

31 January 2022

Public Consultation
Inland Revenue
Wellington

By email: public.consultation@ird.govt.nz

Re: ED0237 Section 17GB notices – the Commissioner’s power to obtain information for tax policy purposes

1. Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the draft Operational Statement: *Section 17GB notices – the Commissioner’s power to obtain information for tax policy purposes*.
- 1.2 The Law Society’s comments are set out below, referencing relevant paragraphs in the Operational Statement.

2. General comment

- 2.1 As a matter of process, and when considered alongside the actions of the Commissioner in November 2021, the Operational Statement is inconsistent with the Commissioner’s obligation to protect the integrity of the tax system under section 6(1) of the Tax Administration Act 1994 (including the public perception of that integrity, section 6(2)(a)). The Operational Statement was issued for consultation some time after the Deputy Commissioner Policy and Regulatory Stewardship sent out letters to approximately 400 individuals, requiring them to provide information under section 17GB.
- 2.2 Given that the Commissioner has acknowledged that there are privacy and confidentiality implications of notices issued under section 17GB, the delay in issuing an Operational Statement (and to obtain a Privacy Impact Assessment from the Office of the Privacy Commissioner), and the decision to proceed in its absence, is regrettable.
- 2.3 Section 17GB is a relatively new information gathering power, and as acknowledged in the introduction to the Operational Statement, it is different from other information gathering powers the Department has. The Commissioner stated in OS13/02: “*Section 17 empowers the Commissioner to require any person to furnish in writing any information and to produce for inspection any documents that are considered “necessary or relevant” to exercise the Commissioner’s statutory functions.*” Section 17 notices are, however, used in a very different context. The Operational Statement should not, therefore, be presented at paragraph 8 as a ‘clarification’ of the Commissioner’s powers. As it is a new power, which will operate for a different purpose to existing information gathering powers, the Operational Statement would

benefit from examples of when and how the power might be exercised, and (importantly) when the power would not be exercised.

- 2.4 With reference to paragraph 2 of the Operational Statement, it is unlikely legal professional privilege or the right to non-disclosure of a tax advice document will be engaged in relation to an information request “*relating to the development of a policy for the improvement or reform of the tax system.*”

3. When can the power be used?

- 3.1 At paragraph 10, the Operational Statement ought to specify the authority for the Commissioner’s statement that ‘*the Court’s have interpreted section 17B as being expressed in the widest terms,*’ and the legal basis on which the Commissioner relies to extend that authority to section 17GB.
- 3.2 At paragraph 11, the Law Society is concerned that the recipients of notices to which section 17GB applies could believe that the section provides the Commissioner with a policy development power that she has not previously had. Whilst the section creates an information-gathering power, it does not create a policy making power. That power must be found elsewhere. The Operational Statement should identify where that is.
- 3.3 Further, the Law Society is concerned that information obtained under section 17GB could be used for political or other non-policy purposes. The Operational Statement should provide an assurance that this will not occur.
- 3.4 At paragraph 12, it would be useful to make clear than an individual is not obliged by a section 17GB notice to create information or bring a document into existence.
- 3.5 Paragraph 14 refers to the Commissioner’s ability to require information pursuant to section 17GB without first having sought to obtain the information voluntarily. Where information can be obtained without the use of section 17GB and the threat of enforcement action, this is preferable. However, it is not clear when the Commissioner might instead seek the voluntary provision of information. The Operational Statement should clarify the circumstances in which that might (and should) occur, as is the case with OS13/02, in relation to section 17.

4. How will the power be used?

- 4.1 Paragraph 18 states the Commissioner has delegated the power to issue notices under section 17GB to only senior officials, currently the Deputy Commissioner (PaRS), Policy Directors, and the Chief Tax Counsel.
- 4.2 The Law Society questions whether it is appropriate to delegate this power to the Chief Tax Counsel. Section 17GB may be used only for policy purposes and as discussed below, operational measures must be taken to ensure that the collection of this information does not improperly inform the subsequent use of information gathering powers for compliance and administration purposes.

5. Limits to the use of information collected under this power

- 5.1 Paragraphs 4 and 19 state, without reference to relevant legislative authority, that ‘*Proceedings includes criminal prosecutions and civil tax challenges.*’ However, this seems to ignore the definition of proceedings in section 3 of the TAA: ‘*proceedings means proceedings commenced before a hearing authority under Part 8 or Part 8A; and includes a document that a tax law requires to be files with a hearing authority, or to be served on a person, in connection with the proceedings.*’
- 5.2 At paragraph 20, the Law Society agrees that information must be held in a manner so that it cannot be used for purposes excluded by section 17GB. However, it is not acceptable to state that operational measures *may* be taken to ensure this. Such steps must be taken and should

be set out with particularity in the Operational Statement, that being the purpose of the document.

- 5.3 The Commissioner has identified she is unable to prevent the information being made available to overseas tax authorities or under other lawful information requests. This means she is unable to ensure that information-sharing requests from other countries, and subsequent civil or criminal proceedings, will not occur following the collection of the information. The only way the Commissioner could achieve this is with anonymous information gathering.
- 5.4 Accordingly, the Law Society considers the Commissioner should always strive to collect the information in a way that does not disclose the identity of the person providing the information, or the identity of the person whose information is provided (recognising these may not be the same people). Only in exceptional circumstances, where it is not otherwise possible, should the Commissioner proceed to hold identifiable data about taxpayers obtained pursuant to section 17GB, and then only for the minimum period necessary. These matters should be dealt with carefully and clearly in the Operational Statement.
- 5.5 Paragraph 21 suggests that information gathered under section 17GB could be used for business purposes other than policy, where it would not lead to proceedings against the individual who has provided the information. The Law Society considers it is inappropriate for information gathered under section 17GB to be used for other business purposes within the Department. To suggest that it may be used in this way undermines the premise on which this new power is based.
- 5.6 Paragraph 22 contemplates that where information has been obtained under section 17GB, the Commissioner may then use other powers to obtain that same information for compliance purposes. Where a taxpayer has provided information under section 17GB, that information cannot be used for the purposes of civil or criminal proceedings, and the Law Society considers this also means the Commissioner cannot use alternative powers to then obtain that information for use in proceedings.
- 5.7 To allow otherwise would be contrary to the protection afforded by section 17GB(2). The Commissioner cannot 'unknow' the information that has been collected under section 17GB. This reinforces the need for collection and storage of information in an anonymous manner, ensuring that the use of other powers to obtain information is not informed by knowledge obtained as a result of first using section 17GB. At a minimum, the Operational Statement should identify that such conduct is not permissible, and the operational measures that will be in place to mitigate this risk.
- 5.8 Finally, we note that the individual providing information could be the owner of a taxpayer, a beneficiary, or an employee. There is no protection against the use of information by the Commissioner in relation to, for example, an audit or investigation in relation to a unit trust in which a person receiving a request has an investment.

6. Privacy Considerations

- 6.1 Paragraph 25 should set out the circumstances in which the Commissioner may be required to disclose information (for example, as a result of a request made under the information-sharing provisions in a double tax agreement or tax information exchange agreement), and the circumstances in which, and agencies to which, the Commissioner could choose to, or be obliged to, disclose under sections 18C – 18K and Schedule 7 of the TAA.

7. Conclusion

- 7.1 The Law Society appreciates the opportunity to provide feedback on the draft Operational Statement. As you know, the Law Society has previously expressed concerns around the

development of the section 17GB power, its use, and the need for safeguards. We remain available to discuss this further if required.

Nāku noa, nā

A handwritten signature in cursive script, appearing to read "Arti Chand".

Arti Chand
Vice President