



Inland Revenue
Te Tari Taake

Review of section 81BA of the Tax Administration Act 1994

Report

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EXECUTIVE SUMMARY

1. Section 81BA of the Tax Administration Act 1994 was introduced in August 2011 as an exception to the secrecy rules to make the disclosure of information from the Inland Revenue Department to other government agencies more flexible. The aim was to increase administrative efficiency by adding flexibility to the release of information, and to improve the provision of services by reducing the need for individuals to provide complex and duplicated information to multiple agencies.
2. The Inland Revenue Department currently has two information sharing agreements under that provision – one with the Ministry of Social Development and another with the Accident Compensation Corporation. The agencies have reported a range of benefits resulting from the current agreements, such as, fraud detection, increased efficiencies for service provision, and providing access to accurate and timely information.
3. The provision contains a requirement (section 81BA(4)) that it be reviewed after five years of enactment (29 August 2016) and before the expiry of six years (29 August 2017). A review has now been undertaken with key stakeholders (Office of the Privacy Commissioner, Ministry of Social Development, Accident Compensation Corporation, Ministry of Justice, and The Treasury).
4. Prior to introduction of section 81BA in 2011, research was undertaken on the public's view of greater information sharing between government agencies. Generally, the public supported the idea of sharing information to increase efficiency of services provided. However, there was also the opinion that appropriate privacy and security safeguards be ensured.
5. The review of the Tax Administration Act's secrecy provisions, currently underway as part of the Making Tax Simpler Government consultation, has also been taken into account to ensure the recommendations resulting from this report are consistent with the proposals presented.
6. The majority of stakeholders have expressed support for retaining section 81BA. The Office of the Privacy Commissioner questioned whether section 81BA is relevant given the Privacy Act provides for information sharing under an Approved Information Sharing Agreement (AISA) under Part 9A of the Act, and whether the override of the Privacy Act contained in section 81BA(6) is necessary.
7. Officials agree that Part 9A of the Privacy Act would be the most appropriate mechanism to share personal information, even when the share involves some non-personal information. However, when the share involves little, or no, personal information (for example, when only company information is involved), the Privacy Act would not apply and

section 81BA would be more appropriate. Guidance material will be developed to explain when and how the two legislative mechanisms for information sharing should be used and this material will be publicly available.

8. In view of the value added by the current agreements, and future opportunities to share non-personal information with other agencies, officials recommend that section 81BA be retained in the meantime, subject to the outcome of the review of the Tax Administration Act's confidentiality framework. In regards to section 81BA(6), officials agree it is unnecessary, and will refer its removal to the Tax Administration Act review work for consideration.

BACKGROUND

9. The Inland Revenue Department uses tax secrecy as one of the methods to support the effective functioning of the tax administration, which includes maintaining the integrity of the tax system and promoting voluntary compliance.

10. Section 81 of the Tax Administration Act 1994 strictly prohibits disclosure of information gathered as part of the Inland Revenue Acts, except where disclosure is reasonably necessary to carry into effect those Acts, or when a specific exception applies. When new proposals for access to information are sought by another government agency, these are first assessed against the likely impact of the integrity of the tax system, and subsequently in relation to their impact on privacy.

11. Current information sharing and disclosure for cross government purposes are legislated for as exceptions to the tax secrecy requirements. They are based on other agencies exchanging relevant information with the Inland Revenue Department for a number of purposes that range from revenue collection activities to production of official statistics. The information also assists other agencies to confirm customer's eligibility to benefits and services, as well as identifying illegal behaviour.

12. The exceptions to the tax secrecy requirements state in which circumstances information can be shared and disclosed and for what purposes. These are legislated:

- through the exceptions listed in section 81, which allow disclosure of taxpayer information for specific purposes and under specific provisions;
- through section 81A which allows disclosure of individual information under an approved information sharing agreement (AISA) and an Order in Council;
- through section 81BA, where the Inland Revenue Department may share information with other government agencies as specified in an Order in Council.

