

# REFLECTIONS ON THE CONTRIBUTIONS OF LAWYERS TO TAX POLICY-MAKING IN NEW ZEALAND

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*Lawyers play an important part in tax policy-making in New Zealand (NZ). This paper briefly reviews NZ's Generic Tax Policy Process (GTPP), and then turns its focus on the important contributions legal practitioners and academics can make to tax policy development. Data has been gathered concerning the contributions of NZ lawyers who are, or have been, tax policymakers, law makers, submitters and commentators. This paper also notes the limited instances where legal and other theoretical approaches to tax policy have been incorporated into tax policy-making design in NZ, including novel tax policy design, such as the concept of the Broad Base Low Rate (BBLR) structure. It concludes that lawyers have made a valuable, but not necessarily distinctive, contribution to tax policy development in NZ. Also, to provide context, the paper compares the NZ approach to tax policy with that of the Republic of Ireland.*

## I. INTRODUCTION

New Zealand (NZ) is frequently promoted as a leader in tax policy design, reflected in part through its innovative Generic Tax Policy Process (GTPP), introduced in 1994 following a review of NZ's Inland Revenue (IR). Specifically, the GTPP promotes consultation and transparency, and features an almost unparalleled environment where officials and practitioners work together in the wider interest of better tax policy and legislation.

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How is this achieved? First, the GTPP encourages early and explicit consideration of key tax policy elements and trade-offs as part of its Strategic, Tactical and Operational phases. Secondly, the GTPP provides an opportunity for external input into the process for formulating tax policy to increase both the actual and perceived transparency of the process, and provide for greater contestability and quality of policy advice between the IR and NZ Treasury. External consultation can occur at the initial stage of policy consideration, the detailed design stage, the legislative drafting phase, the select committee stage and the post-implementation review. Thirdly, the GTPP sets out to clarify the responsibilities and accountabilities of the two major departments actively involved in the process. While much of the work in tax policy-making is undertaken by members of the accounting profession, the contributions of the legal profession during all of the phases of the GTPP are significant and vital to the success of tax policy development and implementation in NZ.

With this background, the paper uses NZ as a case study to explore the contributions of lawyers to tax policy development. Case study as a research method is often maligned and considered to be a non-scientific approach to undertaking research. Notwithstanding this view, case study research is used extensively in academic enquiry in traditional social science disciplines as well as practice-oriented fields. When adopting a case study approach, the design and analysis considerations are of prime importance, more so often than the description of events or the scenario under review. As Yin states the need for a case study arises out of the desire to understand complex social phenomena and allows investigators to retain the holistic and meaningful characteristics of real-life events.<sup>1</sup>

As a consequence of this paper taking the case study approach, the findings will not necessarily be directly transferrable to another jurisdiction. Nevertheless, the findings should be indicative of what may be expected when lawyers in a particular jurisdiction have a significant level of involvement in a transparent and consultative tax policy process. In this regard, the paper does seek to briefly compare NZ to that of the Republic of Ireland, a nation with a relatively small population similar to that of NZ (Ireland's population in 2017 is 4.7 million, with NZ's being 4.8 million in 2017). Both Ireland and NZ are small open economies, with a Westminster-type parliamentary process. One

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<sup>1</sup> Robert K Yin, *Case Study Research: Design and Methods* (Sage Publications, 2<sup>nd</sup> ed. Vol. 5, 2003).

important difference is that Ireland is also accountable to the European Parliament through its membership of the European Union (EU).

The remainder of this paper is organised as follows. In section II, the paper briefly reviews the development of the GTPP, building on prior research (for which the writer has been a contributor). It then extends this review in section III to focus on the important contributions legal practitioners and academics have made to tax policy development in NZ. These contributions encompass, but are not limited to, preparation of submissions on behalf of law firms and the NZ Law Society (NZLS), membership of key committees (such as the Finance and Expenditure Select Committee - FEC), as well as officials within the NZ Treasury and IR. Data, where it is publicly available, has been gathered on the contributions of lawyers who are policymakers, law makers, submitters and commentators. Section IV then explores the limited instances where the writer is aware of legal and other theoretical approaches having been incorporated into tax policy-making design in NZ. This includes tax policy design using the Broad Base Low Rate (BBLR)<sup>2</sup> principle. Following this discussion the paper briefly overviews the tax policy process in Ireland in section V, with a number of conclusions and areas for future research set out in section VI.

## II. OVERVIEW OF THE TAX POLICY-MAKING PROCESS IN NEW ZEALAND

In this section of the paper, the writer sets out a summary of the experience of the GTPP in NZ. It commences with an outline of the GTPP, with a brief explanation of how it operates, and a comment on its utilisation and influence on tax policy development. Underlying the tax policy process in NZ is an environment based on transparency and genuine open consultation.

As commented elsewhere by the writer,<sup>3</sup> NZ chose to take a new and innovative route in the mid-1990s with the adoption of the GTPP, a blueprint for formulating tax policy that

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<sup>2</sup> For further analysis of the BBLR, see a presentation by IR's Acting Deputy Commissioner (Policy and Design), D Carrigan, "Tax administration reform – retaining a coherent tax policy framework through change", (paper presented to the NZ Inland Revenue Tax Administration Conference, 12-13 June 2014). For a broader discussion, see Richard Bird, *The BBLR Approach to Tax Reform in Emerging Countries* (August 2008); available on SSRN at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1273818&mirid=1](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273818&mirid=1).

<sup>3</sup> See Adrian Sawyer, "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of 'Law and Politics'", (2013) 28(2) *Australian Tax Forum* 401, at 408.

is premised on transparency and consultation. The GTPP emerged following a review of the IR (known as the Organisational Review of Inland Revenue), chaired by Rt. Hon. Sir Ivor Richardson, former President of the NZ Court of Appeal.<sup>4</sup> Sir Ivor Richardson identified a number of problems with the previous process for developing tax policy in NZ, noting that<sup>5</sup>:

... the subject matter is complex, and tax legislation is very complex and difficult to understand. The tax policy process was not clear, neither were the accountabilities for each stage of the process. There was insufficient external consultation in the process.

The GTPP was subsequently implemented by a Cabinet directive as a form of administrative or customary practice, rather than formally by way of legislation or regulation. This approach reflects both the strengths and weaknesses of the GTPP.<sup>6</sup> The GTPP's influence on tax policy design is in stark contrast to the policy environment prior to 1994. Tax policy was characterised by an absence of clarity and ascertainable accountabilities during each stage of the process. It was also largely controlled by the Minister of Finance and key Officials, with the perception that the external consultation was insufficient to the extent of being virtually ineffective.<sup>7</sup>

With the GTPP, the NZ Government and Policy Officials are able to draw upon the technical and practical expertise of the business community, along with incorporating the compliance and administrative effects of potential policy changes. Furthermore, the GTPP provides a mechanism to communicate the rationale for policy changes which assists with educating taxpayers about the need for the change and its wider implications.

