

Regulatory Impact Statement: A New Trusts Act

Agency Disclosure Statement

1. This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice.
2. The RIS analyses the Law Commission's recommendations to reform New Zealand trust law. Trust law in New Zealand is important to individuals and businesses, and is a core component of the legal infrastructure and economy.
3. The Law Commission conducted a four year comprehensive review of general trust law (excluding more specialised areas such as charitable and other trust purposes) and found that much of the current Trustee Act 1956 is no longer suited to how trusts operate in practice. The Commission recommended a revised Trusts Act that also restated well-established common law principles. The Commission's recommendations were provided in its report *Review of the Law of Trusts: A Trusts Act for New Zealand* (2013).
4. In March 2014 the Government agreed to the report's key recommendation that the Trustee Act 1956 be repealed and replaced by a new Trusts Act. The Ministry is seeking approval for the release of an exposure draft of a new Trusts Bill for public comment. If significant policy changes are needed in response to the exposure draft, further Cabinet decisions will be sought, supported by impact analysis.

Limits on options analysed

5. The Ministry acknowledges that the RIS does not explore all options for different aspects of trust law. The scope of the Law Commission's review was limited to the law required for trusts to be established and managed successfully, including whether to bring fundamental elements of the common law into the statute. The Commission did not consider options to address problems that arise where trusts and other policy areas interact.
6. The Ministry tested the Commission's recommendations, including against other options, in order to develop the proposed content of a new Trusts Bill. As the Commission undertook comprehensive analysis, this RIS in general identifies the broad impacts and benefits of the most significant of the Commission's recommendations when compared against the status quo, rather than all the options that may have been considered by the Law Commission in arriving at its recommendations, or tested in the Ministry's own analysis.

Uncertainties and assumptions in the analysis carried out

7. It is difficult to quantify the financial impact of the proposals on both existing and future trusts. This is because trusts are private in nature and information about them is not generally available.
8. The Law Commission briefly canvassed the issues and the options for regulation of trusts, including a register of trusts, but concluded that the potential benefits were not sufficient to warrant such a change to the fundamentally private nature of trusts.
9. Information from experienced trust practitioners has been used to provide an estimate of what transitional costs may apply and the overall costs and savings of the proposals. Underpinning the information about costs and benefits are assumptions about the purpose of most trusts in New Zealand. A key assumption is that these trusts are typically trusts of low complexity that hold the family home as its main asset.

Further work for trusts in capital markets

10. Trusts are used extensively in capital markets. Representatives of this industry provided submissions on specific recommendations during the Law Commission's work. However, they did not comment significantly on the wider implications that the reforms could have on trusts used in the capital markets.
11. We are now aware that aspects of the Law Commission's proposals raise some issues for representatives of this industry. Accordingly, officials intend to work with representatives to test whether the proposals analysed in this RIS also suit trusts used in capital markets, or whether a different policy solution is needed. If further policy decisions are required, additional regulatory impact analysis will be undertaken.

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Executive summary

1. Trust law plays a significant role in New Zealand's legal and economic sectors. Trusts are very common structures for holding property and trust law impacts on many people's lives.
2. The Government has agreed that a new Trusts Act will replace the Trustee Act 1956. This decision followed a comprehensive four year Law Commission review of general trust law. The Commission's report recommended a modern statute to improve understanding of trusts while, for the most part, not changing established trust law principles. A new Trusts Act will clarify numerous aspects of the law that are uncertain or inaccessible to many non-legal trust users. The Trustee Act has not been comprehensively updated since enactment and many key principles are found in the common law.
3. The Law Commission's recommendations broadly fall into four main topics: core concepts, trustees, court powers and jurisdiction, and other trust issues. The Commission's recommendations were developed following wide consultation, and also tested by trust law experts. The consultation process involved several rounds of public submissions, and discussions on specific issues with practitioners, academics and government agencies. During 2015, the Minister, supported by the Ministry, consulted with a Ministerial Reference Group which was made up of seven trust law experts.
4. In most cases, the Ministry has accepted the Law Commission's recommendations. The Ministry is proposing that these recommendations form the basis of the new Trusts Act, with some exceptions or modifications.
5. This Regulatory Impact Statement (RIS) divides the Law Commission's recommendations into three categories. The focus of the RIS is on the first category, considered to be significant recommendations that will be the most fundamental aspects of the new Trusts Act. We identify the Ministry's preferred option, and explain in more detail where we modify a Commission recommendation. The significant recommendations cover:
 - 5.1. core trust concepts, including what a trust is
 - 5.2. mandatory trustee duties
 - 5.3. permitted trustee indemnity and exemption clauses
 - 5.4. information that must be provided to beneficiaries
 - 5.5. the appointment and removal of trustees
 - 5.6. the jurisdiction of the courts
 - 5.7. the appointment of a receiver for trusts, and
 - 5.8. changes to the perpetuities rule.
6. The second category of Law Commission's recommendations (Minor) change or add to the legislation, often by restating the common law, but have a relatively minor impact because the changes will generally bring the new Trusts Act into line with current practice. These changes largely relate to administrative matters. The Ministry provides high level analysis of these recommendations and the preferred option in each case.
7. The final category (Modernising) relates to the Law Commission's recommendations that essentially modernise the law without having any significant impact. They have been accepted by the Ministry without modification. These are not analysed in the RIS.
8. Trusts are private arrangements and little information is available about them. This limits the Ministry's ability to identify transitional and compliance costs.

9. Based on the best available information, we consider the overall benefits of the reforms outweigh any transitional costs, which are anticipated to be small. This is because the new Trusts Act is predominantly a refresh of existing trust law.
10. The planned transition to the new Trusts Act is set out with the Ministry's preferred options. Most of the proposals will take effect on commencement. However, there will be some proposals which take effect on commencement for new trusts, but have a transition period for existing trusts. The transition period is intended to mitigate any risks, allowing individuals to make any necessary changes to trust deeds or administration before the new law applies.
11. The Ministry does not support the Law Commission's recommendations involving relationship property and trusts (Recommendations 50 and 51) for amendments to the Property (Relationships) Act 1976 and the Family Proceedings Act 1980. This is because impact analysis of the proposals has not been able to be completed within the time available. The Ministry considers these proposals would benefit from consideration within the review of relationship property law that the Law Commission is scheduled to begin later this year. Introducing these changes now, without full analysis, raises risks of unintended consequences.
12. This RIS differs to the corresponding Cabinet paper *A New Trusts Act for New Zealand* for Recommendation 40, as the Cabinet paper rejects the recommendation to provide the District Court with concurrent jurisdiction with the High Court.

Summary of approach to Law Commission’s recommendations and index

Table 1: Summary of approach to Law Commission’s recommendations and index

Rec #	Subject matter of Law Commission Recommendation	Category	Pg#
1	Characteristics and creation of a trust	Significant	14
2	Mandatory trustee duties	Significant	15
3	Other trustee duties	Minor	36
4	Trustee exemption and indemnity clauses	Significant	17
5	Retention of information by trustees	Minor	37
6	Provision of information to beneficiaries	Significant	20
7	Administrative powers	Minor	37
8	Powers of maintenance and advancement	Modernising	59
9	Age of majority	Minor	38
10	Appointment of agents	Minor	38
11	Appointment of nominees and custodians	Modernising	59
12	Power to appoint delegates	Minor	39
13	Standard of care	Minor	39
14	Investment powers and duties	Modernising	59
15	Distinction between income and capital	Minor	40
16	Apportionment of receipts and outgoings	Minor	40
17	Investment managers	Minor	41
18	Acceptance and rejection of trusteeship	Modernising	59
19	Who may be appointed as a trustee?	Significant	22-25
20	Mandatory and discretionary grounds for removal of a trustee	Significant	22-25
21	Who may remove and appoint trustees, retirement and replacement of trustees	Significant	22-25
22	Appointment of replacement when trustee dies while in office	Significant	22-25
23	Retirement and replacement of trustee	Significant	22-25
24	Exercise of power to remove and appoint trustees	Significant	22-25
25	Numbers of trustees	Significant	22-25
26	Transfer of trust property	Significant	22-25
27	Custodian trustees	Modernising	59
28	Advisory trustees	Modernising	59
29	Revocations and variation by beneficiaries	Minor	41
30	Revocation and variation by the court	Minor	42
31	Extension of trustees’ powers by the court	Minor	42
32	Reviewing the acts and omissions of trustees	Minor	43
33	Other powers of the court – power to give directions	Modernising	59
34	Payment of a commission to a trustee	Modernising	59
35	Beneficiary indemnity for breach of trust	Modernising	59
36	Barring claims and future claims	Modernising	59
37	Payments to the Crown	Modernising	59
38	Distribution of shares of missing beneficiaries	Modernising	59
39	Protection against creditors by means of advertising	Modernising	59
40	High Court and District Court jurisdiction	Significant	25
41	Family Court jurisdiction	Significant	27
42	Alternative Dispute Resolution	Minor	43
43	The Public Trust (exercise of role and ability to charge fees)	Modernising	59
44	The Public Trust (applications for the accounts of trust property to be audited)	Modernising	59
45	Standing of the Official Assignee to challenge a trust	Modernising	59
46	Appointment of receiver for trusts	Significant	28
47	Trustee’s right to indemnity	Modernising	59
48	Creditors dealing with trustees	Minor	44
49	Perpetuities	Significant	30
50	Relationship property - Property (Relationships) Act 1976	N/A	47
51	Relationship property - Family Proceedings Act 1980	N/A	47

Key

Modernising
Minor
Significant
Relationship property

1. Status quo and problem definition

1.1 What is a trust?

13. A trust is a legal relationship created by someone (the settlor) giving property to someone else (the trustee) to look after it for the benefit of another person (the beneficiary). Trusts are very flexible and are used in a wide range of situations, including for family and commercial purposes.
14. Trust law is a core part of New Zealand's legal infrastructure and economy. The Trustee Act 1956 (the Trustee Act) and the common law regulate the administration of trusts in New Zealand.

1.2 Law Commission's four year review of trust law

15. Trust law was referred to the Law Commission in 2009. The Justice and Electoral Select Committee had found that the Trustee Amendment Bill 2007 did not reform trust law extensively enough and called for a comprehensive review.
16. The Commission's report, *Review of the Law of Trusts: A Trusts Act for New Zealand*, was published on 11 September 2013. The Law Commission reviewed the core institution of the trust and made 51 recommendations to modernise and clarify general trust law. The report focuses on express private trusts, which are trusts that benefit individuals, rather than, for example, charitable trusts.¹ However, some of the recommendations relate to fundamental trust matters that are applicable to every trust, so the report has a broad scope.
17. The Commission's recommendations are summarised in **Appendix A**.

1.3 Government response agreed to new Trusts Act

18. The Government responded on 11 March 2014 agreeing with the Law Commission's key recommendation to replace the Trustee Act with a new Trusts Act but said that further work was required on the detail of the new Trusts Act.

1.4 How many trusts does New Zealand have?

19. There is no definitive record of the number of trusts in New Zealand. Due to the private nature of trusts, it is unlikely the exact number will ever be known. However, it is probable that there are a large number of trusts in New Zealand, with the Law Commission estimating between 300,000 to 500,000.² New Zealanders therefore appear to use trusts more than people in comparable countries, with around one trust for every 12 people, compared to one for every 34 Australians and one for every 294 United Kingdom citizens.³
20. Inland Revenue's data indicates 247,400 income tax returns were filed for trusts or estates for the 2014 fiscal year.⁴ In the 2013 Census, 215,280 households reported that their home was owned by a trust, although that figure included estates. The IRD figure is unlikely to capture all non-income earning trusts because these trusts may not submit a return to the IRD. The Census numbers are likely underreported because one of the main problems found with current trust law is that people do not understand the implications of settling a trust and that legal ownership passes to the trustees. (People may not comprehend when completing the Census that their home is no longer owned by

¹ Stage 1 of the Law Commission's review on the law of trusts is contained in the report, while Stage 2 and 3 of the Commission's work on trusts is intended to focus on more specialised areas of trust law, such as charitable and purpose trusts, and the use of companies and other corporate bodies as trustees. These stages remain on the Law Commission work programme, however there is no timeframe for commencement.

² Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013), p 6.

³ Law Commission, *Review of trust law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010), pp 5-6.

⁴ Inland Revenue, www.ird.govt.nz, Research and tax statistics, *Number of customers by return types 2005 – 2014*.

them if the property is settled in a trust.) The total number of trusts may therefore lie towards the upper end of the Law Commission's estimate.

1.5 How are trusts used in New Zealand?

21. Trusts are an important part of the New Zealand economy as they hold a large amount of New Zealand's wealth. The use of trusts in New Zealand is wide ranging, from high finance through to the family home. They are evident in many industries, including the farming, research and charitable sectors, as well as used by listed companies.
22. The Law Commission found that trusts are being established in New Zealand for the following main reasons:
 - 22.1. To provide for family members with special needs or to provide a particular benefit to a class of persons, for example, the education of the settlor's grandchildren.
 - 22.2. To allow self-employed people to separate business from personal assets, to protect personal assets from ordinary business risks.
 - 22.3. For traditional estate planning, for example, to keep a farm within a family for successive generations.
 - 22.4. To hold Māori land and other assets, including by Iwi that have been through a Treaty of Waitangi settlement process.
 - 22.5. To protect separate assets from relationship property claims, for example, to protect a family home for the benefit of children and grandchildren after a first relationship ends, but before a subsequent relationship begins.
 - 22.6. For the efficient operation of business, for example, so business profits can be shared among family members on a flexible basis.
 - 22.7. In the capital markets, both in structured finance transactions and for investment purposes. New Zealand has a popular foreign trust industry, because we have a settlor-based taxation regime for trusts. This means that although a trust may have New Zealand-resident trustees, foreign sourced income and gains can be earned and distributed by trusts on a tax-free basis if settlors and beneficiaries are non-residents.
23. Historically, another reason for trusts' popularity has been flexibility for income tax purposes. For example, trusts were used to shelter income by having it taxed as trustee income (at a flat rate of 33%) rather than at individuals' marginal tax rates (which were, for a time, up to 39%). However, that tax benefit has been removed, as the top marginal tax rate of income tax was reduced to 33% on 1 October 2010, therefore the same rate at which trustee income is taxed.
24. People also used trusts to stream income to beneficiaries on lower marginal tax rates (including minors), or to divert personal services income away in order to qualify for social policy benefits, but the ability to do this has either been removed or restricted by legislative amendment over time.
25. Inland Revenue figures for tax returns from estates or trusts show that returns rose from 2005 (219,500) to 2010 (247,700). Return numbers then dipped but have increased again (247,400 in 2014).⁵ This could suggest that more recently tax treatment has not been a strong incentive for establishing trusts.
26. The repeal of gift duty on 1 October 2011 has made it considerably easier and quicker to transfer property to a trust. On the other hand, other factors may reduce the attractiveness of using a trust structure. For example, eligibility requirements for residential care subsidies mean that there are limits on the gifting of assets. Rules around insolvency and creditor protection can determine

⁵ Ibid.

whether gifting can be set aside. In addition, courts may be more willing to intervene in trust structures when attempting to address perceived injustice in the division of relationship property.⁶

27. It is therefore difficult to predict whether trusts will continue to increase in popularity in New Zealand.

1.6 Current trust law in New Zealand is based on both common law and statute

28. There is an inherent tension in reforming New Zealand's trust law because it is contained in both common law and statute. Many of the rules on the creation and use of trusts stem from ancient principles of equity. The principled evolution of trusts has enabled trusts to adapt themselves to changing social climates.
29. On the other hand, the Trustee Act has not evolved in the same way. The Trustee Act primarily deals with how trusts are administered by trustees and the oversight of trusts by the courts. The Trustee Act's primary purpose is to fill gaps or resolve problems left by the common law and the trust deed. It is a "default statute"; most of its provisions can be overridden by the trust deed.

1.7 Trustee Act is difficult to understand, outdated, and out of step with practice

30. The Ministry considers there are three main problems with trust law:
 - 30.1. **There is a common lack of understanding about trusts:** there is confusion about what a trust is, and the implications of transferring property ownership to a trust. There is also confusion about how trusts work, and the rights and obligations of the parties involved.
 - 30.2. **The Trustee Act is outdated and does not reflect current trust practice:** the provisions are difficult to understand, and are often written in antiquated language. This makes it difficult to draft trust deeds, which routinely need to contract out of the statutory default rules. This creates additional costs.
 - 30.3. **Trust administration is complicated and expensive:** making changes to trusts or managing unforeseen circumstances is difficult. Dealing with simple administrative matters often requires application to the High Court.
31. These problems are based on the evidence gathered by the extensive work of the Law Commission. The Commission found that:
 - 31.1. Many of those with an interest in a trust do not understand what a trust is.
 - 31.2. Many ordinary New Zealanders who are trustees find trust law inaccessible and difficult to understand – much is found in the common law through hundreds of cases, or in very convoluted provisions of the Trustee Act.
 - 31.3. A lack of understanding of the trustee's role and responsibilities means some trusts are not being administered appropriately. This creates a risk of disputes and litigation.
 - 31.4. Trust deeds need to be drafted to override the outdated and complex default rules in the Trustee Act. This causes additional expense, and creates risks that there will be problems in administering the trust if the drafter of a trust is not sufficiently expert.
 - 31.5. Making changes to trusts or dealing with unforeseen circumstances is difficult and costly, and it often involves an application to the High Court.
 - 31.6. Changes since enactment have put the Trustee Act out of step with current practice. For example, there is no provision for disputes to be resolved using alternative dispute resolution and modern investment practices are not supported.

