

23 December 2020

Hon David Parker  
Minister of Revenue and Attorney-General  
Parliament Buildings  
**Wellington**  
By email: [David.Parker@parliament.govt.nz](mailto:David.Parker@parliament.govt.nz)

Tēnā koe Minister Parker

**Re: Taxation (Income Tax Rate and Other Amendments) Bill – information-gathering provisions**

**1. Introduction**

- 1.1. We are writing to you in your role as both Revenue Minister and Attorney-General, to raise serious concerns about the information-gathering provisions in the Taxation (Income Tax Rate and Other Amendments) Bill which were recently introduced and enacted under urgency<sup>1</sup> without prior notification to stakeholders and without public consultation. The new information-gathering provisions are potentially far-reaching, and have rule of law, Bill of Rights and privacy implications, as noted below.
- 1.2. In our view these provisions illustrate the concerns about current tax policy development and the quality of tax legislation we expressed in our letter to you dated 8 December 2020 (copy **attached** for reference). The provisions potentially represent an overreach and are an example of the failure to observe the Generic Tax Policy Process – a process in place since 1995, "designed to ensure better, more effective tax policy development through early consideration of all aspects – and likely impacts – of proposals, and increased opportunities for public consultation".<sup>2</sup>
- 1.3. The way in which the provisions were pushed through under urgency raises significant constitutional and legislative quality concerns. We can see no justification for these provisions being enacted under urgency and without proper supporting information about the compliance impact on taxpayers.
- 1.4. We would appreciate the opportunity to meet with you in the new year to discuss the concerns.

**2. The information-gathering provisions: clauses 33, 35**

- 2.1. The provisions – new section 17GB (clause 33) and new sections 59BA and 59BAB (clause 35) of the Tax Administration Act 1994 – have been reviewed by the Law Society's Tax Law and Rule of Law Committees. The provisions raise a number of concerns:
  - 2.1.1. There was no public notification or consultation with key stakeholders or the public about the clauses prior to the Bill's introduction, and no select committee scrutiny. Public transparency and accountability have been limited to the debates under urgency in the House. The lack of independent external scrutiny is a missed

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<sup>1</sup> Taxation (Income Tax Rate and Other Amendments) Bill introduced 1.12.20 and passed through all stages 2.12.20, Royal Assent 7.12.20.

<sup>2</sup> <https://taxpolicy.ird.govt.nz/about-us/how-we-develop-tax-policy>.

opportunity to identify and rectify potential problems prior to enactment. The lack of notification and consultation also undermines the trust and goodwill of key stakeholders such as the Law Society and CA ANZ who have invested considerable time and effort over the course of 2020 in supporting IR and the tax system's Covid-19 response.

2.1.2. New section 59BA imposes significant new requirements for annual returns from the 2021-2022 income tax year, which should have been the subject of careful consideration and consultation, and which need not have been rushed through under urgency.

2.1.3. The Commissioner is also given a discretionary power for the preceding 7 income years (from the end of the 2013-2014 income year) to request information that *"would be required to be provided under section 59BA if the period began after the end of the 2020-21 income year"*. That is in practical terms a far-reaching provision having retrospective effect. It affects the rights of taxpayers in a fundamental way and should not have been imposed without proper process.

2.1.4. The lack of consultation is noted in the supporting materials to the Bill as a risk, meaning there is incomplete information about the compliance costs to be incurred by trusts:

"Under these proposals additional tax and compliance costs would be imposed on a large number of trustees – Inland Revenue receives approximately 245,000 income tax returns from trustees per year. The absence of consultation is likely to result in Inland Revenue having a limited understanding of the compliance costs that trusts will face with the new information requirements and how large these costs are. The RIS was therefore unable to determine whether the potential integrity benefits from the proposed trust information disclosure outweighed the compliance costs it would impose."

2.1.5. The new information requirements for trusts, and their retrospective effect, will require many trustees to prepare and provide reports which they have not had to prepare and provide in the past, at an unknown (but likely considerable) cost. With respect, the plan to conduct a post-implementation review in 2021 of the compliance burdens imposed on trusts is not a satisfactory answer to the lack of proper information and analysis.

### **3. Constitutional, Bill of Rights and legislative quality concerns**

3.1. The Commissioner's broad powers under new section 17GB to gather information for tax policy purposes are also far-reaching: "A person must, when notified by the Commissioner that the person is required to provide information under this section, provide any information that the Commissioner considers relevant for a purpose relating to the development of policy for the improvement or reform of the tax system." This raises serious questions, including: what does this mean, where are the boundaries of this power, and what are the protections against abuse and overreach?