13. Section 81BA was introduced as an exception to the secrecy rule to make the disclosure of information from the Inland Revenue Department to other government agencies more flexible. It enabled information to be released in more circumstances than was previously possible with the aim of increasing administrative efficiency, reducing the need for individuals to provide complex and duplicated information to multiple agencies.

SECTION 81BA FRAMEWORK

14. Section 81BA contains two key elements:

- a set of legislative principles as to when an exception to secrecy can be applied (section 81BA(1)); and

- an administrative framework to ensure that decisions made under the legislation are robust (section 81BA(3)).

15. Under the framework, information is only shared with another agency if the government agency seeking access to the information has the ability and the authority to collect that information in its own right, but it is more efficient for the agency to obtain or verify the information from the Inland Revenue Department, and the information is available and already collected by the Inland Revenue Department. Cabinet makes the final decision about whether the Inland Revenue Department should share information with another government agency through an Order in Council.

16. An Order in Council adds agility to the process of policy change. While the framework has been included in primary legislation, the operational details of the information sharing are specified by Order in Council, which can be changed within a shorter timeframe, if required, in comparison to legislation. The Order in Council specifies the conditions for the communication of the information to another agency, such as the purpose and the classes of information to be shared.

17. Several privacy safeguards are built into the legislative framework, such as the requirement that information shared must be information that the requesting agency is authorised and able to collect in its own right, but it would be more efficient to obtain it from the Inland Revenue Department. In addition, the Inland Revenue Department and the agency seeking access to the information must enter into a memorandum of understanding, covering a range of specified matters, including safeguards for the information being shared.

18. Consultation must be undertaken with the Privacy Commissioner and the requesting agency in the making of the information sharing agreement and prior to the recommendation of an Order in Council to that effect.

CURRENT AGREEMENTS

19. Since its introduction in 2011, the Inland Revenue Department has utilised the section 81BA framework to share information with:

- Ministry of Social Development – Tax Administration (Information Sharing with Ministry of Social Development) Order 2012, under which the Inland Revenue Department may share information with the Ministry of Social Development for the purposes of assessing eligibility to benefits and services, by providing access to more accurate and timely earnings information.

The agreement with the Ministry of Social Development enables sharing information about income received by individuals in receipt of a benefit and their personal circumstances where those are relevant to benefit entitlement level. Examples of the information shared are: sources and amounts of income, information on relationship and

dependents, and change of beneficiaries' circumstances. The sharing of information occurs monthly.

- Accident Compensation Corporation – Tax Administration (Information Sharing with Accident Compensation Corporation) Order 2015, where the Accident Compensation Corporation requests information from the Inland Revenue Department from time to time for the purposes of assessing levies, eligibility for, and calculating, earnings-related compensation.

The agreement with the Accident Compensation Corporation enables the sharing of information about businesses and self-employed people which will enable them to calculate earnings levies and compensation. Data shared includes business description (e.g. close company or self-employed) and earnings data. The sharing of information occurs as determined by the Annual Schedule received from the Accident Compensation Corporation, and can either be requested fortnightly, monthly, or on demand.

CONSULTATION PRIOR TO INTRODUCING SECTION 81BA

20. Public consultation on the concept of greater information sharing between government agencies, and specifically the Inland Revenue Department sharing its data with a range of government agencies, was previously undertaken as part of the legislative process for introducing section 81BA in the Taxation (Tax Administration and Remedial Matters) Bill 2011.

21. A discussion document (*Making Tax Easier*, June 2010) sought submissions on the proposal of the Inland Revenue Department sharing Pay As You Earn (PAYE) data with the Ministry of Social Development. The majority of submitters were in favour of the proposal and commented that it could increase efficiency and reduce the need for individuals to provide complex and duplicated information to multiple agencies.

