

24 July 2017

Attorney-General

**Trusts Bill: Advice on consistency with Bill of Rights Act**  
**Our Ref: ATT395/269**

1. We have considered the Trusts Bill for consistency with the New Zealand Bill of Rights Act 1990, scheduled for consideration by Cabinet Legislation Committee on 26 July 2017.
2. We have used the **attached** version 6.10 of the Bill, which is currently undergoing ministerial consultation. If significant changes affecting our advice are made as a result of this consultation, we will provide you with updated advice.
3. We have concluded that while the Trusts Bill engages s 19 of the Bill of Rights Act, it is consistent with the Bill of Rights Act.

**Outline of Trusts Bill**

4. The Trusts Bill responds to the Law Commission's review of trust law in New Zealand. It clarifies core concepts related to express trusts (e.g. what constitutes a trust and what a trustee's duties are), while also making trust legislation more useful in fixing practical problems. It also aims to modernise outdated language and concepts in existing legislation concerning trusts.
5. According to its purpose clause (cl 3), the Trusts Bill restates and reforms New Zealand trust law by:
  - 5.1 Setting out core principles of the law relating to express trusts;
  - 5.2 Providing default administrative rules for express trusts;
  - 5.3 Providing mechanisms to resolve trust-related disputes; and
  - 5.4 Making trust law more accessible.

**Whether s 19 is at issue**

6. Section 19(1) of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on grounds set out in the Human Rights Act 1993. Those grounds include age and disability.

- 6.1 Age means any age commencing with the age of 16.<sup>1</sup>
- 6.2 Disability is defined to include intellectual or psychological disability or impairment and any other loss or abnormality of psychological function.<sup>2</sup>
7. They key questions in assessing whether there is a limit on the right to be free from discrimination are:<sup>3</sup>
- 7.1 Whether the legislation provides for differential treatment or effects between persons in comparable situations on the basis of a prohibited ground of discrimination; and
- 7.2 Whether that treatment imposes a material disadvantage on the person differentiated against.
8. The authorities make clear that a broad and purposive approach is to be adopted.<sup>4</sup> Once a distinction on a prohibited ground is identified, the question of whether a disadvantage arises is a factual one.<sup>5</sup>
9. Where there is a limit on the right to be free from discrimination, the next question is whether the limitation is justifiable under s 5 of the Bill of Rights Act. This inquiry may be summarised as:<sup>6</sup>
- 9.1 Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right?
- 9.2 If so:
- 9.2.1 Is the limiting measure rationally connected with its purpose?
- 9.2.2 Does the limiting measure impair the right no more than is reasonably necessary for sufficient achievement of its purpose?
- 9.2.3 Is the limit in due proportion to the importance of the objective?

#### *Discrimination by age*

10. The Trusts Bill contains several clauses that present a *prima facie* limitation on s 19(1) of the Bill of Rights Act through age-based discrimination. Through cl 9, the Bill defines an adult as a “person aged 18 years or older” and a child as a “person under the age of 18 years”. At cl 19(1) it also defines the age of majority in relation to express trusts as 18.

---

<sup>1</sup> Human Rights Act 1993, s 21(1)(i)(ii).

<sup>2</sup> Human Rights Act 1993, s 21(1)(h).

<sup>3</sup> *Ministry of Health v Atkinson & Ors* [2012] NZCA 184; [2012] 3 NZLR 456 at [109].

<sup>4</sup> *Ministry of Health v Atkinson & Ors* [2012] NZCA 184; [2012] 3 NZLR 456 at [108].

<sup>5</sup> See, e.g., *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

<sup>6</sup> *R v Hansen* [2007] 3 NZLR 1 at [104].