3.2. The new section 17GB power raises Bill of Rights concerns which we consider have not been fully addressed and resolved:

3.2.1. As Attorney-General you issued a section 7 report on the Bill, identifying that clause 33 appeared to be inconsistent with sections 14 (freedom of expression: the right not to be compelled to disclose) and 21 (the right to be free from unreasonable search and seizure) of the New Zealand Bill of Rights Act. The report concluded the inconsistencies would be remedied by a provision similar to section 38 of the Statistics Act 1975:

“... a similar provision in the Bill would protect the interests of those who provide information for purposes relating to the development of policy for the improvement or reform of the tax system by ensuring that the information would not subsequently be admissible as evidence against them”.<sup>3</sup>

3.2.2. The clause was subsequently amended in the House, but the new section 17GB(2) does not go as far as section 38.<sup>4</sup> Section 38 prohibits use of the information in “any proceeding”, and section 17GB(2) only prohibits use of the information in proceedings against the person who provided it.

3.2.3. This may have the effect that, for example, information provided under section 17GB(1) by a person could result in a proceeding against a family member, with the person who disclosed the information being compellable in that proceeding to give oral testimony. It is not clear whether such a result would be inconsistent with the Bill of Rights, and it is not something that was identified in the section 7 report.

3.2.4. In addition, as you noted during the debates in the House in relation to the new section 17GB(3), the Commissioner having acquired information under section 17GB can then require the same information under another power (such as section 17) and prosecute based on that –

“We have also passed an amendment to the clause at the committee stage to make it clear that the commissioner cannot use information collected pursuant to the new section 17GB as evidence in court against the person who provided it. *However, this restriction will not apply to information obtained by the commissioner under any other provision in the Tax Administration Act 1994, such as her main information-gathering power in section 17B, whether that information is sought or collected before or after a section 17GB information collection occurs.*”

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<sup>3</sup> *Report of the Attorney-General under the Bill of Rights Act on the Taxation (Income Tax Rate and Other Amendments) Bill*, at [20].

<sup>4</sup> Section 38 Information is privileged – “Except in respect of a prosecution under this Act, no return made pursuant to this Act and no copy of a schedule or return in the possession of the respondent *shall be disclosed or used as evidence in any proceedings whatever*, and no person who has completed a statutory declaration under [section 21](#) shall be compellable in any proceedings whatever to give oral testimony regarding the return or to produce any return, document, or record with respect to any information obtained in the course of administering this Act, except in the manner provided by this Act.” [emphasis added]

This section recognises that the primary purpose of section 17B is in obtaining information for tax policy purposes while ensuring that the commissioner's other information-gathering powers are maintained. The new information-gathering powers to collect information from trustees in order to gain insight into whether the top personal tax rate of 39c is working effectively will provide better information to understand and monitor the use of structures and entities by trustees."<sup>5</sup> [emphasis added]

- 3.2.5. It is a criminal offence not to provide the information requested (unless the person proves the information is not in their "knowledge, possession or control": section 143(2)(a) Tax Administration Act), and this is an absolute liability offence.
- 3.2.6. In addition to the potential breach of the Bill of Rights, there are also privacy impacts. The disclosure of private financial affairs under compulsion of "any information that the Commissioner considers relevant for a purpose relating to the development of policy for the improvement or reform of the tax system" is an extraordinarily broad, intrusive power. If this additional information-gathering power was considered necessary, it should have been subject to full and public scrutiny in the usual way through the select committee process.
- 3.2.7. The use of urgency, as part of a taxation rate adjustment, meant there was no time for stakeholders including the Law Society to make submissions that might have led to amendments that better protected the rights of New Zealanders. Clearly the government considered the new information-gathering provisions were needed as a matter of taxation policy, but in the Law Society's view there was nothing about these reforms that justified their inclusion in an urgent taxation rate adjustment bill. While the government's general commitment to quality legislation as set out in the Legislation Guidelines is commendable, the Law Society believes the government did not live up to that commitment with this Bill.

#### **4. Conclusion**

- 4.1. In short, we consider the introduction and enactment of the new information-gathering provisions under urgency and without adequate scrutiny is highly undesirable and may well result in litigation and the need for remedial amendments. The provisions should have been developed in the usual way (via GTPP) and put in the next Tax Bill, to allow the full range of risks and compliance issues to be properly evaluated by the Finance and Expenditure Committee, tax experts and interested stakeholders.

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<sup>5</sup>

Third Reading debate 2 December 2020 ([https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb\\_20201202\\_20201203\\_16](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20201202_20201203_16)).

- 4.2. We would appreciate the opportunity to meet and discuss these concerns with you and your advisers, and we will contact your office to find a time that is convenient for you in early 2021. If you have any questions in the meantime, please contact Fazleen Ismail, General Manager External Relations ([fazleen.ismail@lawsociety.org.nz](mailto:fazleen.ismail@lawsociety.org.nz)).

