

2 November 2018

Targeting serious crime: extending information sharing
C/-Deputy Commissioner, Policy and Strategy
Inland Revenue Department
PO Box 2198
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By email: policy.webmaster@ird.govt.nz

Re: Targeting serious crime: extending information sharing – SFO and Customs

The New Zealand Law Society (Law Society) welcomes the opportunity to submit on the proposals in the Government's discussion document, *Targeting serious crime: extending information sharing*, September 2018.

An existing Approved Information Sharing Agreement (AISA) implemented in 2014 between Inland Revenue (IR) and the New Zealand Police (Police) enables IR to provide information, under certain criteria to Police to detect, prevent and prosecute serious crime. It is now proposed to extend the AISA to include the Serious Fraud Office (SFO) and the New Zealand Customs Service (Customs).

The proposed extension has been considered by the Law Society's Tax Law and Human Rights and Privacy Committees, and the Law Society's comments are set out below.

Executive summary

The Law Society expressed significant concerns about the proposed IR-Police information sharing in 2013 and reiterated its concerns regarding the IR-Police AISA in 2014.¹

The Law Society has the same concerns about the proposed extension. Those are, in short, that using taxpayer information for non-tax purposes unjustifiably limits taxpayers' fundamental rights and undermines the integrity of the tax system.

The existing AISA and proposed extension allow agencies to request (or IR to proactively provide) information – including information obtained by IR under compulsion – in circumstances where the agencies' own extensive statutory powers would not enable them to obtain the information. IR's powers to override individuals' privacy and non-incrimination rights have historically been justified by the primacy given to revenue collecting, and by limiting the use of the information gathered to revenue collection purposes alone. In the Law Society's view, the extension has not been adequately justified.

¹ NZLS submission 24.5.2013 *Targeting serious crime: A government discussion document about the sharing of tax information to prevent serious crime (attached)*; NZLS submission 5.12.2014 *Amendments to targeting serious crime: information sharing agreement between Inland Revenue and New Zealand Police*, available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0003/85377/IRD-information-sharing-5-12-14.pdf.

If the extension is to proceed, extra protections should be incorporated into the AISA.

The IR-Police AISA

Information sharing as provided for in the 2014 AISA is a fundamental departure from the longstanding position that tax information will be secret except for tax-related disclosure. As noted above, IR's powers to override individuals' privacy and non-incrimination rights have been justified by the importance of revenue collecting, and the fact that the information gathered will be used solely for the purposes of revenue collection and not shared elsewhere on pain of criminal penalties against tax officials.

As IR itself has noted:²

Provisions protecting taxpayer confidentiality have been in place for over 130 years, since the introduction of the Property Assessment Act 1879. The Court of Appeal has said that the tax system ... rests on **the assurance provided by stringent official secrecy provisions that the tax affairs of taxpayers are solely the concern of the Revenue and the taxpayers and will not be used to embarrass or prejudice them.** [Knight v Barnett (1991) 13 NZTC 8014 (CA) at 8,016] (emphasis added)

In 2013 the Law Society submitted that the proposed information sharing in many instances would unjustifiably breach taxpayers' fundamental rights against unreasonable search and seizure and the right not to be compelled to be a witness or confess guilt.³

In 2014 the Law Society expressed disappointment that the proposed information sharing had proceeded essentially unchanged and recommended that limits be imposed on IR's proactive information sharing (including, at a minimum, that information gained by compulsion be excluded).

The proposed extension

As noted earlier, provisions protecting taxpayer confidentiality have been in place for over 130 years and there is a clear public benefit in protecting privacy in tax records. How the extension can be reconciled with these factors has not been properly addressed in the discussion document.

The Law Society agrees with the conclusion in the discussion document that the proposed extension of information sharing may not alter the way in which the Commissioner of Inland Revenue exercises her statutory powers.⁴

It does not however agree with officials that there will not be any undue infringement of taxpayers' rights against unreasonable search and seizure, and privilege against self-incrimination. On the contrary, the extension means that the coercive and intrusive powers (in sections 16 to 19 of the Tax Administration Act 1994) given to IR to enable it to efficiently administer revenue collection will be used to assist other departments of state which do not have the same powers.

The right to be free from unreasonable search and seizure, and the privilege against self-incrimination, are fundamental in a free and democratic society. Any limitation of those rights must be properly scrutinised and clearly justified. Efficiency of government operations is an inadequate rationale. Every infringement is "undue" unless demonstrably necessary.

The discussion document has not made a persuasive case for the proposal to extend the existing

² Inland Revenue discussion document, *Targeting serious crime*, May 2013, at Chapter 2, paragraph 2.2.

³ NZLS submission 24.5.2013, at p6.

⁴ Inland Revenue discussion document, *Targeting serious crime: extending information sharing* September 2018, at p12.

ASIA. There is very little information provided in the examples about the problems experienced by the requesting agencies. As a result, the circumstances in which it is envisaged the SFO or Customs might ask for information is not clear from the discussion document.

The Law Society is also concerned that the publicity surrounding the current consultation, which asserts that the proposed extension targets “organised crime”,⁵ is misleading. The scope of the extension is in fact much wider. There is a low threshold for information sharing under the AISA and many offences that fall short of truly serious offending are captured. The Law Society submitted in 2013 that the proposed threshold of four or more years’ imprisonment was too low.⁶

The risks to the integrity of the tax system that would attend on the information sharing proposals are such that information should only be shared in relation to truly serious offending. There are a very large number of offences that attract a sentence of four or more years’ imprisonment, including all dishonesty offences. A more targeted ... approach is required.

Protections

If the proposed extension to the AISA is to proceed, the Law Society considers that the following protections should be incorporated.

- First, innocent third parties (for instance family members) may be affected by the information sharing and it would be prudent to insert a clause requiring the requesting agency to protect the interests of third parties as far as possible. This obligation is implicit in clause 4 (page 11) of the draft AISA, which only allows for disclosure of “relevant information”. However, it would be helpful to include specific protections for those not under investigation.
- Secondly, people should be informed when providing information to IR under compulsion that the information may be provided to other agencies.

Conclusion

The Law Society has previously expressed a range of concerns about the existing IR-Police information sharing agreement. For the same reasons it considers the proposal to extend the information sharing to the SFO and Customs should not proceed. Members of the Law Society’s Tax Law and Human Rights and Privacy Committees would welcome the opportunity to meet to discuss these concerns. Contact can be made in the first instance through the Law Society’s Law Reform Manager Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours sincerely



Kathryn Beck
President

Encl: NZLS submission dated 24.5.2013

⁵ Ministers’ media release 26.9.2018, *Information sharing to target organised crime*: <https://www.beehive.govt.nz/release/information-sharing-target-organised-crime>.

⁶ NZLS submission 24.5.2013, at p7.