⁶ For example: *Clayton v Clayton* [2015] NZCA 30.

32. Without government intervention the problems identified by the Law Commission will persist in the future.
33. The Law Commission considered that these problems undermined the way trusts function. The Ministry's scan of the common law shows that the amount of litigation involving trusts is increasing.⁷ The nature of the litigation highlighted particular problems, such as requiring court applications for straightforward administrative actions like replacing an incapacitated trustee and transferring property out of their name.
34. A survey of 3500 people in 2011, on financial habits and attitudes, showed that 22 per cent of respondents were trustees. Of those, 19 per cent said they were not confident they were doing all the things they should as a trustee. Other responses showed that these trustees were often wrong about a number of their specific duties (from about a third to almost three-quarters, depending on the duty described in the survey question).⁸
35. Actual data on the costs impact of the problems on trust users more broadly is not available, largely because trusts are private in nature and little data is available on them.

1.8 Trusts used in capital markets

36. In New Zealand, trusts are the key wholesale market (ie not public or retail) mechanism that banks and corporations use to borrow money and structure their debt. However, representatives of the finance industry did not comment significantly on the wider implications that the reforms could have on trusts used in the capital markets during the Law Commission's extensive review of trust law.
37. Wholesale capital market trusts operate largely between businesses, rather than working with retail investors. They operate in a very different context to other trusts, such as family trusts. While capital market trusts generally have beneficiaries, it is the creditors, and not the beneficiaries, that are the main focus.
38. Some of the Law Commission's proposals, designed to support other types of trusts, may not be well suited to capital market trusts. There may be slightly different problems to address in this context compared to other types of trusts. Issues raised by representatives of the sector include:
 - 38.1. the explicit mandatory duties to act for the benefit of beneficiaries, and to exercise stewardship over the trust property for the beneficiaries;
 - 38.2. the prohibition on exempting or indemnifying a trustee for gross negligence, and
 - 38.3. aspects of the proposal to define a trust in statute.
39. We intend to continue to work with the industry to test whether the recommendations made can work for capital market trusts. There is no intention to impede the operation of capital market trusts in advancing the trust law reforms.
40. If different regulatory solutions are needed for these trusts, we will seek further Cabinet decisions and provide supporting regulatory impact analysis, before the new Trusts Bill is introduced.

⁷ A review of case law that refers to the Trustee Act between 2010 and 2015 showed that between October 2010 and October 2011 there were about 50 cases, while between October 2014 and October 2015 there were about 120.

⁸ www.stuff.co.nz/sunday-star-times/5640131/Most-want-trusts-brought-to-heel.

2. Objectives

41. The purpose of the RIS is to analyse and identify the preferred options for a new Trusts Act, based on the Law Commission's recommendations, which are set out in **Appendix A**.
42. Our objectives are to have accessible, understandable, useful and fair trust law, that reduces administrative difficulties and costs, and is generally aligned with internationally accepted principles.⁹
43. The aim is to introduce an Act that facilitates the efficient operation of trusts and resolution of trust related disputes. Extensive (and therefore expensive) explanations from lawyers should not be necessary. Trust users should be able to easily read and navigate the legislation.

2.1 Criteria to assess the options

44. In considering the objectives, we have used the following criteria for assessing the options:
 - 44.1. **Easy to access and understand:** the option makes it easy for settlors to understand what they are doing when establishing a trust. It makes trustees' obligations clear so trustees can administer trusts well. It outlines beneficiaries' rights in relation to trusts so they can enforce them.
 - 44.2. **Reflects trust practice now and allows for future developments:** the option reflects and supports the way trusts are currently used and is sufficiently flexible to allow practices to change over time.
 - 44.3. **Fair and principled, encouraging confidence in the use of trusts:** the option creates trust law that is equitable by balancing the interests of those involved with trusts. It encourages people to deal with trusts with confidence, including overseas settlors. It provides principles for the basis of court intervention in trusts.
 - 44.4. **Uses simple, cost-effective, efficient processes:** the option provides simple, cost-effective and efficient ways to administer trusts and resolve problems and disputes related to trusts.
45. The criteria can conflict because providing flexibility in the law can be at the expense of clarity and certainty. There are tradeoffs in applying the criteria for some recommendations. We note where one criterion is more important than another, because of the nature of the problems and context. In some cases the criterion will not be relevant to the recommendation, and this is also noted.

⁹ These objectives align with those of the Law Commission in its report *Review of the law of trusts: preferred approach*, IP31, p 7.

3. Options and impact analysis

3.1 Approach to the options analysis of the Law Commission's recommendations

46. The Law Commission's four year review was comprehensive and involved extensive consultation (see consultation section below). The Ministry accepts that the Commission evaluated a full range of feasible options to address the identified problems. After receiving the Commission's report, the Minister of Justice established a Reference Group of seven trust law experts to test many of the Commission's recommendations. The group has provided advice on how to refine the recommendations to improve their practical operation.
47. The RIS does not duplicate the Commission's full options analysis. During 2015 the Ministry engaged in policy work that looked at options for specific proposals in more detail. The focus was on fundamental trust law topics, or on proposals that were either contentious¹⁰ or presented operational difficulties. This policy work is reflected in the Ministry's preferred option.

3.2 Categorisation of the Law Commission's recommendations

48. The Law Commission proposes trust law reforms that broadly update the statute, while also widening its scope beyond trustees. Core aspects of trust law, based on accepted common law principles, are also recommended for inclusion in the new Trusts Act. Most recommendations are not major changes, and either modernise the Trustee Act provisions or restate the common law.
49. The Ministry has assessed the Law Commission's 51 recommendations according to the level of change from the existing Trustee Act to the proposed new Act. The recommendations have been categorised as follows:
 - 49.1. **Significant:** recommendations that significantly change or expand the legislation and practice. Areas where the Ministry proposes a departure from a recommendation, or where the Law Commission recommendation did not provide sufficient policy detail, are also analysed in this category. There are 16 recommendations in this category. All Significant recommendations have been accepted, with some modifications.
 - 49.2. **Minor:** recommendations that are important because the legislation is changed or expanded, but have only a minor impact in practice. There are 16 recommendations in this category. All Minor recommendations have been accepted, with some modifications.
 - 49.3. **Modernising:** recommendations that largely redraft existing sections with a very minor impact. The Ministry of Business, Innovation and Employment is implementing one of these recommendations. There are 17 recommendations in this category. All Modernising recommendations have been accepted.
50. The Law Commission made two recommendations relating to relationship property (Recommendations 50 and 51). These are significant but are discussed separately because they propose changes to areas of the law where relationship property and trusts intersect. The Ministry does not support the recommendations at this time.
51. The approach to the different categories of recommendations is:
 - 51.1. Significant recommendations are discussed in detail in Part A
 - 51.2. Minor recommendations are briefly analysed in Part B, and
 - 51.3. relationship property recommendations, 50 and 51, are discussed in Part C.

¹⁰ This was based on Law Commission submitters' views and also the views of the Reference Group.

52. Modernising recommendations are listed in Table 15 in **Appendix B**. These recommendations are not further analysed because they essentially modernise existing provisions, with only small changes. In some cases the recommendations may be exempt from the RIS requirement.
53. The Ministry has also identified 42 sections of the Trustee Act that were not directly covered by any of the Law Commission’s recommendations. The operative content of these sections needs to be included in the new Trusts Act as they provide important powers, immunities and mechanisms for trusts. However the current level of detail is no longer required in keeping with plain English modern drafting. How the substance of these provisions will be provided for in the new Trusts Act is a drafting matter to be worked through with the Parliamentary Counsel Office. Accordingly, these sections also fall into the Modernising category and are listed in **Appendix B** (Table 16).
54. Of the 42 sections, two are identified as no longer required in the new Trusts Act. They are also listed in **Appendix B** (Table 17) with a brief outline explaining why repeal is proposed for the individual section concerned.

3.3 Options analysed

55. The RIS analysis covers the options of:
 - 55.1. the status quo
 - 55.2. the Law Commission recommendation(s), and
 - 55.3. for some of the proposals, a modification of the Law Commission recommendation.
56. A modified option is included where that option responds best to the identified problems or gaps, aligning with our objectives.

Part A - Analysis of the Significant recommendations

57. The recommendations in this category are: 1, 2, 4, 6, 19, 20-26, 40, 41, 46 and 49.

Core trust concepts (Recommendations 1, 2, 4 and 6)

58. These recommendations relate to the nature of the trust relationship, including what a trust is and the essential trustee duties.

Defining what a trust is (Recommendation 1)

Status quo and problem definition

59. The common law determines what a trust is and how it may be established. Trust law has developed over hundreds of years based on recognising structures that create equitable and legal property ownership rights.

60. The Law Commission found that there is a lack of knowledge about trusts, despite the high level of trust use in New Zealand. Many ordinary people with no legal training are now trustees or beneficiaries of trusts. This increases the risk of improper administration and litigation.

Law Commission recommendation

61. To increase understanding, the Law Commission proposes defining in statute an *express* trust (one intentionally created by a person rather than by operation of law) through its essential characteristics and its method of creation. This would make trust law clearer and more accessible for trust users. If a trust did not meet the definition it would be out of scope of the Act and governed by the common law.

62. The proposed characteristics of an express trust were:

62.1. the **legal relationship** in which the trustee deals with trust property on behalf of the beneficiaries

62.2. the trustee's **fiduciary duty** towards the beneficiaries or for the purposes of the trust

62.3. a **beneficiary's rights** ie enforcement of the trustee's duties against the trustee and equitable rights in the trust property, and

62.4. a trust must not have the **same** sole trustee and sole beneficiary.

63. The recommendation also sets out the ways of creating an express trust. This is by the settlor (by words or actions) indicating an intention to create a trust, identifying the beneficiaries (or permitted purpose), and identifying the trust property (collectively known as "the three certainties"). The recommendation includes a statutory process as another way of creating an express trust. Defining the key terms of "trustee" and "beneficiary" is also recommended.

Modified Law Commission recommendation

64. We propose an *inclusive* definition of an express trust, that describes key aspects of a typical trust (including the three certainties), but indicates that there may be other characteristics present.

Options analysis for addressing the problems

65. We have weighted the first criterion higher than the other criteria because the problem is largely about a lack of understanding.

Table 2: Options analysis for Recommendation 1

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ The trust concept is not easy for most people to understand.	✓ Leaving the characteristics and requirements for the creation of a trust in common law is consistent with the development of trust law in equity. Supports the way trusts are currently used and allows for changes over time.	~ Does not provide clarity about the nature of trusts to lay people. Does not necessarily prompt the courts to consider whether an arrangement is actually a valid trust. Similar to the approach in other jurisdictions.	✗ Those involved in trusts need to rely on expensive legal advice to get basic knowledge about trusts.
Law Commission recommendation	✓ Helps people understand what a trust is. The statute is clearer on its terms, and non-lawyer trustees, settlors and beneficiaries do not need to know the common law to understand the main points of trust law.	✗ Trusts have developed in equity over many hundreds of years and it is difficult to define a trust in simple, easily understood terms. Does not easily allow for the character of a trust to respond to changing needs, and how people may want to deal with property in the future.	~ Could promote confidence by putting the essential elements of a trust on a more robust legislative footing. Could encourage greater court scrutiny of trust structures. Most comparable jurisdictions do not define a trust in legislation. Risks creating two streams of trust law.	✓ Legal advice is not necessary to understand key concepts of trusts.
Modified Law Commission recommendation (preferred option)	✓ As above.	✓ Flexibility to allow a court to determine (with reference to common law) that a particular structure is a trust, and should be governed by the Act.	✓ Fairly balances the need to highlight trust characteristics against a desire for flexibility and future trust development.	✓ As above.

Ministry’s preferred option: modified Law Commission recommendation

66. The Ministry prefers a modified Law Commission recommendation, by having an inclusive description of key features of an express trust, rather than an exhaustive definition. The net outcome of this option is that people’s understanding of a trust is improved, while the flexibility of trust law to respond to changing needs in the uses of trust is retained.

Trustees’ mandatory duties (Recommendation 2)

Status quo and problem definition

67. In addition to any duties imposed by the terms of the trust deed, a trustee is subject to general duties implied by the common law. These duties exist in relation to the trust property and towards the beneficiaries. For example, there is a duty on trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries.

68. The Law Commission found that many trustees do not understand their obligations. Trustees knowing and understanding their basic duties is essential to proper trust administration. This includes both positive obligations and acts trustees must refrain from doing.
69. Trustees may not be adequately performing their role. Lack of understanding may affect settlors' knowledge of what they are asking of potential trustees. A beneficiary's ability to hold trustees to account may also be reduced.

Law Commission's recommendation

70. The Law Commission recommends that the new Trusts Act summarise the mandatory duties of trustees. This would not be a complete code: equity, through the common law, would continue to add detail and shades of meaning, and would aid interpretation.
71. The Commission recommends six mandatory duties which are essential to the existence of a trust and which could not be excluded or varied by the trust deed. The six duties are intended as baseline obligations that apply across all trusts and to all trustees. This includes trusts that are created by or in accordance with other legislation that relies on general trust law, for instance trusts established under Te Ture Whenua Māori Act 1993.
72. The proposed mandatory duties are to:
 - 72.1. be familiar with the terms of the trust
 - 72.2. act in accordance with the terms of the trust
 - 72.3. act honestly and in good faith
 - 72.4. act for the benefit of the beneficiaries or to further the purpose of the trust, in accordance with the terms of the trust
 - 72.5. exercise stewardship over the trust property for the beneficiaries or the purpose of the trust, and
 - 72.6. exercise powers for a proper purpose.

Options analysis for addressing the problems

73. We have weighted the first criterion higher than the other criteria because the problem is largely about a lack of understanding.

Table 3: Options analysis for Recommendation 2

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ Trustees' duties are not easy for most trustees, settlors or beneficiaries to find, as they are not set out in the Trustee Act, and have mostly been established by common law.	✓ Common law duties allow for flexible development. Duties can differ in various contexts, and are expressed differently by different people.	✗ Uncertainty reduces confidence that all trustees are acting appropriately. Whether the duties are met depends on trustees' understanding, influenced by legal advice and clear deed drafting.	✗ Even if it can be argued that the duties are sufficiently clear in the common law, trustees are not well informed. Reliance on drafting and legal advice to educate trustees about their obligations increases compliance costs.
Law Commission recommendation (preferred option)	✓ Clear, plain English duties that educate trustees and others. Trustees understand their role and can better administer trusts. Beneficiaries know their rights so they can enforce the trust.	~ Some flexibility as general principle is summarised for each duty, without adding in nuances and variations that may apply at common law. Several relevant jurisdictions impose (or propose) some mandatory duties in statute, but this proposal goes further.	✓ May encourage improved standards because of the greater prominence given to the duties in statute.	✓ Arguably easier to establish a trust, and administration made more effective because duties are more clearly explained and understood.

Ministry's preferred option: Law Commission recommendation

74. The Ministry's preferred option is the Law Commission recommendation. The specific drafting may need to be amended during the exposure draft process. The net outcome of this option is that trustees' duties, which are a key aspect of how trusts function, are well-understood and trusts are administered more effectively.

Trustees' exemption and indemnity (Recommendation 4)

Status quo and problem definition

75. Trustees are personally liable for their actions as trustees. However, under common law and the Trustee Act, a trustee is indemnified out of trust property for expenses and liabilities incurred when acting in good faith within the terms of the trust. In the absence of an exemption clause in a trust deed, a trustee who acted negligently in carrying out his or her duties would usually be personally liable for the losses caused by this behaviour.

76. However, a trust deed will often exempt trustees from liability for certain behaviour, and/or may indemnify them, from the trust property, for any losses suffered as a result. Such exemption and indemnity clauses in trust deeds are valid, but there are limits to what can be excluded. It is well accepted in law that liability for fraudulent conduct, wilful misconduct or dishonesty cannot be excluded, but that liability for negligence can. It is less clear whether liability for behaviour which is more than negligence, but is not fraud (etc) can lawfully be excluded, however exclusion clauses to this effect are common.