The GTPP has five core stages, each of which has their own components totalling 16 phases (see Figure 1). The subject matter of reform is almost always firmly entrenched

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<sup>4</sup> Rt. Hon. Sir Ivor Richardson, *Organisational Review of the Inland Revenue Department, Report to the Minister of Revenue and the Minister of Finance*, (Inland Revenue, April 1994). Sir Ivor Richardson was also instrumental in his oversight of the Rewrite Advisory Panel that worked alongside the NZ Government's fourteen year project to rewrite the Income Tax Act; for an analysis see Adrian Sawyer, "RAP(ping) in Taxation: A Review of New Zealand's Rewrite Advisory Panel and its Potential for Adaptation to Other Jurisdictions", (2008) 37(3) *Australian Tax Review*, 148.

<sup>5</sup> See Richardson, n 4 above, at 5.

<sup>6</sup> See Sawyer, n 3 above, at 403.

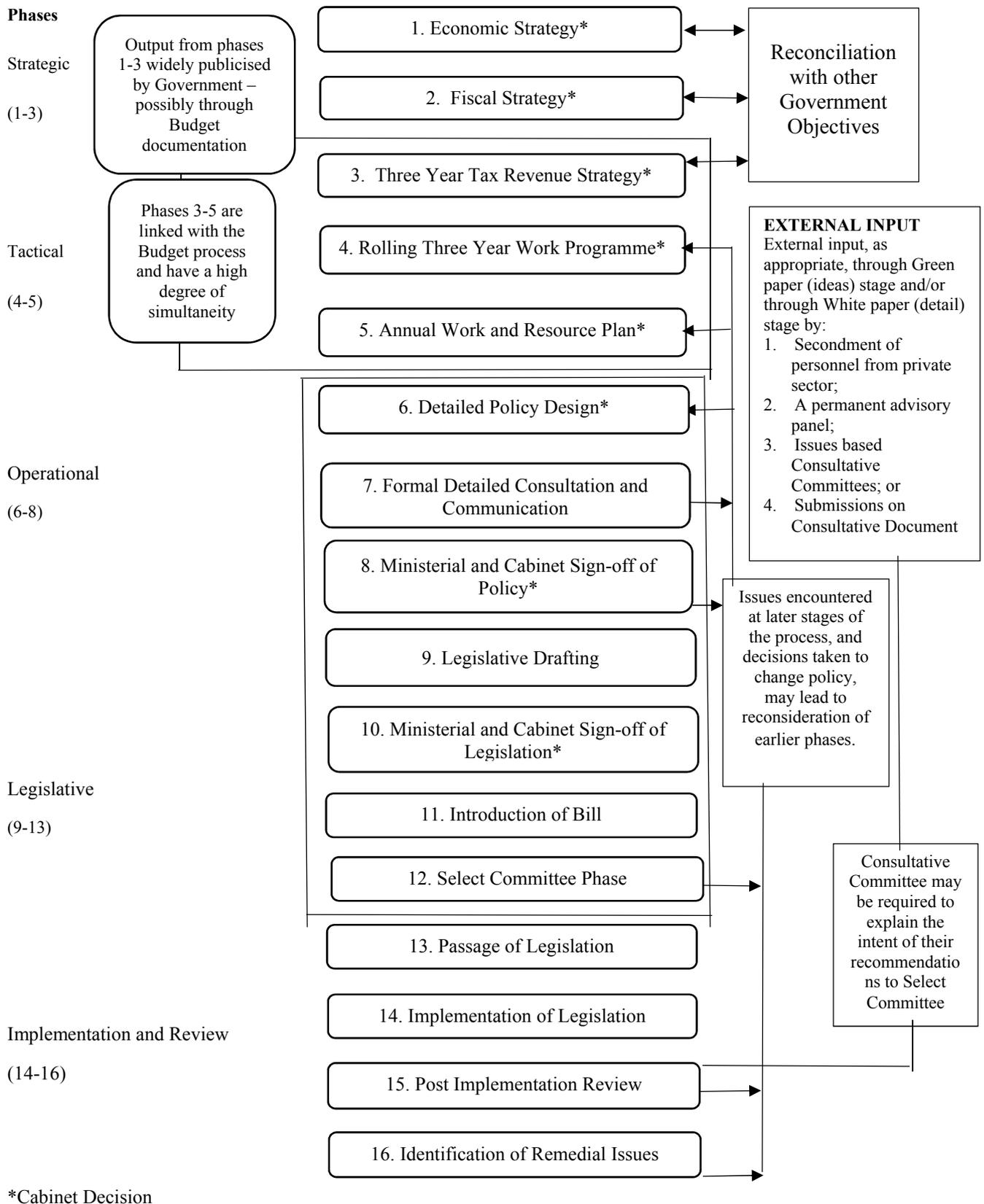
<sup>7</sup> See Sawyer, n 3 above, at 403.

in the government of the time's economic, fiscal and revenue strategies (Phases 1–3). A further feature of the GTPP is the requirement for the NZ Government to announce annually its Rolling Three Year Work Programme (RTYWP),<sup>8</sup> which in turn leads to the annual work and resource plan of the IR. The GTPP contains a number of external inputs and feedback loops, including a post implementation of legislation review. Throughout the GTPP, the linkages and feedback loops are intended to reflect a flexible process that recognizes that some activities may occur simultaneously or in a slightly modified order, such as when legislative drafting may occur (within Phases 6–12). Phases 9-14 are part of the parliamentary process and were in place long before the GTPP was developed.

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<sup>8</sup> The latest RTYWP is available at the IR's Policy Advice Division's website at: <http://taxpolicy.ird.govt.nz/work-programme>, (at 18 November 2016).

**Figure 1: The Generic Tax Policy Process<sup>9</sup>**



<sup>9</sup> See Richardson, n 4 above, at 66.

The NZ Government was encouraged by Sir Ivor Richardson's Organisational Review Committee to adopt the GTPP (as set out in Figure 1) as a significant improvement over the then incumbent approach to tax policy-making based upon three key features the GTPP would offer.<sup>10</sup> First, the GTPP clarifies the responsibilities and accountabilities of the two major departments actively involved in the process (namely the IR and the NZ Treasury). Second, the GTPP encourages earlier and more explicit consideration of key tax policy elements and trade-offs through the linking of its first three stages. Finally, the GTPP provides an opportunity for external input (such as from legal practitioners and firms) into the process for formulating tax policy. This is intended to facilitate both the actual and perceived transparency of the process, and provide for greater contestability and quality of policy advice.

