

17 May 2017

Julia Rendall  
Trusts Bill Consultation Team  
Ministry of Justice  
DX SX10088  
Wellington

Email: [Julia.Rendall@justice.govt.nz](mailto:Julia.Rendall@justice.govt.nz)

**Re: NZLS submission on the Exposure Draft Trusts Bill – points of clarification**

Thank you for your email of 21 April regarding the New Zealand Law Society’s recent submission on the exposure draft Trusts Bill (‘the ED Bill’).<sup>1</sup>

The Ministry has asked for clarification in relation to some of the issues covered in the Law Society’s submission, as well as additional questions on the Bill generally. Responses from the NZLS Property Law Section’s Trusts Working Group are set out below.

***Clause 11(8)(a) – Maximum duration of trust***

Clause 11(8)(a) of the ED Bill states that:

*“Despite anything in this section –  
(a) a charitable trust may continue indefinitely; and”*

The Law Society’s submission said: “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.”

The Ministry’s question is as follows:

“We do not want cl 11(8)(a) to have any unintended consequences, but it is unclear to us what implications the clause might have in other charity contexts. Could you please provide us with examples of possible implications in other charity contexts?”

The Law Society’s response is:

There is potential ambiguity in this clause, because "charitable trusts" are not defined. In the absence of a definition, the exception for charitable trusts may be left open to interpretation and render the provision difficult to work with in practice.

Presumably it is not intended for this provision to refer to a narrow definition of a trust, for example:

- Section 7(1) of the Charitable Trusts Act 1957 which provides that: “[t]he trustees of any trust which is exclusively or principally for charitable purposes may apply to the Registrar in accordance with this Part for the incorporation of the trustees as a board under this Part”. Section 2 of the Charitable Trusts Act 1957 defines “charitable purpose” as “... every purpose in accordance with the law of New Zealand is charitable; and, for the purposes of Parts 1 and 2, includes every purpose that is religious or

---

<sup>1</sup> Submission dated 16 January 2017, [http://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0020/107732/I-MOJ-ED-Trusts-Bill-16-1-17.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0020/107732/I-MOJ-ED-Trusts-Bill-16-1-17.pdf).

educational, whether or not it is charitable according to the law of New Zealand". Taken together, section 2 and section 7(1) define a "charitable trust" for the purposes of the Charitable Trusts Act 1957.

- Section 13(1) of the Charities Act 2005 provides that the trustees of a trust of which an amount of income is derived by the trustees in trust for charitable purposes qualifies for registration as a charitable entity. Section 5(1) of the Charities Act 2005 then defines "charitable purpose" as including "... every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community". The balance of section 5 expands and/or qualifies that definition. Taken together, section 5 and section 13(1) define a "charitable trust" for the purposes of the Charities Act 2005.

It is also noted there could be flow-on effects in other legislation, such as the Income Tax Act 2007. If for any reason a trust is not treated as a "charitable trust" for the purposes of the new Trusts Act, then that trust will be an invalid purpose trust (see proposed section 10(b)(ii), and the definition of "permitted purpose" in proposed section 4 of the Trusts Bill) and may not be treated as a "trust" for fiscal purposes either (despite otherwise meeting the requirement to be a charitable trust because income derived or accumulated is held for charitable purposes). In that situation, the tax concessions available in the Income Tax Act 2007 may not apply.

The Law Society considers that for these reasons it would be useful for the new Act to provide a definition of both "charitable trust" and "charitable purpose", in accordance with the Bill's purpose to codify and simplify common law concepts.

***Clause 61(3), Capital of trust property may be applied for maintenance, etc***

Clause 61(3) states:

*61 Capital of trust property may be applied for maintenance, etc*

*(1) If a person is entitled to the capital of the trust property or any share of the capital, the trustee may pay or apply amounts of that capital for the maintenance, education, advancement, or benefit (including past maintenance or education) of the person.*

...

*(3) However, the trustee must not pay or apply an amount to a person where there is only a remote possibility that the person will ultimately acquire a vested interest.*

The Law Society's submission said:

"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 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."

The Ministry's question is:

It is not clear to us how cl 61(3) would open up the possibility that an object of a power of appointment may challenge a decision of a trustee as described. Could you please clarify how the drafting of cl 61(3) would open up this possibility?

The Law Society's response is:

The object of a power of advancement under most New Zealand family trusts is the owner of a contingent determinable interest. The interest is usually contingent on the object being alive at the trust wind up date. It is determinable because it can be destroyed by the exercise of a power of appointment.

A trust deed may for instance say the remaining trust fund goes to final beneficiaries who are alive on the wind-up date. If B is in the class of final beneficiaries, then B is considered the object of the power of advancement.

At present, nothing in the law prevents trustees advancing to B on the basis that B's interest is too "remote".