77. The Law Commission considered that a higher standard for the type of behaviour that cannot be excluded from liability should be clearly imposed, to protect beneficiaries, not only from trustees'

behaviour that is fraudulent, wilful or dishonest, but also for behaviour that goes beyond mere negligence. This would be clearly set out in the statute.

78. There is currently no statutory requirement on trust advisors (such as lawyers, accountants and trustee companies) to draw exemption and indemnity clauses to a settlor's attention.
79. The Commission found that some settlors are unaware of the practical effect of exemption and indemnity clauses in trust deeds. This is particularly important as settlors may not know of the potential loss for beneficiaries because a trustee's action is covered by an exemption clause, resulting in loss to the trust property through the indemnity.

Law Commission recommendation

80. The Law Commission recommends that the new Trusts Act provide that exemption and indemnity clauses in trust deeds cannot exclude liability, or allow a trustee to be indemnified, for gross negligence, in addition to fraudulent conduct, wilful misconduct or dishonesty.
81. The Commission also recommends that any paid trust advisor or drafter must advise the settlor about the consequence of exemption and indemnity clauses. If the advisor does not, and he or she is a trustee, the clause will be invalid in its application to the advisor trustee.

Modified Law Commission recommendation

82. Gross negligence is not commonly used, nor defined, in New Zealand statutes. It is context specific, and is intended to be a higher standard than ordinary negligence.
83. The Law Commission arrived at the expression "gross negligence" after considering a range of different terms, such as recklessness and gross carelessness. They have indicated, however, that they are not fixed on any specific wording, provided that a generally higher standard is imposed to protect beneficiaries from excessively negligent trustees.
84. We accept that a higher standard than negligence is necessary, but we have not yet resolved what the most appropriate term is. We propose that the Commission's recommendation is adopted in principle but that the term "gross negligence" will be reconsidered to see if there is an alternative term which works better across the range of trust contexts.

Options analysis for addressing the problems

85. Because this proposal is intended to alter current behaviour in terms of the drafting of exemption and indemnity clauses, the second criterion "reflects trust practice now" is not relevant to the analysis of this issue.

Table 4: Options analysis for Recommendation 4

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ Not clear to those who are unaware of the common law what a trustee is permitted to be exempted and indemnified for. Many settlors may be unaware of the impacts of exemption and indemnity clauses unless informed by the drafter.	N/A	✗ Trust deeds often contain a clause protecting trustees from liability. Arguably allows a trustee to be grossly negligent, and still be compensated for loss out of the trust assets, to the detriment of beneficiaries. Unfair to beneficiaries and does not encourage confidence in the use of trusts.	✗ The administration of trusts is less likely to be cost-effective if settlors, trustees and beneficiaries do not understand the issues of liability.
Law Commission recommendation	~ The extent to which a trust deed can limit a trustee's liability for breach of trust is clearly stated. However, the meaning of "gross negligence" is not entirely clear. The paid advisor requirement helps those involved in trusts better understand the extent of a trustee's liability.	N/A	✓ No exemption for what amounts to grossly negligent behaviour is a fair and principled position. Balances the loss falling between trustees and beneficiaries. Clearer rules encourage confidence in the use of trusts, and improve knowledge of limits of acceptable trustee behaviour. Paid advisor requirement encourages confidence because liability of a trustee will be clearer.	✓ Increases understanding of issues of liability. Ensures the limits of exemption and indemnity clauses are clear, helping trustees carry out their duties responsibly.
Modified Law Commission recommendation (preferred option)	~ Potentially using a different term to convey the behaviour (something more than mere negligence) could help settlors, trustees and beneficiaries more clearly understand the limits on a trustee's liability. For example, gross carelessness (as in Tax Administration Act 1994).	N/A	✓ As above.	✓ As above.

Ministry's preferred option: modified Law Commission recommendation

86. The Ministry's preferred option is a modified Law Commission recommendation, by setting out a standard of behaviour in the statute that cannot be exempted, which is more than mere negligence. This may or may not be "gross negligence". Another option could be "recklessness" or, alternatively, "gross carelessness" (the latter of which is used in the Tax Administration Act 1994).

Provision of information to beneficiaries (Recommendation 6)

Status quo and problem definition

87. The Trustee Act 1956 does not deal with the information trustees must provide to beneficiaries.
88. The common law provides that no beneficiary has an entitlement as of right to disclosure of trust documents.¹¹ However, beneficiaries do have a right to have the trust property properly managed. As a consequence, there are corresponding obligations on trustees to properly manage the trust and to meet fiduciary obligations they owe to all beneficiaries. To ensure trustees can be held to account, it may be necessary for the beneficiaries to have access to relevant trust documents.
89. The leading New Zealand authority is the Court of Appeal's 2016 decision of *Erceg v Erceg*¹² (*Erceg*). The Court held there is no presumption favouring disclosure, nor a presumption against disclosure. Whether to disclose, and the extent of disclosure, are discretionary decisions for the trustee.¹³ In addition, when the court is involved, it should approach review of the trustee's decision as an incident of its supervisory function over trusts and trustees.¹⁴
90. When the Law Commission considered provision of information to beneficiaries, the *Erceg* decision had not been delivered. The Commission found the law was problematic from a practical perspective because it was difficult for trustees to determine what their obligation to provide information entailed, as the position relied on the discretion of the court.¹⁵ The Commission further noted that trustees are commonly required to make decisions about providing information and could do with greater clarification and guidance.
91. Despite *Erceg*, trustees are still likely to be unaware of disclosure requirements and have inconsistent disclosure practices.

Law Commission recommendation

92. The Law Commission recommends the new Act set out two presumptions: that trustees must notify qualifying beneficiaries of certain basic trust information (including that a person is a beneficiary) and that trustees must provide information to beneficiaries who request it.
93. However, the Commission recommends adding a significant qualification to this. A trustee may decide that information should not be provided if the trustee considers this reasonable, after taking into account a range of factors (listed in the new Act). These factors are intended to allow the trustee to consider the particular circumstances of the beneficiary, the intentions of the settlor and the type of information requested, amongst other things. The intention is for the new Act to provide greater guidance to trustees and beneficiaries.

¹¹ *Erceg v Erceg* [2016] NZCA 7, at [27]; *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, at [67].

¹² *Erceg v Erceg* [2016] NZCA 7.

¹³ *Ibid*, at [29] the Court sets out a three part question for trustees to follow when deciding whether to disclose. The question is, what, if any, disclosure will best:

- Ensure the sound administration of the trust?
- Discharge the powers and discretions in respect of the fiduciary obligations the trustee owes the beneficiary, in particular the trustee's duty to account?
- Meet the trustee's obligation to fulfil the settlor's wishes?

¹⁴ *Ibid*, at [26].

¹⁵ *Schmidt v Rosewood Trust Ltd* [2003] 3 All ER 76.

Modified Law Commission recommendation

94. The Law Commission recommendation relies on an earlier case¹⁶ that set out a list of considerations to guide trustees in their decision whether to disclose information. *Erceg* was delivered after the Commission’s report. *Erceg* adds a further consideration for a trustee, namely “the nature and context of the application for disclosure”. For completeness, we consider that this additional factor should be added to the list in the new Trusts Act.

Options analysis for addressing the problems

95. We have weighted the criteria equally for this issue.

Table 5: Options analysis for Recommendation 6

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ Arguably less clear than having a bright line presumption (either in favour of or against disclosure). No beneficiary has the right to disclosure, and whether disclosure occurs requires an exercise of trustee discretion.	✓ Allows for flexible development of the law as every decision to disclose or not must be considered in the particular context (ie of the beneficiaries’ application, the disclosures sought, and the relevant obligations in issue).	✓ Law is equitable in the balancing of interests of those involved with trusts. Remains circumstance-dependent. Provides principles for the basis of court intervention, namely the court is to approach the review of the trustee’s decision under its supervisory function over trusts.	✗ Does not provide clear guidance for trustees and therefore the administration of trusts is not straightforward.
Law Commission recommendation	✓ Provides greater guidance to trustees and beneficiaries by stating in legislation an unambiguous presumption in favour of disclosure (a baseline trustee obligation). Clearly listing the factors that might reasonably mean that presumption can be negated.	✓ The onus is on the trustees to explain why they believe there are good reasons not to disclose. Flexibility is maintained as the presumption can be rebutted depending on the particular circumstances.	✓ Advances current position of no presumption of providing information to beneficiaries. Retains balance between beneficiary’s interest in knowing information, and competing interest that may be present to uphold wider purposes of trust, and context of trust. For instance, commercial sensitivities or family feelings that should be considered.	✓ Gives trustees an understanding of how to approach providing information to beneficiaries, aiding in the administration of trusts. Ensures that beneficiaries are provided with appropriate information about the trust.
Modified Law Commission recommendation (preferred option)	✓ As above.	✓ As above.	✓ The nature and context of the application adds further nuance to the exercise of the trustee’s discretion.	✓ As above.

¹⁶ Ibid.

Ministry's preferred option: modified Law Commission recommendation

96. The Ministry's preferred option is a modified Law Commission recommendation (the inclusion of an additional factor to follow the most recent court decision). This recommendation will provide guidance for trustees but continue to allow the exercise of discretion where appropriate.

Trusteeship (Recommendations 19-26)

97. These recommendations are grouped together for analysis as they relate to the appointment and removal of trustees, and the subsequent transfer of trust property.

Trustees' appointment and removal (Recommendations 19 - 26)

Status quo and problem definition

Appointment and removal of trustees

98. Under common law, any person with legal capacity to hold property may be appointed a trustee. After appointment, a change in circumstances may require a trustee to be removed and/or replaced. The Trustee Act sets out the default process, when a trust deed has no provision for removing and appointing trustees, or when the deed provisions do not cover the particular circumstances. The Trustee Act empowers certain people to remove and replace trustees, in certain situations, without court intervention. The court also has general discretion to remove and appoint trustees whenever it is expedient.
99. The empowered people include the person given the power to appoint and remove trustees in the trust deed, continuing trustees, or where a trustee dies, that trustee's personal representative.
100. There is no minimum number of trustees required under the Trustee Act, so a removed trustee does not always need to be replaced. However, some provisions effectively mean there is a minimum requirement of two individual trustees, unless the initial appointment was a single trustee, or a statutory trustee corporation.
101. The provisions in the Trustee Act are vague and confusing. Empowered people do not always know in what circumstances a trustee should be removed. Issues also arise when there is no person with appointment and removal powers in the trust deed, or that person is unable or unwilling to act (because, for example, they are physically or mentally incapacitated), and there are also no other trustees able or willing to act. It can also be hard to retire. Application to court is sometimes required to remove a trustee in non-contentious circumstances that should be resolved out of court.
102. Those exercising a power to appoint and remove trustees under statute may not be aware of the common law duties on those exercising such powers. The common law is also unclear.

Transfer of trust property

103. The Trustee Act provides that unregistered trust property automatically transfers to the new and/or continuing trustees when a trustee is removed or retires.
104. However, the transfer of registered trust property (such as land or shares) is only possible if the departing trustee completes formal documentation. If a departing trustee does not, or cannot, complete the documentation, a court order is required. Multiple applications are necessary where a departing trustee is the trustee of multiple trusts.
105. The current law is complicated and trustees are often unaware that automatic transfer of registered interests does not occur. Application to the High Court is expensive and time consuming for what is often a simple administrative matter.

Law Commission's recommendations

106. The Law Commission made a number of recommendations relating to the appointment and removal of trustees to update and clarify provisions in the Trustee Act, and extend the law in certain areas.
107. The Commission has recommended imposing restrictions on who may be a trustee, based on capacity but not suitability. It recommends excluding minors, undischarged bankrupts, persons subject to a property order or for whom a trustee corporation is acting as manager, and any corporation in receivership, liquidation or voluntary administration (Recommendation 19).
108. Default provisions for trustee removal without going to court are recommended (Recommendation 20), and who may remove and appoint a trustee, and the mechanics of doing so (Recommendation 21). Further default rules covering appointment and removal when a trustee dies (Recommendation 22) or wishes to retire (Recommendation 23) are provided.
109. The Commission has proposed allowing additional people to remove and appoint trustees. These people are: the holder of an enduring power of attorney over property, a property manager under the Protection of Personal and Property Rights Act, and the liquidator of a corporate trustee. When one of these additional people acts, the Commission has recommended a supervisory role for the Public Trust, and a requirement to send a statement of accounts to the beneficiaries when notifying them of the change in trustee.
110. Also recommended are default rules that provide flexibility on the number of trustees (Recommendation 25). As long as the minimum trustee number in the trust deed is maintained, trustees may not necessarily be replaced, and a sole trustee can be replaced with more than one, unless contrary to the trust deed.
111. There is also a recommendation for the common law duties, that apply to those who remove or appoint trustees under the Trusts Act, to be set out and clarified (Recommendation 24).
112. If for any reason the process in these recommendations (and Recommendation 26) cannot occur, or those involved do not want to proceed with this process, an application can be made to the court for the discharge and replacement of the trustee (and transfer of trust property), as is the process now.

Transfer of trust property

113. The Law Commission recommends imposing a mandatory duty on a departing trustee to transfer property to the continuing trustees; and a default process to transfer registered trust property when a trustee has been removed but has not transferred that property to new or continuing trustees (Recommendation 26).
114. The process for the transfer of registered trust property would involve the Public Trust issuing a certificate of vesting to facilitate the transfer.

Modified Law Commission recommendation

115. The Ministry does not consider the additional supervision of the Public Trust is necessary. It creates additional work and costs for trustees, without a clear benefit in risk reduction. It is also too onerous to require a non-trustee personal representative to provide a statement of trust accounts to beneficiaries. While it is important that beneficiaries are aware of a change in trustees (and other trust information), any information that is provided should be in line with Recommendation 6 as there may be good reason to withhold it.
116. We also consider that people who are subject to a welfare guardianship order should be added as a ground for non-appointment, and for removal. This is because these people are also unlikely to have sufficient legal capacity to act as trustees.

Transfer of trust property

117. The Law Commission’s proposed Public Trust process, for the transfer of registered property, is not likely to work in practice. The statute should instead empower a person who acts to remove a trustee to transfer property on the removed trustee’s behalf. This would reduce the need to go to court or for the Public Trust to be involved – both adding costs.

Options analysis for addressing the problems

118. We have weighted the criteria equally. The first table considers the appointment and removal of trustees, the number of trustees, and duties (Recommendations 19-25). The second table considers the transfer of trust property after removal (Recommendation 26).

Table 6: Options analysis for Recommendations 19-25

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ No guidance on who can be appointed a trustee. Provisions cause confusion about when a trustee may be removed out of court. Risk that removals and appointments could be invalid. Lack of knowledge about common law duties on the exercise of appointment and removal powers.	✗ Limited solutions for trustee removal or retirement when trustees are incapacitated. New Zealand’s aging population will exacerbate these issues. Trust deeds may not contemplate all circumstances and statute does not necessarily cover them either.	✗ Trustees may be appointed who are not able to function effectively as they have limited capacity to deal with property. Trustees unable to act due to incapacity may remain trustees as it is too difficult and costly to be removed. Difficulty in retiring may prevent some from becoming a trustee.	✗ An application to the High Court is often required for non-contentious, administrative type issues. This is time consuming, costly and difficult.
Law Commission recommendation	✓ The process for the removal and appointment of trustees is comprehensive and coherent. The duties on those who act are clearly set out and easy to understand.	✓ Apart from the mandatory grounds for removal, all the other recommendations are default and able to be overridden by the terms of the trust. The removal grounds are broad enough to cover a wide range of possible circumstances.	✓ Ensures those without legal capacity are not appointed or can be replaced if capacity lost. Default provisions infrequently used as most deeds provide valid options. Duties mitigate the risk of abuse of powers. Application to court will remain available for controversial cases.	~ Reduces need for court application in non-controversial circumstances. Supervision by Public Trust adds unnecessary complication and cost. Too onerous for a non-trustee personal representative to provide statement of accounts to beneficiaries.
Modified Law Commission recommendation (preferred option)	✓ As above.	✓ As above.	✓ People who have a welfare guardian are also unlikely to have sufficient legal capacity to act as trustees. Important information should be given to beneficiaries, however there may be good reasons to withhold (consistent with rec 6).	✓ Removes an unnecessary additional step that adds cost. Those involved can exercise discretion to fit the circumstances.