For the most part, consultation under the GTPP is principally with tax practitioners on bills and consultative documents, and in this regard, tax lawyers will normally be active in preparing responses. The form of consultation, however, may be adapted depending upon what is being consulted. For example, consultation may involve large public meetings (such as for the reform of the taxation of charities) or the use of an online forum and blogs (for example, with changes to the student loans scheme). When the tax treatment of indigenous authorities was consulted upon, regional hui (a form of traditional meeting held by Māori) were organised using indigenous networks.<sup>11</sup>

An important weakness in the GTPP is that late policy or legislative developments may be added by way of a Supplementary Order Paper (SOP)<sup>12</sup> during the parliamentary phase. With a SOP, the underlying policy of the proposed amendment is usually not exposed to public scrutiny via formal consultation. While this may not necessarily be a problem where the change is remedial and corrective of minor defects in existing legislation,<sup>13</sup> if significant new developments are introduced, this is a major concern.

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<sup>10</sup> See Sawyer, n 3 above, at 404.

<sup>11</sup> For further discussion, see Sally-Ann Joseph, "Public consultation in tax policy: lessons for Singapore and Hong Kong", (2016) 9(3) *Journal of Asian Public Policy*, 291.

<sup>12</sup> An SOP is a late legislative amendment introduced by the Government at the Second Reading stage (during Step 13 in the GTPP) after the Finance and Expenditure Committee (FEC) has reported on the bill (that is, after the consultation process has been completed). Usually these will be remedial and minor in nature, but this is not always the case.

<sup>13</sup> See Sawyer, n 3 above, at 404.

Such actions effectively bypass the GTPP, leading to lower quality legislation (technical content and drafting).<sup>14</sup>

So why has the GTPP managed to survive? The writer has previously reviewed the prior literature on the GTPP, and examined why it has been both successful and managed to survive the political policy environment that operates in NZ.<sup>15</sup> One important element has been the GTPP's adaptability to change to the various approaches to political policy development in NZ, as well as general acceptance of its merits from MPs across the political spectrum. Furthermore, the private sector has continued to operate in a cooperative manner with Officials, with a view of ensuring the underlying policy is likely to meet its aims and be effective in practice. It is of note that the private sector and Officials in the IR have close links, with Officials making themselves readily accessible to tax practitioners.

When the Mixed Member Proportional (MMP) political system commenced in 1996, shortly after adoption of the GTPP in 1994, this was initially expected (at least) to provide a challenge to the operation of the GTPP.<sup>16</sup> When the GTPP was introduced, NZ had a First Past the Post (FPP)<sup>17</sup> election system for its single house Parliament (the House of Representatives). The evidence post the introduction of MMP indicates that it has not prevented major tax reform in NZ, with the Tax Working Group (TWG) in 2009-2010 complementing the contributions of the GTPP to tax policy development in NZ with the most significant tax reform for New Zealand in 25 years. Nevertheless, it has necessitated greater compromise in tax policy negotiations between political parties. The contributions of the TWG are discussed further in section III of this paper.

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<sup>14</sup> A significant example of introducing a major tax policy change via a SOP was the introduction of Loss Attributing Companies (LTCs) in 2011; see further the comments of Peter Vial, "The Generic Tax Policy Process: A "Jewel in Our Policy Formation Crown"?", (2012) 25(2) NZULR 318-346.

<sup>15</sup> See Sawyer, n 3 above, at 404-425.

<sup>16</sup> A feature of the MMP system has been (minority) coalition governments, with the major party needing to work closely with several other smaller parties to develop tax policy.

<sup>17</sup> FPP is a system whereby the person who receives the highest number of votes for their electorate seat will win that seat. The party with the highest number of electorate seats will then be asked to form a government. If that party has more than 50 per cent of the electorate seats then it can become the government without needing to form a coalition with one or more additional parties. Usually a government would be formed by a single political party that held a majority of electoral seats.

Turning now to the platform for tax policy setting in NZ, it is important to recognise that NZ's BBLR<sup>18</sup> approach was introduced in the mid-1980s by then Minister of Finance, (Sir) Roger Douglas, prior to the implementation of the GTPP. The BBLR is a coherent tax policy framework that seeks to appropriately balance (with trade-offs) a number of factors: efficiency; fairness; compliance costs; and administration costs. It aims to have a broad base of taxation while keeping tax rates as low as possible. NZ collects the bulk of its tax revenue from three broad bases; personal income, company income and consumption. This has allowed a low top individual tax rate of 33 percent, which is aligned with trust rate and close to the 28 percent company rate.

The NZ Treasury comments with respect to BBLR in NZ:<sup>19</sup>

*The best evidence available suggests that the BBLR framework is the optimal approach to tax policy for New Zealand in the medium-term.* This framework aims to improve economic efficiency (and ultimately enhance economic growth performance) by reducing the distortions to economic decision-making caused by taxes. The BBLR framework achieves this by employing extensive tax bases and applying low tax rates to those bases in order to reduce the behavioural distortions caused by the tax system as far as possible. *In other words the BBLR framework aims to make tax a neutral factor in decisions, so that decisions can be made based on their underlying economic merit rather than being influenced by tax considerations.* The BBLR framework attempts to do this while at the same time raising the revenue required to fund government expenditures (and striking a balance between the associated taxpayer compliance and Inland Revenue administration costs incurred to achieve this revenue objective). High tax rates are inconsistent with the BBLR

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<sup>18</sup> For further discussion on BBLR, including its endorsement by the TWG, see Tax Working Group, *A Tax System for New Zealand's Future: Final Report* (VUW, 2010), at 14; available at: <http://www.victoria.ac.nz/sacl/cagtr/twg>. More generally on the BBLR, see OECD, *Choosing a Broad Base - Low Rate Approach to Taxation*, (OECD Tax Policy Studies, No. 19, 2010).

<sup>19</sup> See NZ Treasury, *Regulatory Impact Statement: Changes to Personal Tax, the Research & Development Tax Credit and KiwiSaver: Status Quo and Problem Nature and magnitude of the problems with current personal tax settings, Taxation (Urgent Measures and Annual Rates) Bill* (2009); available at: <http://www.treasury.govt.nz/publications/informationreleases/ris/treasury/prk/03.htm> (emphasis added). For further discussion on NZ's approach to tax policy, see Matt Benge, "Formalising Good Tax Policy Practice: the New Zealand Model", (paper presented at the Structures, Processes and Governance in Tax Policy-Making Conference, Said Business School, Oxford, 8-9 March 2012); available at: [http://www.sbs.ox.ac.uk/sites/default/files/Business\\_Taxation/Events/conferences/2012/tax\\_policy\\_making/benge.pdf](http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Events/conferences/2012/tax_policy_making/benge.pdf).

tax policy framework, which seeks to minimise the economic harm caused by taxes. While pursuing a BBLR framework, other factors such as equity and the tax system's redistributive role are also taken into account in tax policy design.

