New Zealand Law Society
Te Kāhui Ture o Aotearoa

Taxation Principles Reporting Bill

08/06/2023

Submission on the Taxation Principles Reporting Bill

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa welcomes the opportunity to comment on the Taxation Principles Reporting Bill (**the Bill**).

1.2 The Law Society supports the general premise underlying the Bill. Although the Commissioner is able, as a matter of law, to produce equivalent reports under current legislation, the establishment of a regular reporting regime has the potential to increase the public availability of information from the Commissioner and to improve the public understanding of information about the tax system and tax policy. The Law Society acknowledges that regularly reporting such information in a consistent format may contribute to the evidence-based development of policy.

1.3 However, the Law Society does not support the Bill as drafted. The Law Society has the following concerns:

(a) the process followed to draft the Bill, including the failure to follow the Generic Tax Policy Process (GTPP) and the truncated select committee process;

(b) the proposed further extension of the purposes for which the Commissioner may exercise information gathering powers;

(c) the nature of the 'tax principles,' which (when read with the descriptors in Schedule 1) appear to reflect political positions on the operation of the tax system and appropriate taxation settings; and

(d) the power for the Commissioner to amend the tax principles measurements, including the approved taxation principles in clause 13.

1.4 The Law Society **wishes to be heard** on this submission.

2 Concerns about legislative process and the Generic Tax Policy Process

The Generic Tax Policy Process is increasingly disregarded

2.1 The GTPP has been in place since 1994. It 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 ensure that "*tax initiatives are subject to public scrutiny at all stages of their development*."[1] It is intended to ensure early and informed consultation, which promotes effective and workable laws, and reduces the need for subsequent remedial reforms. As noted on Inland Revenue's website:[2]

> *The GTPP is widely accepted as the way to make tax policy, and tax professionals and professional associations expect it to be used. It leads to cooperation, assistance and frank dialogue.*

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1 See IRD's website here.

2 *Ibid*.

2.2 The Bill has not proceeded in accordance with the GTTP. The Regulatory Impact Statement (**RIS**) confirms no formal consultation has been undertaken,[3] and even informal consultation was confined to 'discussion' with two organisations. This is despite repeated expressions of interest and requests for consultation by numerous parties, including the Law Society, since the Minister's announcement in April 2022. It also follows previous attempts by the Law Society to encourage a return to the GTPP after the disruptions of COVID-19, and serious concerns raised by the Law Society (and other stakeholders) around the processes followed when extensive new information gathering powers[4] were introduced in 2020 and passed under urgency.

2.3 The Law Society is disappointed that a Bill concerned with 'universally accepted'[5] tax principles has not followed the GTPP or in fact included any meaningful level of consultation. The Bill pre-empts the sort of debate that used to be part of the GTPP, and removes points previously debated in GTPP and treats them as assumptions (i.e. the proposed principles). The ultimate drafting of those tax principles is reflective of the legislative deficits that occur when this process is dispensed with.

Select Committee timeframes

2.4 The timeframe provided for submission to the select committee – 16 working days – is also concerning. In circumstances where the public has had no prior opportunity to engage in debate around whether the principles articulated are in fact immutable or universal, this is inadequate. It further exacerbates the process deficiencies noted above.

3 Comments on the Bill

Justiciability – clause 8

3.1 Clause 8 of the Bill would provide that neither a report produced under the Act, nor the Act itself (including the taxation principles), may be used as evidence in any matter of law or fact (or in the interpretation of any matter of law or fact). The commentary to the Bill suggests this reflects an intention that the reporting framework principles and measurements are not to apply more widely, assume constitutional status, or influence the interpretation of other legislation.[6]

3.2 The Law Society is concerned this places the Commissioner's powers and responsibilities outside of the reach of the Courts, even where a taxpayer may be seeking review of the exercise of those powers, for example where the Commissioner exercises their information-gathering powers to require information for the purposes of reporting under the Bill. The reports published by the Commissioner may indicate whether the collection of the information was necessary to carrying out the reporting, or whether that reporting was outside of the scope of the Act. This provision could unjustifiably limit a legitimate right of review.

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3 Regulatory Impact Statement, page 2.
4 Section 17GB Tax Administration Act 1994.
5 Page 5, Inland Revenue Commentary on the Bill.
6 *Ibid*, page 9.

3.3 Further, it seems unlikely the tax principles and reporting under the Bill will be of the negligible consequence suggested. Once such a tax principle is enshrined it may not matter if it is simply a point on which the Commissioner must report: it will be seen as a foundational principle on the basis of which all manner of future tax policy could be justified. Indeed, it is surely the intention of Bill that the reporting will inform the development of future tax policy responses.

3.4 In the Law Society's view, any clause purporting to limit the courts' oversight of public powers and obligations (even if only by making this more difficult, rather than ousting jurisdiction) should be well-justified and a proportionate response to a legitimate risk or concern. This does not appear to be the case with this legislation.