Table 7: Options analysis for Recommendation 26

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ Law is complicated and trustees are often unaware that automatic transfer of registered interests does not occur.	~ Formal process to transfer property works well, however where removed trustee can't sign, it causes problems.	✓ Requiring a removed trustee to be involved in the transfer ensures that property is not transferred when it shouldn't be.	✗ An application to the High Court is often required for non-contentious, administrative type issues. This is time consuming, costly and difficult.
Law Commission recommendation	~ Not clear when the transfer is deemed to have occurred: the proposed vesting certificate could suggest that legal ownership had been transferred, before the land register had been updated.	✗ Vesting certificate process unlikely to work in practice.	~ As above, however uncertainty over the transfer process may prevent use of it and cause more applications to court.	~ May reduce the need for application to court, however creates an additional administrative step involving the Public Trust, which equates to additional costs.
Modified Law Commission recommendation (preferred option)	✓ Clear process set out for transferring property when a trustee unable or unwilling to be involved.	✓ Current "paperwork" to formally transfer property remains the same, which works well.	✓ Person involved in removal of trustee is in the best position to transfer property. Will often be a trustee themselves, subject to mandatory duties. Other duties on non-trustees.	✓ Simple process that reduces the need for application to court.

Ministry's preferred option: modified Law Commission recommendation

119. The Ministry's preferred option is to largely accept the Law Commission's recommendations, with the modifications as outlined. This provides a simple, more comprehensive and coherent process for removing and appointing trustees, and transferring registered trust property, when necessary to ensure trusts can be appropriately administered. This will reduce the need for applications to court.

Other core trust matters (Recommendations 40, 41, 46 and 49)

High Court and District Court jurisdiction (Recommendation 40)

Status quo and problem definition

120. The District Court has equitable jurisdiction under section 34 of the District Courts Act 1947. This means the District Court can hear some claims in relation to trusts, however because "court" is defined in section 2 of the Trustee Act to mean "the High Court", the powers to grant remedies or make orders under that Act are reserved to the High Court.

121. The Law Commission considers that it is inconsistent for the District Court to have the same general equitable jurisdiction as the High Court but not to have jurisdiction to exercise powers under a new Trusts Act. The Commission does not think trust law is inherently more complex than other areas of equity and should remain solely to be dealt with by the High Court.

Law Commission recommendation

122. The Law Commission recommends that the District Court has concurrent jurisdiction with the High Court for matters under a new Trusts Act rather than retaining the High Court’s exclusive jurisdiction.
123. The Commission’s view is that concurrent High Court jurisdiction, and appropriate powers of transfer, are sufficient to deal with the needs of complex trust cases. It proposes the District Court has concurrent jurisdiction to determine any proceedings:
- 123.1. where the amount claimed or value of the property in issue is not more than the upper limit of the District Court’s equitable jurisdiction, or
- 123.2. that do not involve any claim for money or any claim or issue over property.
124. The recommendation allows litigants to elect to file their claims in the High Court rather than the District Court if they consider that the High Court should hear the case, even if the amount in dispute is within the District Court’s jurisdiction.

Options analysis for addressing the problems

125. We have weighted the criteria equally for this issue, except for the first criterion which is not relevant.

Table 8: Options analysis for Recommendation 40

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	N/A	~ Reflects trust practice now, but does not allow for the District Court (DC) to provide quicker and more efficient trust resolution processes, and increased trust expertise, in the future.	✓ The High Court (HC)’s greater trust law expertise may mean that exclusive HC jurisdiction provides greater confidence in the use of trusts, including dispute resolution.	~ The HC has simpler processes for civil law matters than the DC because there is a shorter waiting list. The cost of filing documents is similar. However, there are far fewer places where the HC will sit in New Zealand compared to the DC.
Law Commission recommendation (preferred option)	N/A	✓ Allows for increasing trust expertise to be developed in the DC, while also permitting applicants to file a trust case directly in the HC if they prefer.	~ DC jurisdiction over trust matters is appropriate as a court of general civil jurisdiction. Litigants can benefit from the current experience and capacity of the HC, but also take advantage of future developments in the DC. However, in the short term, because the DC is not considered by some to have required expertise in trust law, may discourage confidence in trust dispute resolution.	✓ The DC is working towards being more efficient and cost effective. The DC is located throughout New Zealand meaning potentially more cost-effective, efficient processes for resolving trust problems and disputes in time. Should reduce travel costs. Litigants have more options and choice over where they file their claim.

Ministry's preferred option: Law Commission recommendation

126. The Ministry's preferred option is the Law Commission recommendation. As a court of general civil jurisdiction, the District Court should have jurisdiction over trust matters. The net outcome is that litigants will have more options and choice over where they file their claim.

Family Court jurisdiction (Recommendation 41)

Status quo and Law Commission's problem definition

127. The Family Courts Act 1980 established the Family Court as a division of the District Court. The Family Court has jurisdiction for a wide variety of matters affecting couples, families and children. At times, the Family Court is required to consider trust law matters when they arise in some relationship property matters and other family proceedings.
128. The Family Court has the ancillary jurisdiction of the District Court (under section 41 of the District Courts Act 1947) so the Family Court is able to give equitable relief where a matter is already within its jurisdiction. However, these powers do not allow the Family Court to make many orders or give directions necessary to effectively resolve all issues because it has no jurisdiction to hear a cause of action founded in equity or exercise powers under the Trustee Act. In some situations, parties have to make subsequent applications to the High Court to address the trust matters that are intertwined with relationship property.
129. For example, if the Family Court is considering a case under the Property (Relationships) Act 1976 (PRA) that involves trusts, the Court could not make an order removing a trustee and appointing a new trustee. The parties would have to bring proceedings in the High Court for such an order.
130. The Law Commission sees no reason why the Family Court should not have powers under a new Trusts Act to better deal with matters properly before it and reduce the need for parties to bring subsequent proceedings in the High Court. The Family Court should be provided with the tools necessary to exercise its jurisdiction.

Law Commission recommendation

131. The Law Commission recommends that the Family Court be able to make orders under a new Trusts Act where necessary to protect any property or interest that is the subject of proceedings until the issues are fully resolved by the court. This would allow the Family Court to, for example, make an order removing a trustee and appointing (even temporarily) a new independent trustee where this is necessary to manage serious deadlock or hostility between trustees or to preserve assets until the property claims of the parties can be properly resolved.
132. The Law Commission also recommends that the Family Court should be able to make orders under the new Trusts Act, with the consent of the parties, to resolve a closely related dispute or issue between the parties where this is necessary, or would better promote the resolution of the substantive proceedings between the parties. The intention is to allow the parties to proceedings properly before the Family Court to consent to the court resolving closely related trust matters that may otherwise fall beyond its jurisdiction. This will help prevent the need for subsequent proceedings in the District or High Courts.

Options analysis for addressing the problems

133. We have weighted the fourth criterion above the others for this issue, because it is predominantly about providing for efficient trust administration. The first criterion is not relevant.

Table 9: Options analysis for Recommendation 41

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	N/A	~ Many parties prefer to bring proceedings in the High Court, but this reduces options and does not allow for development of the Family Court's expertise.	✓ The High Court has greater trust law expertise, which may provide greater confidence in the resolution of trusts disputes.	✗ The Family Court cannot effectively resolve all issues properly before it. Increases the time it takes to resolve disputes and the cost.
Law Commission recommendation (preferred option)	N/A	✓ The Family Court can already consider aspects of trust law and can further develop expertise.	✓ Does not confer significant new jurisdiction on the Family Court. Parties must consent to closely related matters being heard in the Family Court. The courts consider the fair and principled resolution of disputes.	✓ Reduces the need for further proceedings in the High Court by giving the Family Court the tools to remedy matters properly before it.

Ministry's preferred option: Law Commission recommendation

134. The Ministry's preferred option is the Law Commission recommendation. This will give the Family Court the tools necessary to deal with trust matters closely related to proceedings properly before it, reducing the need for parties to bring subsequent proceedings in the High Court to resolve disputes.
135. Submitters to the Law Commission raised concerns about the transfer provisions in the PRA. Some consider it is too difficult to have complex relationship property proceedings transferred to the High Court. It may be useful to have broader transfer provisions. However, these issues will be considered as part of the Law Commission's review of the PRA so we have not considered them here.

Appointment of receiver for trusts (Recommendation 46)

Status quo and problem definition

136. While receivers are more commonly thought of in connection with companies, the jurisdiction of the court to appoint one is not limited to companies. As well as appointments of receivers under the Receiverships Act 1993, the High Court also has the ability to appoint a receiver in respect of trust assets under its inherent jurisdiction.¹⁷
137. The Law Commission found the High Court's inherent jurisdiction is rarely used, and that this may stem from lack of awareness or understanding that the ability to appoint a receiver for a trust is available. There may also be some confusion as to what a receiver can do in respect of a trust. The traditional receiverships model is a person appointed by a secured creditor to exercise a contractual right to sell the assets over which the security interest is held. However, the court may additionally appoint a receiver when the assets of the trust are at risk or as a temporary solution when there is some doubt over whether to remove or replace trustees.

¹⁷ Note that the High Court Rules, which appear in Schedule 2 of the Judicature Act 1908, govern such appointments. These High Court Rules are being updated under the Judicature Modernisation Bill. The relevant rules appear in Subpart 4 of Part 7 in Schedule 1 of the Bill. This Bill had a second reading on 18 February 2015 and is currently awaiting the Committee of the Whole House stage.

Law Commission recommendation

138. The Law Commission recommends the new Act recognise the High Court's jurisdiction to appoint a receiver of a trust. This would make appointments of a receiver more accessible. The intention is to increase awareness about how receivership with trusts works, and that receivers may deal with a wider range of issues than receivership traditionally implies.
139. The Law Commission recommends the new Act specify the grounds on which a receiver may be appointed; who may act as a receiver; the powers and duties of a receiver; priorities of those involved; a process for terminating the receivership; and provision for the receiver's fees to be paid out of the trust property. The necessary policy detail of this recommendation was not dealt with in the Law Commission's report.

Modified Law Commission recommendation

140. The Ministry agrees with the Law Commission's recommendation in principle. It may be necessary to use a term other than 'receiver' in the new Trusts Act to reflect any differences in the role in relation to trusts, compared to a traditional receivership model and avoid confusion with other legislation that refers to 'receivership'¹⁸. One possible example is 'trust administrator'. We consider this is a matter requiring careful drafting.
141. Additional policy detail is also required to give effect to the Law Commission's intention. The Ministry therefore proposes adding the following policy detail to the recommendation:
- 141.1. The new Act should recognise the High Court's general supervisory role by providing for the High Court to appoint a person to administer and manage a trust if satisfied this is necessary for the well being of the trust and it is just and equitable to do so.
- 141.2. Any person may be appointed (subject to the same restrictions as for who may be a trustee: Recommendation 19).
- 141.3. Appointment can arise on the High Court's own motion or following application by any interested person (including a creditor).
- 141.4. The High Court will determine the powers and duties of the receiver/administrator having regard to trust terms and the interests of justice.
- 141.5. Once appointed, a receiver/administrator may apply for additional powers as required.
- 141.6. The High Court will determine the duration of the receivership/administration and provide for how it ends.
- 141.7. The High Court also may decide if the receiver/administrator is to be paid from trust assets.
- 141.8. The question of priorities is left to be determined by the High Court as appropriate in the circumstances and if necessary with reference to general priority principles found in insolvency legislation.¹⁹

Options analysis for addressing the problems

142. We have weighted the criteria equally for this issue.

¹⁸ For instance, the Gambling Act 2003 and the Food Act 2014.

¹⁹ This reflects the Law Commission's commentary see Law Commission Report IP31, *Review of the Law of Trusts: Preferred Approach*, p 164.

Table 10: Options analysis for Recommendation 46

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ The ability to appoint a receiver in respect of a trust is not widely known or used.	~ Receivers for trusts are currently rare. Their use in the future is not well-supported.	~ Yes, but some uncertainty at the edges (ie whether the court can appoint a manager versus appointing a receiver).	✗ The ability to apply for a receiver is not well understood or known.
Law Commission recommendation	✓ The law is accessible for lay trustees, creditors and beneficiaries. The wider role a receiver might play in managing a dysfunctional trust is clear.	✓ The use of receivers is able to develop over time and become more widely used if it is seen as an effective way to help with trust disputes or problems.	✓ Highlights that a receiver could be appointed to manage and administer the trust, in addition to other powers the High Court determines are appropriate in the circumstances.	✓ An accessible and modern legislative mechanism for appointment of receivers for trusts provides the court with a potential tool to resolve problems and disputes related to trusts.
Modified Law Commission recommendation (preferred option)	✓ As above	✓ As above	✓ As above	✓ As above

Ministry’s preferred option: modified Law Commission recommendation

- 143. The Ministry’s preferred option is a modified Law Commission recommendation. This is because the Ministry’s option includes the additional policy detail that the Law Commission’s recommendation did not contain. The options analysis in Table 10 comparing the Law Commission recommendation with the Ministry’s preferred option is therefore identical, as the Ministry’s additions intend to give effect to the Law Commission’s proposals.
- 144. As with the Law Commission’s recommendation, the preferred option will make appointments of a receiver more accessible and better understood in their application to trusts. The new provision may encourage appointment of a receiver to manage a dysfunctional trust and break a deadlock between trustees to get the trust up and running.

Perpetuities (Recommendation 49)

Status quo and problem definition

- 145. The common law rule against perpetuities (the rule) and the Perpetuities Act 1964 restrict the length of time a trust may hold property. To understand the effect of the Perpetuities Act, one must also understand the common law.
- 146. At common law, the rule was that no interest was good unless it vests, if at all, not later than 21 years after some ‘life in being’ at the creation of the interest. For trusts, this means the deed must establish a date for the final distribution of trust property. This date could be fixed, or calculated with reference to someone’s life (or the lives of more than one person).
- 147. The Perpetuities Act modifies the rule rather than replacing it with a statutory code. The Perpetuities Act provides an ability to specify a perpetuity period of 80 years or less. It also allows people to ‘wait and see’ whether a trust will vest within the permitted period, rather than being void for uncertainty at the outset.

148. The Law Commission found there is merit in having a restriction on the length of time a trust can hold property. A restriction encourages the alienability of land and prevents a person from tying up land ownership long after their death. A time limit additionally acts to avoid unwieldy trust administration. Finally, unlike other jurisdictions that have abolished any limits on the duration of trusts, New Zealand's tax system does not discourage trusts of long duration.²⁰
149. However, the Law Commission found problems with people's understanding of the current law because the rule is so complex. Different rules apply to trusts settled before 1964 (the Perpetuities Act was not retrospective), and practitioners need to know both the common law rules and the changes made to them by the 1964 Act. As a result, some trust deeds may inadvertently breach the rule and therefore be invalid.
150. The Law Commission also found the current law is uncertain, as it may not be clear until the perpetuity period is nearly expired whether a disposition will vest or be invalid. The rule can be harsh and arbitrary in that whether a disposition vests can depend on how expertly it was drafted.
151. A related common law rule is the rule against excessive accumulations. This provides that a direction to accumulate funds is void if it extends beyond the perpetuity period. The Perpetuities Act reformulated the rule against excessive accumulations by providing that a direction to accumulate and dispose of funds will be valid if the disposition is valid, and will be invalid if the disposition is invalid. Again, the law is complicated and would benefit from simplification.
152. The rule also applies outside of trust law in some commercial contexts (eg it applies to future limitations on real or personal property including options to purchase). The Law Commission found little rationale for this and that the application was inconsistent. The Law Commission considered the rule conflicted with modern commercial practice (eg it is desirable to create indefinite options to purchase at the same time as creating an easement or covenant).

Law Commission recommendation

153. The Law Commission recommends replacing the complex common law rules and repealing the Perpetuities Act in favour of a clear simple statement to assist understanding. The new Trusts Act would provide a default maximum duration for trusts of 150 years from the date the trust is established. The Law Commission refers to increasing life expectancies in support of an upper limit of 150 years.
154. The proposed maximum duration would only apply to trusts. A bright-line rule could promote confidence in trusts by putting the maximum length of a trust on more robust legislative footing.
155. The Law Commission recommends retaining the rule against accumulations from the Perpetuities Act but expressing it in a way that is consistent with other reforms. So, trustees may accumulate income provided it is distributed on termination of the trust.
156. The Law Commission also recommends repealing section 59(2) of the Property Law Act 2007. This would remove the current restriction on future estates and interests in property.

Modified Law Commission recommendation

157. The Ministry agrees with the principles underpinning the reasons for having a maximum duration period for trusts to hold property in New Zealand. There is a need to place some restriction on the freedom of one generation to control the devolution of property at the expense of the generations that follow. However, where that justification is absent, the rule should not apply. We therefore agree with repealing section 59(2) of the Property Law Act.

²⁰ For instance, in Ireland the rule was abolished from 2009 following a recommendation by the Irish Law Reform Commission on the basis that the tax system provided sufficient disincentives for trusts of long duration, including through an annual tax on the capital held in trust. See Law Reform Commission of Ireland *Report on the Rule against Perpetuities and Cognate Rules* (LRC 62-2000).