The BBLR model is essentially a simple, easily understandable and coherent framework that acts as a reference point for guiding tax policy development. As a consequence it means that all significant areas of the economy should be taxed reasonably consistently and therefore the resulting tax policy should reduce economic distortions. The key aspects should be capable of being understood by the public, and its overall simplicity and coherence has enabled it be durable. However, the BBLR has some 'deficiencies', although most are theoretical in nature. For instance, economic theory would argue that the most efficient mechanism to raise revenue would be to apply different tax rates to each taxpayer depending on their individual elasticities. The BBLR does not do this, and as such, is an example of where pragmatism outweighs economic theory. The BBLR also does not correct for positive and negative externalities to the extent that traditional economic theory would advocate. From a practical implementation perspective, one major deficiency of the BBLR base in NZ is the absence of a comprehensive capital gains tax (CGT). Whether NZ should move down the path of developing and implementing a comprehensive CGT is a contentious issue politically.<sup>20</sup>

With growing evidence of increasing inequality in New Zealand, as well as increasing calls for governments to be more proactive in influencing the behaviour and decision-making of individuals, the time is ripe for a comprehensive debate over whether BBLR remains the 'best' approach for NZ. Issues such as responsive regulation, addressing environment concerns, resetting residential house prices, are in urgent need of informed debate. While the author believes the BBLR has served NZ relatively well in terms of tax policy development compared to many other countries, the evidence of its 'casualties' provides impetus for informed debate, such as through the establishment of a working group similar to the TWG.

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<sup>20</sup> For a recent contribution to the debate over a CGT in NZ, see the special issue of the NZJTLTP (2015) Vol 21(1).

It is certainly an arguable contention that any novel policy development ultimately an illusion if one accepts it can be no more than a pretence that policymakers will be influenced by external input and be willing to be transparent in their decision-making. The author would suggest that NZ's GTPP, coupled with the BBLR platform, comes close to avoiding being termed an illusion. While key personnel within the IR remain receptive to consultation and generally act with transparency, there are limits to this. In effect, through the prevailing government ideology, coupled with the Treasury's strong preference for neoliberalism, it is difficult for the IR to resist displaying being dogmatic and doctrinaire adherence to neoliberalism, in general, and BBLR, in particular. The IR would need convincing to depart from BBLR, although the absence of a CGT regime might suggest they can accept a less than optimal form of BBLR. The author accepts that in principle a capital gain is income, at least from a theoretical perspective. It should not be lost in this discussion, however, that a CGT remains a 'political football'.

Apart from the work of the TWG, the GTPP has not been tested in an environment of fundamental tax policy change. Outside of taxation, the GTPP formed the basis for a much wider form of policy development, the Generic Policy Development Process (GPDP), implemented from 2005.<sup>21</sup> Reference to, and use of, the GPDP ceased several years ago, without any apparent replacement policy development process.

Outside of NZ, how has the GTPP been perceived? Dirakis and Bondfield<sup>22</sup> argue that the GTPP is "as good as it gets" in the tax policy arena, taking into account the level of resources available to NZ. These authors also suggest that there is much for other countries, including Australia, to learn and adapt from NZ's GTPP experience. The authors conclude:<sup>23</sup>

*The standard of New Zealand openness is exemplified by Inland Revenue posting its briefing to the incoming Minister; in Australia, these are more likely to find themselves on a quick trip to the shredder rather than the web.*

In this regard, Australia still awaits the release of a report on an assessment of

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<sup>21</sup> See Ministry of Economic Development (MED), *Origin and Objectives of the GPDP* (NZ Government, 12 December 2005); available from <http://www.med.govt.nz>.

<sup>22</sup> Michael Dirakis, and Brett Bondfield, "At the Extremes of a "Good Tax Policy Process": A Case Study Contrasting the Role Accorded to Consultation in Tax Policy Development in Australia and New Zealand", (2011) 11(2) NZJTL 250.

<sup>23</sup> See MED, n 21 above, at 275 (emphasis added).

world best practice consultative tax policy practices commissioned by the Board of Taxation.

Little et al., as part of the Canadian tax policy forum, offer insights into the GTPP from both IR and practitioner perspectives.<sup>24</sup> The authors highlight the extensive cooperation and trust between the private and public sectors in NZ. In this regard, they suggest that private sector practitioners (including lawyers), on occasions, will advocate for changes that are not necessarily in their own (or their clients') direct financial interests.<sup>25</sup> Rather, they may take a view to support what is considered to be best for 'New Zealand Inc.' (or NZ as a whole). Little et al. also comment on major private sector organisations often initiating policy changes with Officials and suggesting modifications to proposals to facilitate their effective operation.<sup>26</sup> Little et al. acknowledge that the GTPP is closely entwined with the political environment of NZ, along with the tax policy framework reflected in the BBLR.

Arnold offers the following overview of the strengths and weaknesses of NZ's GTPP:<sup>27</sup>

The strengths of the New Zealand process for making tax policy are:

- the participation of private-sector tax professionals in the process on both a formal and an informal basis;
- the open access to Inland Revenue tax policy officials and the minister accorded to tax professionals;
- the shared responsibility for tax policy and cooperation between the Treasury and Inland Revenue;

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<sup>24</sup> Stuart Little, Geoff D Nightingale, and Alan Fenwick, "Development of Tax Policy in New Zealand: The Generic Tax Policy Process", (2013) 61(4) Canadian Tax Journal/Revue Fiscale Canadienne, 1043. The authors are from the NZ Treasury and a Big 4 Accounting firm.

<sup>25</sup> Little et al., n 24 above, at 1050.

<sup>26</sup> Little et al., n 24 above, at 1051.

<sup>27</sup> Brian Arnold, "The Process of Making Tax Policy: Summary of Proceedings", (2013) Vol 61(4) Canadian Tax Journal/Revue Fiscale Canadienne, 989, at 996.

- the integration of the broad policy, legislative design, and drafting functions, coupled with a tight legislative process, which results in a tax policy process that is fast and certain; and
- the publication each year by Inland Revenue of its work program for the next 18 months, so that the public is notified on an ongoing basis of the tax issues that the government considers to be important.

The weaknesses of the New Zealand process are the following:

- the resources devoted to tax policy are shrinking at a time when demands on tax policy officials are increasing; as a result, insufficient strategic thinking occurs with respect to tax policy and fewer foreign consultants are used;
- there is insufficient post-implementation review of tax measures; and
- consultation on proposed tax measures limited to the New Zealand tax community is increasingly inadequate in a global economy.

