

17 March 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Taxation (Annual Rates for 2020-21, Feasibility Expenditure, and Remedial Matters) Bill Supplementary Order Paper

Purpose

1. The Minister of Revenue is seeking to present the House with a Supplementary Order Paper (SOP) on the Taxation (Annual Rates for 2020-21, Feasibility Expenditure, and Remedial Matters) Bill (the Bill). The Bill was vetted prior to its introduction in 2020 and found to be consistent with the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).
2. There is no statutory requirement for SOPs moved after a Bill's introduction to be formally vetted for consistency with the Bill of Rights Act, however it is possible for you to present a paper to the House (Standing Order 381(1)). You have requested advice on the consistency of this SOP with the Bill of Rights Act. Therefore, we have considered whether the SOP is consistent with the rights and freedoms affirmed in the Bill of Rights Act.
3. We have not yet received a final version of the SOP. This advice has been prepared in relation to the latest version of the SOP (IRD 22553-/1.31). We will provide you with further advice if the final version of the SOP includes amendments that affect the conclusions in this advice. We understand that sensitive policy matters will be incorporated in a further version of the SOP. Advice on the consistency of these matters with the Bill of Rights Act will be provided at a later date.
4. We have concluded that the SOP appears to be consistent with the right to freedom of expression, and right to be secure against unreasonable search and seizure, as affirmed in ss 14 and 21 of the Bill of Rights Act. We set out our analysis below.

Summary

5. The SOP amends the Tax Administration Act 1994 (the principal Act), the Income Tax Act 2007, the KiwiSaver Act 2006 and the Unclaimed Money Act 1971. These amendments fall into three categories: policies progressed as part of the Government's COVID-19 response, changes to policies already included in the Bill, and remedial and technical amendments.
6. Our advice focuses on cl 69C, which is one of the remedial and technical amendments to the principal Act. We have not identified any Bill of Rights Act concerns arising from the other proposals in the SOP.
7. Clause 69C amends s 17H of the principal Act to expand its application to an information demand made under s 17GB. A demand made under s 17GB (a s 17GB demand) is a demand for information the Commissioner of Inland Revenue (Commissioner) considers relevant for a purpose relating to the development of policy for the improvement or reform of the tax system. It is proposed under cl 69C that where a person does not fully comply

with this demand, the Commissioner can apply to the District Court, under s 17H of the principal Act, for a court order requiring the person to provide the information. This is in addition to the Commissioner's existing power to prosecute an individual for non-compliance with a s 17GB demand (s 143(1)(b)).

8. We understand that the objectives for including cl 69C in the SOP are to ensure the Commissioner can obtain the information it seeks and to align s 17GB with existing information-gathering provisions.
9. We have considered the cumulative impact of cl 69C with existing mechanisms to compel an individual to provide the information demanded. In our view, cl 69C engages the right to freedom of expression (s 14) and the right to be secure against unreasonable search or seizure (s 21). While we consider the impact of having two avenues to prosecute an individual for non-provision of information appears excessive, we have concluded that cl 69C appears to be consistent with ss 14 and 21 of the Bill of Rights Act.

The SOP

10. As set out in the Explanatory note to the SOP, the amendments to the principal Act are to be remedial and technical amendments to correct cross-references in provisions of the principal Act to include references to s 17GB.
11. Section s 17GB was inserted into the principal Act on 7 December 2020 by the Taxation (Income Tax Rate and Other Amendments) Act 2020. As noted above, s 17GB provides that the Commissioner may compel information from a person for a purpose relating to tax policy development. Failure to comply with a s 17GB demand is a criminal offence (s 143(1)(b)). A person is liable upon conviction to a fine not exceeding \$4,000 for the first offence, with increasing fines for subsequent offences.
12. The Taxation (Income Tax Rate and Other Amendments) Bill was vetted prior to its introduction and proposed s 17GB appeared to be inconsistent with the right to freedom of expression and the right to be secure against unreasonable search and seizure (ss 14 and 21 of the Bill of Rights Act). Your report on the Taxation (Income Tax Rate and Other Amendments) Bill, presented to the House of Representatives under s 7 of the Bill of Rights Act, recommended a change to the Bill which you considered would ensure proposed s 17GB would be consistent with the Bill of Rights Act. This change was implemented.¹
13. Our analysis focuses on cl 69C of the SOP. Clause 69C amends s 17H of the principal Act so that it would apply to s 17GB demands. Section 17H currently provides (as relevant):

17H Court may make order for provision of information

Applying to Court for orders

- (1) When a person does not fully comply with an information demand ..., the Commissioner may apply to the District Court for an order requiring the person to provide the information or the tax return, as applicable.

¹ Section 17GB(2) and (3), as enacted, provide that the Commissioner must not use, as evidence in proceedings against a person, information provided by that person in response to a demand for information for purposes relating to the development of policy for the improvement or reform of the tax system, cannot be subsequently admissible in proceedings against the person who provided the information.

Application as alternative remedy

- (2) The Commissioner may make an application under subsection (1) as well as, or instead of, prosecuting the person.

...

Court review

- (5) The Court may—

- (a) order the information to be provided to the Court; and
- (b) review the information to determine—
 - (i) whether to make an order requiring the person to provide the information to the Commissioner; and
 - (ii) whether the information is the subject of legal professional privilege ...; and
 - (iii) whether the information is contained in a tax advice document, and if so, whether it is required to be disclosed under section 20E, 20F, or 20G.²

Court orders

- (6) The Court may order the person named in the application to provide the information, or a part of the information, to the Commissioner if and to the extent to which the Court is satisfied that the information—

- (a) is likely to be relevant for a purpose relating to the administration or enforcement of a revenue law or a matter arising from, or connected with, a function lawfully conferred on the Commissioner; and
- (b) is not the subject of legal professional privilege....

