



LEGISLATION DESIGN AND ADVISORY COMMITTEE

9 June 2023

Ingrid Leary MP
Finance and Expenditure Committee
Parliament Buildings
Wellington 6160

Taxation Principles Reporting Bill

Introduction

1. The Legislation Design and Advisory Committee (LDAC) is mandated by Cabinet to scrutinise Bills against the *Legislation Guidelines* (2021 Edition) (Guidelines). The Guidelines have been created to promote legislation that is well designed and accords with fundamental legal and constitutional principles.
2. LDAC's focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
3. For the reasons set out below, LDAC considers that legislation is unnecessary to achieve the purposes of the Taxation Principles Reporting Bill (the Bill). We appreciate that there may be occasions when Parliament may wish to legislate in order to signal the importance of a matter as opposed to having substantive effect, however given the disadvantages discussed below such approaches should be used very sparingly.
4. If the Bill does proceed, we have concerns about the current formulation of clause 6 (Te Tiriti o Waitangi obligations apply) and clauses 13 to 15 (relating to the approved taxation principles measurement). Taken together, LDAC considers that there is a significant risk that the Bill will create unintended and unforeseen consequences that need to be addressed.

The Bill's policy objectives could be achieved by non-legislative means

5. Legislation Guideline 2.3 states that "*Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective.*" The Cabinet manual also states that Ministers and agencies must ensure that unnecessary new legislation is avoided.¹
6. The rationale against unnecessary legislation is twofold:
 - 6.1. *Legislating involves significant cost:* Legislation incurs enactment and compliance costs. Enactment costs include both the financial costs to submitters, and the time of the House and select committee. Compliance costs include the cost of affected parties changing processes and obtaining legal advice as to the potential impacts of the change to legislation.
 - 6.2. *Legislation can have unforeseen and unintended consequences:* All legislation may be interpreted in a manner that was not intended by Parliament. Over time this can cause the law to develop in an unforeseen way.

¹ Cabinet Manual 2023 at 7.24.



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7. Here, the Bill seeks to establish a reporting framework based on a set of tax principles set out in Schedule 1 on measurements set out in clause 13.
8. As discussed below, measurements may be added or removed by the Commissioner of the Inland Revenue Department (the Commissioner) over time (clause 14).
9. This reporting framework is achievable through non-legislative means, for example a Cabinet direction (accompanied by the allocation of appropriate resources within an appropriation).
10. Given the availability of non-legislative means to achieve the policy objective, the case for legislation must be strong. LDAC is not aware of what that case is in the present instance. While legislating can signal the importance of an issue, this alone is insufficient to justify the significant costs and inherent risks identified above and below.
11. In LDAC's view a more appropriate course of action is to issue a direction through a Cabinet office circular. Directions of this nature can support transparency on whether or not system objectives are being achieved, while also having the benefit of being more easily updated as amendments do not require legislative amendment (see paragraphs 16 to 19 below).
12. LDAC recommends that the committee seek advice from the department as to why legislation is necessary to achieve its purpose, and whether those reasons are sufficient to justify the costs.
13. Even if the Bill does proceed however, LDAC has significant concerns about the uncertainty that its current provisions may create, and so the risk of unintended consequences. These concerns are set out below.

Clause 6 (Te Tiriti o Waitangi obligations apply)

14. Clause 6 of the Bill includes an operative or general Treaty clause. LDAC has two main concerns with the current approach in this clause.
15. First, it is not clear to LDAC, on the face of the legislation, what outcome the Treaty clause is intended to achieve, or what engagement and Treaty analysis supports the clause. In particular it is unclear what is meant by the "public service's obligations" in relation to the Treaty. It may be intended to refer to the obligations in section 14 of the Public Service Act 2020 for the public service to support the Crown in its relationships with Māori under the Treaty.
16. If so, the clause is unnecessary because that obligation already applies to the Commissioner under the Public Service Act 2020. If it is instead intended to impose additional obligations on the Commissioner to implement the legislation in particular ways, LDAC would expect clearer and more specific operative provisions to be included, which clearly implement the policy outcomes intended to give expression to the Treaty in the context of the Bill, rather than merely relying on an operative or general clause to achieve this.