22. However, some supporters were keen to ensure the appropriate privacy and security safeguards were in place, and concerned to ensure that only relevant information was shared with relevant agencies. Some submitters who disagreed with the proposal were concerned there was little enough privacy as it was, and there was concern about the level of information already available, increasing the risk of error with greater levels of automated data sharing.

23. The concerns have been worked through to ensure the proposal offered security safeguards in accordance with government security standards, and individuals' privacy was protected according to the requirements of the Privacy Act 1993.

24. Business NZ commented that feedback from their members showed they view various government departments as ‘the Government’, so any sharing of information for government purposes is often assumed to take place anyway.

LAW COMMISSION REVIEW OF THE PRIVACY ACT 1993

25. Prior to the release of the discussion document in 2010, officials consulted with the Law Commission to ensure the proposed information sharing was consistent with the Law Commission’s review of privacy, particularly regarding process. The Law Commission did not raise any concerns and was satisfied for the Inland Revenue Department to proceed with consultation, and with including the proposals in the wider *Making Tax Easier* discussion document from June 2010. The Law Commission also indicated that this should not affect the direction that their review was heading in, nor would it impact on their timeline for the release of their privacy review.

COMMENTS FROM THE AGENCIES CONSULTED IN 2010

MINISTRY OF SOCIAL DEVELOPMENT

26. The Ministry of Social Development saw the information sharing under the new framework as having considerable potential to improve and enlarge the current information matching arrangements with the Inland Revenue Department, and supported the concept of the data sharing framework. Accurate and timelier information on employment income from the PAYE tax database would assist the Ministry of Social Development to assess correct entitlements more quickly, make timely adjustments to payments where income levels change, and consequently avoid unnecessary debt for customers.

MINISTRY OF JUSTICE

27. The Ministry of Justice considered the Inland Revenue Department’s data sharing proposal presented a number of significant opportunities for the fines and civil debt enforcement operation of the Courts. The immediacy and accuracy of access to PAYE data from the Inland Revenue Department could enable the Courts to drive down administrative costs, eliminating costs associated with obtaining information such as a fine defaulter’s place of employment. This would likely see a reduction in the use of more administratively costly forms of enforcement, such as seizure of property, and would also reduce the need to seek information from multiple agencies to resolve cases.

THE TREASURY

28. The Treasury supported the information sharing framework outlined as a basis for sharing data and considered that this would lead to administrative efficiencies within the public sector. The framework would support the Government’s priority of delivering better,

smarter public services for less. Given the importance of taxpayer secrecy to voluntary compliance, a gradual shift towards enhanced data sharing seemed appropriate.

THE OFFICE OF THE PRIVACY COMMISSIONER

29. The Office of the Privacy Commissioner raised some concerns about the new framework before section 81BA was introduced. While supporting the aim of increasing the speed, accuracy, and administrative efficiency of information exchange between the Inland Revenue Department and the Ministry of Social Development, the Office of the Privacy Commissioner was of the opinion the framework should contain many more safeguards than initially presented, and recommended that Inland Revenue officials worked with the Office of the Privacy Commissioner's staff to explore using the information matching framework (set out in Part 10 of the Privacy Act 1993) to deliver this proposal. This was resolved at the time and the Office of the Privacy Commissioner has subsequently expressed being broadly comfortable with the proposed information sharing between the Inland Revenue Department and the Ministry of Social Development, and agreed the initiative would improve the efficiency of an important public service, and should produce significant benefits.

CONSULTATION ON SECTION 81BA REVIEW

30. The provision (section 81BA) has been in place now for five years and contains a requirement (section 81BA(4)) that it be reviewed. Consultation has been undertaken with key stakeholders regarding the following mandated considerations:

- the operation of the section;
- the impacts of the section (in consultation with the Office of the Privacy Commissioner);
- whether any amendments to the section are necessary or desirable; and
- whether the section is needed.

