



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on
the Taxation (Income Tax Rate and Other
Amendments) Bill

Presented to the House of Representatives pursuant to Section
7 of the New Zealand Bill of Rights Act 1990 and Standing
Order 265 of the Standing Orders of the House of
Representatives

1. I have considered whether the Taxation (Income Tax Rate and Other Amendments) 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. I have concluded that clause 33 of the Bill appears to be inconsistent with the right to freedom of expression, and the right to be secure against unreasonable search and seizure as affirmed in sections 14 and 21 of the Bill of Rights Act.
3. As required by section 7 of the Bill of Rights Act, I draw this apparent inconsistency to the attention of the House of Representatives.

Summary

4. Clause 33 of the Bill inserts proposed section 17GB into the Tax Administration Act 1994 ('the principal Act') by providing the Commissioner of Inland Revenue ('Commissioner') with a power to require any information from an individual that the Commissioner considers relevant for a purpose relating to the 'development of policy for the improvement or reform of the tax system'.
5. I have concluded that clause 33 is inconsistent with the right to freedom of expression, and the right to be secure against unreasonable search and seizure that are affirmed by the Bill of Rights Act. The Bill is otherwise consistent with the rights and freedoms of the Bill of Rights Act.

The framework of the Bill

6. The Bill amends the Tax Administration Act 1994 and the Income Tax Act 2007. It introduces a new top personal income tax rate of 39% on annual income over \$180,000, for the 2021-22 and later income years. The Bill makes a number of consequential amendments to tax rules to incorporate and accommodate this new rate.
7. The Bill also contains amendments to the principal Act, which the Explanatory note to the Bill describes as follows:
 - 7.1 a clarifying amendment to ensure that the Commissioner can collect information solely for tax policy development purposes (clause 33); and
 - 7.2 a new information-gathering measure to collect further information from trustees in order to gain insight into whether the top personal tax rate of 39% is working effectively and provide better information to understand and monitor the use of structures and entities by trustees (clause 35).
8. Finally, the Bill also sets the minimum family tax credit ('MFTC') threshold for the 2021-22 tax year and adjusts the existing MFTC threshold for the 2020-21 tax year to account for the weekly increase in main benefits made in 2020.

Clause 33 of the Bill

9. The Commissioner currently has a wide range of information-gathering powers to protect the integrity of the tax system, to carry into effect the revenue laws, to encourage

compliance with the revenue laws, and to carry out or support the Commissioner's lawfully conferred functions (section 16B(1)).

10. Currently, section 17B(1) of the principal Act provides:

17B Commissioner may require information or production of documents

- (1) A person must, when notified by the Commissioner in an information demand, provide any information that the Commissioner considers necessary or relevant for any purpose relating to—
- (a) the administration or enforcement of an Inland Revenue Act;
 - (b) the administration or enforcement of any matter arising from, or connected with, a function lawfully conferred on the Commissioner.

11. Clause 33 of the Bill inserts section 17GB into the principal Act, which provides as follows:

17GB Commissioner may require information or production of documents for tax policy development

A person must, when notified by the Commissioner in an information demand, 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.

12. Under the principal Act, a person commits a criminal offence if they do not provide information to the Commissioner when required to do so by a tax law (section 143(1)(b)), unless the information is not within their knowledge, possession or control (section 143(2)(a)). A person is liable upon conviction to a fine not exceeding \$4,000 for the first offence, with increased fines for the second and subsequent offences.

Section 14 – Freedom of Expression

13. 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

¹ 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 section 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 [18]; 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).

14. Where a provision is found to limit a particular 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 section 5 of that Act. The section 5 inquiry may be approached as follows:²

14.1 does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?

14.2 if so, then:

14.2.1 is the limit rationally connected to the objective?

14.2.2 does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

Is the objective sufficiently important and the limit rationally connected to the objective?

15. The objective of clause 33 is to ensure the Commissioner has access to information to provide good tax policy advice for a well-functioning and effective tax system. I consider that this is a sufficiently important objective, and the requirement to supply information for the ‘development of policy for the improvement or reform of the tax system’ is rationally connected to that objective.

16. I also consider the imposition of criminal penalties to be rationally connected to the objective. Effective research may involve seeking information from a range of people. Most people will willingly assist government departments to carry out research by providing them with the information that they seek. However, there will always be some people who choose not to do so. It may therefore be necessary to make it compulsory to do so, and to establish proportionate criminal sanctions for non-compliance. It is for this reason that failure to provide information to the Government Statistician for the purposes of the census is a criminal offence.³ For similar reasons the Commissioner requires the power to make demands for information for purposes relating to the development of policy for the improvement or reform of the tax system and for those demands to be supported by criminal sanctions.

Is the impairment on the right greater than reasonably necessary?

17. The remaining element of the s 5 inquiry calls for an assessment of whether the limit on the right to freedom of expression goes no further than reasonably necessary to achieve the objective of the legislation.

18. I am concerned that the limitation on freedom of expression may be greater than is reasonably necessary to fulfil the aims of the legislation because information or documents provided to the Commissioner under a demand made for purposes relating to the development of policy for the improvement or reform of the tax system could be

² See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [123].

