

# THE REVIEW OF THE LAW OF TRUSTS

Dr Geoff McLay, Law Commission

**Lindsay:** I'm pleased to introduce Dr Geoff McLay, one of the Commissioners responsible for the New Zealand Law Commission Review of the Law of Trusts. Geoff, the Review started in 2009 and has been a significant project which culminated in the release of the Commission's August 2013 report: Review of the Law of Trusts: A Trusts Act for New Zealand. Can you please tell us a bit more about the project and how it came about?

**Geoff McLay:** The project will review the Trustee Act 1956, the Perpetuities Act 1964 and the trust law generally. It follows an earlier review by the Commission into some aspects of the law of trusts about 10 years ago. This latest Review is the first stage of an even wider review which we hope to undertake into charitable trusts and trustee corporations in due course.

In this first Review, we've focused on the core *institution of the trust*. We believe our Review will strengthen the common understanding and importance of the institution of the trust in New Zealand and give more certainty and guidance to trustees, beneficiaries and settlors.

**Lindsay:** What sorts of things have been covered in your Review?

**Geoff:** The current Trustee Act is very hard to follow so we've looked to modernise some of the concepts. We want the statute to reflect some of the important things that trustees have to do in a way that's not done at the moment. For example, we want to make it clear what a trust is, and what it's not. So that's about making the law of trusts clear and accessible.

Perhaps one of the most important areas we have covered, is that we've recommended that the law should state what duties trustees have. We've recommended six mandatory duties that are essential to the existence of a trust (duties trustees have no matter what the trust deed says) and eleven default duties (duties trustees have, unless the trust deed says differently).

We've also made recommendations to streamline some of the more administrative provisions that are required for when things go wrong in relation to a trust. For example, we've proposed modernising procedures when a trust deed needs to be varied by the Court. We think the new Act will make procedures easier and more effective for people when things need to be fixed up.

So, our focus has been on firstly, trying to make the core obligations of trustees very clear (in a way that they're not clear at the moment) and secondly, trying to fix up some of the vital administrative mechanisms in the statute. We think our proposals will make the day to day administration of trusts easier and the resolution of difficulties, less costly and more efficient.

**Lindsay:** That sounds like a positive outcome. How many trusts are there in New Zealand?

**Geoff:** We estimate there's between 300,000 to 500,000 trusts in New Zealand, so a vast number of people are settlors, beneficiaries or trustees of trusts.

**Lindsay:** With that many trusts, it's important trustees know what they have to be doing...

**Geoff:** New Zealanders ought to be able to easily access the key legal information they need about trusts and we see that as a role of any new Trusts Act. By articulating the trustee duties in the proposed Trusts Act, it will make the law easier for New Zealanders to understand.

When you work through the list of duties we've proposed, they're not intended to be much different from the duties that trustees have at the moment. By setting them out in black and white, it will give the trust the rigor that perhaps in some parts of New Zealand society it doesn't quite have at the moment.

**Lindsay:** What about beneficiary rights? Have any recommendations been made in that area?

**Geoff:** Perhaps one key recommendation which will be of interest to most trustees is around the obligation of trustees to provide information to beneficiaries. We've recommended that the law should reflect what the case law says at the moment, which is that trustees have to provide sufficient information to sufficient beneficiaries to enable the trust to be enforced. However, we've also gone a bit further and suggested a framework for trustees to work through to manage any requests for information from beneficiaries.

The aim with the framework is to give guidance on some of the considerations that trustees need to work through in what can be a very contentious area at times. We accept there'll be occasions where trustees quite legitimately decide not to supply certain information to particular beneficiaries, so we've not been absolute about it. We're trying to take into account those subtleties which are important to what trustees have to deal with. Ultimately settlors select trustees because of their judgment and a key aspect of trusteeship is the exercise of judgement in what you do, taking account of the obligations owed to the beneficiaries.

We've really emphasised the key role of the trustee duties and guarding the institution of the trust as it were. We've taken the view Lindsay, that at the end of the day, it doesn't mean much to owe obligations to somebody, or for someone else to have obligations owed to them, if nobody knows that there's a trust or what the basic nature of that trust is.

**Lindsay:** So that will make it a lot clearer to people setting up trusts and to people managing trusts, that the focus has to be on the beneficiaries of those trusts...

**Geoff:** Yes. Trustees have to administer trusts for the benefit of their beneficiaries and this is emphasised in both the Commission's reports and in our proposed Bill. We think that if a trust is established, then it needs to be taken seriously by the people who are settlors and trustees.

The property held on trust does not absolutely belong to the trustees and clearly they hold the property on trust on behalf of the beneficiaries. The trustees need to behave consistently with their obligations and exercise good faith in all of their dealings. The proposed statute won't be everything you need to know about trusts, but it will make some of the essential things that you need to know much clearer.

**Lindsay:** Thank you Geoff. It's good context for *10 Minute Trustee Success*. The new Act is clearly going to make things like trustee duties more explicit and that has to be a good thing. I'd encourage trustees to go to the Commission website and read the Review of the Law of Trusts: A Trusts Act for New Zealand. The website is [www.lawcom.govt.nz/project/review-law-trusts](http://www.lawcom.govt.nz/project/review-law-trusts).

**Geoff:** Thanks Lindsay.