ACCIDENT COMPENSATION CORPORATION

31. The Accident Compensation Corporation strongly supports the continuity of the share, and the underlying principle that the Accident Compensation Corporation should be able to obtain customer information which the Inland Revenue Department already holds, and is legally available to the Accident Compensation Corporation. It considers this a much more convenient and usually quicker process than collecting it directly and it avoids the customer being approached by multiple agencies for the same information.

32. The Accident Compensation Corporation is aware that proposals for changes to the secrecy provisions of the Tax Administration Act are being considered, and is hopeful that

these will provide more flexible provisions for sharing information between agencies. While the current arrangements requiring an Order in Council and a subsequent Memorandum of Understanding (MOU) are effective, a single step of an MOU between agencies under the authority of the new legislation would be quicker and more efficient to implement, and more amenable to any amendments that changing circumstances require.

MINISTRY OF SOCIAL DEVELOPMENT

33. The Ministry of Social Development reports great benefits as a result of the share enabled by the Tax Administration (Information Sharing with Ministry of Social Development) Order 2012. The information sharing has been operating under section 81BA since March 2013, and the benefits are reflected in the accurate determination of entitlements, early detection of customers with overpayments, and identification of fraud. This ensures customers are given an opportunity to comply in a timely manner, which reduces the overall number of cases requiring further action. The measured benefits from this share are outlined further in this paper in paragraphs 45-48.

MINISTRY OF JUSTICE

34. The Ministry of Justice supports the recommendations presented in this paper. In particular, they agree that an AISA is not an appropriate mechanism for sharing that relates primarily to non-personal information. They expect to be consulted in relation to the guidance to be developed, in relation to when various sharing mechanisms should be used.

THE TREASURY

35. The Treasury has been consulted in the preparation of this paper.

THE OFFICE OF THE PRIVACY COMMISSIONER

36. The comments provided by the Office of the Privacy Commissioner relate to:

- the state of having dual information sharing mechanisms; and
- the explicit Privacy Act override in section 81BA(6).

Other mechanisms for information sharing

37. The Office of the Privacy Commissioner noted that in 2011, when section 81BA was introduced, the AISA framework had not been enacted. Part 9A of the Privacy Act is now in place and the Inland Revenue Department has experience in using the framework. They note that section 81A (Disclosure of information under approved information sharing agreement) is being amended to clarify that the Inland Revenue Department may supply both personal information about an identifiable individual, and non-personal information, to another agency under an AISA. That clarification will further support the Inland Revenue Department's

ability to use AISAs in the future. They suggest that the Part 9A AISA mechanism would be a more appropriate mechanism to share information in most situations, particularly where significant personal information was involved.

38. They comment that when they were consulted on the initial proposal for bespoke information sharing provisions to be included in the Tax Administration Act in 2010-11, it was said that uncertainty may arise if multiple mechanisms were available to enable the same information sharing activities to occur. In their opinion this point remains a valid concern and may lead to confusion and uncertainty over the most appropriate mechanism to use.

39. The Office of the Privacy Commissioner therefore recommended that, if the Inland Revenue Department concludes there is merit in retaining section 81BA, it would be helpful for both the Inland Revenue Department staff and other agencies, and for public transparency, if the Inland Revenue Department develops guidance explaining when and how it was envisaged the different sharing mechanisms would be used.

The explicit override in section 81BA(6) currently unduly affects the interface with the Privacy Act

40. The Office of the Privacy Commissioner's main area of uncertainty relates to the intended application of section 81BA(6) which provides that:

'The communication of information under this section is not subject to the Privacy Act 1993.'

41. Because the Office of the Privacy Commissioner could not identify any consideration of that clause during the 2010-11 policy development phase, they have concluded that the provision was mostly likely a drafting inclusion aimed at clarifying that the information sharing foreseen by the new section 81BA would not be affected by the restrictions on use and disclosure of information under principles 10 and 11 of the Privacy Act¹. They consider the savings provisions in section 7² of the Privacy Act, combined with the clear authority provided for under section 81BA itself, adequately provide for certainty in this regard.