3.5 The Law Society submits that clause 8 should be removed from the Bill.

3.6 If the Law Society's submission is not accepted, and very much in the alternative, a subclause (2) should be added to the following effect: '*Nothing in this Act limits or affects the right of a person to seek judicial review in respect of any matter to which this Act relates.'*[7]

The 'Tax Principles' – Schedule 1

3.7 The Law Society does not agree that the tax principles themselves (which must be read with the descriptors) are articulated in such a way as to reflect 'universally accepted' and politically neutral principles that can be used to report on the health of the tax system across multiple governments.

3.8 The process followed to identify and state the tax principles in the Bill has precluded public consensus. While the principles themselves may be less contentious despite that, the accompanying descriptions are more problematic. Given the tendency of the Bill to otherwise remain light on specifics, the intention of these descriptions is unclear. For example:

(a) the description of horizontal income provides: *"… there are important areas where exemptions to taxing economic income are justified in the pursuit of wider societal outcomes (e.g. not taxing the imputed rent or gains on an owner-occupied home)."* This is a political statement, and in fact a description of the current Government's policy regarding taxation of owner-occupied properties;

(b) the description of vertical equity provides: "*In practice, wealthy people should at the very least pay no lower a rate of tax on their economic income than middle income New Zealanders already do*." This appears to reflect a political position on tax policy, being the taxation of 'economic income' including realised and unrealised capital gains. The Law Society notes that, notwithstanding the fact that the definition of 'economic income' is unclear but appears to be assumed, New Zealand does not in fact tax all 'economic income'. Whether it should is inherently and inevitably political;

(c) the description of vertical equity also states '*the tax system should be progressive'*. While the description notes this does not mean all taxes are progressive, it is an emphatic and perhaps aspirational target when considering the current operation of

[7] For example, see section 159 Local Government (Auckland Transitional Provisions) Act 2010.

the tax system. It is also a position within which there can be significant political differences bearing on whether a progressive tax system can be achieved; and

(d) the description of compliance and administrative costs states: '*Compliance and administrative costs for taxpayers and the Government should be reasonable, but this is not justification for substantial unfairness in the tax system*.' This appears to indicate acceptance that taxes may be imposed irrespective of compliance and administrative burden (and so perhaps even cost-benefit), simply for the purpose of addressing 'unfairness' within the tax system. Tax 'unfairness' is a highly political and subjective question.

3.9 The Law Society emphasises that the above is not a reflection of its position on any particular tax setting. Rather, the point intended is that these matters are more properly the subject of public consideration and consultation under the GTPP, within the context of policy and legislative development, or are political issues that ought to be ventilated fully in the context of Parliament's consideration of tax legislation. They are not universally accepted fundamental principles, though they may become so after proper process and consideration. But to elevate them to that status now suggests that important future tax policy debates are being pre-empted. Articulating these issues as accepted fundamental principles will ultimately reduce the prospect of the sort of debate that asserting such status requires.

3.10 The Law Society notes, for example, that some mention of "coherence" of taxation laws, and "consultation" in relation to changes in those laws, could also be considered to be taxation principles worthy of inclusion in Schedule 1.

3.11 The Law Society submits that the principles as expressed in Schedule 1 should be reconsidered, as well as the way each principle is described. Further public consultation is required.

Tax Principles Measurements and amendment – clauses 13 and 14

Clause 13 – Tax Principles measurements

3.12 The approved measurements in clause 13 are fairly broad:

(a) *income distribution and income tax paid:*

(b) *distribution of exemptions from tax, and of lower rates of taxation:*

(c) *perceptions of integrity of the tax system:*

(d) *compliance with the law by taxpayers.*

3.13 It is not clear how these would operate with any certainty. Measurements such as 'perceptions of integrity' are highly subjective – there is no indication as to whether the Commissioner is to be measuring taxpayer perceptions, the Minister's perceptions, or their own perceptions, for example. There is also no express link to the Minister's and Commissioner's existing responsibility to protect the integrity of the tax system, under section 6 of the Tax Administration Act 1994. This uncertainty appears to be intentional, as

the commentary to the Bill[8] highlights the flexibility such measurements will bring to the data required and the methods of analysis. It is seen as 'future-proofing' the Bill.

3.14 However, this has the potential to create uncertainty in terms of understanding and accepting the taxation principles, and to create implications for the Commissioner's use of information-gathering powers. Taxpayers will have no certainty or assurance around the ongoing scope of information that may be required and who will be targeted by those requirements. In effect, and when combined with the Commissioner's powers under clause 14, the measurements are a simple vehicle by which to expand the scope and effect of the reporting, without any protection against the politicisation of the framework.