Arnold concludes his commentary concerning NZ's tax policy process by noting that:<sup>28</sup>

New Zealand's situation is so special in many respects (and not just because of the country's small population) that its GTPP is not readily transferable to other countries. Nevertheless, *it was suggested that it would be worthwhile to develop model or best practices with respect to the institutionalization of the relationships among the principal players in the tax policy process.*

Little et al. conclude favourably on the GTPP, stating:<sup>29</sup>

Tax policy works fairly well in New Zealand. An important reason is the formalized GTPP process, which encourages consultation early and often in the development of tax policy.

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<sup>28</sup> Arnold, n 27 above, at 1007 (emphasis added).

<sup>29</sup> Little et al., n 24 above, at 1056 (emphasis added).

However, *a good tax policy process goes beyond formalized consultation. For the GTPP to work well, there need to be coherent policy settings that the private sector can buy into.* Moreover, a good tax policy process is not something that can be captured in a written road-map. It *requires willingness between the government, officials, and the private sector to truly listen and engage.* It is critical that the government be open to acting on good suggestions put forward by the private sector.

The GTPP has continued to operate largely unscathed under both ‘left of centre’ and ‘right of centre’ governments, remaining intact for over 20 years with very few instances of governments choosing not to follow it.<sup>30</sup> This brief overview of the GTPP has highlighted the transparency and consultative features of tax policy-making in NZ, as well as indicating areas where lawyers may be involved in the tax policy process. In the next section of the paper, the writer explores areas where lawyers are, or have been, involved in tax policy-making, along with some instances where opportunities for their involvement may not have been taken.

### III. LAWYERS AND TAX POLICY-MAKING IN NEW ZEALAND

The potential for involvement at the highest level of tax policy-making is through being part of the NZ Government, or the select committees that consider draft (tax) legislation. In this regard, it is interesting to consider the number of Ministers of Finance and Ministers of Revenue that have a legal background since the mid-1980s. This period commenced with the election of the then reforming NZ Labour Government. Since that time, there has not been any Minister of Finance with a legal qualification/background. Rather, most have an arts or commerce degree, with the most recent (Hon. Steven Joyce), a degree in zoology! The Minister of Revenue (known for a period as the Treasurer in the early MMP days), has had two lawyers, the first being Rt. Hon. Winston Peters in the mid-1990s, and the second, Hon. Judith Collins following a Cabinet reshuffle in late 2016. Ms. Collins holds a Bachelor of Laws, Master of Laws and a Master of Taxation, and is arguably the most qualified person academically to hold the portfolio of Minister of Revenue in NZ since the mid-1980s. Similar to the assessment of those holding the

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<sup>30</sup> The total most significant instances when the GTPP has not been followed are the introduction of the 39 percent tax rate in 1999-2000 by then Minister of Finance, Dr Michael Cullen, and the introduction of the LTC framework in 2010. For further discussion, see Vial, n 14 above, and Sawyer, n 3 above.

position of Minister of Finance, most Ministers of Revenue in NZ have a commerce degree and are not qualified lawyers.

Select committees are key parliamentary institutions with which public servants and those working in the wider State sector have contact. These committees undertake detailed work on a range of different matters on behalf of the NZ House of Representatives, and report their findings to it. Specifically the Finance and Expenditure Committee's (FEC's) remit includes:

- the detailed scrutiny of bills (except appropriation and imprest supply bills, and those considered under urgency);
- examination of the estimates of expenditure;
- the review of departmental and agency performance;
- international treaty examinations;
- petitions from NZ citizens; and
- conducting inquiries.

In summary, the FEC examines issues relating to NZ Government finance, revenue and taxation. It also looks at the overall performance of the economy. The FEC serves as the equivalent of a Public Accounts Committee (PAC). However, the FEC's functions are wider than those of a traditional PAC, in that they encompass the audit of the Crown's and departmental financial statements, government finance, revenue and taxation.<sup>31</sup>

The composition of the FEC since 2000 reveals some interesting findings with respect to its combined 70 current and past members. The current FEC comprises 11 members, and has two lawyers (18 percent), including Rt. Hon Winston Peters. Prior to the most recent

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<sup>31</sup> See further Joachim Wehner, "Principles and Patterns of Financial Scrutiny: Public Accounts Committee in the Commonwealth" (2003) 41(3) *Commonwealth and Comparative Politics* 21. See also Elizabeth McLeay, "Scrutiny and capacity: An evaluation of the parliamentary committees in the New Zealand Parliament", (2006) 21(1) *Australasian Parliamentary Review* 158, at 166-168, and Kerry Jacobs, Kate Jones and David Smith, "Public Accounts Committee in Australasia: the state of play" (2007) 22(1) *Australasian Parliamentary Review* 28. In contrast, Sir Geoffrey Palmer argues that the FEC is "no longer the power in the lands that its predecessor, The Public Expenditure Committee, used to be ..."; see Sir Geoffrey Palmer, "What is Parliament for?" (2011) NZLJ 378 at 384.

change of membership on 8 February 2017, it had three lawyers (27 percent). Its current Chair, Chris Bishop is also a lawyer. Of the previous 61 FEC members, 9 have been lawyers (a meagre 15 percent). Of the past FEC members, three have been a Minister of Revenue, two a Minister of Finance and one Prime Minister (Rt. Hon John Key). Few past members of the FEC have had extensive experience as a practicing lawyer. There is one notable exception, Hon Kate Wilkinson, who practised as a lawyer for 25 years before entering Parliament in 2005 and spending a year on the FEC before retiring from political life.

In addition to the support from public Officials, the FEC has its own specialist tax advisor who have been appointed to advise the FEC on a bill-by-bill basis.<sup>32</sup> This position has been in place since 1992.<sup>33</sup> Advisers to select committees generally have a very different function from witnesses (such as submitters), and Officials who are responsible for drafting the content of a bill. Advisers will analyse the evidence before the select committee, and advise how concerns raised in submissions can be dealt with. They do not usually give their advice in public; it is often in the form of a confidential report that may be released publicly at a later stage. They will generally be present when the select committee enters the confidential phase of its deliberations.

The specialist tax adviser to the FEC is usually a very experienced tax lawyer. Currently the FEC's specialist tax adviser is Therese Turner, and previously it has been David McLay and Lindsay McKay. Harris comments with respect to the role of the specialist tax adviser to the FEC:<sup>34</sup>

The Finance and Expenditure Committee has routinely used a specialist tax adviser to provide an independent source of advice for the consideration of tax legislation. This has *not precluded the receipt of advice from The Treasury and the Inland Revenue Department*, but has *provided the committee with an independent sounding board, on technical legal issues*, such as avoidance and

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<sup>32</sup> Appointment is in accordance with protocol; see Hon Margaret Wilson, (Speaker of the House of Representatives, NZ), *Protocol for the provision of independent specialist assistance to select committees*, J5A (2007); available at: [https://www.parliament.nz/resource/en-nz/48DBHOH\\_PAP15218\\_1/a020737cc00a82bf54b3c519fbe1141cae0e07cc](https://www.parliament.nz/resource/en-nz/48DBHOH_PAP15218_1/a020737cc00a82bf54b3c519fbe1141cae0e07cc).