42. They also do not see any need for a statutory override of the other privacy principles that they consider should still apply, e.g.:

¹ Principle 10 relates to the use of information for other purposes other than the one the information was obtained in connection with, and Principle 11 relates to disclosure of information to other body or agencies unless the agency believes, on reasonable grounds, the specified exceptions apply.

² Part 2 section 7(3) - An action is not a breach of privacy of any of principles 1 to 5, 7 to 10 and 12 if that action is authorised by or under the law.

- Principle 5, which addresses an agency’s obligations to provide appropriate safeguards for the storage and security of personal information;
- Principles 6 and 7, which address an individual’s rights to access and correct personal information an agency holds; and
- Principle 8, which requires agencies to take reasonable steps to ensure information is accurate, up to date, complete, relevant, and not misleading before use.

43. The Office of the Privacy Commissioner considers that subsection 81BA(6) is not only unnecessary, but could provide an unwarranted override that could effectively undermine the privacy interests of the persons subject to any information sharing under a section 81BA information sharing agreement. The Office of the Privacy Commissioner, therefore, recommends that if the Inland Revenue Department concludes it is appropriate to retain section 81BA, consideration should nonetheless be given to removing section 81BA(6). Officials will recommend this for consideration as part of the wider review of the Tax Administration Act’s secrecy provisions.

44. The Accident Compensation Corporation supports the recommendations resulting from this review, and has a view that the removal of section 81BA(6) will not affect the Corporation’s ability to rely on section 81BA for the exchange of information with Inland Revenue, which is necessary for the efficient provision of services to its customers.

MEASURED BENEFITS

MINISTRY OF SOCIAL DEVELOPMENT

45. Sharing information under this provision has increased efficiency, reducing the need for individuals to provide complex and duplicated information to multiple agencies. Utilising the framework to provide information to the Ministry of Social Development has generated a number of benefits, resulting from the Ministry of Social Development having access to more accurate and timely earnings information.

46. In March 2013, the Ministry of Social Development started using the Inland Revenue Department’s PAYE information to identify all current working-age beneficiaries who also had employment income. Based on the information provided by the Inland Revenue Department, the programme has enabled the Ministry of Social Development to identify clients who have not notified a change in employment circumstances in a timely manner, resulting in more timely assessment and delivery of correct entitlement to social assistance, and reduced compliance costs to employers and the Ministry of Social Development.

47. The information sharing between the Inland Revenue Department and the Ministry of Social Development has shown positive results³. At 30 June 2013, 3,139 benefits had been cancelled because the recipient was not entitled to them, saving the taxpayer \$33.7 million per year. At 30 June 2014, the number of cancelled benefits increased to 6,000 amounting to \$47.4 million in savings. The amount of money recovered from fraud overpayments in 2013/14 was \$3.94m, and in 2014/15 was \$4.85m.

48. The Ministry of Social Development reports⁴ 2,336 client benefits were cancelled in 2014/15, and 1,652 in 2015/16, and detection of \$37.7 million in overpayments in 2014/15 and \$44.4 million in 2015/16.

ACCIDENT COMPENSATION CORPORATION

49. In regards to the benefits generated from the sharing agreement with the Accident Compensation Corporation, the sharing has been operating for a shorter period of time, since January 2016, and the Accident Compensation Corporation reports it has not been able to quantify the benefits as yet. However, its limited experience has been positive so far, since the Corporation now has access to information that the Inland Revenue Department holds that could otherwise be difficult and time-consuming for the Corporation to collect.

REVIEW OF THE TAX ADMINISTRATION ACT'S CONFIDENTIALITY FRAMEWORK

50. A discussion document entitled *Making Tax Simpler: Proposals for modernising the Tax Administration Act* was released by the Government at the end of 2016. The document included proposals on information collection and confidentiality, considering the need for greater information sharing within government to support the Government's better public services objectives.

