreement”, “trustee” means “the majority of trustees”. However, the reference to a “majority of the trustees” may have unintended and undesirable consequences for the rest of the Act. For example, based on this definition, a trustee who is in the minority may not be considered to be “a trustee”. This might have the unintended consequence that a minority trustee is not subject to duties such as honesty and good faith. As sub-clause (c) is clearly aimed at clause 32, the Law Society recommends that sub-clause (3) be deleted from the “trustee” definition and instead be directly incorporated into clause 32. Clause 32 would then be drafted as follows:

        32 Duty to act unanimously

        (1) Subject to subsection (2) below, if there is more than 1 trustee, the trustees must act unanimously.

        (2) If the duty in this section is excluded, in relation to a decision, application, notice, direction, consent or agreement, the trustees must act by majority.

Part 2 – Express trusts

Q3: Do these provisions set out a clear approach for the creation and characteristics of express trusts?

Q4: Do you have any comments about how the provisions could be improved?

14. Clauses 8 and 9 of the Act attempt to define "express trust" and the characteristics of an express trust. The Law Society does not consider that the concept of "express trust" is apt for definition. There has been a long-standing debate amongst legal academics about how to define an "express trust". To date, a satisfactory definition has been elusive. Defining the characteristics of an express trust in this manner would also likely stifle the evolution of the trust structure through judge-made law.

15. The Law Society considers that attempting to define an express trust carries a real risk that some arrangements will be caught which are not intended to be caught. This is largely because the proposed characteristics set out in clause 9 are over-inclusive. For example, the characteristics might encompass an agency relationship.

16. Clause 9(2) – which permits the court to determine whether a trust is an express trust if the trust lacks the characteristics listed in clause 9(1) – does not address the Law Society's concern. Requiring that an application be made to the court to determine whether a trust is an express trust would be an expensive and time consuming process. If clause 9(2) is retained it should also provide that an application can be made to the court seeking a declaration that the trust is *not* an express trust.

17. Clause 11 sets out the maximum duration of a trust. The Law Society makes two comments in relation to this clause:

    (a) Clause 11(6) provides that trust property is to be vested in all surviving beneficiaries in equal shares. While it is correct that in some cases the courts will apply the principle "equality is equity" and order equal distributions of trust property on the expiry of a discretionary trust, that is not always the case. For example, if there was a very wide class of discretionary beneficiaries, the court would not likely order a distribution to each beneficiary of (for example) $1.00 each. Instead, the court would interpret the settlor's intentions and order a distribution in a meaningful and sensible way. Clause 11(6) should therefore not pre-empt the position and instead should contemplate either the trustees or the court making the decision on vesting.

    (b) Clause 11(8)(a) may need to be drafted more precisely. The words "a charitable trust may continue indefinitely" may have implications in other charity contexts.

Part 3 – Trustees' duties and information obligations

Part 3, Subpart 1 – duties of trustees

Q5: Do the provisions on duties clearly set out the basic obligations of a trustee?

Q6: Do you have any comments about how they could be improved?

18. Setting out the trustees' duties in the Act carries a risk that the law will become rigid. The courts have been reluctant to exhaustively define a trustee's duties, to allow for the law to develop to deal with new situations. To prevent this kind of atrophy, the Law Society recommends that clause 13 include a new sub-clause (3) which states that the provisions relating to trustee duties are not an exhaustive list and are not intended to set out the principles of the common law on trustee duties as they currently exist and are not intended to expand on or limit or otherwise define those duties.

19. Clause 15(3) states that, for the avoidance of doubt, the modification of certain default duties is not inconsistent with the mandatory duty to act for the benefit of the beneficiaries or further the permitted purpose of the trust set out in clause 20. The Law Society notes that clause 24 (duty not to exercise power for own benefit) is also inconsistent with the duty to act for the benefit of the beneficiaries. Therefore, the Law Society also recommends that clause 24 be added to clause 15(3).

20. Clause 22 contains the general duty of care. However, it is unclear from the words "or performing any function in relation to a trust" whether the duty also applies where a trustee neglects or refuses to carry out a function or exercise a power. The Law Society recommends that this point is made express.

21. The Law Society notes that the words "(other than the exercise of a discretion to distribute trust property)" have been included to deal with the point raised in previous submissions about the application of a duty of care to the exercise of dispository powers. From a drafting point of view, those words should not be within brackets because they are operative words.