158. We prefer an alternative maximum duration period of 125 years. This strikes a better balance between not tying property up for too long (arguably 150 years could do this) and also being at least as long, and probably slightly longer, than the longest period currently permitted under the common law's 'life in being plus 21 years' rule. We also note that 125 years aligns with the United Kingdom's legislation.

Options analysis for addressing the problems

159. We have weighted the criteria equally for this issue, except for the fourth criterion which is not relevant.

Table 11: Options analysis for Recommendation 49

	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes
Status quo	✗ The combination of common law and a prescriptive Act means it is not easy for most people to understand what the legal requirements are for the length of a trust or accumulations. The current rules about perpetuities are incomprehensible to the majority of people (lawyers and non-lawyers).	~ Anecdotal evidence indicates a number of trusts may accidentally breach the rule. However, in practice it is likely most trusts are wound up and finally distributed before the actual distribution date specified in the deed.	✓ The rule represents a balance between the freedom of an owner of land to dispose of it as they please and the freedom of its later occupants to do the same. There are also public interests in both individual autonomy and keeping assets in the stream of commerce.	N/A
Law Commission recommendation	✓ A clear and simple statement of the legal position for the maximum permitted duration of a trust aids understanding. Avoids the need for detailed understanding of the common law. Aligning the accumulations rule with the new maximum duration period will provide further clarity.	~ May be more in line with current deed drafting (ie specifying a vesting date from the date of the execution of the deed), avoiding any formula to calculate the trust's duration. However, duration period is above the maximum period currently likely in terms of life expectancy, and may tie property up for too long.	~ Appropriately balances retaining a limit against the provision of a rule that is easy to understand. Perpetual trusts (eg many states in the United States, Ireland and Canada) occur in jurisdictions with very different tax systems to New Zealand's system. However, longer duration period than that seen in comparable jurisdictions.	N/A
Modified Law Commission recommendation (preferred option)	✓ As above	✓ As above, plus a slightly shorter duration is closer to the maximum period currently possible under the common law rule (eg a foetus's life plus 21 years).	✓ As above, plus the period aligns with the limit adopted in the United Kingdom's Perpetuities and Accumulations Act 2009.	N/A

Ministry's preferred option: modified Law Commission recommendation

160. The Ministry's preferred option is a modified Law Commission recommendation. The new Trusts Act will improve certainty in trust dealings by making it clear that trusts cannot last more than 125 years. The Ministry's more modest limit of 125 years goes towards ensuring trust administration does not become unwieldy. It also reflects the current limit in the United Kingdom and Wales.

Part A: Conclusions and implementation plan

161. A summary of the preferred options for Part A are shown in Table 1 below. The table also shows the proposed transition approach for the changes.

Table 12: Summary of the Ministry’s preferred options and proposed transition

	Law Commission recommendation	Preferred option for new Trusts Act	Proposed transition approach for existing trusts, and risks mitigation, where applicable
R1	Definition of a trust	Modified Law Commission recommendation using an inclusive statement of trust characteristics, not an exhaustive definition.	Apply from commencement date.
R2	Mandatory trustee duties (mandatory)	Law Commission recommendation.	Apply from commencement date.
R4	Trustee exemptions and indemnity	Modified Law Commission recommendation that may or may not use term ‘gross negligence’ to describe behaviour that is more than mere negligence.	Transition period of one year. Advisor notification requirement will not apply to existing trusts.
R6	Provision of information to beneficiaries (mandatory)	Modified Law Commission recommendation with addition of a further factor for a trustee to consider when deciding whether to provide the information.	Transition period of one year.
R19	Who may be appointed as a trustee?	Modified Law Commission recommendation adding a restriction on a person subject to a welfare guardianship order.	Apply from commencement date. For the avoidance of doubt, this section would not disqualify existing trustees who do not meet the provisions of this recommendation.
R20	Mandatory and discretionary grounds for removal of a trustee (mandatory and default)	Modified Law Commission recommendation adding a person subject to a welfare guardianship order as a ground for removal.	Apply from commencement date.
R21	Who may remove and appoint trustees, retirement and replacement of trustees (default)	Modified Law Commission recommendation by removing Public Trust supervision, and removing the requirement for a personal representative who is not a trustee to provide a statement of accounts to the beneficiaries.	Apply from commencement date.
R22	Appointment of replacement when trustee dies while in office (default)	Modified Law Commission recommendation by removing Public Trust supervision.	Apply from commencement date.
R23	Retirement and replacement of trustee (default)	Modified Law Commission recommendation by removing Public Trust supervision.	Apply from commencement date.
R24	Exercise of power to remove and appoint trustees (mandatory)	Law Commission recommendation.	Apply from commencement date.
R25	Numbers of trustees (default)	Law Commission recommendation.	Apply from commencement date.

	Law Commission recommendation	Preferred option for new Trusts Act	Proposed transition approach for existing trusts, and risks mitigation, where applicable
R26	Transfer of trust property	Modified Law Commission recommendation providing a different process to facilitate the transfer of trust property when a removed/resigning trustee cannot participate.	Apply from commencement date. Clarify that timing of resignation/ departure of trustee triggers which law applies for the resulting vesting process.
R40	High Court and District Court jurisdiction	Law Commission recommendation.	N/A
R41	Family Court jurisdiction	Law Commission recommendation.	Apply from commencement date, except that where proceedings have already been filed, or are being heard, parties before the Family Court will need to file subsequent applications to the High Court.
R46	Appointment of receiver for trusts	Enhanced Law Commission recommendation adding the policy detail	Apply from commencement date
R49	Perpetuities	Modified Law Commission recommendation with 125 maximum period of duration.	<p>Apply from commencement date. However, perpetuity periods set out in existing trusts will continue to apply unless:</p> <ul style="list-style-type: none"> • they are subsequently amended through a permitted variation route. Such amendment may (unless the trust terms restrict this) extend the perpetuity period up to a maximum of 125 years; • the trust contains a mechanism for calculating the perpetuity period rather than a specific date. The trust will terminate on the date calculated through the mechanism, or at 125 years, whichever is earlier. <p>If an existing trust is completely silent as to vesting, it will already be void before the new Act comes into force and so it will remain void.</p>

Part B - Analysis of Minor recommendations

Table 13: Analysis of recommendations that have minor impacts (Recommendations 3, 5, 7, 9, 10, 12, 13, 15, 16, 17, 29, 30, 31, 32, 42, 48)