51. The discussion document proposed a model for information disclosures from The Inland Revenue Department to other government agencies for non-tax-related purposes, for the provision of public services. It is a proposal to modernise the information protection and disclosure framework in the Tax Administration Act by moving to a regulatory model that allows information sharing to be enabled by Order in Council.

³ Inland Revenue Annual Report 2013 and Annual Report 2014

⁴ Report on information sharing activity for the period 01 July 2014 to 30 June 2016, Ministry of Social Development and Inland Revenue

52. The aim of the new model would be providing greater flexibility and timeliness to the implementation and amendment of information sharing agreements. This would improve efficiency and effectiveness of government services, while not compromising the ability of the Inland Revenue Department to perform its function. The model would also ensure the appropriate safeguards are in place, ensuring confidentiality is not impacted more than necessary to achieve the purpose of the information sharing.

53. The proposed model would need to meet certain criteria to allow Inland Revenue information to be shared for the provision of public services. The criteria are:

- providing the information will improve the ability of the government to efficiently and effectively deliver services or enforce laws
- the information cannot easily or efficiently be obtained or verified from other sources
- the amount and type of information provided is proportionate given the purpose for which it is being shared
- the information will be adequately protected by the receiving agency
- sharing the information will not unduly inhibit the provision of information to the Inland Revenue Department in the future.

54. The model would also include an underlying memorandum of understanding where the operational details would be set out, such as:

- the classes or types of information to be shared
- how the information will be used
- how the information will be provided or accessed
- requirements for security, storage and disposal
- how (or whether) information can be further disclosed
- any review requirements, including disclosure of any breaches.

55. The proposed model is very similar to section 81BA of the Tax Administration Act 1994.

CONCLUSIONS AND RECOMMENDATIONS

56. The benefits provided by the agreements are evident in the evaluation of the shares provided by the two agencies (the Ministry of Social Development and the Accident Compensation Corporation) with which the Inland Revenue Department has information sharing agreements under the 81BA provision. These agreements have enabled fraud detection, increased efficiencies for service provision, and provided access to accurate and timely information.

57. Key stakeholders consulted on this review have, in the majority, expressed support for retaining the section. Officials have considered their comments, as well as the proposals on the recent Government discussion document *Making Tax Simpler: Proposals for modernising the Tax Administration Act*, to develop final recommendations. The relevant points are discussed as follows.

58. The Government discussion document *Making Tax Simpler: Proposals for modernising the Tax Administration Act* contained proposals to modernise the confidentiality framework, with the aim of providing a more flexible, cohesive and transparent framework governing the protection and sharing of the Inland Revenue Department's information. It is recommended that final decisions on the future of section 81BA are made as part of this wider review.

59. The Office of the Privacy Commissioner commented that having multiple mechanisms for information sharing may raise uncertainty. However, while an AISA provided under Part 9A of the Privacy Act 1993 would be the most appropriate mechanism to share personal information, even when the share involves some non-personal information, it would not be the most appropriate mechanism for shares that involve little or no personal information, for example, when sharing company information. In these situations, section 81BA provides an appropriate mechanism and there are further opportunities where it could be used, since the Inland Revenue Department holds business information that could be useful to other agencies. For this reason, it is recommended the section be retained in the meantime, subject to the outcome of the Tax Administration Act review of the confidentiality framework. In this regard, officials agree with the suggestion for developing guidance explaining when and how the different sharing mechanisms should be used, and making the guidelines publicly available.

60. Another main point considered is the explicit Privacy Act override in section 81BA(6). Officials agree with the Office of the Privacy Commissioner comments that this could have unintended consequences by allowing the Inland Revenue Department to disregard all 12 privacy principles, and preventing individuals from exercising their right to make a complaint to the Office of the Privacy Commissioner. The removal of section 81BA(6) will, therefore, also be recommended for consideration as part of the review of the Tax Administration Act's secrecy provisions.