22. In clause 25 it might be prudent to add that the trustee must "consider if the current exercise of a power continues to be appropriate".

Q7: Do you think there should be an additional mandatory duty for the trustee to act personally, in order to clarify how the trustee's ability to give powers to other people operates (see cls 64 and 65)?

23. No.

Q8: Should there either be a different standard of care for powers of investment or is it appropriate for the general duty of care to apply in this case? Why?

24. No. The general duty of care includes a heightened duty where that trustee has or holds him or herself out as having special knowledge or experience. Therefore, there would be a higher standard of care where a trustee has investment knowledge or experience (which is appropriate). The Law Society considers that it would discourage those without special investment knowledge or experience if a higher standard of care was required as a matter of course. The Law Society therefore recommends that the standard remain the same (as the

general duty of care with an increased duty for those with specialised experience or knowledge).

Part 3, Subpart 2 – exemption and indemnity clauses

Q9: Do the exemption and indemnity provisions clearly set out the extent to which trustees can limit their liability?

Q10: Do you have any comments about the language used, or otherwise about how the provisions could be improved?

25. The Law Society considers that the provisions on exemption and indemnity clauses are appropriate. However, the Law Society suggests that guidance on what amounts to "gross negligence" would be helpful. Definitions of equivalent terms have been included in other legislation. For example, section 141C(3) of the Tax Administration Act 1994 defines "gross carelessness" as "doing or not doing something in a way that, in all the circumstances, suggests or implies complete or a high level of disregard for the consequences".

Q11: Should the liability of an advisor under cls 15(4) and 36 be specifically set out in the Bill or be left for development under ordinary tort principles?

26. Regarding clause 15(4), (relating to an advisor's duty to explain the modification or exclusion of a default duty), the Law Society considers that this is a reasonable safeguard and that a prudent advisor should bring this to the attention of the settlor in any event even without a statutory requirement mandating this. The Law Society is of the same opinion in relation to clause 36 (relating to the advisor's duty to explain the meaning and effect of a liability exclusion or indemnity clause).

Part 3, Subpart 3 – trustee's obligations to keep and give trust information

Q12: Do these provisions clearly set out a trustee's obligation to keep and give trust information?

Q13: Do you have any suggestions about how the provisions could be improved?

27. Clause 37 sets out the core documents the trustee must keep. The Law Society recommends that clause 37(a) and (b) should refer to "trust instrument" rather than "trust deed". If this change is made, the term "trust instrument" should be used throughout the exposure draft Bill.

28. Clause 38 requires each trustee to hold the trust instrument and other documents containing the terms of the trust (and variations to those documents). It also provides that it is sufficient if at least one trustee holds copies of the other documents referred to in clause 37(c) – (i). However, the Law Society notes that often trustees will employ others (such as solicitors) to hold trust documents. The Law Society therefore recommends that clause 38 be amended to permit a solicitor or other person acting for the trust to hold these documents, provided that the trustee is able to obtain access on request. Consequential amendments would be required to clause 40 to permit a non-trustee to hold the documents.

29. The Law Society recommends the following amendment:

> **38 Keeping documents where there is more than 1 trustee**
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> If there is more than 1 trustee of a trust, each trustee must comply with the obligations in section 37 by –
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> (a) holding copies of the documents specified in section 37(a) and (b); and
>
> (b) being satisfied that at least 1 of the trustees, or a person who acts for the trust, holds copies of the other documents specified in section 37 and that those documents will be made available to the other trustee or trustees on request.

Provision of information to beneficiaries

30. The Law Society considers that the drafting of clause 42(1) is imprecise. Clause 42(1) requires a trustee to make available to a "sufficient number" of beneficiaries "sufficient trust information" to enable the terms of the trust to be enforced against the trustees. The Law Society recommends that instead of referring to a "sufficient number of beneficiaries" that this be tied to the definition of "qualifying beneficiary or representative of a qualifying beneficiary". It would also be useful to define "sufficient information".

31. Clause 44(2) provides that the trustee may decide to not provide information to a beneficiary based on the factors set out in clause 45(2). There may be other reasons, not referred to in clause 45(2), why a trustee might justifiably decide to not provide information. The Law Society recommends that the Bill include an additional generic right to withhold information if the trustee(s) consider that, acting in the best interests of the beneficiar(ies), there is a good basis for withholding the information.

