

16 August 2019

Public Consultation
Inland Revenue
PO Box 2198
Wellington

By email: PublicConsultation@ird.govt.nz

Exposure Draft 0210: Application of discretion in section 18D(2) – an exception to confidentiality

1. Introduction

- 1.1. The New Zealand Law Society welcomes the opportunity to comment on Exposure Draft 0210: *Application of discretion in section 18D(2) of the Tax Administration Act 1994 – an exception to confidentiality* ('exposure draft'). The exposure draft replaces Standard Practice Statement 11/07: *Application of discretion in section 81(1B) of the Tax Administration Act 1994 – The secrecy provisions*, which has been withdrawn.
- 1.2. The exposure draft sets out the Commissioner's proposed practice regarding the new confidentiality rules in the Tax Administration Act 1994 ('TAA') that replaced the former secrecy rule, as enacted by the Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019.

2. General comments

- 2.1. Section 18 of the TAA protects sensitive revenue information from disclosure by Inland Revenue by requiring all officers to keep such information confidential unless the disclosure is permitted under ss 18D-18J and schedule 7 of the TAA. Those exceptions to the confidentiality rule provide IR with a broad discretion to disclose sensitive revenue information. However, the exposure draft focuses on the general exception whereby sensitive taxpayer information may be disclosed in carrying out or supporting a function of the Commissioner, and the disclosure is considered to be reasonable by reference to five factors set out in s 18D(2)(b) of the TAA.
- 2.2. The draft could be improved in terms of consistency of the use of defined terms and the examples in the Appendix could be set out in a more clearly and user-friendly manner. As they stand, the examples in the Appendix are difficult to follow.

3. Specific comments

Paragraph 7

Paragraph 7 sets out the relevant legislative provisions governing tax confidentiality and permitted disclosures that enable IR to disclose sensitive revenue information. However, Schedule 7 Part A (2) of the TAA has been paraphrased incorrectly [on page 5]:

3.1.1. Clause (2)(a) does not contain the words “*or performing or supporting a function lawfully conferred on the Commissioner under a revenue law*”. Rather, clause 2(a) was replaced and clause 2(c) was repealed on 26 June 2019 by section 106(1) of the Taxation (Annual Rates for 2019–20, GST Offshore Supplier Registration, and Remedial Matters) Act 2019, with effect from 18 March 2019.

3.1.2. As a result, the present Schedule 7 Part A (2) of the TAA should read as follows:

Schedule 7 Part A

2 Disclosures for carrying into effect revenue law.

Section 18 does not prevent the disclosure of sensitive revenue information -

(a) for the purpose of carrying into effect a revenue law:

(b) to a person or entity specified in clauses 3 to 13 for the purpose and about the matter described in the provision, subject to any conditions set out in the provision.

(c) (repealed)

3.1.3. The commentary states in brackets that sensitive revenue information is “(essentially taxpayer specific information)”. As s 16C(3) of the TAA defines the meaning of sensitive revenue information the comment in brackets is unnecessary.

Paragraph 13

3.2. Paragraph 13 refers to “*Schedule 7 Part B (which permits disclosures to taxpayers and their representatives)*”, however, that Schedule in fact refers to “*Disclosures to persons or their representatives*”.

Paragraph 24

3.3. A sentence should be added to this paragraph to explain that, in the example of a taxpayer making misleading public statements, the disclosure of sensitive revenue information must be made “*in carrying out or supporting*” a lawful function of the Commissioner, to satisfy the first part of the statutory test in s 18D(2)(a) of the TAA. Only if that necessary requirement is satisfied can the relevant officer go on to consider whether disclosure is reasonable by having regard to the factors in s 18D(2)(b) of the TAA.

As shown in example 1 in the Appendix, if the first statutory test cannot be satisfied, the Commissioner cannot proceed under the second test to consider the factors in s 18D(2)(b).

3.4. For the avoidance of doubt, this should be made clear in the example at paragraph 24 and throughout the draft, for the sake of clarity and consistency in the application of this discretion.

Examples 3, 4 and 5 Appendix

3.5. With regard to these examples, it appears that the s 18D(1) requirement contained in the table uses the wording “revenue law”, “income tax act” and “ITA Act” interchangeably. The term “revenue law” is defined in s 16C(1) and the wording of s 18D(1) specifically uses the term “revenue law”. The examples should refer to “revenue law” which is defined in s 16C of the TAA and includes the Inland Revenue Acts, which incorporates the Income Tax Act with the definition. Consistent wording would assist the clarity of the policy.

Example 4 in appendix

- 3.6. On page 20, in the paragraph immediately below the title “*Example 4: Discussions with tax pooling intermediary*” and at the end of the first sentence thereafter, the commentary states “... *on behalf of a tax agent or its advisor*”. The context would suggest that the word “*advisor*” is a typo as it should refer to the “*client*”.
- 3.7. At the top of page 21 in the table illustrating the process to be followed under s 18D(2)(a), the commentary on whether the particular proposed disclosure would satisfy the test of “*supporting*” a function of the Commissioner is somewhat obscure.
- 3.8. We understand that the commentary means to say that, even if the proposed disclosure does not directly enable the Commissioner to collect taxes, it could still be argued that the proposed disclosure *supports* that tax collection. If so, further clarification on that point would be helpful.

Example 5 in appendix

- 3.9. Similarly, on page 23, in the table illustrating the process under s 18D, the commentary on whether the particular proposed disclosure would satisfy the test of “*supporting*” a function of the Commissioner could be improved to provide more clarity for the reader.

We hope you find these comments helpful. If you wish to discuss them, the convenor of the Law Society’s Tax Law Committee, Neil Russ can be contacted via the Law Society’s Law Reform Adviser Emily Sutton (Emily.Sutton@lawsociety.org.nz / 02040166356).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Herman Visagie', with a large, sweeping flourish at the end.

Herman Visagie
Vice President