



LAW COMMISSION

TE AKA MATUA O TE TURE

MEDIA RELEASE

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Hon Sir Grant Hammond KNZM
President
Law Commission

LAW COMMISSION RECOMMENDS MAKEOVER FOR NEW ZEALAND TRUST LAW

The Law Commission is recommending a new Act clarifying the legal rights and duties of New Zealanders who use trusts to manage their assets.

If enacted, the new **Trusts Act** would be relevant to tens of thousands of New Zealanders who use trusts as an alternative way of holding and managing property or other assets. It is estimated New Zealand has up to 500,000 trusts used for a variety of purposes ranging from owning the family home, through to use in business, by charities, and by many, including Māori, to hold land and other assets collectively.

Law Commission President Sir Grant Hammond said trusts form core a part of New Zealand's economic, social and legal infrastructure. It was therefore vital for the law on trusts to be clear and accessible to ordinary people who use them. He said the current law was outdated and much of it is difficult to understand.

“The nature of the trust relationship and its legal implications are not always well understood by the parties, which is not surprising given the age and complexity of the current law.

“While people are entitled to hold and dispose of their property as they wish, those setting up trusts cannot simply receive the benefits of the arrangements, without also having to take on the essential features of the trust that confer those benefits,” Sir Grant said.

The Commission considers it is in the public interest to have a modern statute that gives trustees and others guidance as to how a trust is to be managed and increases the accountability of trustees.

“The new Trusts Act will set out the core characteristics of a trust and requirements for creating a trust. The Act will make it clear what is, and what is not, a trust. It will also provide a summary of the basic obligations that trustees owe to beneficiaries.”

Under provisions recommended by the Commission, if a trust has purportedly been established, but the reality is that the person who established it continues to manage the trust assets as if they are their own personal property, the new Act would make it clear that the court could find that a trust has not in fact been established.

The Commission emphasised that the recommendations did not undermine legitimate uses of trusts. The new Act would preserve the flexibility and usefulness of the trust.

The Commission also recommends giving the Family Court a wider ability to deal with trusts in order to do justice when resolving relationship property disputes when couples separate. Under the proposed reform, the Court, where necessary, would be able to include the relationship assets that have been placed in a trust by one partner in the property to be divided between the couple.

The Commission's Report brings together the key findings and recommendations that have emerged during their comprehensive review.

Sir Grant said the Commission's recommendations would be of considerable benefit to existing as well as to new trusts. The proposed reforms will provide simplified, relevant procedures to better enable the day-to-day business of trusts with minimal expense. They will make the administration of trusts more straightforward and should reduce the need to go to court.

The Commission also intends to look at further areas of trust law in two later reviews, one on purpose trusts and charitable trusts, and one on statutory trustee companies and other corporates acting as trustees.

-ENDS-

For further information and comment, contact: Lisa McCormick, IT & Communications Manager, Law Commission, tel (04) 914 4817, lmccormick@lawcom.govt.nz

This media release and a copy of the publication is available from our website at:
<http://www.lawcom.govt.nz/project/review-law-trusts/report>

Q&A ON TRUSTS AND THE LAW COMMISSION'S REPORT

1. What is a trust and how are they used in NZ?

Trusts are a legally binding arrangement involving a settlor, who establishes the trust, one or more trustees, who are entrusted with the management and control of the trust's assets, and beneficiaries, who are entitled to benefit from the trust.

Trusts provide an alternative way of holding and managing property or other assets. They are unusually common in this country and are used by tens of thousands of New Zealanders. Current estimates suggest New Zealand has between 300,000 and 500,000 trusts. Trusts serve a wide variety of purposes in New Zealand society, including allowing families to hold wealth collectively, for charitable purposes, for use in business and in complex financial transactions, and by Māori to hold Māori land and in Treaty settlements.

2. Would existing trustees be required to do anything differently to comply with their obligations under the recommended new law?

Trustees already owe extensive obligations to beneficiaries. The recommendations do not change this, but do make those obligations clearer and more accessible. The proposed statements of the trustees' duties in statute may make trustees more aware of what they are already legally required to do.

It is already necessary for trustees to retain documents that are important for the administration of the trust. The recommended new Act would include a list of documents, including the trust deed, a list of trust assets and records of trustee resolutions, which must be retained.

The new Act would make it clearer that trustees have a general obligation to provide information about the trust to the trust's beneficiaries, and will give guidance about the factors that trustees must consider in deciding whether to release information. Trustees would need to consider proactively giving basic trust information to beneficiaries who are likely to receive trust property.