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R3 Other trustee duties					
<p><u>Status quo</u></p> <p>A range of duties found in the common law, with different duties applying according to their importance in relation to the nature of the trust. Will be implied in the trust relationship if the trust deed is silent.</p>	<p>✘ Found only in the common law with considerable variation and nuance in the duties.</p>	<p>~ Trust deeds can be tailored for the particular circumstances.</p> <p>Courts can continue to consider what core duties apply in those circumstances.</p>	<p>✘ People involved in trusts are likely to be unfamiliar with what is required of trustees.</p>	<p>✘ Particularly difficult for lay trustees to know what their obligations are.</p>	<p>✘ Unless the trust deed spells out the duties, settlors, beneficiaries and trustees are unlikely to have a good understanding of what is required of trustees.</p>
<p><u>Law Commission recommendation</u></p> <p>Commonly accepted common law trustee duties set out in general terms (see Appendix A). Can be excluded/modified by the terms of the trust or by statute, however, the exclusion/modification in the trust deed cannot be inconsistent with the mandatory duties.</p> <p><u>Modified Law Commission recommendation</u></p> <p>In addition, paid advisors are required to disclose to settlors any exclusions or modifications of the default trustee duties in the trust deed.</p>	<p>✔ A full plain English statement of important duties that gives substance to the trust relationship.</p>	<p>✔ Trust deeds can modify or exclude as necessary, and the common law in New Zealand will still be able to develop over time.</p>	<p>✔ Some overlap in the mandatory and default duties. Attempts to exclude duties could require the court to interpret if truly excludable, through the overall context.</p> <p><u>With modification</u></p> <p>✔ Additional disclosure requirement will improve settlors' understanding of the duties trustees are governed by.</p>	<p>✔ Prompts consideration of routine duties and tailoring these in the deed according to what the purpose of the trust requires, although careful drafting may be necessary.</p>	<p>Preferred Option</p> <p>✔ Provides settlors, trustees and beneficiaries with clear guidance on trustees' duties, while still providing flexibility.</p> <p><u>With modification</u></p> <p>✔ Additional disclosure requirement will improve settlors' understanding about trustee duties, and enable them to ensure duty settings are appropriate.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R5 Retention of information by trustees					
<p><u>Status quo</u></p> <p>The duty to retain important trust documents can be implied from the common law relating to other trustee duties, such as the duty to provide information to beneficiaries and the duty to maintain proper accounts and records.</p>	<p>✗ Some trustees are unsure what records they are required to keep and sometimes do not retain even the most basic trust information.</p>	<p>~ The extent of the duty can be varied depending on the particular circumstances of the trust.</p>	<p>✗ The lack of clear guidance on what documents must be retained can mean this information can be lost over time, disadvantaging beneficiaries.</p>	<p>✗ Particularly difficult for lay trustees to know what their obligations are.</p>	<p>✗ The law is not particularly accessible for trust users, which is likely to lead to poorer outcomes for the functioning of trusts.</p>
<p><u>Law Commission recommendation</u></p> <p>Set out a non-exhaustive list of documents a trustee is required to retain, so far as is reasonable. One trustee may retain the information on behalf of other trustees where the trust has multiple trustees (excluding the trust deed and variations to this).</p>	<p>✓ Sets out in plain English the key documents a trustee needs to keep and for how long.</p>	<p>✓ Reflects what trustees are already required to do and the list is non-exhaustive so there is scope for additional record-keeping requirements to be included via the trust deed.</p>	<p>✓ Greater transparency over what information must be retained is likely to provide all trust users with enhanced confidence the information will be kept.</p>	<p>✓ All significant documents are listed, however the trust deed itself may need to specify further requirements depending on the type of trust.</p>	<p>Preferred Option</p> <p>✓ Provides clarity on the obligation on trustees to retain significant documents to ensure proper management of the trust.</p>
R7 Administrative powers					
<p><u>Status quo</u></p> <p>The various default administrative powers (e.g. to sell, maintain and insure trust property) are scattered throughout multiple sections of the Trustee Act, and business related powers have a narrow scope.</p>	<p>✗ Lengthy and complicated sections which are difficult to follow and understand.</p>	<p>✗ The default powers are routinely overridden and do not reflect modern realities.</p>	<p>~ The quality of the trust becomes increasingly dependent on the quality of drafting.</p>	<p>✗ Inefficient as requires alternative drafting to contract out of the default position.</p>	<p>✗ These powers are complicated and outdated. Heavy reliance on deed drafting to ensure useful trustee powers is available.</p>
<p><u>Law Commission recommendation</u></p> <p>Provide as a default that trustees have the powers of a natural person (including powers in relation to a business). Include a non-exhaustive schedule setting out some commonly used powers of a trustee.</p> <p><u>Modified Law Commission recommendation</u></p> <p>Remove the schedule of powers.</p>	<p>✓ Simplifies in plain English.</p> <p>Schedule may create unnecessary complexity because not exhaustive.</p> <p><u>With modification</u></p> <p>No confusion about what powers are in or out.</p>	<p>✓ Modernises trust law to provide useful, flexible powers</p> <p>Accords with common practice in deed drafting.</p>	<p>~ The powers are still default, however this democratises drafting in the sense that the default powers are useful.</p>	<p>✓ Reduces the need for contracting out of the default position.</p>	<p>✓ Improves an important area of trusts law by updating the default powers provisions and expressing these in simple terms.</p> <p>Preferred Option</p> <p>✓ The modification avoids the potential for confusion.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R9 Age of majority					
<p><u>Status quo</u></p> <p>The Trustee Act and the Age of Majority Act 1970 means the 'age of majority' for trusts is 20 years.</p>	<p>✗ Sections mixed use of age terms could be confusing.</p>	<p>✓ Trust deeds can override the provision and set an alternative age.</p>	<p>✗ Discriminatory for no good grounds and out of line with other legislation that deals with adulthood, under which a minor is a person under 18 years.</p>	N/A	<p>✗ Out of date with current thinking about when people reach adulthood.</p>
<p><u>Law Commission recommendation</u></p> <p>For the purposes of the new Trusts Act and trust law generally (including wills), the age of majority is 18 years. The Age of Majority Act 1970 does not apply, so references to minors would imply a person under 18 years.</p>	<p>✓ Same rule would apply to all sections.</p>	<p>✓ Trust deeds can override the provision and set an alternative age.</p>	<p>✓ No reason for discriminating against 18 and 19 year olds who have the same legal capacity as 20 year olds.</p> <p>Consistent with most other law.</p>	N/A	<p>Preferred Option</p> <p>✓ Removes a discriminatory provision while still allowing settlors to stipulate the appropriate age for beneficiaries to receive property.</p>
R10 Appointment of agents					
<p><u>Status quo</u></p> <p>The Trustee Act permits trustees to appoint agents to transact trust business or do anything required in executing the trust or administering trust property. Agents can also be appointed under trust deeds or equity.</p>	<p>✗ Not clear the trustee functions an agent can be appointed to carry out. Confusion over who can be appointed as an agent and whether a professional is required.</p>	<p>✗ Agents can be useful for trustees and confusion about their appointment and role reduces this usefulness.</p>	<p>~ Consistent with trustees' duties by not allowing trustees' fundamental decision-making powers to be delegated to agents. However, oversight may be weak because there is nothing to suggest active assessments are to be made of the agent's actions.</p>	<p>~ Agents are provided for but the law is not particularly straightforward, lessening the likelihood that trustees consider how agents could assist with trust administration.</p>	<p>✗ An unhelpful provision that is not easily applied by trustees.</p>
<p><u>Law Commission recommendation</u></p> <p>Trustees can appoint agents to carry out "administrative functions" and these functions are defined, together with a definition of "trustee functions", which are specific powers, rights or functions that should be properly vested in the trustee alone.</p> <p><u>Modified Law Commission recommendation</u></p> <p>Clarify distinction between "administrative functions" in this recommendation and "power of administration" used in Recommendation 13.</p>	<p>✓ Clarifies the functions that can be given to an agent. Guidance helps trustees to appoint appropriate agents and better meet their trustee duties.</p> <p><u>With modification</u></p> <p>Reduces potential for any confusion from the use of similar terms.</p>	<p>✓ Enables trustees to use agents more freely and may encourage agency arrangements to the benefit of trusts.</p>	<p>✓ Requires trustees to keep arrangements under review, and trustees must intervene if a trustee exercising the standard of care would consider it necessary.</p>	<p>✓ A clear process for agency appointments and the approach to fulfilling the role.</p>	<p>✓ Trustees have a good understanding of how the agency relationship is established and works over the duration of the trust. Their ongoing responsibilities for agents are explicit.</p> <p>Preferred Option</p> <p>✓ The modification avoids the potential for confusion in the functions that can be carried out by an agent.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R12 Power to appoint delegates					
<p><u>Status quo</u></p> <p>The Trustee Act provides a delegation power for trustees, by power of attorney, where they are (or about to become) absent from New Zealand or physically incapable. A delegation allows another person to act in place of a trustee in all respects.</p>	<p>✓ Spells out the circumstances in which a trustee can exercise a delegation power.</p>	N/A	<p>✗ No safeguards to protect the role of beneficiaries.</p> <p>The duration of the delegation is unlimited, and no requirement to let beneficiaries know that a delegation has occurred.</p>	<p>✗ Limited circumstances to which a delegation can apply, creating gaps as there may be other situations that might reasonably require a delegation.</p>	<p>✗ The power is more limited than necessary and lacks balance in the approach to upholding the beneficiaries' interests.</p>
<p><u>Law Commission recommendation</u></p> <p>Allow trustees to appoint a delegate to carry out "all or any" of the trustees' role for up to 2 years. Circumstances in which the power of delegation can be exercised are described and expanded to include temporary mental incapacity and temporary physical incapacity. Includes requirement to reasonably notify beneficiaries.</p> <p>A co-trustee or beneficiary can apply to the Public Trust for the Public Trust to become a delegate for a trustee who is unable to make a decision and there is no delegation in place.</p> <p><u>Modified Law Commission recommendation</u></p> <p>A beneficiary may only apply to the Public Trust if there are no co-trustees to make the decision. Also, notification requirements should align with factors in Recommendation 6.</p>	<p>✓ Spells out the circumstances in which a trustee can exercise a delegation power.</p>	N/A	<p>✓ Protections for beneficiaries through notification where a delegation has been effected.</p> <p>Limitation period on the duration of a delegation.</p> <p><u>With modification</u></p> <p>Avoids one beneficiary acting without others' agreement.</p> <p>Puts beneficiaries on equal footing (because under Recommendation 43, the Public Trust could not act if the matter was contentious).</p> <p>Trustee discretion should remain as may be good reason to withhold information.</p>	<p>✓ Expands the circumstances in which a delegate can be appointed, helping trustees to avoid more problems that may arise for their trust.</p>	<p>✓ An updated, useful and comprehensive power of delegation.</p> <p>Preferred Option</p> <p>✓ The modification ensures that a single beneficiary cannot seek a delegation without the views of the other beneficiaries being considered.</p>
R13 Standard of care					
<p><u>Status quo</u></p> <p>The common law requires trustees to use reasonable care and skill in carrying out their role, however this is excludable in a trust deed.</p>	<p>✗ Common law standard of conduct is not necessarily clear to lay trustees.</p>	<p>~ The standard of behaviour depends on the particular circumstances of the trust.</p>	<p>✗ People are more likely to be unfamiliar with what is required of them.</p>	<p>✗ Particularly difficult for lay trustees to know what their obligations are.</p>	<p>✗ The law is not very accessible for trust users, which is likely to lead to poorer outcomes for the functioning of trusts.</p>
<p><u>Law Commission recommendation</u></p> <p>The common law position should be set out in the statute as a default provision. When exercising a 'power of administration' a trustee must exercise such care and skill as is reasonable in the circumstances, having regard to any special knowledge or experience the trustee has (referred to as a 'standard of care').</p>	<p>✓ A clear and accessible statement for trustees to understand what is required of them.</p>	<p>✓ The standard of care can be modified or excluded as necessary in the trust deed.</p>	<p>~ The standard of care is still default, however in principle provides balance in the broader empowerment of trustees by directly addressing how the trustee powers are exercised.</p>	<p>✓ Prompts consideration of the standard of care and tailoring this in the deed according to what the purpose of the trust requires, although careful drafting may be necessary.</p>	<p>Preferred Option</p> <p>✓ Provides trustees with clear guidance on how to carry out their role, while still providing for flexibility.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R15 Distinction between income and capital					
<p><u>Status quo</u></p> <p>The Trustee Act requires trustees to distinguish between capital and income when investing, and be impartial between the interests of different beneficiaries.</p> <p>Income must go to life tenants and capital appreciation goes to the remainder of beneficiaries, and if funds accumulate from an investment, distribution of funds must be balanced between both life tenants and the remaining beneficiaries.</p>	<p>✓ Appears to be a well-understood provision.</p>	<p>✗ These rules are often overridden by the trust deed as they are out of step with modern investment practice.</p>	<p>✗ Does not necessarily enable trustees to maintain a fair balance between income and capital beneficiaries.</p>	<p>✗ When trustees are considering an investment, they must choose products based on legal categories rather than overall investment and achieving maximum return.</p>	<p>✗ The law does not reflect modern day portfolio investment approaches and therefore will likely disadvantage beneficiaries.</p>
<p><u>Law Commission recommendation</u></p> <p>Trustees have discretion to determine whether a return is to be treated as income or capital for the purposes of distribution. Must be consistent with their duties as trustees and take into account the interests of all beneficiaries.</p>	<p>✓ Frees up trustees to determine for themselves what is capital and income for the purposes of distribution.</p>	<p>✓ Many New Zealand trust deeds already take this approach.</p> <p>Is suited to the New Zealand context as it works well for discretionary trusts.</p>	<p>✓ Should allow trustees to invest more effectively.</p> <p>Relies more on trustee ability to properly balance the interests of different classes of beneficiaries.</p>	<p>✓ Facilitates total return investment and allow trustees to invest trust funds without regard to whether the return on investment is technically of an income or capital nature.</p>	<p>Preferred Option</p> <p>✓ Provides trustees with the ability to maximise gains to the trust portfolio, while still taking all beneficiaries' interests into consideration.</p>
R16 Apportionment of receipts and outgoings					
<p><u>Status quo</u></p> <p>The Trustee Act sets out apportionment rules for receipts and expenses, depending on whether a particular receipt or expense is classified as income or capital. The common law provides rules on apportionment where the trust deed is silent.</p>	<p>✗ Sections are considered obscure and highly complex.</p>	<p>✗ Many, if not most, newer trust deeds already allow trustees to exercise their discretion in apportionment.</p>	<p>✗ The difficulty in applying the rules can result in impractical outcomes.</p>	<p>✗ Complex calculations may be needed for small sums of money.</p> <p>Inconvenient and expensive for a trustee and the trust.</p>	<p>✗ A convoluted part of the current regime that is confusing and unhelpful to trustees.</p>
<p><u>Law Commission recommendation</u></p> <p>A default ability for trustees to exercise discretion when apportioning receipts and expenses. The trustee must ensure the apportionment is fair and reasonable in all the circumstances and in accordance with generally accepted business practice.</p>	<p>✓ Simplified and enabling sections will assist trustees to fulfil their role.</p>	<p>✓ Consistent with modern trust deeds and can be modified or excluded as necessary in the trust deed.</p>	<p>✓ Principled basis for apportionment and is in line with the recommended approach to income and capital.</p>	<p>✓ Gives flexibility for trustees' decision making.</p>	<p>Preferred Option</p> <p>✓ Frees up trustees from rigid dated rules and allows for modified practices that fit with the modern trust context.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R17 Investment managers					
<p><u>Status quo</u></p> <p>The Trustee Act requires trustees to personally assess investment advice and decide whether to accept or reject it. This is a default provision.</p>	<p>~ The rule is well understood, however trustees must personally assess investment advice and may not have expertise.</p>	<p>✗ Many trust deeds contract out of the default provision.</p>	<p>~ Investment decisions can be complex and are often better handled by specialised professionals.</p>	<p>✗ Inefficient as requires alternative drafting to contract out of the default position.</p>	<p>✗ Trustees may not be best qualified to make investment decisions.</p>
<p><u>Law Commission recommendation</u></p> <p>Authorise trustees to appoint investment managers and give them authority to make investment decisions (subject to legislative safeguards).</p>	<p>✓ Trustees do not need to have expertise in investment.</p>	<p>✓ Reflects practice. Default provision allows deeds to contract out.</p>	<p>✓ Trustee must act honestly and in good faith when appointing an investment manager.</p>	<p>✓ Reduces the need for contracting out of the default position.</p>	<p>Preferred Option</p> <p>✓ Allows trustees to rely on expert investment advice.</p>
R29 Revocations and variation by beneficiaries					
<p><u>Status quo</u></p> <p>The common law allows beneficiaries who hold the entire beneficial interest in the trust, are all legally competent adults, and agree, to act together to require the trustees to revoke a trust and distribute the trust property.</p> <p>Under the common law a beneficiary of a fixed share of trust property can request that the trustee transfers that share to him or her.</p>	<p>✗ Many everyday users of trusts who are not legally trained would not be aware of the rules and understand how they apply.</p>	<p>✓ Trusts operate based on the common law rules.</p>	<p>~ The ability of beneficiaries to act in this way will depend on the particular circumstances, and boundaries of the law are unclear e.g. whether consenting beneficiaries can also resetttle a trust.</p>	<p>✗ Time consuming and expensive legal assistance required as trust deeds need to be modified to enable the trust property to be dealt with or the trust administered in a different way.</p>	<p>✗ Beneficiaries would not typically be aware of their ability to act, and what they would need to do to take this kind of action.</p>
<p><u>Law Commission recommendation</u></p> <p>Set out the two common law rights of beneficiaries relating to the distribution of trust property, and the transfer of a fixed share in trust property, as above.</p> <p>Clarify that beneficiaries may also act together with trustees to confer <i>new</i> powers upon trustees or deviate from, or vary, the terms of the trust, and also resetttle a trust.</p> <p><u>Modified Law Commission recommendation</u></p> <p>In addition to these rights, allow for beneficiaries and trustees to agree to <i>reduce or remove</i> trustee powers.</p>	<p>✓ Clear statement of the law in one place.</p>	<p>✓ Reflects well-established rules in common law.</p>	<p>✓ Provides more certainty for all trust users and allows for changes to trusts as circumstances change. Similar rules in Australia and UK common law.</p>	<p>✓ Provides clear process for beneficiaries to change trusts.</p> <p><u>With modification</u></p> <p>The ability to also restrict trustee powers may be beneficial in some circumstances (eg a form of investment permitted in the trust deed has, due to changing circumstances, become risky).</p>	<p>✓ Improves an important area of trusts law by empowering beneficiaries.</p> <p>Preferred Option</p> <p>✓ The modification, for completeness, provides an additional ability that may be helpful.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R30 Revocation and variation by the court					
<p><u>Status quo</u></p> <p>The court has statutory powers to approve the variation, revocation or enlargement of the powers of the trustees in respect of the trust property. Available where the beneficiaries are minors, incapacitated in a certain way, or unascertained, and variations cannot be to the detriment of beneficiaries.</p>	<p>✗ There is a limited group of beneficiaries that the court can act for.</p>	<p>✗ Does not adequately cover the needs of those involved, because there are situations where the consent of the beneficiaries cannot reasonably be obtained.</p>	<p>✗ Uncertainty as to the range of varying arrangements the court can make e.g. a variation that changes the fundamental purpose of the trust.</p>	<p>✗ Has limitations and it is not always clear whether the court can act in regard to the different classes of beneficiaries.</p>	<p>✗ While the law has long recognised that trusts may need to change in some circumstances, the rules are not widely known and some areas where the court could appropriately assist are not provided for.</p>
<p><u>Law Commission recommendation</u></p> <p>The court can approve any revocation, variation or resettlement of a trust and make other changes to a trust on behalf of minors; incapacitated people; and other classes of future beneficiaries.</p> <p>The court can waive the requirement for the consent and approve any revocation, variation or resettlement of a trust or any other changes to a trust.</p>	<p>✓ The rules are clearly set out in the legislation for all users of trusts.</p>	<p>✓ Provides for a greater number of situations where the consent of beneficiaries cannot reasonably be obtained, while enabling future situations to also be covered.</p>	<p>✓ The court may not reduce or remove rights of beneficiaries without intending to.</p> <p>Allowing court intervention strikes a balance between the competing interests of beneficiaries who can consent and who cannot or will not.</p>	<p>✓ Practical issues would not prevent a trust from being rearranged.</p>	<p>Preferred Option</p> <p>✓ Strengthens the overall accessibility of the court's power to intervene in a trust, while providing for appropriate limitations on the power.</p>
R31 Extension of trustees' powers by the court					
<p><u>Status quo</u></p> <p>The Act allows the court to only sanction specific transactions where the court is satisfied that it is inexpedient, difficult or impractical for the trustee to undertake the transaction.</p>	<p>✗ Confusion in the provision about the court powers.</p>	<p>✗ There may be other transactions where it would be appropriate to have court sanction, to assist with trust administration.</p>	<p>~ The threshold for court intervention is high.</p>	<p>✗ Narrow interpretation restricts the court to approving each transaction (rather than vary the trust deed to enable a series of transactions).</p>	<p>✗ Trust administration in this area is not comprehensively provided for, with a limited scope of transactions that can be sanctioned, and a high bar for court action.</p>
<p><u>Law Commission recommendation</u></p> <p>A power for the court to make amendments to the non-distributive administrative provisions of the terms of any trusts where necessary to enable the trustees to efficiently manage trust property.</p> <p>Amendments to the trust terms that change the beneficial interests under the trust are not permitted.</p>	<p>✓ A clear statement of the purpose of provision and what the court is allowed to do.</p>	<p>✓ Broader than what is currently permitted however seeks to ensure statute more easily accommodates changing circumstances and business practices.</p>	<p>✓ Simple and relatively wide basis for the test for court intervention allows for easier access by trustees.</p> <p>Allowing the court to act so that trust property can be efficiently managed supports trust use.</p>	<p>✓ Wider scope and much simplified test for the court to determine whether to act should enhance trustees' ability to seek administrative assistance.</p>	<p>Preferred Option</p> <p>✓ A more useful tool for the purposes in which the power of the court is intended i.e. administrative assistance to trustees.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R32 Reviewing the acts and omissions of trustees					
<p><u>Status quo</u></p> <p>The Act allows the court to review the act, omission or decision of a trustee on application of a beneficiary. Only applies to actions that have been taken under the Act's powers (not under powers in the trust deed).</p>	<p>✗ Confusing to allow review of statutory powers but not trust deed powers. Uncertain whether review is available where same powers in both.</p>	<p>✗ Risk of inconsistent practice by the courts due to uncertainties.</p>	<p>✗ Unclear if the court has a wide power of review which could lead to inconsistencies in the law.</p> <p>No standard for the court to apply in determining when to intervene, and what breach must be shown by applicant beneficiaries.</p>	<p>✗ Creates an anomaly because some actions are reviewable and some are not</p> <p>Sometimes an artificial distinction between actions taken under the trust deed and under powers in the Act.</p>	<p>✗ Uncertainty leads to inconsistent practice and the onus on beneficiaries is too high. If it is too hard to apply for review, it defeats the purpose of providing a mechanism for beneficiaries to hold trustees to account.</p>
<p><u>Law Commission recommendation</u></p> <p>The court can review trustee actions (under either trust deed powers or the statute) where a trustee has made a decision (etc) that was "not reasonably open" to him/her, and set aside the action if on the balance of probabilities the decision was not reasonably open to the trustee.</p> <p>Two step process if a review is undertaken, involving beneficiary's evidence and, if dispute shown, the trustee's evidence.</p>	<p>✓ Clear who can apply, what they must prove and what decisions (etc) can be reviewed.</p>	<p>✓ Consistent standard but also inherent jurisdiction of court remains – flexibility remains and can benefit from international jurisprudence.</p>	<p>✓ Introduces a clear, principled basis for a review by the court.</p> <p>A broader scope of beneficiaries can apply for a review.</p> <p>Strikes balance between beneficiary interests in having recourse and trustee discretion.</p> <p>Reduces onus on beneficiaries which is currently too hard.</p>	<p>✓ Having a standard will reduce frivolous claims as beneficiaries will need to show genuine and substantial dispute.</p>	<p>Preferred Option</p> <p>✓ A clear process that balances beneficiaries' ability to seek court supervision and ensure that trustees are acting appropriately, against an appropriate bar for interference with trustees' decisions.</p>
R42 Alternative Dispute Resolution					
<p><u>Status quo</u></p> <p>Alternative Dispute Resolution (ADR) is available for some trust disputes, either because it is expressly permitted in a trust deed, or because all parties agree to it. Some trusts cannot use ADR, because of unascertained or incapacitated beneficiaries who cannot consent to the use of ADR or any agreements resulting from it.</p>	<p>✗ In a few cases creates a barrier to accessing ADR by requiring court approval to use it.</p>	<p>~ Modern trust deeds may provide for ADR however others may wish to use it as a mechanism but are unable to easily.</p>	<p>✗ Unfair to a small number of trustees who have to seek court resolution of disputes.</p>	<p>✗ Because ADR is easier and cheaper than going to court, it would be beneficial to make it clearer that ADR is generally available to all trusts.</p>	<p>✗ Court resolution of disputes is likely to be more costly, time consuming and complex than ADR, so some parties that cannot easily utilise it are disadvantaged.</p>
<p><u>Law Commission recommendation</u></p> <p>The statute clarifies that ADR may be used by trustees to resolve internal or external disputes (other than a dispute as to a trust's validity). The power can be excluded or modified by the terms of the trust.</p>	<p>✓ ADR provisions would provide value by increasing awareness about ADR as a trusts dispute resolution mechanism.</p>	<p>✓ Makes it clear that ADR is available if considered appropriate for the purpose and objectives of the trust.</p>	<p>✓ ADR provisions are default so court resolution of disputes would still be required where the trust deed did not permit ADR or limited its application.</p>	<p>✓ When compared with resolution of disputes through the courts, ADR has the advantages of lower costs, quicker resolution, increased confidentiality and privacy, and a less adversarial process.</p>	<p>Preferred Option</p> <p>✓ The benefits of ADR are well-accepted and its use is to be supported, and making sure ADR was freely available would help to relieve the burden on the court system.</p>

Option	Criteria for assessment of options				Conclusions/net outcomes
	Easy to access and understand	Reflects trust practice now and allows for future developments	Fair and principled, encouraging confidence in the use of trusts	Uses simple, cost-effective, efficient processes	
R48 Creditors dealing with trustees					
<p><u>Status quo</u></p> <p>The common law establishes many principles relating to creditors' rights against trustees for their liabilities. In some situations, the creditor is permitted to be put in the place of the trustee and use the trustee's right of indemnity to satisfy the creditor's debt from trust property.</p> <p>The creditor will be prevented from doing this if the trustee's indemnity is impaired for some reason, such as a breach of trust.</p>	<p>✗ The common law basis means this area is not very accessible to lay persons.</p>	<p>~ Creditors always run the risk that the party they are contracting with will not be able to meet their obligations, whether that party is an individual, a corporate trustee or a company.</p>	<p>✗ Creditors can be unaware that they are dealing with a trust so unreasonable to expect them to ensure the trustee is not acting negligently.</p> <p>Little incentive to hold trustees to account or for trustees not to breach their duties as beneficiaries are often also trustees and benefit from the trustee's actions.</p>	N/A	<p>✗ The trust may receive an unjust windfall in circumstances where a creditor has acted in good faith.</p>
<p><u>Law Commission recommendation</u></p> <p>A new statutory provision to retain the creditor's ability to claim against the trust property and rely on the trustee's indemnity even where this indemnity has been impaired.</p>	<p>✓ Makes it clear what rules apply to creditors dealing with trusts.</p>	<p>✓ Goes some way toward strengthening the position of creditors.</p>	<p>✓ Removes incentives for trustees' to breach duties.</p> <p>Bona fide creditors (who have given value and acted in good faith) are able to rely on the trustee's indemnity despite any breach by the trustee.</p>	N/A	<p>Preferred Option</p> <p>✓ Creditors' rights are unaffected by a trustees' breach of which they were unaware, consistent with equitable principles that no person should be allowed to profit at another's expense.</p>

Part B: Conclusions and implementation plan

1. A summary of the preferred options for Part B are shown in Table 14 below. The table also shows the proposed implementation plan for the changes.