11. Those under the age of 18:
  - 11.1 May find their parent or guardian being given trust information instead of receiving it themselves as a beneficiary (cl 46 – 51);
  - 11.2 Can have income on their interest as a beneficiary applied towards their welfare, including through their parent or guardian (cl 58);
  - 11.3 Can have income used by the trustee in specified ways (cl 59);
  - 11.4 Cannot indemnify a trustee for breach of trust (cl 77);
  - 11.5 Could have their personal property handed over to their parent or guardian instead of receiving it themselves (cl 83, 84);
  - 11.6 Cannot be appointed as a trustee (cl 90); and
  - 11.7 May not receive a fixed share of trust property even if they have an absolute entitlement to that share (cl 115).
12. Accordingly, those aged 16 and 17 are prevented from exercising the full range of powers available to beneficiaries, such as receiving trust information and varying or amending a trust. They are also prevented from being a trustee of express trusts. The provisions outlined at paragraph 11 therefore give rise to a limit on the right to be free from discrimination on the basis of age.
13. Age restrictions necessarily involve a degree of generalisation using age as a proxy measure of maturity and capacity to act responsibly. This avoids having to assess each individual's maturity and responsibility.
14. We consider the limitation imposed by the Trusts Bill to be justified on three grounds.
  - 14.1 The purpose of the Trusts Bill is to articulate core principles and rules relating to express trusts, including trustees' duties and beneficiaries' powers. Given the nature of being a trustee - dealing with property for the benefit of others - this limitation is connected to the purpose of ensuring trustees fully comprehend and can carry out their duties as stated in the Bill. Similarly, the age limitation in relation to beneficiaries is connected to ensuring competent exercise of beneficiary responsibilities.
  - 14.2 Excluding 16 and 17 year olds from holding office as trustees or taking certain actions as beneficiaries is consistent with other areas of the law in which the age of 18 is the age of competence. Examples are the purchase of alcohol under the Sale and Supply of Alcohol Act 2012, appointment as a director under the Companies Act 1993, and registration as an auctioneer under the Auctioneers Act 2013. The age of 18 is also the default age of the end of childhood under the United Nations Convention on the Rights of the Child, which requires states party to provide various protections to children.

- 14.3 The Trusts Bill also does not prevent anyone under the age of 18 from ever being a trustee: Part 5 sets out a process for replacing trustees, under which a person would be eligible to become a trustee after attaining the age of majority. Beneficiaries also have access to the full range of beneficiary powers when they reach 18, unless they otherwise lack capacity to manage their own affairs. Until then, either a parent or guardian or the courts act for beneficiaries. All can reasonably be considered responsible proxies for those under 18 in this context.

*Discrimination by disability*

15. We have also considered whether the Bill also raises the issue of prima facie discrimination on the grounds of disability, in particular intellectual or psychological impairment.
16. The Trusts Bill provides that people who lack capacity cannot be trustees, and cannot exercise the full range of beneficiary powers.<sup>7</sup> Capacity is judged in terms of a person's ability to manage their own affairs (for a beneficiary), or perform the functions of a trustee (for a trustee). A person will lack capacity if they are:
- 16.1 Subject to an order appointing a manager for their property under s 31 of the Protection of Personal and Property Rights Act 1988; or
- 16.2 Have a trustee corporation managing their property under ss 32 or 33 of the Protection of Personal and Property Rights Act.
17. If a person has a property manager or trustee corporation managing their property, an assessment has already been made by the court that they wholly or partly lack the competence to manage their own affairs in relation to their property.<sup>8</sup> In making that decision the court is directed to make the least restrictive intervention possible in the management of the affairs of the person concerned.<sup>9</sup>
18. Requiring a trustee to have the capacity to carry out his or her functions is linked to the important purpose of sound trust management. Unless a person with an intellectual or psychological disability has a property manager or trustee corporation managing their property, whether they lack the capacity to carry out the functions of a trustee would be a factual question to be decided when they are being considered for appointment.
19. Similar reasoning applies to the provisions applying to beneficiaries who lack capacity to manage their own affairs. The requirement for a beneficiary to have capacity to manage their own affairs is a necessary skill for exercising the responsibilities and rights of a beneficiary.
20. Accordingly, to the extent that the provisions regarding capacity constitute prima facie discrimination on the basis of disability, they are a justified limitation on that right.

---

<sup>7</sup> See, for example, cl 90(2)(c) and (4) in respect of trustees and cl 45 and paragraph (b) of the definition of "lacks capacity" for a beneficiary.

<sup>8</sup> Protection of Personal and Property Rights Act 1988, s 25(1)(b).

<sup>9</sup> Protection of Personal and Property Rights Act 1988, s 28(a).

**Review of this advice**

21. In accordance with Crown Law protocol, this advice has been reviewed by Vicki McCall, Crown Counsel.



---

Helen Carrad  
Crown Counsel

**Noted**



---

Hon Christopher Finlayson  
**Attorney-General**  
24 / 07 / 2017