<sup>33</sup> See Anon, "Finance committee to get own adviser", (1992) *The Dominion*, 10 March.

<sup>34</sup> Mary Harris, "Keynote Address: Public Servants and Parliament: A New Zealand perspective" (2007) 22(1) *Australasian Parliamentary Review*, 9 at 12 (emphasis added).

evasion and issues of policy and administration *where the two departments may hold differing views.*

The specialist tax adviser will frequently provide a separate report to the NZ Parliament. This report principally considers the comments made by Officials in their report to the FEC that have been made after submissions on the bill had been received, along with their responses to issues raised.<sup>35</sup> Recently the NZLS presented a submission to the current Parliamentary Standing Orders select committee urging improvements to the submission process. Key concerns involve providing adequate time for the public to make submissions to select committee on bills and allow the select committee more time to consider bills, submissions and to report back to Parliament. Closer scrutiny is urged over amendments to bills late in the process, such as via SOPs. One instance in the area of taxation included a proposal to authorise under delegated legislation significant transitional powers to suspend, amend or override the Tax Administration Act 1994 (TAA 1994) during the current Business Transformation programme within IR.<sup>36</sup>

Looking more broadly at the composition of the NZ Parliament, Table 1 provides a summary of the previous occupations of MPs from 1996 to 2014:

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<sup>35</sup> For a recent example, see Therese Turner, *Report of the Specialist Tax Adviser to the Finance and Expenditure Select Committee on the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill 2016* (October 2016); Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill 2016; available at: [https://www.parliament.nz/resource/en-NZ/51SCFE\\_ADV\\_00DBHOH\\_BILL69669\\_1\\_A534387/7b6c77dc0c64d739e69b6402a6ab93bf971a5334](https://www.parliament.nz/resource/en-NZ/51SCFE_ADV_00DBHOH_BILL69669_1_A534387/7b6c77dc0c64d739e69b6402a6ab93bf971a5334).

<sup>36</sup> See further: New Zealand Law Society, *Submission on Review of the Standing Orders* (November 2016); available at: <https://www.lawsociety.org.nz/news-and-communications/news/law-society-recommends-changes-to-parliaments-rules-to-achieve-better-legislation>.

**Table 1: Previous Occupations of MP 1996-2014 (%)<sup>37</sup>**

Occupation	1996	1999	2002	2005	2008	2011	2014
Businessperson	18	17	19	20	11	20	23
Manager/Administrator	8	6	8	9	16	13	17
Teacher	17	18	18	15	14	7	10
Local Government	3	5	6	3	2	8	9
Lawyer	8	8	10	7	15	10	8
Public servant	-	-	-	-	-	-	7
Farmer	13	12	8	10	8	7	5
Media	3	2	2	1	3	5	5
Consultant	6	8	6	7	2	4	3
Health Professional	-	-	-	-	-	-	3
Trade Unionist	7	6	8	7	5	4	2
Accountant	4	3	2	2	4	1	1
Engineer	3	3	3	2	2	2	1
Other (or not stated)	11	13	12	17	16	19	6
TOTAL	100	100	100	100	100	100	100

Another important committee of the NZ Parliament that has input into tax legislation is the Legislation Design and Advisory Committee (LDAC).<sup>38</sup> The LDAC's mandate is to promote quality legislation, which it does this in three ways:

1. By providing advice to departments early in the development of policy and legislation to resolve problems in the design of legislation and to identify potential public and constitutional law issues.

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<sup>37</sup> Source: NZ Parliamentary Service, *Final Results for the 2014 New Zealand General Election*, Parliamentary Library Research Papers 2015/01 (2015); available at: <https://www.parliament.nz/resource/en-NZ/00PLLawRP2015011/1cb65e1e0919e68b3048392636652383f18cd7c1>. Note: This covers all MPs elected under NZ's MMP election system since 1996. Businessperson includes company directors, the self-employed, real estate agents, investment bankers and chairpersons. 'Teacher' includes lecturers and principals. The category of 'manager/administrator' includes financial administrator, voluntary sector administrator, and executive officers of public agencies. 'Other' includes those working for nongovernment organisations, and MPs whose previous occupation is publicly unavailable. Prior to 2014, 'Public servants' and 'health professionals' were included in the 'Other' category. Main sources are Statistics NZ, NZ Official Yearbook, and MPs' biographies as listed on political party websites. Data for 2017 should be known once the composition of the government is determined.

<sup>38</sup> For further details of the activities of the LDAC, see <http://www.ldac.org.nz/>.

2. By setting standards through the publication of guidelines (endorsed by Cabinet) and the supporting manual for lawyers and policy advisors engaged in designing, developing and drafting legislation.
3. By scrutinising NZ Government bills that come before NZ Parliament.

The LDAC is largely comprised of lawyers. Importantly, it is not concerned with the policy objectives of legislation; its focus is on ‘good’ legislative practice and public law issues. Its input into tax law drafting is indirect at most, given the input of the IR into tax law drafting.

The Parliamentary Counsel Office (PCO) has the responsibility for drafting legislation to support the NZ Government's legislative programme.<sup>39</sup> Its goal is to ensure legislation that is effective, clear, consistent with other legislation, and adheres to legal principles. However, unique to NZ within common law jurisdictions, tax legislation is not drafted by the PCO but within the IR by the Policy and Strategy Group (PSG, previously Policy Advice Division). In addition to drafting legislation and other tax materials, the PSG, jointly with the NZ Treasury, advises the NZ Government on all aspects of tax law and reform, and on social policy measures that interact with the tax system. This forms part of the contestable policy paradigm that operates in NZ. More generally, the role of the PSG is to:

- draft tax legislation (including regulations);
- forecast tax revenues; and
- negotiate, interpret and maintain NZ’s network of double tax agreements (DTAs) with other countries.