Table 14: Summary of the Ministry’s preferred options and proposed transition

	Law Commission recommendation	Preferred option for new Trusts Act	Proposed transition approach for existing trusts, and risks mitigation, where applicable
R3	Other trustee duties (default)	Modified Law Commission recommendation adding a requirement for paid advisors to disclose exclusions/modifications to duties in the trust deed.	Apply from commencement date.
R5	Retention of information by trustees (mandatory)	Law Commission recommendation.	Apply from commencement date.
R7	Administrative powers (default)	Modified Law Commission recommendation removing the schedule of example powers.	Transition period of one year.
R9	Age of majority	Law Commission recommendation.	Apply from commencement date.
R10	Appointment of agents (default)	Modified Law Commission recommendation clarifying distinction between “administrative functions” and “power of administration” in Recommendation 13.	Apply from commencement date, except for existing agency arrangements.
R12	Power to appoint delegates (default)	Modified Law Commission recommendation adding that beneficiaries can only apply to the Public Trust if there are no co-trustees available.	Apply from commencement date, except for existing delegations.
R13	Standard of care	Law Commission recommendation.	Apply from commencement date.
R15	Distinction between income and capital (default)	Law Commission recommendation.	Applies to existing trusts from commencement date, even if trust deed contains contrary wording. Default for new trusts: applies from commencement unless excluded by trust terms.
R16	Apportionment of receipts and outgoings (mandatory for existing trusts, default for new trusts)	Law Commission recommendation.	Applies to existing trusts from commencement date, even if trust deed contains contrary wording. Default for new trusts: applies from commencement unless excluded by trust terms.
R17	Investment managers (default)	Law Commission recommendation.	Apply from commencement date.
R29	Revocations and variation by beneficiaries (mandatory)	Modified Law Commission recommendation adding that beneficiaries (of age and capacity) may agree to enlarge/restrict/otherwise vary powers of trustees to manage or administer trust property.	Apply from commencement date.
R30	Revocation and variation by the court	Law Commission recommendation.	Apply from commencement date, except that proceedings already commenced need to be completed under the old law.
R31	Extension of trustees’ powers by the court	Law Commission recommendation.	Apply from commencement date, except that proceedings already commenced need to be completed under the old law.

	Law Commission recommendation	Preferred option for new Trusts Act	Proposed transition approach for existing trusts, and risks mitigation, where applicable
R32	Reviewing the acts and omissions of trustees	Law Commission recommendation.	Apply from commencement date, except that actions/omissions when the old law was in force would need to be resolved under the old law.
R42	Alternative Dispute Resolution (default)	Law Commission recommendation.	Apply from commencement date.
R48	Creditors dealing with trustees	Law Commission recommendation.	Apply from commencement date (ie it should apply to transactions entered into after the commencement date).

Part C - Relationship property recommendations

162. The Law Commission's overall approach in its review was to address matters of core trust law rather than issues where other policy areas interact with trust law. However, the Law Commission included two recommendations regarding relationship property and trusts, Recommendations 50 and 51.
163. The Ministry does not support the Law Commission's recommendations relating to relationship property legislation and trusts at this time. This is because, due to time constraints, an impact analysis of these recommendations has not been completed. On the basis of a high level assessment of the proposals, the Ministry considers that the wider implications of the changes are not identified. While the Law Commission review on trusts was extensive, the recommendations on relationship property law were not fully examined in context in the same way. The Ministry considers a full analysis of the problems and options should be conducted as a part of the Law Commission's review of relationship property law, which is scheduled to begin in 2016.

The Law Commission's recommendations

164. Section 44C of the Property (Relationships) Act 1976 (PRA) enables the court to order compensation where relationship property is transferred to a trust, and the effect of that transfer is to defeat one of the party's rights, even though there was no intention to defeat those rights. However, the court's power to order the trustees to pay compensation is limited to trust income and there is concern that section 44C does not adequately achieve a fair division of assets.
165. Section 182 of the Family Proceedings Act 1980 (FPA) allows the court to vary the terms of ante and post-nuptial settlements, including trusts, when a marriage or civil union ends. The court may remove capital or assets, vary the terms, or resettlement the trust for the benefit of one or both parties to the marriage or civil union. Section 182 of the FPA does not apply to de facto relationships.
166. Some consider that the courts are pushing trust law to its limit when attempting to address perceived injustice in the division of relationship property when couples separate, creating instability in the law.
167. Two amendments were recommended by the Law Commission as reforms that could go some way to addressing identified concerns:
 - 167.1. Amend section 44C of the PRA to allow the court to make an order requiring trustees to pay a specified sum of money from the trust property or to transfer any property of the trust, to one partner or spouse (Recommendation 50).
 - 167.2. Amend section 182 of the FPA so that it also applies to de facto partners as well as married and civil union partners (Recommendation 51).

High level assessment of the proposals

168. The proposed amendment to section 44C of the PRA represents a major change that would benefit from consideration as a part of a comprehensive review of relationship property law.
169. The Ministry considers that there are significant risks with making the proposed amendments without conducting full analysis in the context of the relevant law. The amendment to section 44C of the PRA may:
 - 169.1. Create further uncertainty in the operation of trusts if all trust assets were potentially available as compensation for one partner to a relationship.
 - 169.2. Have a significant effect on farming trusts, which are commonly used to protect farm property for future generations. Farms put into a trust during a relationship may have to be sold if an order is made under section 44C, as courts would be unable to vary or resettle the trust.

- 169.3. Not provide appropriate redress in many cases, because section 44C is limited in its application. The section captures only relationship property that is transferred to a trust during the relationship by one or both of the partners.
170. The overarching appropriateness of section 182 of the FPA, and its compatibility with the PRA, needs further analysis. The recommended amendment does not address the question of the consistency of section 182 of the FPA with the PRA. Unlike the equal sharing regime under the PRA, under section 182 the court is concerned with restoring the expectations that the parties had of the settlement at the time it was made.
171. It would be preferable to also undertake the necessary analysis within the Law Commission's relationship property review and before any changes are made.

3.4 Costs and benefits of the trust law reforms

172. It is difficult to quantify the costs and benefits of this reform on existing and new trusts. As already noted, information about established private trusts is not readily available and each trust can vary considerably in its form and purpose.
173. The Law Commission stated that where changes were being made to the current law, these were designed to make things easier rather than harder for settlors, beneficiaries and trustees. The Commission found that real costs arise for trusts as a result of the cumbersome and outdated procedures in the current Act, and many recommendations will be helpful for trustees and reduce costs.
174. The Ministry has sought the views of the Minister's Reference Group (see consultation section below) on the transitional costs and overall benefit of the reforms. See the Implementation section for the Reference Group's comments on transitioning to the new Trusts Act.

Transitional costs

175. The Ministry believes there will be some transition costs, but these would in many cases be voluntary, would fall on only a small proportion of existing trusts, and would not be considerable. The Law Commission found that a large number of New Zealand trusts appear to be family trusts with limited trust property (many will have one asset that is the family home).²¹ The 2013 Census supports this with 215,280 households reported that their dwelling was in a family trust.²²
176. A 'standard' family trust that has used a standard trust template is unlikely to require amendment after the new Trusts Act takes effect. This is because many of the proposals either restate existing common law, or are default, so can be explicitly or implicitly overridden by the trust terms.
177. While acknowledging this, members of the Minister's Reference Group have advised that some trust advisors may use the reform as an opportunity to review all their clients' deeds, even if this is not strictly necessary. If so, their estimates are that transition costs could range from \$300 to \$1000 + GST in lawyers' fees for a one-off review or simple variation of a straightforward family trust deed. The cost is likely to be proportionate to the complexity of the trust.

Longer term costs and benefits

178. These costs and benefits are broadly intangible and non-quantifiable. For the reforms overall, members of the Reference Group considered in summary:
 - 178.1. The total benefits of the new Trusts Act outweigh the costs of implementing the changes.
 - 178.2. The new Trusts Act will provide clarity so that trustees are less likely to act contrary to the law, and subsequently there should be fewer disputes.
 - 178.3. Savings will result as some matters will no longer need to be resolved in court, such as transferring property title when a trustee has lost capacity. High Court proceedings can cost a client \$5000 to \$10,000 for simple cases. There will also be consequential savings in court costs, including judges' and registrars' time. Clearer law should also reduce litigation risks in the medium to long term.
179. The Ministry considers there will be long term benefits and net savings to existing trusts due to clearer, simpler and more accessible law. For new trusts being settled under the new Trusts Act, the default provisions will make drafting of trust deeds easier, and simplify the ongoing administration of trusts. This should result in lower compliance costs for new trusts when compared to compliance costs imposed under current trust law.

²¹ *Review of the law of Trusts: Preferred Approach*, para 1.31.

²² Statistics New Zealand.

4. Consultation

4.1 The Law Commission's consultation process

180. The Law Commission's process over its four year review involved consultation with a reference group made up of leading trust practitioners and academics. Submissions were received on five *Issues Papers* that were released between 2010 and 2011, covering topics as follows:
- 180.1. *Review of trust law in New Zealand: Introductory Issues Paper*
 - 180.2. *Some issues with the use of trusts in New Zealand: Second Issues Paper*
 - 180.3. *Perpetuities and the revocation and variation of trusts: Third Issues Paper*
 - 180.4. *The duties, office and powers of a trustee: Fourth Issues Paper*, and
 - 180.5. *Court Jurisdiction, trading trusts and other issues: Fifth Issues Paper*.
181. Submissions were also received on a *Preferred Approach* paper in November 2012. This paper included 59 proposals for the wide range of specific topics, which built on discussion and submissions received on the Issues Papers.
182. In its final report the Law Commission discussed submitters' views on these papers, and its response to concerns and how these were considered when finalising proposals, in the sections on each specific topic.
183. The Commission also consulted with the Ministry of Justice, the Ministry of Business, Innovation and Employment, Inland Revenue, the Māori Land Court, and engaged with the Te Ture Whenua Māori Act review.
184. During its review the Commission consulted substantially with the legal profession (including the New Zealand Law Society and the Auckland District Law Society), and discussed aspects of trust law reforms with professional accountants.

4.2 The Ministry of Justice's consultation

185. The Minister of Justice established a Reference Group in 2015 to consider many of the Law Commission's recommendations and to understand the practical implications of these. The Reference Group is made up of seven trust law legal experts.
186. The Ministry considered the Reference Group's views on specific recommendations and these were tested during the policy development process. The Ministry's preferred option of a modified Law Commission approach is, in the majority of cases, a result of the feedback from the Reference Group. The Reference Group also provided comment on the Ministry's preferred option.
187. The Ministry is working with representatives from the finance industry to test whether the recommendations made can work for capital market trusts.
188. The proposed exposure draft of the Trusts Bill provides a further opportunity for consultation with the public, sector and government agencies.

5. Implementation of new Act, including risk mitigation

189. As indicated above, most of the proposed recommendations will be given effect when the new Trusts Act comes into force. There will be some proposals that take effect on commencement for new trusts, but have a transition period for existing trusts.
190. In addition, implementation of some recommendations will require amendment to/or repeal of other Acts:
- 190.1. Insolvency Act 2006: Recommendation 45 requires an amendment to the Insolvency Act to provide that Official Assignee has standing to apply to the court to challenge the validity of a trust regardless of whether the bankrupt could have done so prior to the bankruptcy. Implementation of this requires the Regulatory Systems Bill 2015 to be passed. This provision should not apply to proceedings commenced before the amendment comes into force. Once in force, it will apply to existing and new trusts.
 - 190.2. Perpetuities Act 1964 and Property Law Act 2007: Recommendation 49 requires repealing the Perpetuities Act and repealing section 59(2) of the Property Law Act in order to move to a bright line maximum duration rule.
191. The Ministry considers that there is little risk in implementing the new Trusts Act. The changes to the law are largely a restatement of the existing law (both statute and common law) or modernising the law to reflect current practice.
192. Due to the private nature of trusts, the effectiveness of the new Trusts Act will largely depend on lawyers and trust practitioners communicating the changes to their clients. Inadequate provision of information to settlors, trustees and beneficiaries about how trusts work, and the rights and obligations of the parties involved, will undermine one of the objective's of the reforms, which is to provide a useful and understandable statute. While settlors, trustees and beneficiaries will not need expensive legal explanations to understand what the Trusts Act says, they will rely on their lawyers making them aware of the new Trusts Act itself.
193. We understand from the Reference Group that in summary:
- 193.1. it was unlikely that many trust deeds would need to be changed, because the new Trusts Act will largely be a restatement of the existing law
 - 193.2. the approach of lawyers will probably vary, as some lawyers will provide an update to their clients about the changes, while others could more actively promote review of their clients' trusts (resulting in a higher number of one-off costs to trusts)
 - 193.3. when made aware of the changes, people who are involved with trusts are less likely to seek legal advice on reviewing their trust unless there is a direct impact on their circumstances
 - 193.4. changes to the law would more often be discussed when a person contacted their lawyer to raise some other issue relating to their trust
 - 193.5. if a trust deed is reviewed and changed because of the new Trusts Act, the cost of this will differ according to the extent of changes that are required, and
 - 193.6. it may be that some trusts are revoked because they are no longer considered necessary, which will involve legal costs (these will also vary depending on the trust and the individual lawyer involved).
194. We are confident in the ability of lawyers to upskill on the new trusts law and communicate the changes effectively, as is appropriate in the particular circumstances. The profession has demonstrated willingness to engage with the Law Commission's review process by making

submissions, and more broadly through holding trust law seminars. It is likely further seminars will follow once the new Act comes into force. Additionally, lawyers have an obligation under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 to give clients “clear information and advice”, which necessitates awareness and understanding of the relevant law.

195. We anticipate the New Zealand Law Society would, in time, update its law awareness pamphlet on the “The Family Trust” to reflect key changes. The pamphlet is a useful tool to promote the importance of legal consultation in key areas of a person’s life such as trust use, and promote the law through educating the public, including on how lawyers can help them make sure their legal rights are upheld.
196. Trust law is a specialised area of property law. Legal advice will largely depend on the particular trust deed and circumstances of the trust. Therefore, communication by practitioners is the best approach.
197. There is some risk that non-legal trust practitioners, who are not subject to their own formal professional standards, may not keep up to date with the law change. To minimise this risk, the Ministry will provide information about the new legislation, and the timing of the changes, on our website. However, we will recommend that people get their own legal advice.

6. Monitoring, evaluation and review

198. The Ministry will monitor the effectiveness of the trust law reforms through its established monitoring and reporting mechanisms such as the Ministry's Five Year Strategic Plan, environmental scanning, and the annual regulatory scan.
199. The Ministry also expects to receive feedback from legal practitioners and trust users, and would review this feedback as it arises. No formal evaluation of the new Trusts Act after enactment is planned. The cost of developing and implementing the collection of private trust-related data to support such an evaluation (for example, to determine compliance costs under the new Trusts Act) would be prohibitive. Without baseline data, identifying these costs would also be of low value.

Appendix A – Law Commission’s recommendations, *Review of the Law of Trusts: A Trusts Act for New Zealand, Report 30, August 2013*

Law Commission recommendation

1. Characteristics and creation of a trust

Include sections in a new Trusts Act which outline what an express trust is and how it is created to provide general guidance on the nature of the trust relationship. This will not be a code: it will be possible (though rare) for a trust to exist outside the Act. Other key terms such as trustee, beneficiary, discretionary beneficiary, settlor and trust property should be defined. The Te Ture Whenua Māori Act 1993 and jurisdiction of the Māori Land Court not affected.