Clause 14 – Addition or exclusion of measurements

3.15 Clause 14 proposes to allow the Commissioner to include tax principles measurements additional to those in clause 13, where: they consider them to be appropriate, they are within the direct responsibility of the Commissioner, and a description is published 2 or more months in advance of the measurements being used in a report. Clause 14(2) would allow the Commissioner to exclude measurements considered inappropriate, including the measurements specified in clause 13.

3.16 The commentary[9] to the Bill provides that the purpose of clause 14 is to:

> *… allow the framework to grow over time and maintain pace with future developments. Additional measurements could reflect the availability of new data or when data becomes available with sufficient quality to be suitable for publication.*

3.17 This may suggest that legislating for a reporting regime, in this broad manner, is unsuitable. While the RIS[10] suggests a statutory reporting framework will provide the benefit of regular and defined reporting, allowing for the observation of variations and trends, this is not secured by the Bill as drafted. The Commissioner may simply amend the measurements used for reporting. Further, the principles are not such that they require reporting in a particular manner or with a particular data set.

3.18 In any event, the amendment of these legislatively articulated measurements even if to maintain currency ought to be a task undertaken by Parliament. The Law Society's concern is that it is inappropriate for the Act to be (effectively) amendable by the Commissioner without Parliamentary oversight or the ability to disallow those amendments. While this is undesirable in terms of *adding* measures or excluding measures the *Commissioner* has previously added, it is most concerning in respect of the relationship between clauses 13 and 14. As currently drafted, it appears clause 14 would allow the Commissioner to exclude a measure set down by Parliament in clause 13. While clause 14 employs the language of clause 13 being a 'minimum set' of measurements, clause 13 itself contains no such reference, nor any other indication that they cannot be excluded by the Commissioner.

3.19 There are also process concerns. The Law Society notes that the commentary states the purpose of requiring notification is to enable public feedback. However, there is no

8 *Ibid*, page 13.
9 *Ibid*, page 14.
10 Page 9, Regulatory Impact Statement

requirement for public consultation, simply publication of the decision to include or exclude measurements. Nor is there any specific requirement around how or where the Commissioner is to give notice of the measures being amended. The Law Society reiterates that clause 14(2) appears to permit the Commissioner to exclude measurements specified by Parliament under clause 13: the use of such a 'Henry VIII clause'[11] without any specified process, formal notification, or ability for review or disallowance[12] is an inappropriate delegation of Parliament's law-making power for a non-essential purpose.

3.20 The Law Society recommends clause 14 be removed from the Bill. If it is to be retained, the Law Society recommends amendments to provide:

(a) the Commissioner cannot exclude measures specified by Parliament in clause 13;

(b) public consultation is required in advance of the Commissioner publishing the addition or exclusion of measures; and

(c) specific requirements for publication of new or excluded measures, for example, publication on IR's website and/or formal Gazette.

Information gathering purposes extended – schedule 2

3.21 While the commentary on the Bill states it does not propose any new information-gathering abilities beyond those already contained in the Inland Revenue Acts, this is slightly misleading. Schedule 2 to the Bill proposes inserting the Taxation Principles Reporting Act 2023 into schedule 1 of the Tax Administration Act 1994 (**the TAA**), thereby including it as an 'Inland Revenue Act' for the purposes of section 17 of the TAA.

3.22 The Commissioner's information gathering powers under section 17 of the TAA would then extend to requiring information from taxpayers for the purposes of carrying into effect the Bill.[13] That is, the Commissioner could now require information from taxpayers, for the purpose of reporting against the tax principles.

3.23 Section 17M of the TAA would allow the Commissioner to use any information gathered for this purpose, for the purpose of carrying into effect any of the other Inland Revenue Acts, or carrying out any lawful function. Like the concerns raised at the time section 17GB of the TAA was inserted in 2020, this represents an extension of information gathering beyond the scope of information necessary to effectively administer the taxation regime, where there are no protections for the taxpayer compelled to provide information. Sensitive information could be required ostensibly for the purpose of the Commissioner's report on 'trends and variations', but retained and used for unknown additional purposes, including compliance.

3.24 There are no in-built protections against this. There is no requirement for the information to be received and *held* in an anonymised and aggregated format, only that it is *published* in an anonymised and aggregated format.[14] The taxation principles measurements can then be

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11 See: https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-28-delegated-legislation/

12 By virtue of clause 15 of the Bill.

13 Section 16(a) TAA via section 17(a) TAA, refers.

14 Clause 9(b) of the Bill.

very simply amended by the Commissioner, altering the scope of the information that might be required for the purpose of carrying into effect the Bill.

3.25 The Law Society submits that the Bill be amended to require the Commissioner uses only information already held by Inland Revenue. If the Committee is not minded to recommend such an amendment, the Law Society invites the Committee to consider a legislative requirement for IR to:

(a) hold information collected for the purpose of carrying out functions under the Bill in an aggregated and anonymised form only.

(b) not use information collected for the purpose of carrying out functions under the Bill for any other purpose.

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