Within the IR, two senior positions are held by lawyers. The Acting Deputy Commissioner, Policy and Strategy (David Carrigan), and the lead for NZ’s international tax portfolio, Carmel Peters, come with considerable experience as tax lawyers. Within the IR most lawyers are located in the Office of the Chief Tax Counsel (OCTC). The OCTC’s function is to maintain taxpayer confidence in the NZ tax system by providing guidance on the correct interpretation of the Inland Revenue Acts and other relevant laws,

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<sup>39</sup> For further details on the PCO, see: <http://www.pco.parliament.govt.nz/>.

and by considering case law through the disputes process. Many other lawyers within the IR work in the Legal and Technical Services Group (LTSG), which has a number of key functions, namely:<sup>40</sup>

- providing independent advice and support services to assist in the resolution of complex tax issues (some which include social policy matters);
- litigating and prosecuting where enforcement is considered necessary;
- representing the Service Delivery Group and other business groups within IR in identifying and resolving issues arising from new legislation, court cases and through tax disputes; and
- developing and monitoring various types of IR taxpayer guidance, including Standard Practice Statements, Operational Statements, and Depreciation Determinations.

Other lawyers within the IR are involved in undertaking investigations and audits of taxpayers, but do not have a direct influence on tax policy. However, their recommendations may indirectly lead to future tax policy changes.

The previous discussion is not reflective of tax policy in NZ prior to the mid-1990s. Prior to the introduction of the GTPP, the development of tax policy in NZ was the responsibility of the NZ Treasury. This was a small group of policy analysts, the vast majority of which were economists. The role of the IR was then similar to the Australian Tax Office (ATO), largely that of the administration of the tax system, with the exception of having the responsibility for drafting legislation.<sup>41</sup> Since the introduction of the GTPP, the IR has become the principal government agency responsibility of tax policy, supported by the NZ Treasury.

Collectively the IR and NZ Treasury, in working together, have been successful in NZ in tax policy development. This is an unusual allegiance within common law countries, so what makes joint tax policy work in NZ? Essentially, it reflects a good working

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<sup>40</sup> See further: <http://www.ird.govt.nz/aboutir/who-we-are/structure/tlsg/>.

<sup>41</sup> See further Brian J Arnold, "The Process of Tax Policy Formulation in Australia, Canada and New Zealand" (1990) 7 Australian Tax Forum 379.

relationship and common understanding of what constitutes an effective tax system, namely: the tax mix; tax design; and tax administration. In NZ this is underpinned by taking a principled approach to policy development, namely through a combination of the BBLR, the GTPP, the RTYWP, and evidence-based advice.

Outside of the public sector, there has been involvement in tax policy by lawyers through a number of mechanisms. The most notable areas are through making submissions on tax bills, Officials issues papers (and other forms of proposed policy change notifications), and to various tax reviews. The two most prolific submitters on tax policy proposals and bills are Chartered Accountants Australia and New Zealand (CA-ANZ – formerly New Zealand Institute of Chartered Accountants - NZICA) and the NZLS. Both of these bodies work on behalf of their constituent members, with CA-ANZ representing around 33,000 NZ members (out of a combined 130,000 Australasian members), and the NZLS with approximately 13,000 members. CA-ANZ has one lawyer as part of its specialist in-house tax team, as well as one lawyer on its wider Tax Advisory Group (formerly known as the National Tax Committee). Unsurprisingly, the NZLS’s Tax Law Committee, which was established in 1988, comprises only senior tax lawyers (14 in total), and has a strong working relationship with the IR.

Turning now to reviewing the role of lawyers with tax review bodies and committees, the first such review under BBLR was the Tax Review 2001.<sup>42</sup> This group was set up by then Minister of Finance, Dr Michael Cullen, and comprised five members, one of which was a practising lawyer (who now works for the IR). The Tax Review 2001 issued both an interim and final report (following the consideration of submissions), although almost all of its recommendations were not taken up by the NZ Government at the time.

Like most previous reviews of the NZ tax system, the Tax Review 2001 was not able to set its own agenda. For instance, three of the four members of the Committee of Experts

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<sup>42</sup> The Tax Review 2001 (also known as the McLeod Review) was established by the NZ Government in 2001 to carry out a public review into the tax system. The functions of the Tax Review 2001 were to: examine and inquire into the structure and effects of the tax system in NZ; to formulate proposals for improving that system, either by way of making changes to the system, abolishing any existing form of tax, or introducing new forms of tax; and to report to the NZ Parliament through the Minister of Finance, the Minister of Revenue and the Minister of Economic Development. The terms of reference were set within the constraints of maintaining revenue neutrality with any recommendations for change; available at <http://www.treasury.govt.nz/publications/reviews-consultation/taxreview2001>, (October 8, 2015).

on Tax Compliance,<sup>43</sup> which was established in 1998, were senior tax lawyers and a judge. Furthermore, the Inquiry into the Powers and Operations of the Inland Revenue Department,<sup>44</sup> in 1998, had two of its twelve members with a legal background. Of the remaining eleven consultative-type committees established since 1998, all except two have had a minority of their members who were lawyers.<sup>45</sup> The other two consultative-type committees had no lawyers as members.

One recent instance where lawyers have had a critical but small role in tax policy development was through the TWG. The writer has previously discussed<sup>46</sup> the establishment of the TWG in 2009, an independent group comprising experts from academia, IR, NZ Treasury and tax practice, to undertake a review of the NZ tax system from a core principles policy-focused perspective.<sup>47</sup> While the TWG received resource support from the IR and the NZ Treasury, it operated separately from, and outside of, the ‘government appointed committee’ framework of earlier tax reviews.<sup>48</sup> Specifically, the TWG had three tax lawyers within its thirteen members, along with two senior IR officials, who were tax lawyers, providing support. The NZ Treasury officials were economists.

The TWG, as part of its structural review of the NZ tax system, established six principles for reform, namely: the overall coherence of the system; efficiency and growth; equity and fairness; revenue integrity; fiscal cost; and compliance and administration costs.

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<sup>43</sup> Committee of Experts on Tax Compliance, *Tax Compliance: A Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (NZ Government, December 1998).

<sup>44</sup> Finance and Expenditure Committee, *Inquiry into the Powers and Operations of the Inland Revenue Department: Report of the Finance and Expenditure Committee* (NZ Parliament, October 1998).

<sup>45</sup> These committees that had senior tax lawyers/judges as members were: Consultative Committee on the Taxation of Income from Capital (The Valabh Committee – 1990-1991); Tax Simplification Consultative Committee (1990); Consultative Committee on the Valuation of Livestock for Tax Purposes (1992); Organisational Review Committee (Richardson Committee – 1994 – this Committee also devised the GTPP); Working Party on the Re-Organisation of the Income Tax Act 1976 (1993); Working Group on the Taxation of Life Insurance and Superannuation Fund Savings (1997); Law Commission (effectively an independent Crown Entity that reviews the law and makes recommendations for improvement to the NZ Government – in 2000 it examined legal professional privilege and taxation); Savings Product Working Group (2004); and the Rewrite Advisory Panel (1995 to 2014).

<sup>46</sup> See Adrian Sawyer, “Moving on from the Tax Legislation Rewrite Projects: A Comparison of New Zealand Tax Working Group/Generic Tax Policy Process and the United Kingdom Office of Tax Simplification”, [2013] 3 BTR, 321.