2. Mandatory trustee duties (mandatory)

Set out mandatory duties of a trustee (cannot be excluded from the trust relationship):

- 1.1. to be familiar with the terms of the trust
- 1.2. to act in accordance with the terms of the trust
- 1.3. to act honestly and in good faith
- 1.4. to act for the benefit of the beneficiaries or to further the purpose of the trust, in accordance with the terms of the trust
- 1.5. to exercise stewardship over the trust property for the beneficiaries or the purpose of the trust, and
- 1.6. to exercise powers for a proper purpose.

Note that in the exercise of any duty, there is no requirement that beneficiaries are treated equally, as long as they are treated in accordance with the terms of the trust.

3. Other trustee duties (default)

Set out default duties of a trustee (which apply to the extent that they are not excluded/modified, explicitly or implicitly, by the trust deed):

- 1.1. not to exercise any power directly or indirectly for the trustee’s own benefit
- 1.2. to actively and regularly consider the exercise of the trustee’s powers
- 1.3. not to fetter the future exercise of the trustee’s powers
- 1.4. to avoid a position of conflict of interest
- 1.5. to maintain accounts of the trust property that adequately identify the assets, liabilities, income and expenses of the trust and are appropriate to the value and complexity of the trust property
- 1.6. not to be unfairly partial to some beneficiaries to the detriment of others
- 1.7. not to make a profit (that has not been permitted by the beneficiaries)
- 1.8. to act without reward except where it has been permitted by the beneficiaries or is in accordance with the trustee’s right to be reimbursed for legitimate expenses and disbursements
- 1.9. where there is more than one trustee of a trust, to act unanimously
- 1.10. to manage the trust with reasonable care and skill, and
- 1.11. to invest prudently.

4. Trustee exemption and indemnity clauses

Prohibit trustees from being exempted or indemnified for dishonesty, wilful misconduct and expand to also include gross negligence. Require paid advisors to notify settlor of meaning/effect of such clauses, or otherwise, if the advisor is also a trustee, the exemption/indemnity has no effect for that advisor.

5. Retention of information by trustees (mandatory)

Set out that trustees must, so far as is reasonable, retain certain documents (for example, the trust deed and any variations made to it, assets held as trust property).

6. Provision of information to beneficiaries (mandatory)

The Trusts Act should provide that trustees have a mandatory obligation to provide sufficient trust information to beneficiaries to allow the trust to be enforced. There should be a presumption that specific information will be provided, unless a trustee reasonably considers that certain factors suggest it should not be (for example, the age and other circumstances of the beneficiaries, or if there are issues of personal or commercial confidentiality).

Law Commission recommendation

7. Administrative powers (default)

Grant trustees the powers of a natural person in relation to trust property, which must be exercised subject to trustees' duties, the standard of care and purpose of the trust. A schedule should provide commonly used powers for avoidance of doubt purposes.

8. Powers of maintenance and advancement (default)

Re-enact and modernise sections 40 and 41 of the Trustee Act 1956, which empower trustees in private trusts to distribute to beneficiaries outside of the explicit distribution requirements in a trust deed for the beneficiary's advancement, education, maintenance or benefit.

9. Age of majority

Set the age of majority for the purposes of the Act and general trust law at 18 years (down from 20 years) to bring trust law into line with other New Zealand legislation.

10. Appointment of agents (default)

The Trusts Act should set out that trustees can appoint agents to carry out "administrative functions" which should be defined, and will exclude "trustee functions", which will also be defined. Set out certain administrative rules relating to agency appointments.

11. Appointment of nominees and custodians (default)

The Trusts Act should include a power to appoint nominees and custodians of trust property.

12. Power to appoint delegates (default)

The Trusts Act should set out that trustees can, by power of attorney, appoint a delegate to carry out "all or any" of the trustees' powers, duties, discretions. The circumstances in which the power of delegation can be exercised are described and expanded to include temporary mental incapacity and temporary physical incapacity. Set out certain administrative rules relating to delegations.

13. Standard of care

Require trustees to exercise reasonable care and skill when exercising powers of administration.

14. Investment powers and duties (default)

Allow trustees to use modern investment approaches when investing in trust property. Provide a duty to exercise a standard of care, diligence and skill that a prudent business person would exercise.

15. Distinction between income and capital (default)

Allow trustees to use modern investment approaches when investing trust property and exercise their discretion on whether a return on investment is to be treated as income or capital for the purposes of distribution.

16. Apportionment of receipts and outgoings (mandatory for existing trusts, default for new trusts)

Give trustees discretion to determine how to apportion receipts and outgoings between all capital and income accounts, as long as fair and reasonable and in accordance with accepted business practice.

17. Investment managers (default)

Authorise trustees to appoint investment managers and give them authority to make investment decisions (subject to legislative safeguards).

18. Acceptance and rejection of trusteeship

Reflect and clarify the common law by making clear that a person appointed as a trustee of an express trust may accept or reject the trusteeship, and how they may do so. If nothing is done to accept/reject the trusteeship within three months, the trusteeship is deemed to have been rejected.

19. Who may be appointed as a trustee?

Specify restrictions on who may be appointed as a trustee (for example, restricting those under the age of 18, undischarged bankrupts, etc).

20. Mandatory and discretionary grounds for removal of a trustee (mandatory and default)

Modify the existing statutory grounds for removal of a trustee by setting out a list of circumstances when a trustee must be removed, and circumstances where a trustee could be removed if that is desirable for the proper functioning of the trust. The statutory grounds for removal could not be overridden, but the trust deed could include further grounds or detail to guide the exercise of the discretion. Retain the court's general discretion to remove trustees if expedient.

21. Who may remove and appoint trustees, retirement and replacement of trustees (default)

Allow additional people to remove and appoint trustees (holder of an enduring power of attorney, property manager under Protection of Personal and Property Rights Act, liquidator of a corporate trustee). Proposed a process where Public Trust supervises the removal and replacement of a trustee.

22. Appointment of replacement when trustee dies while in office (default)

Provide a process for the replacement of a trustee who dies.

23. Retirement and replacement of trustee (default)

Provide that a trustee may retire by deed signed by person with removal/appointment powers in trust deed, remaining trustees, or the retiring trustee and the replacement trustee acting together. Proposed supervision by Public Trust.

24. Exercise of power to remove and appoint trustees (mandatory)

Restate and clarify existing common law by providing that those exercising a power to discharge and/or appoint trustees (under Recommendations 20, 22 and 23), rather than because they are appointed by the terms of the trust, are subject to a mandatory duty to exercise the power in good faith, honestly, and for a proper purpose.

25. Numbers of trustees (default)

Provide that trustees can be removed without being replaced (provided it does not reduce the number of trustees below the minimum required), and if sole trustees are removed or die, he or she may be replaced with more than one replacement trustee.

26. Transfer of trust property

Provide a duty on departing trustees to transfer property to continuing trustees, and that trustees are divested of trust property if validly removed from office. Public Trust can issue a certificate of vesting to facilitate the transfer of registered trust property, providing an alternative to court for non-contentious cases which arguably should not take up court time. The court's supervision would be retained for contentious cases.

27. Custodian trustees (default)

Re-enact section 50 of the Trustee Act (remuneration of custodian trustees) in modernised form, with clarifications, additions and reforms. These largely clarify the role and obligations of the custodian trustee where a trust has both custodian and managing trustees.

28. Advisory trustees (default)

Re-enact section 49 of the Trustee Act (which provides for the appointment of advisory trustees by the settlor, the court, a trustee or a person with power to appoint a trustee) with the "advisory trustee" renamed the "special trust advisor", and with certain clarifications and reforms.

29. Revocations and variation by beneficiaries (mandatory)

The Trusts Act should state the common law rule that certain beneficiaries can agree to revoke a trust and require trustees to distribute the trust property, and may request trustee to transfer their share to them.

30. Revocation and variation by the court

Expand the court's power to vary and revoke trusts and set out factors for the court to consider when exercising the powers.

31. Extension of trustees' powers by the court

Give the court power to make amendments to the non-distributive administrative provisions of the terms of any trusts where necessary to enable trustees to efficiently manage property.

Law Commission recommendation

32. Reviewing the acts and omissions of trustees

Make rules about review of trustee decisions clearer by introducing a standard for review (whether trustee made a decision (etc) that was “not reasonably open” to them), a 2 step test, and permit the review of actions under trust deed powers. Broaden scope of people who can apply for a review.

33. Other powers of the court – power to give directions

Retain the power to apply to the court for directions and include more detail about the types of circumstances for which directions may be sought. Modernise and clarify current law.

34. Payment of a commission to a trustee

Re-enact section 72 of the Trustee Act with minor modifications and modern drafting. This section authorises payment of commission to a trustee.

35. Beneficiary indemnity for breach of trust

Re-enact section 74 of the Trustee Act with modern drafting. This section gives the court power to make a beneficiary indemnify a trustee for breach of trust

36. Barring claims and future claims

Re-enact section 75 of the Trustee Act with modern drafting. This section allows a trustee to serve upon any claimant or potential claimant a notice requiring them to take legal proceedings (within three months from date of service) to enforce and prosecute the claim in court. At expiry of notice, trustee may apply to court for an order barring the person’s claim.

37. Payments to the Crown

Re-enact sections 77-79 of the Trustee Act with some changes to simplify and remove unnecessary procedural requirements. These sections set out process for trustees to undertake where beneficiaries cannot be located.

38. Distribution of shares of missing beneficiaries

Re-enact section 76 of the Trustee Act with changes to modernise advertising requirements. This section gives court broad powers to approve distributions by trustee where beneficiaries cannot be traced.

39. Protection against creditors by means of advertising

Re-enact section 35 of the Trustee Act with changes to modernise advertising requirements. This section protects trustees from liability where they advertise and give notice to potential creditors before distributing property under a trust.

40. High Court and District Court jurisdiction

Give the District Court concurrent jurisdiction with the High Court to determine matters under the new Trusts Act.

41. Family Court jurisdiction

Expand the jurisdiction of the Family Court to include specific trust matters where the court considers an order or direction is necessary to:

- protect or preserve any property or interest until proceedings can be resolved, or
- give proper effect to any determination of the proceedings before the court.

Where the parties consent, allow the Family Court to make any Trusts Act order to resolve any closely related dispute where this would assist the resolution of the substantive proceedings.

42. Alternative Dispute Resolution (default)

Include new provisions on Alternative Dispute Resolution (ADR) to clarify that trustees have the power to use ADR to settle trust disputes for existing and new trusts, and clarify how ADR works in respect of trusts.

43. The Public Trust (exercise of role and ability to charge fees)

New Trusts Act should provide that:

- where carrying out any of its new roles under the new Act (Recommendations 12, 21-23, 26), the Public Trust should not act where doing so would involve any element of dispute, contention or significant complexity;
- the Public Trust should be accountable to the Government for the exercise of its roles under the new Trusts Act; and
- the Public Trust could charge a reasonable fee for carrying out those roles.

44. The Public Trust (applications for the accounts of trust property to be audited)

Re-enact section 83B of the Trustee Act in modernised form and with modification so that the audit application process still has an application to the Public Trust, but no longer needs an application to a judge in chambers.

45. Standing of the Official Assignee to challenge a trust

46. Appointment of receiver for trusts

Recognise High Court's jurisdiction to appoint a receiver of a trust, to make this ability more accessible and modern.

47. Trustee's right to indemnity (mandatory)

Set out the fundamental and well-understood principles about the liability of trustees and their right to indemnity in a modernised version of section 38 of the Trustee Act.

48. Creditors dealing with trustees

Strengthen the ability of creditors who have acted in good faith, and the Official Assignee, to rely on the trustee's indemnity even where this indemnity has been impaired (for example, because the trustee committed a breach of trust).

49. Perpetuities

Repeal the Perpetuities Act 1964 and replace the current common law perpetuities rule with maximum trust duration of 150 years from trust establishment. Update the rule against accumulations and repeal section 59(2) of the Property Law Act 2007 to reflect the law change.

50. Relationship property

Amend section 44C of the Property (Relationships) Act 1976 to provide that a court may make an order requiring the trustees of the trust to pay or transfer to one partner capital from the trust property.

51. Relationship property

Amend section 182 of the Family Proceedings Act 1980 to cover de facto relationships.

Appendix B – Law Commission’s recommendations categorised as Modernising and sections of the Trustee Act not covered by the Law Commission’s recommendations

Table 15: Law Commission’s recommendations categorised as modernising

	Law Commission recommendation	Proposed transition approach for existing trusts
R8	Powers of maintenance and advancement	Apply from commencement date.
R11	Appointment of nominees and custodians	Apply from commencement date, except for existing appointments.
R14	Investment powers and duties	Apply from commencement date.
R18	Acceptance and rejection of trusteeship	Apply from commencement date.
R27	Custodian trustees	Apply from commencement date.
R28	Advisory trustees	Apply from commencement date. Deeming statement necessary to clarify that anyone appointed as an ‘advisory trustee’ under the Trustee Act 1956 shall be deemed to be appointed as a ‘special trust advisor’ under the new Trusts Act.
R33	Other powers of the court – power to give directions	Apply from commencement date, except that proceedings already commenced need to be completed under the old law.
R34	Payment of a commission to a trustee	Apply from commencement date, except that proceedings already commenced need to be completed under the old law.
R35	Beneficiary indemnity for breach of trust	Apply from commencement date, except that proceedings already commenced need to be completed under the old law.
R36	Barring claims and future claims	Apply from commencement date. Include a statement to clarify that notice given under the old Act could still lead to proceedings under the new Act, because the proposal is to modernise the drafting of section 75 rather than change any policy.
R37	Payments to the Crown	Apply from commencement date.
R38	Distribution of shares of missing beneficiaries	Apply from commencement date, except that proceedings already commenced need to be completed under the old law.
R39	Protection against creditors by means of advertising	Apply from commencement date.
R43	The Public Trust (exercise of role and fees)	Apply from commencement date for Recommendation 12. The other four new functions for the Public Trust are removed under the modification (see Recommendations 21-23 and 26).
R44	The Public Trust (application to audit trust property)	Apply from commencement date.
R45	Standing of the Official Assignee to challenge a trust (being enacted in the Regulatory Systems Amendment Bill, led by the Ministry of Business, Innovation and Employment)	Transition approach to be set out in the Regulatory Systems Amendment Bill.
R47	Trustee’s right to indemnity	Apply from commencement date.

Table 16: Sections of the Trustee Act 1956 not covered by the Law Commission’s recommendations to retain in the new Trusts Act in modern form

Section of Trustee Act 1956 to be retained and modernised	
22	Protection of purchasers, etc, dealing with trustee
23	Devolution of powers or trusts
25	Application of insurance money where policy kept up under any trust, power, or obligation
27	Reversionary interest
28	Valuations
30	Power to concur with others
33A	Trustee may sue himself in a different capacity
34	Protection against liability in respect of rents and covenants
34A	Trustee to have lien on policy money for premiums
36	Protection in regard to notice
37	Exoneration of trustees in respect of certain powers of attorney
38(1)	Implied indemnity of trustees (on liability of co-trustees)
39	Protection of trustee who pays trust money to bankrupt in good faith and without knowledge of bankruptcy
39A	Protection of trustee in handling over chattels to life tenant
39B	Protection of trustee in handing over chattels to infant
41A	Conditional advances for maintenance, etc
42	Protective trusts
42C	Matters to be taken into consideration when exercising powers
42E	Power to adjust interests in trust property of portfolio investment entity
44	Evidence as to a vacancy in a trust
46(4)	Appointment of Public Trust as trustee of last resort
48	Corporations acting as trustees
53	Orders as to contingent rights of unborn persons
54	Vesting order in place of conveyance by infant mortgagee
55	Vesting order consequential on order for sale or mortgage of land
56	Vesting order consequential on judgment for specific performance
58	Power to appoint person to convey
60	Vesting orders in respect of shares in ships and industrial property
61	Vesting orders of charity property
62	Orders made upon certain allegations to be conclusive evidence
67	Persons entitled to apply to court
69	Protection of trustee while acting under direction of court
70	Powers of court to give judgment in absence of a trustee
71	Power of court to charge costs on trust estate
76A	Service of notices, etc, under sections 75 and 76

80	Indemnity to banks and others
86	Fees and commission deemed a testamentary expense
87	Costs of inquiring regarding beneficiaries
88	Life tenant to have powers of a trustee in certain cases
89	Repeals, amendments, and savings

Table 17: Sections from the Trustee Act 1956 not covered by the Law Commission’s recommendations to repeal as they are no longer required

Section of Trustee Act 1956 to be repealed

64B Powers of court in respect of capital dividends

This section deals with the power of the court to make orders and is no longer necessary as the new Trusts Act makes no distinction between capital and income.

81 Operation on bank account of trustees

This section deals with how trusts and trustees can operate and open bank accounts. There appears no policy reason to continue to provide in statute for this, when it can already occur.