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17. LDAC recommends the committee seek advice from the department on any consideration of the guidance issued by Te Arawhiti entitled 'Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design' as well as the guidance referred to in that document so that a proper and fulsome analysis can be undertaken. Only once this assurance is provided to the committee can it seek to understand how clause 6 may operate in the context of the Bill.
18. In addition, the wording of clause 6 is novel. LDAC cautions against introducing variations in the wording of Treaty clauses without a very deliberate and clear policy outcome for doing so. LDAC recommends that the committee seek advice from the department to ensure that, if clause 6 is to remain, it reflects current drafting practice.

Clause 14 (Approved taxation principles measurement: approval procedure for inclusion and exclusion)

19. Clause 14 empowers the Commissioner to include or exclude taxation principles measurements from the reporting obligations imposed by the Bill if the Commissioner decides it "appropriate" or "inappropriate" for the purpose of this Act. The principles themselves are contained in Schedule 1 of the Bill.
20. To put clause 14 in its immediate context, we note—
 - 20.1. Clause 13 sets out the default taxation principles measurements (but for the operation of clause 14).²
 - 20.2. Clause 15 states that the approval procedure for the inclusion or exclusion of taxation principles measurements is not secondary legislation for the purposes of the Legislation Act 2019.
21. Clause 14 is intended to empower the Commissioner with the ability to expand and reduce the measurements against which the Commissioner is required to report under the Bill. These measurements are a core element of the policy of the Bill in terms of defining the basis on which the trends and insights from regular reporting will be assessed. In this way clause 14 has the potential to significantly increase or decrease the scope and application of the Bill – it therefore has the effect of a Henry VIII provision.

² We note that while clause 14 identifies these measurements as being the "minimum set described by section 13...", nothing else in clauses 13 or 14 has the effect of preserving the listed measurements as a "minimum set".



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22. LDAC is concerned about the inclusion of a wide Henry VIII power in the Bill. This concern is significantly exacerbated by the absence of any real test or limitations on the use of the power.³ In particular, the purpose of this Act does not provide a clear statement of the policy objective or the considerations that should underlie a decision as to whether to expand or limit the measurements. This means that there is no clear standard against which the Commissioner must assess whether or not to include measurements.
23. It is also concerning that the exercise of this power is not considered to be legislative under clause 15 of the Bill. The Legislation Guidelines state that powers should generally be classed as legislative if they change the scope of the empowering Act, as this power clearly does.
24. If the exercise of the power were legislative, additional safeguards would apply including the need for publication, presentation to Parliament, and the potential for disallowance on the grounds set out in Standing Orders for disallowance (which merely go to matters affecting the appropriate use of a delegated power, and not to policy matters). We note that a wish to avoid one or more of those safeguards is not, on its own, an indication that the power is not legislative and that if any of these safeguards is not appropriate, an exemption would be more appropriate than characterising a legislative power as non-legislative.
25. If the Bill is to proceed, LDAC recommends that the committee—
 - 25.1. seek advice from the department about whether a clearer test could be added to the Bill to ensure that the Henry VIII power is more appropriately scoped under clause 14; and
 - 25.2. consider providing that the exercise of the Commissioner’s powers under clause 14 is secondary legislation.

Speed through the House

26. As a final matter, LDAC is concerned about the speed at which the Bill has passed through the House. LDAC acknowledges that there is a natural desire to pass legislation before the end of the Parliamentary term, however this should not come at the expense of good legislative processes.
27. The select committee process allows time for submitters, advisers, and lawmakers to gather their thoughts and take a considered perspective on a Bill – this is necessary for good law making. A truncated select committee process may still add value, however they make it difficult for submitters, advisers, and lawmakers to fully engage with the Bill’s content.

³ Clause 14(1)(a) and 14(2) only require the commissioner be satisfied the measurement to be included or excluded is appropriate or inappropriate respectively. The only restriction provided by clause 14(1)(b) is that the measurement is “within the direct responsibility of the Commissioner in relation to the tax system”.



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28. In LDAC's view there should be clear justification for increasing the speed at which legislation passes through the House. LDAC is unaware of any suitable reason why the current Bill ought to be subject to a shorter select committee process.

Recommendation

29. LDAC recommends that the committee seek advice from the department as to why legislation is necessary to achieve this purpose.
30. If the Bill does proceed, LDAC recommends that the Committee pays careful attention to the matters addressed in this submission in order to avoid unintended consequences.
31. Thank you for considering our submission. We would like to be heard in person.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Steel'.

Mark Steel
Chairperson
Legislation Design and Advisory Committee