There is, however a law that states that an object who may take under a gift over (a double contingency) is not an object of the power of advancement in section 41 of the Trustee Act 1956 (see *Winch v Winch* [1917] 1Ch 633. Therefore, if the trust deed states that if B dies before the wind-up date leaving a child (C), then C will take B's share. C would not be the object of the power of advancement in section 41 of the Trustee Act 1956 (unless and until B died before the trust wind-up date).

The use of the term "remote" may catch the double contingency situation – but it may catch others – such as where the "chance" of a default beneficiary receiving a share of the trust property is considered low. There is therefore a risk that clause 61(3) as drafted may catch that type of situation and change the law. The term "remote" is ambiguous and may therefore prove to be complicated in practice. This would give other objects (such as discretionary beneficiaries) grounds for claiming that trustees acted ultra vires by exercising the power of advancement in favour of a final beneficiary (B) because they will be able to claim B's interest was too "remote". The Law Society suggests the removal of this provision and the application instead of current case law.

### ***Clauses 128 – 130, Vesting orders***

The Ministry has also asked for the Law Society's views on clauses 128 – 130 (**attached**) of the ED Bill, replacing sections 55, 56 and 58 of the Trustee Act. The Ministry's comments on these clauses are as follows:

Clauses 128 and 129 allow the court, where it has made certain orders relating to the transfer of interests in land, or an order for specific performance of a contract concerning land, to declare that one party holds the interest as a trustee, and to make an order vesting the property to another party.

Clause 130 allows the court to appoint a person to convey the property, rather than relying on the vesting order.

These clauses are closely modelled on the equivalent Trustee Act sections and seem a little out of keeping with much of the rest of the Bill. We didn't receive many submissions on these sections, and are still seeking feedback on whether the equivalent Trustee Act sections are commonly used, whether the clauses are needed in the Bill, and whether there is any way they could be clarified or improved. We would appreciate any insight you could provide on these sections.

The Law Society's response is:

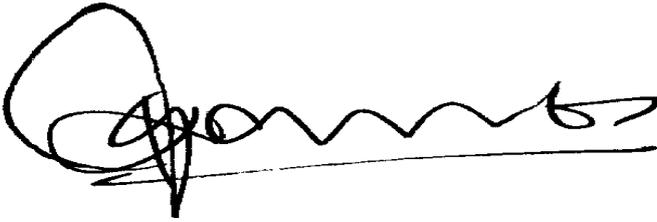
These clauses repeat the codification in the earlier Act of the Court's power in equity to declare trusteeship when appropriate, and to exercise mechanical steps accordingly through a vesting order or through directing a third party to conduct a conveyance. In practical terms, the third party is usually the Registrar of the Court authorised to sign a transfer (presumably an A & I in respect of land).

The content of them however, and their repetition in the draft Bill, seems unexceptional. It would seem strange in the overall context of this exercise (to codify the common law position) that there would be any contemplation of removing this codification and returning to a common law position. In short, these powers should remain, but the clauses could be improved with more modernised language.

These clauses are seldom used. On a few known occasions, the Registrar has been authorised to do a conveyance; on those occasions, it was without reference to the Trustee Act, and the power was assumed by everyone to exist. If there was ever to be a challenge to those powers, it would be good to quote the power in the Trustee Act.

We hope the above comments provide helpful clarification. If you do have any further questions or wish to discuss the comments, please contact Katrina Thomas, the NZLS Property Law Section Manager ([katrina.thomas@lawsociety.org.nz](mailto:katrina.thomas@lawsociety.org.nz) / 04 463 2963).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Jones', written over a horizontal line. The signature is stylized with a large initial 'T' and 'J'.

Tim Jones  
**Vice President**

Encl (1)

**Clauses 128 – 130, exposure draft Trusts Bill:**

128 Vesting order consequential on order for sale or mortgage of land

(1) This section applies if the court gives a judgment or makes an order directing the sale or mortgage of any land.

(2) Each person who is entitled to, or who has any interest in, the land, or who has any contingent right in the land, and who is a party to the proceeding to which the judgment or order relates or is otherwise bound by the judgment or order is deemed to be so entitled or to have an interest, as the case may be, as a trustee.

(3) The court may make an order vesting the land or any part of the land for any estate or interest that the court thinks fit in the purchaser or mortgagee or in any other person.

129 Vesting order consequential on judgment for specific performance

(1) This section applies if a judgment is given for the specific performance of a contract concerning any interest in land, or for the sale or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest in land.

(2) The court may declare—

(a) that any of the parties to the action are trustees of any interest in the land or any part of the land; or

(b) that the interests of unborn persons who might claim under any party to the proceeding, or under the will or voluntary settlement of any deceased person who was during his or her lifetime a party to the contract or transaction to which the judgment relates, are the interests of persons who, on coming into existence, would be trustees.

(3) If the court makes an order under subsection (2), the court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

130 Court may appoint person to convey

(1) In any case where, in relation to an interest in trust property, a vesting order can be made under this Act, the court may instead make an order appointing a person to convey the property or any interest in the property or to release a contingent right.

(2) A conveyance or release by a person appointed under subsection (1) in accordance with the order has the same effect as a vesting order.