32. Clause 47 provides that a beneficiary may apply to the court for an order that trust information be provided by the trustee. However, the Law Society recommends that this clause should also allow a trustee to apply to the court for an order that the trustee be permitted to withhold information. Clause 43(2)(b) prevents a trustee from withholding some or all basic trust information from some beneficiaries (but not all). There may be circumstances where it may be in the beneficiaries' interests for information to be withheld. A trustee should be entitled to apply to the court in these circumstances to be allowed to withhold information from all beneficiaries.

33. The Law Society notes that the recent Court of Appeal decision in *Erceg v Erceg* [2016] NZCA 7 has resulted in a conflict between the common law and the exposure draft provisions (clauses 42 – 47), regarding the provision of information to beneficiaries. (The Court in *Erceg* reduced the disclosure obligations of trustees and held that disclosure is dependent on the trustees' discretion and on the particular facts at the time.) However, the exposure draft Bill provides a more prescriptive set of rules (albeit still providing the trustee with a right to exercise his or her discretion). The Law Society notes that the draft Bill, if enacted in its current form, would therefore change, rather than codify, existing case law. This may warrant further consideration.

Part 4 – Trustees' powers and indemnities

Part 4, Subpart 1 – powers of trustee

Q14: Do you think subpart 1 of Part 4 clearly sets out the powers of a trustee?

Q15: Do you have any comments about how the provisions could be improved?

34. Clause 50 sets out protection of purchasers dealing with the trustee and acquiring or dealing with trust property. The exercise of a power by a trustee may be challenged for a number of reasons, not just as an ultra vires exercise of the power. Clause 50 ought to take that into account. For example, there is no reason why a purchaser who acts bona fide without knowledge should be placed at risk because a trustee exercised a power in bad faith or had a conflict of interest.

35. Clause 61 sets out a statutory power of advancement. However, it is unclear whether the whole or only part of a beneficiary's prospective share can be paid out under the power of advancement. The Law Society recommends that clause 61 should permit both. A trustee ought to have the discretion to allow the whole of a prospective share to be paid out (in accordance with the trust instrument provisions).

36. Clause 61(3) changes the law, which may not have been intended. This clause provides that a power of advancement must not be exercised in favour of a beneficiary where a beneficiary only has a remote possibility of acquiring a vested interest. That is not currently the legal position. This provision would therefore open up the possibility that an object of a power of appointment may challenge a decision of a trustee to exercise a power of advancement in favour of a default beneficiary. Currently, an object of a power of appointment can only challenge the trustee's decision on other grounds.

Exercise of trustee powers and functions by others

37. Clause 64 sets out powers for a trustee to appoint others to exercise powers or functions or make decisions. Clause 64(1)(c) also permits a trustee to appoint an "eligible person" to hold or deal with trust property as nominee or custodian. Clause 64(4) sets out a definition of "eligible person".

38. Clause 64(2) then sets out certain things that a trustee may not authorise a person to do on behalf of the trustee regardless of the terms of the trust instrument. The Law Society considers that this might cause difficulties in the area of investment trusts. For instance, sub-clause (a) provides that a trustee cannot appoint others (such as a trust manager) to carry out a function that is or is related to, the determination of whether trust property should be distributed, used, possessed, etc. However, this is exactly what investment trust managers do. Therefore, sub-clause (2) needs careful consideration as it may be overly restrictive in practice.

39. Clause 64(5)(b) also contains a restriction relating to "eligible persons". The Law Society considers that the provisions should not be that restrictive. Similarly, sub-clause (c) prevents clause 64 being contracted out of. It ought to be the settlor's decision whether those provisions are appropriate or not. Therefore, as a whole, clause 64 is overly restrictive and is likely to cause problems in practice.

40. Clause 65 contains a duty to keep appointments under review. Clause 66 refers to the power to delegate all or any of the trustee's powers. The Law Society makes three points in relation to clauses 65 and 66:

    (a) The Law Society recommends that clause 65(1) should refer to a "power to appoint others under section 64" rather than "a power of appointment", to avoid confusion with a depository power.

    (b) Clause 66(5) states that a delegate may exercise the delegating trustee's power to resign. The Law Society considers that a power to resign should only be able to be delegated if the instrument granting the delegation expressly provides for this.

    (c) Clause 66(6) states that the delegation provisions in clause 66 apply despite any contrary intention in the terms of the trust instrument. The Law Society considers that this is likely to be unduly restrictive. The modern practice is that trust instruments often contain a much more extensive power of delegation. In addition to that, the trust instrument may restrict a power of delegation. If a settlor has deliberately restricted a power of delegation, then the settlor's intention as set out in the trust instrument should prevail.