3. What new powers would trustees have under the Law Commission's recommendations?

Every trustee, except those with trust deeds that specify a different approach, would have:

- All of the powers in relation to the trust property that a person has if they own the property personally;
- Flexible powers to invest trust property to maximise returns for the beneficiaries and the power to delegate authority for investment decisions to an investment manager;
- The power to use alternative dispute resolution to settle a trust dispute.

4. What else would change for existing trusts as a result of the Law Commission's recommendations?

The recommended new Act would provide procedures for dealing with situations where previously there was no other option but to apply to the High Court, such as where a trustee becomes incapacitated and there is no one with the power to remove and replace them, or where trust property is in the name of a deceased trustee and needs to be transferred into the new trustee's name.

5. How would the Law Commission's recommendations affect the validity of existing trusts?

The recommendations do not change the law about what is a valid trust, so it would not invalidate trusts that currently meet the requirements. The new Act would make it clearer what is required for the establishment of a trust and the obligations of those involved.

6. How does the Law Commission's Report address problems with people putting assets into trusts but continuing to treat those assets as if they still own them?

Under the Commission's recommendations, the real nature of the trust relationship and the obligations that arise from it would be more apparent. In a trust, the settlor no longer owns the trust property, but it is legally owned by the trustees (one of whom might be the settlor), who are obligated to administer it for the benefit of the beneficiaries. The trustees owe significant legal duties to the beneficiaries for the administration of the trust property, which do not allow the property to be treated as if it had never been put in trust. If a trustee is not carrying out their duties, the beneficiaries are entitled to hold the trustees to account.

If a trust has purportedly been established, but the reality is that the settlor continues to manage the assets as if they are the settlor's own, the new Act would make it clear that the court has the power to find that a trust that is not in fact been established.

7. How does the Law Commission's Report address problems with people using trusts to hide their assets from third parties?

The Commission's recommendations would put more emphasis on the legal effect of creating a trust. The consequences are that the settlor no longer owns the trust property and it is instead legally owned by the trustees, who are obliged to administer it for the benefit of the beneficiaries. Trusts need to be established with the intention to create this ownership arrangement.

The new Act would confirm that the court may find that a purported trust is not in fact a real trust if it has been set up without the intention to create a real trust. It would be expected that a purported trust that has the effect of hiding assets that are still considered to be the settlor's could come under scrutiny by the courts.

The recommended Act would clarify and put emphasis on the obligations on trustees to carry out the trust duties. Trustees owe these obligations to the beneficiaries, rather than to the settlor who created the trust (although the settlor may be one of the beneficiaries). A properly administered trust with trustees who are meeting their legal obligations would not be able to benefit only the settlor and consider only the settlor's interests.

Outside of trust law, there are already statutes that allow creditors in an insolvency situation, partners in a relationship breakdown and the government in relation to an application for government-funded assistance to access assets that have been placed in trust in certain situations. These other areas of law and policy have not been the primary focus of the Commission's review.

The Commission's recommendations also address the scenario where a creditor has given value to a trust but, because the trustee has acted in breach of trust or outside of their powers or some other circumstance, the creditor has no legal claim to recover and instead the trust retains an unjustified benefit. Creditors would be given a limited claim to satisfy this liability where they had acted in good faith.

8. What changes does the Law Commission's Report propose where people have used trusts to hide relationship property from their spouse or partner?

The Property (Relationships) Act 1976 governs the division of property when married, civil union or de facto partners separate.

Where relationship property is transferred to a trust, the effect of the transfer of property may be that one partner can no longer claim a share of that property. The Act allows the court to set aside a transfer when it has been made by one partner with the intention to defeat the rights of the other.

Because of difficulties in proving intention, a further provision was introduced by Parliament in 2002 to deal with other situations where property is transferred to trusts. Under this new section, the court may compensate a partner whose rights to property have been defeated as a consequence of the property being transferred to a trust. However, that provision has proved inadequate in addressing the detrimental effect that transfers to trusts can have on fair division under the Act. This is because the court cannot withdraw assets or funds from the trust to compensate the defeated partner but can only make orders about the income from the trust. In a number of cases this has resulted in injustice for one of the partners.

As a way of trying to enable the courts to access the property placed into a trust, applicants and their lawyers have used arguments questioning the validity of the trust itself. Current approaches have not been able to restore the effectiveness of the equal sharing policy in the Property (Relationships) Act and have caused distortions in trust law.

The Commission's recommendation would allow courts to order the transfer of trust assets to compensate a disadvantaged partner if those assets would have been available for division between the couple as relationship property if they had not been placed in the trust. This expands what the court can require to be used as compensation from only the income generated by the trust property to the trust assets as well.