³ Under Part 5 of the Statistics Act 1975

used for other purposes, such as enforcement or criminal prosecution of the person who provided the information. This may be contrary to the privilege against self-incrimination that is protected by the right not to engage in compelled expression. It may give rise to a situation where a person is required to provide information for research purposes, only for that information to be used against them in legal proceedings.

19. I note that the Statistics Act 1975 provides that information disclosed to the Government Statistician through the exercise of his powers under that Act may not subsequently be admissible as evidence in proceedings against the person who provided the information.⁴
20. I consider that a similar provision in this 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. Such a provision would remedy the inconsistency. However, in the absence of such a provision, I conclude that the legislation interferes with freedom of expression to a greater extent than is required in order to obtain information for purposes relating to the development of policy for the improvement or reform of the tax system.
21. For that reason, I have therefore concluded that clause 33 appears to be inconsistent with the right to freedom of expression.

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

22. I have also considered the Commissioner’s power to obtain information under clause 33 in light of section 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. The touchstone of the section is the protection of reasonable expectations of privacy. The test in section 5 of the Bill of Rights Act does not apply to section 21, as the Supreme Court has held that an unreasonable search cannot logically be demonstrably justified in a free and democratic society.⁵ The question is therefore whether the search is unreasonable.
23. A request for information or documents can constitute a search for the purposes of section 21. While section 21 has traditionally applied in a law enforcement context due to the coercive power that police and other enforcement officers can apply to ordinary persons, recent authority suggests that it may also apply to regulatory or other functions of the state that involve significant intrusions into the affairs of citizens.⁶ In the present

⁴ Section 38 of the Statistics Act 1975 provides that information provided may not be admissible in any proceedings, except for prosecutions for failing to make disclosures under the Act itself.

⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161], per Blanchard J.

⁶ Butler & Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis New Zealand Limited, Wellington, 2015, 2nd ed) at [18.8.1], in particular, citing the comments made by Tipping J in *Hamed v R*, and McGrath J in *R v Ngan* [2008] 2 NZLR 48 (SC). Although the Canadian approach, upon which section 21 was partly based, suggests a narrower law enforcement focus, Butler & Butler note that a number of Canadian cases in the regulatory context (for example, where powers of compulsion have been exercised by tax and competition

context, the Privy Council was prepared to assume that the Commissioner's exercise of their information-gathering power engaged section 21.⁷

24. For the reasons set out above at paras. 17 to 21, in relation to freedom of expression, I am concerned that the powers of search and seizure under section 33 are unreasonable in that they may give rise to greater interference than is necessary to pursue the objectives of the clause.
25. Again, this could be remedied by a clause that provides that information disclosed as a result of demands made for purposes relating to the development of policy for the improvement or reform of the tax system may not subsequently be admissible as evidence in proceedings against the person who provided the information.

Commissioner's power to require trust information (clause 35)

26. Clause 35 of the Bill inserts proposed new sections 59BA and 59BAB into the principal Act to:
 - 26.1 Require a trustee of a trust to provide an annual return of all income derived by the trustee as a trustee of the trust in accordance with the form prescribed by the Commissioner, and the list of information specified in proposed new section 59BA(2).
 - 26.2 Provide the Commissioner the power to require a trustee to provide a return that relates to the trust after the end of the 2013-2014 income year and before the 2021-22 income year, that would be required to be provided under proposed new section 59BA if the period began after the end of the 2020-21 income year, and where that information is in the knowledge, possession, or control of the trustee (clause 59BAB).
27. The information in proposed new section 59BA expands on the current annual return requirements upon a trustee of a trust under existing section 59(3) of the principal Act (which will be repealed by clause 34 of the Bill).
28. In my view, the information requested under proposed new sections 59BA and 59BAB appears rationally connected to the objective of monitoring a trustee of a trust's compliance with tax laws, which fits with the Commissioner's core functions.
29. There does not appear to be another way for the Commissioner to obtain such information. If a trustee of a trust does not have the information within their knowledge, possession or control to comply with a request under proposed clause 59BAB, it appears that criminal liability cannot attach.

authorities) suggest that the equivalent to section 21 will be engaged, at least where penal liability is the main purpose of the conduct.

⁷ *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC) at 6.

30. I therefore consider that clause 35 is proportionate to the objective of gathering information from a trustee of a trust in accordance with the Commissioner's core functions, and does not appear to be inconsistent with section 14 of the Bill of Rights Act. Further, I consider that it is a reasonable search power, such that it is not inconsistent with section 21 of the Bill of Rights Act.

Conclusion

31. I have concluded that clause 33 of the Bill appears to be inconsistent with the right to freedom of expression, and the right to be secure against unreasonable search or seizure affirmed in sections 14 and 21 of the Bill of Rights Act.
32. I consider that if the Bill contained a provision to ensure that information, provided in response to a demand for information purposes relating to the development of policy for the improvement or reform of the tax system, would not subsequently be admissible in proceedings against the person who provided the information, clause 33 would be consistent with the rights and freedoms affirmed by the Bill of Rights Act.



Hon David Parker
Attorney-General