41. Clause 68 sets out the trustee's liability for acts of a delegate. It states that the trustee is not liable for the acts of the delegate unless the trustee failed, in appointing the delegate, to fulfil a trustee's mandatory duties. This is the case despite any contrary intention in the terms of the trust instrument. The Law Society recommends that this includes the obligation of the trustee to keep the appointment under review. Clause 68 should be amended as follows:

    68 Trustee's liability for acts of delegate limited

    (1) The trustee is not liable in a proceeding brought by or on behalf of a beneficiary for any act or default of a delegate unless the trustee failed, in appointing the delegate to fulfil any of the trustee's mandatory duties <u>or failed to keep the appointment under review</u>.

Part 4, Subpart 2 – trustees' indemnities

42. Clause 79 contains a creditor's claim to trust property through the trustee's indemnity. The clause ought to also make it clear that the creditor's claim against the trust property will terminate on the disposal of the property unless the receiving party (such as a beneficiary) knew or ought to have known that the trustee was not entitled to be fully indemnified out of the trust property for a creditor's claim or the disposal would leave the trust insolvent.

<u>Part 5 – Appointment and discharge of trustees</u>

Q21: Do the provisions create a clear and workable framework for appointing and removing trustees and transfer of trust property?

Q22: Do you have any comments about how the provisions could be improved?

43. Clause 88(1) sets out the persons who have the power to remove a trustee. The Law Society recommends that clause 88(1)(a) should be amended by deleting the words "and appoint". This is because a person may have a power to remove trustees but may not have a power to

appoint trustees. The same comment applies in respect of clause 88(2)(a), (b) and (c), clause 94(1), clause 95(4) and clause 99.

44. The drafting of clause 95(1)(a) is imprecise. It provides that a person with the power to remove and appoint trustees must act to remove a trustee if "a trustee becomes disqualified under section 86(2)(c)". The Law Society recommends that clause 95(1)(a) be reworded in a manner consistent with the wording of clause 86(2)(c) – that "a trustee becomes disqualified because the person lacks the capacity to perform the functions of a trustee".

45. A practical problem many practitioners have encountered is that where a trustee becomes incapacitated, he or she cannot sign an Authority & Instruction (A&I) form for the transfer of any interest in land out of their name. Even if a power of attorney with a deed of delegation exists, LINZ will not recognise it. In this situation, an order from the High Court is necessary to transfer the interest in land out of the incapacitated trustee's name. It would be useful if the exposure draft Bill included a provision to deal with this issue without having to resort to making an application to the High Court.

Part 6 – Revocation and variation of trusts

Q24: Do these provisions set out a clear process for the revocation or variation of trusts in limited circumstances?

46. Clause 111(2)(c) sets out a class of persons on whose behalf the court may give consent to a revocation, variation, or resettlement of a trust. It refers to persons who may acquire an interest at a future date or on the happening of a future event or on becoming a member of a certain class of persons. On its face, it appears to include objects of powers of appointment. It is illogical that the court may give consent on behalf of objects of powers of appointment (who may well have a real prospect of receiving trust property) but the court may not give consent on behalf of beneficiaries who have remote property rights (such as default beneficiaries with determinable contingent property rights). The Law Society submits that an adult object of a power of appointment ought to be a person who must give consent for the purposes of clause 111.

47. Clause 112 provides a power to waive the requirement for an adult beneficiary to give consent to a revocation, variation, or resettlement. This allows a beneficial interest under a trust to be reduced or taken away (so long as the interest is not yet vested). Clause 113 then provides that the court may vary or extend a trustee's powers. However, the court cannot exercise that jurisdiction if the variation or extension alters or otherwise affects a beneficiary's interest under the trust. The Law Society submits that there is an inconsistent approach in clauses 112 and 113. Under clause 112, a beneficiary's interest may be taken away without the beneficiary's consent (so long as the interest is not vested). On the other hand, under clause 113, a variation cannot be made if it would alter or affect a beneficiary's interest under a trust. The Law Society submits that removing a beneficiary's interest is more serious than altering trustee powers. Therefore, it is submitted that a similar test should be applied to clause 112 and clause 113. The Law Society recommends that clause 113 be amended so that the variation or extension of trustee powers is not permitted where it would materially and detrimentally affect a beneficiary's interest under the trust.