...

14. Under s 143G of the principal Act, failure to comply with a court order is a criminal offence and the individual is liable on conviction to imprisonment for a period not exceeding 3 months or a fine not exceeding \$1,000 for each offence.

Consistency of cl 69C with the Bill of Rights Act

Section 14 – Freedom of expression

15. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.³

² Section 20E, 20F and 20G relate to the disclosure of tax advice documents, which under s 20B do not need to be disclosed.

³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977). The Court of Appeal has confirmed that every person has a general common law right to refuse to answer questions posed by an official: *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 349 (CA); Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) considers this right to have been affirmed by s 14 of the Bill of Rights Act; Butler & Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis New Zealand Limited, Wellington, 2015, 2nd ed) at [13.27.1]; Crown Law Office *Criminal Cases Review Commission Bill – Advice on Consistency with the New Zealand Bill of Rights Act 1990* (14 September 2018); Hon Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Alcohol Reform Bill* (8 November 2010).

16. We consider that cl 69C *prima facie* limits the freedom of expression as it means that an individual can be compelled, at the demand of the court, to provide the information under s 17GB and a person commits an offence if they do not comply with the court order.
17. Where a provision is found to limit a right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:⁴
 - (a) does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - (b) if so, then:
 - (i) is the limit rationally connected with the objective?
 - (ii) does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - (iii) is the limit in due proportion to the importance of the objective?

Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom, and is the limit rationally connected with the objective?

18. We understand there to be two objectives for the inclusion of cl 69C in the SOP:
 - (a) so that the Commissioner can obtain the desired information it seeks for the purposes outlined in s 17GB (tax policy development) where the individual has not complied with the s 17GB demand. This recognises that a prosecution for failing to provide information under s 143(1)(b) would not necessarily provide the Commissioner with the desired information; and
 - (b) to align s 17GB with existing information-gathering powers in the principal Act.
19. We consider that these objectives are sufficiently important to justify some limitation on the right, and further, that cl 69C appears rationally connected with these objectives.

Does the provision impair the right no more than is reasonably necessary and is it in due proportion to the objective?

20. Our concern is around the impact of extending s 17H to apply to s 17GB demands. As such, our consideration of the consistency of cl 69C has focused on proportionality.
21. The effect of cl 69C is that there are two avenues to criminally prosecute a person for failing to provide information (for policy development purposes): failing to comply with a s 17GB demand, and for failing to comply with a court order under s 17H. We acknowledge that this possibility exists in respect of other information-gathering provisions in the principal Act.⁵

⁴ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

⁵ For example, s 17B. Section 17B is a general information-gathering power giving the Commissioner power to require a person to provide any information the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of an Inland Revenue Act, or the administration or enforcement of any matter arising from, or connected with, a function lawfully conferred on the Commissioner.

22. However, it is not clear to us why recourse to both avenues is necessary in this context, where the information demand relates to information for a tax development policy purpose. In our view, the ability to apply for a court order in and of itself provides an effective mechanism and appropriate safeguard to meet the objective of ensuring the Commissioner can access the required information because:
- (a) Under s 17H of the principal Act, an individual can challenge the scope of the information demand and the Court may review the information in respect of the demand made, and order the person to provide the information (or part of the information) if and to the extent to which the Court is satisfied it is relevant for an administration or enforcement of a revenue law purpose, or a function lawfully conferred on the Commissioner (s 17H(6)). The protections for privilege and tax advice documents also apply.⁶ We consider that the extension for failing to comply with a court order, punishable by imprisonment, is justified in these circumstances because the offence reflects the importance of the court's ability to enforce an order it makes (i.e. the offence essentially is contempt of a court order).
 - (b) In comparison, there is no opportunity for a person to challenge the scope of the s 17GB demand if prosecuted by the Commissioner for failing to provide the information under the demand (a strict liability offence). The only defence available is where the information was not in the person's knowledge, possession or control (s 143(2)).
23. In considering whether the availability of both is a disproportionate response to the objectives, we approach the proposal presuming that, as a responsible prosecutor, the Commissioner would not exercise their powers oppressively. We also take into account that, if the purpose is to obtain information, the Commissioner is more likely to seek a court order than to prosecute the individual for non-compliance with a s 17GB demand as it does not necessarily result in provision of the information. Therefore, we consider the risk that an individual would be prosecuted under both provisions appears to be negligible.
24. In our view, a further consideration is the fact that the courts can protect defendants from improper or oppressive prosecutorial conduct, should such avenue be pursued by the Commissioner.
25. For all these reasons, we consider cl 69C is in due proportion to the importance of the objectives sought to be achieved and, therefore, that cl 69C appears to be consistent with the right to freedom of expression (s 14).

Section 21 – Right to be secure against unreasonable search or seizure

26. We have also considered the amendment under cl 69C in light of s 21 of the Bill of Rights Act, which affirms the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. We consider that a court order compelling an individual to provide information can constitute a search for the purpose of s 21.

⁶ Clauses 69D and 69E-69G amend provisions in the principal Act relating to legally privileged information and tax advice documents. The effect is that the protections for legally privileged information and relevant tax advice documents would extend to information demanded under s 17GB.

27. We have focused our analysis on s 14, as it has broad application. However, we consider the same arguments apply to both sections and therefore that cl 69C appears to be a reasonable search power in terms of s 21 of the Bill of Rights Act.

Conclusion

28. We have concluded that cl 69C the SOP appears to be consistent with the right to freedom of expression and the right to be secure against unreasonable search and seizure affirmed in ss 14 and 21 of the Bill of Rights Act.



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