

23 November 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Taxation (Annual Rates for 2019–20, GST Offshore Supplier Registration, and Remedial Matters) Bill

Purpose

1. We have considered whether the Taxation (Annual Rates for 2019–20, GST Offshore Supplier Registration, and Remedial Matters) Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (IRD 21621/ 1.46). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 26(1) (retroactive criminal liability), s 25(c) (the right to be presumed innocent until proven guilty) and s 27(1) (right to justice). Our analysis is set out below.

The Bill

4. The Bill is a taxation omnibus Bill which amends the Income Tax Act 2007, the Goods and Services Tax Act 1985, the Tax Administration Act 1994, the Student Loan Scheme Act 2011, the Child Support Act 1991 and the Accident Compensation Act 2001.
5. The main objectives of the Bill are to set the annual rates of income tax for the 2019-20 year and to set in place a regime for imposing and collecting Goods and Services Tax (GST) on low value imported goods.
6. The Bill also contains amendments to the Child Support Act 1991, the Student Loan Scheme Act 2011 and the Income Tax Act 2007 to improve the administration of student loans, Working for Families and child support, and provisions around the reporting of rental losses to prevent these being used to reduce tax on other income and relating to the buy-back of pre-1990 forest land emissions units.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

7. 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.¹
8. The Bill has a number of requirements for the provision of certain information related to the imposition of GST on low-value imported goods, including:
 - a. requiring non-resident suppliers who make ‘distant supplies’ worth, in total, more than \$60,000 during the relevant 12 month period to register themselves as suppliers with IRD and provide GST returns for their supplies; and
 - b. requiring operators of electronic marketplaces and redeliverers dealing with distant suppliers to register and provide returns for GST in cases where a non-resident supplier provides goods valued at \$1000 or below to a New Zealand customer who is not a registered person².
9. These provisions may be seen to limit the right to freedom of expression, however we consider that the limitations contained in the Bill are justified under s 5 of the Bill of Rights Act because:
 - a. the objective of collecting revenue information to enable a fair operation of the taxation system, in which overseas suppliers do not hold comparative advantage over local suppliers due to avoidance of GST payment, is sufficiently important to justify some limitation on s 14;
 - b. requiring the persons who hold information relevant to GST payment to provide it to IRD is rationally connected to that objective;
 - c. the provisions impair s 14 no more than is reasonably necessary, in that no information unconnected to the purpose of collection of GST is required; and
 - d. given the importance of the fairness of taxation, and the efficiency of its administration, to the function of Government, the above limits are proportionate to the importance of the objective.
10. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 26 (1) – Retroactive criminal liability

11. Section 26 (1) of the Bill of Rights Act affirms that no one shall be liable to conviction for any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² Business-to-business supplies are excluded from the scope of the amendments.

12. Clause 73 of the Bill inserts commentary into Schedule 2 of the Tax Administration Act 1994 that relates to the definition of “investment entity” and “custodial institution” when applying the Common Reporting Standard (CRS). The amendment is intended to clarify the original intent, which was for the obligations in Part 11B of the Tax Administration Act 1994 that apply to financial institutions apply to those that are managed by corporate trustees (to enable international cooperation in the detection and deterrence of offshore tax evasion). The amendment will require corporate trustees to comply with those reporting requirements from 1 July 2017. Civil penalties for not complying with the CRS are set out under s 142H of the Tax Administration Act, while criminal offences for knowingly failing to register and report in accordance with the CRS are set out at s143A(1)(ab) and (ac) of that Act. On face value, this appears to engage s 26 (1).
13. However, while the obligation to comply applies retroactively, we do not consider that the criminal offences can apply retroactively. While affected entities are required to bring reporting from 1 July 2017 into line with the CRS, the obligation to do so only comes into effect after the Bill is enacted. An entity can only knowingly fail to register or provide information after the clarification included in the Bill has come into effect (which, in itself, requires a sustained intention of non-compliance). Reliance on an interpretation of the obligation that was open to interpretation prior to that date cannot amount to knowingly failing to comply with reporting requirements in the years preceding the Bill coming into effect.
14. This view is bolstered by the operation of the civil penalty regime. Section 142H(2)(b) contains a transitional rule that provides a financial institution with a defence to non-compliance with the CRS, for a failure that occurs before 1 July 2019, if the Commissioner is satisfied that the entity has made reasonable efforts to meet the requirement and reasonable efforts to correct the failure within a reasonable period of becoming aware of the failure. This effectively provides a period during which financial institutions can prepare to become compliant. In addition, section 142H(2)(a) provides a defence where the non-compliance is due to circumstances outside the control of the financial institution. These defences mitigate the threat to the right to not be punished for something that may not have constituted an offence before the Bill comes into force.
15. For this reason, we conclude that s 26 (1) is not engaged.

Section 25 (c) – The right to be innocent until proven guilty

16. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence is entitled to the right to be presumed innocent until proved guilty according to law. This right requires the prosecution to prove, beyond reasonable doubt, that the accused is guilty.
17. Clause 76 of the Bill amends the existing duty of the Commissioner of Inland Revenue under section 89Z of the Child Support Act 1999 to exempt a liable parent from payment of child support if the Commissioner believes on the balance of probabilities that it is likely that the liable parent is a victim of a sex offence for which another person has been convicted or proved to have committed that sex offence before the Youth Court, which has resulted in the conception of the child.
18. Under clause 76 of the Bill, the Commissioner must still grant an exemption if satisfied of those same circumstances, but also if satisfied, in their opinion, it is

likely that another person has committed a sex offence. That is, the Commissioner can grant the exemption whether or not the perpetrator has been convicted and even if the other person has been acquitted of the offence.

19. We have considered whether this provision engages s 25(c), given that it entitles the Commissioner to make a finding on the existence of a sex offence, despite no person having been found guilty of the offence or a person having been acquitted of the offence.
20. However, section 25(c) of the Bill of Rights Act only applies to someone who is charged with a criminal offence. The Commissioner is not required to find a specified person was likely to have committed the sex offence, but rather, that the applicant was the victim of a sex offence (even if the perpetrator cannot be named) and it is likely that the child was conceived as a result of that sex offence. For this reason, we have concluded that section 25(c) is not engaged.

Section 27(1) – The right to justice

21. Section 27(1) of the Bill of Rights Act affirms that everyone has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
22. As section 89Z of the Child Support Act relates to the liability of a liable parent, we have considered whether clause 76 affects the rights, obligations, or interests protected or recognised by law of the 'other person' (perpetrator). We have been advised that an exemption granted to an applicant on the basis of them having been a victim of a sex offence will not result in the liability of the 'other person' being increased. In the event that an exemption application provides evidence that satisfies the Commissioner that the perpetrator comes within the definition of 'parent' in section 7 of the Child Support Act (which in itself is a high threshold), that person will have the opportunity to challenge any assessment as a liable parent that the Commissioner may make. On this basis, we have concluded that the Bill appears to be consistent with section 27(1).

Conclusion

23. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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