48. Finally, the exposure draft Bill does not provide a fast track method of winding up small uneconomic trusts. This was discussed earlier in the submission process but has not been taken further. The Law Society recommends that this be revisited.

Q25: Do you have any other comments about how the provisions could be improved?

49. It is unclear what would constitute a "fixed share of the trust property" (clause 110) and an "interest in the property of a trust" (clause 111(1)). These are very important trust concepts as entry points to the application of these new rules and where possible should be clarified, even if only on a non-exhaustive (not "means") basis.

Part 7 – Court powers and dispute resolution

Q27: Do you have any comments about how the provisions [in Part 7] could be improved?

50. Clause 126(1) contains provisions allowing the court to order payment of reasonable fees to a trustee. However, the provision states that services that "far exceed" the services normally expected of a trustee are required before an order can be made. The Law Society submits that this requirement is too rigid and may result in unfairness in certain situations. It should be removed and the existing 'just and reasonable' test in section 72(1) of the Trustee Act 1956 retained.

51. Clause 135(2), which gives the court power to make certain orders regarding ADR, should include an additional power to give orders or directions as to the form of the ADR process to be undertaken (i.e. mediation, arbitration, expert enquiry, conciliation). It should also include the power to direct who will act as mediators or arbitrators or in some other independent capacity.

Schedules

Q31: Do you have any comments on the transitional provisions in schedule 1?

52. Clause 3 of Schedule 1 sets out transitional provisions relating to the duration of trusts. However, these will significantly change the position where the perpetuities rules would have otherwise applied to a trust. It appears that instead of a trust being required to vest at, for instance, the end of the wait and see period under the Perpetuities Act, a trust can continue for 125 years. The Law Society recommends that the term of existing trusts should be referenced to the expiry of perpetuity periods rather than 125 years. If existing trusts are not tied to the expiry of perpetuity periods, beneficiaries' entitlements could be changed dramatically in some cases. This needs to be considered in more detail.

53. The Law Society considers a one-year transition on the provision of information provisions may be too short in practical terms and recommends a two-year transition, to enable current trustees to gather the required information specified in clauses 41 to 47.

Concluding general questions

Q37: Do you think the Bill sets out key rules relating to trusts in a way that can be easily understood and applied by everyday people who use trusts?

54. The Law Society considers that the clarity of drafting (and logical ordering of provisions) is a significant improvement on the Trustee Act 1956. It should assist professionals in understanding trust law and the Act is likely to be more accessible to trustees, settlors and beneficiaries. However, it may be helpful for laypersons to have access to a booklet or guide.

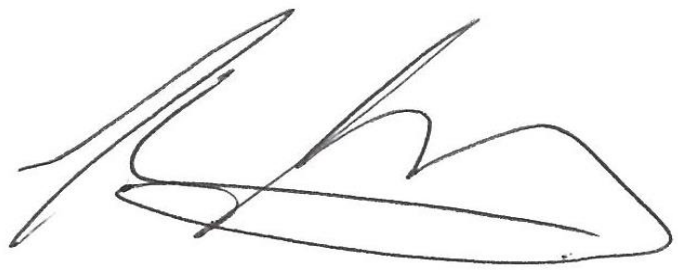
Q41: The intention is that the Bill would not require existing trust deeds to be changed. Do you agree that this is the case?

55. The Ministry of Justice commentary on the exposure draft Bill assumes that "the Bill will not require existing trust deeds to be changed because the Bill largely restates the existing law". However, given the number, age and variability of drafting of existing trust instruments, it would be surprising if none of those trust instruments needed to be amended in the light of the new trusts legislation.

56. Also as noted in paragraph 4 above, many older trust instruments do not include a power to amend the trust instrument or to resettle the trust, and the only way to change the nature of the trust is to bring the trust to an end and distribute to one of the beneficiaries who immediately gifts everything into the new trust in a modern form. When this technique is followed, there is a completely new trust and a completely new settlement of property on that trust. Therefore, there is likely to be some cost associated with the changes to the law.

This submission was prepared with assistance from the Law Society's Property Law and Family Law Sections. If further information or discussion would assist the Ministry in finalising the exposure draft Bill, please do not hesitate to contact the Property Law Section manager Katrina Thomas (katrina.thomas@lawsociety.org.nz / 04 463 2963) in the first instance.

Yours sincerely



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