Nāku iti noa, nā



Arti Chand  
**NZLS Vice-President**

Cc: Naomi Ferguson, Commissioner of Inland Revenue

Encl: NZLS letter dated 8 December 2020

8 December 2020

Hon David Parker  
Minister of Revenue  
Parliament Buildings  
**Wellington**

By email: [David.Parker@parliament.govt.nz](mailto:David.Parker@parliament.govt.nz)

Tēnā koe Minister Parker

**Re: Covid-19 response and tax legislation reform**

**1. Introduction**

- 1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa congratulates you on your appointment as Minister of Revenue. We wish you all the best in the role and look forward to continuing our good working relationship with your officials.
- 1.2. As you know, the Law Society is the professional body for lawyers in New Zealand and is responsible for regulating and representing the legal profession. In particular, we have a statutory mandate to “*assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law*”.<sup>1</sup> This is central to our role speaking out in the public interest and in representing the profession on issues such as access to justice, the operation of the justice system, and the quality of legislation.
- 1.3. We are writing to you to express our continuing support for the very close engagement and co-operation between the Law Society’s Tax Law Committee, other key tax stakeholders such as Chartered Accountants Australia & New Zealand, and Inland Revenue. There has been a sustained, collaborative effort from all parties during the Covid-19 lockdown and subsequently, to address tax operational and policy issues at pace, and this has helped support the resilience of New Zealand’s tax policy settings during the crisis.
- 1.4. The pandemic has however also exacerbated some long-standing issues regarding the effectiveness of current tax policy development and the quality of tax legislation. The issues are briefly set out below, with our thoughts on potential solutions. We have raised the issues with Revenue officials and would welcome the opportunity to meet with you and your advisers to discuss in more detail.
- 1.5. We also note that Revenue officials do complex and commendable work, often under time pressure, and the comments that follow are not intended as a criticism of officials but rather to emphasise some systemic concerns.

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1 Lawyers and Conveyancers Act 2006, section 65(e).

## **2. Tax policy development – current engagement, and use of the Generic Tax Policy Process**

- 2.1. The Law Society acknowledges and supports the efforts the Commissioner of Inland Revenue has made to ensure the rule of law was upheld during the response to the Covid-19 crisis, particularly in relation to the extended use of the Commissioner’s care and management powers,<sup>2</sup> and that consultation during the year was undertaken as far as possible in the circumstances.
- 2.2. However, the ongoing response to the crisis requires commitment to the fundamental values underpinning our legal system, including the checks and balances provided by public scrutiny and input into the tax policy and law-making process. As New Zealand moves into the pandemic recovery stage, we should return as soon as practicable to the use of the long-standing Generic Tax Policy Process (GTPP) as the preferred framework for developing tax policy and legislation.
- 2.3. The GTPP is designed to “ensure better, more effective tax policy development through early consideration of all aspects – and likely impacts – of proposals, and increased opportunities for public consultation”, and that “tax initiatives are subject to public scrutiny at all stages of their development”.<sup>3</sup> Early, informed consultation helps ensure effective and workable laws, and reduces the need for subsequent remedial reforms. By engaging stakeholders and allowing sufficient time for consideration and meaningful consultation (including providing draft legislation at an early stage), Inland Revenue is able to develop practical and sustainable reforms.
- 2.4. Currently, reform proposals are often released on a confidential basis at short notice with consultation limited to key stakeholders, so that only a small number of people are able to review and provide comment on proposed reforms. This seems to be emerging as a new standard approach to tax law development, resulting in law that is less effective and workable, and increasing the need for subsequent remedial reforms. We acknowledge the need for a reasonably speedy legislative process, but it is essential to incorporate appropriate quality checks and independent scrutiny. This includes returning to the GTPP as the standard.

## **3. Late, substantive legislative changes via SOPs**

- 3.1. A related concern is that the sheer volume and complexity of tax legislation means there is an over-reliance on supplementary amendments and secondary legislation. There appears to be an increasing trend toward routine use of Supplementary Order Papers to introduce new reforms, often late in the tax development process and without any adequate external scrutiny. Previously there was a presumption against the frequent use of SOPs, whereas now SOPs are commonly used to ‘mop up’ issues and tack reforms onto bills that are already in front of select committee or in their late stages in the House.
- 3.2. This approach results in tax law being developed in a piecemeal way. By contrast, in other areas, the Parliamentary Counsel Office develops legislation in a disciplined and predictable way, requiring clear drafting instructions and developing draft legislation at arm’s length.

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2 <https://taxpolicy.ird.govt.nz/-/media/project/ir/tp/publications/2019/2019-ir-cab-leg-19-sub-0012/2019-ir-cab-leg-19-sub-0012-pdf.pdf>

3 <http://taxpolicy.ird.govt.nz/how-we-develop-tax-policy>

The Law Society's Tax Law Committee convenor Neil Russ would welcome an opportunity to meet and discuss these issues, and we will contact your office to find a time that is convenient for you. If you have any questions in the meantime, Mr Russ can be contacted through the Law Society's General Manager External Relations, Fazleen Ismail ([fazleen.ismail@lawsociety.org.nz](mailto:fazleen.ismail@lawsociety.org.nz)).

Nāku iti noa, nā



Arti Chand  
**NZLS Vice-President**

Cc: Naomi Ferguson, Commissioner of Inland Revenue  
David Carrigan, Deputy Commissioner, Policy and Regulatory Stewardship, Inland Revenue  
Emma Grigg, Tax Policy Director, Policy and Strategy, Inland Revenue