<sup>47</sup> Details of independent, Inland Revenue and Treasury members of the TWG can be found at, The Centre for Accounting, Governance and Taxation Research. Details of the number of experts who assisted the TWG are also provided.

<sup>48</sup> These operate within the External Input phase of the GTPP.

Following its analysis, the TWG made a number of significant recommendations for reform, including major changes to tax rates, structures and bases.<sup>49</sup> In the 2010 Budget the NZ Government announced a major overhaul of the NZ tax system, adopting many of the recommendations of the TWG.<sup>50</sup> This was the most significant overhaul of the NZ tax system in 25 years.

With respect to tax legislation developed since 2000, submitters on the 40 plus major tax bills have, in almost every instance, included submissions from major law firms, and in some instances, from senior lawyers in a personal capacity. This is in addition to the NZLS that has made submissions on all except one major tax bill during this period.<sup>51</sup>

In terms of lawyers acting as commentators providing information in a digestible format for the general public, the media rarely draws upon the services of qualified lawyers in the area of taxation. However, experienced lawyers are, on occasion, called upon to provide information and comment to support journalists in compiling their media items. One area where lawyers do provide a more general commentary on tax policy is through their firm's client newsletters, most of which are publicly available. All of the NZ's major law firms are involved, to varying degrees, in providing this form of service to assist in making tax policy and legislative change more accessible to the general public.

The paper now turns to reviewing the level of inclusion of legal and other theoretical approaches in tax policy development in NZ.

#### IV. INSTANCES OF INCLUSION OF LEGAL AND OTHER THEORETICAL APPROACHES IN TAX POLICY-MAKING DESIGN IN NEW ZEALAND

As a starting point, it is useful to have an understanding of the theoretical concepts that underlie NZ tax policy. In this regard the prevailing doctrine that applies with respect to

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<sup>49</sup> The recommendations were included in the TWG's January 2010 report which is publicly available; see, The Centre for Accounting, Governance and Taxation Research, "VUW Tax Working Group", <http://www.victoria.ac.nz/sacl/cagtr/twg>.

<sup>50</sup> For details of the New Zealand Budget 2010 announcements, see: <http://www.treasury.govt.nz/budget/2010>.

<sup>51</sup> Law firms and organisations (excluding the NZLS) that have made a submission on more than three tax bills are: Russell McVeagh (17); Minter Ellison Rudd Watts (13); Chapman Tripp (12); Bell Gully (6); Simpson Grierson (3); and DLA Piper/Phillips Fox (3). Other legal organisations that have made two or more submissions include: Whitireia Community Law Centre (4); Dunedin Community Law Centre (3); and the Legislation Advisory Committee (3).

the managing the NZ economy is one of neoliberalism, similar to many other developed countries. Neoliberalism, as a concept, engenders a broad spectrum of reactions, ranging from general embracing, or reluctant acceptance, to outright opposition. It is an approach in which the control of economic factors is shifted from the public sector to the private sector. YourNZ offers the following definition of neoliberalism:<sup>52</sup>

Drawing upon principles of neoclassical economics, neoliberalism suggests that governments reduce deficit spending, limit subsidies, *reform tax law to broaden the tax base*, remove fixed exchange rates, open up markets to trade by limiting protectionism, privatize state-run businesses, allow private property and back deregulation.

Christensen argues that NZ is an example of an ‘extreme’ form of neoliberalism, concluding:<sup>53</sup>

[W]e have argued that the neo-liberal tax reforms in New Zealand in the 1980s and in 2010 are best understood as the *product of autonomous bureaucratic action*. In both reform processes we found that the goals and ideas for reform came from bureaucratic organizations rather than from politicians, that bureaucrats took an activist role in policy-making, and that the policy preferences of politicians changed considerably as a consequence of bureaucratic policy advocacy. *The ideas, role and influence of bureaucrats were thus the most important factors for explaining that New Zealand moved very far in the direction of low rates, broad bases and neutrality in tax policy.*

The author is supportive of a review of the dominant neoliberal paradigm through an informed debate, potentially led by a working group similar to the TWG. In this regard, a ‘rebalancing’ of the dominant players through the inclusion of more lawyers (and potentially sociologists and others professionals), at the expense of some of the economists, would be a positive step forward in examining NZ’s neoliberal paradigm.

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<sup>52</sup> See further: <https://yournz.org/2012/06/14/what-is-neoliberalism/> (emphasis added).

<sup>53</sup> Johan Christensen, “Bringing the bureaucrats back in: Neo-liberal tax reform in New Zealand” (2012) 32(2) *Journal of Public Policy* 141, at 164 (emphasis added).

Turning now to the inclusion of legal and other theoretical approaches in tax policy, there is little publicly available evidence of the direct inclusion of such approaches in tax policy decision making in NZ, with some notable exceptions. The Tax Review 2001 and TWG are arguably the most notable recent instances where input from the specialist support personnel and submissions, incorporated economic analyses advocating for changes in policy (such as to tax owner-occupiers of houses in the Tax Review 2001). Such ‘radical’ proposals have engaged the public to express their opposition to them, with the extent of such opposition usually resulting in these proposals failing to see the ‘light of day’. Their endorsement by the NZ government of the time could be considered to be ‘political suicide’.

One theoretical approach to tax policy development that has endured since the mid-1990s is the BBLR. Under the BBLR, what is seen as an appropriate balance of economic theory and practical administrative efficiency for NZ appears to have been achieved. As a consequence the basis of the BBLR has operated without significant amendment over the last 30 years. Indeed, reviews of taxation, including the Tax Review 2001 and the TWG Group have argued that there should be a high burden of proof before moving away from the current BBLR principles.

The hallmarks of tax policy development in NZ are transparency and consultation. While the GTPP facilitates the use of economic and other theories in the strategic phase, the remainder of the GTPP is premised on tax policy and legislative design that incorporates a blend of policy based on the BBLR paradigm, and practical administrative reality. Collectively these are brought to the fore through the consultation process that involves numerous tax lawyers and legal firms. The GTPP provides a clear framework which is an important part of its success. Tax reform debates, which will usually involve lawyers, can therefore be principled, and comment on whether or not tax changes are consistent with the BBLR’s framework.

Wales and Wales, in their initial report on best practice tax policy development, state:<sup>54</sup>

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<sup>54</sup> Christopher J Wales and Christopher P Wales, *Structures, processes and governance in tax policy-making: an initial report* (Economic and Social Research Council & said Business School, Oxford, UK, 2012), at 12 and 13.

We recommend that greater consideration should be given to the respective roles of lawyers, economists and generalists within the policy-making process and to the role of those with other specialised professional training, such as accountants. ... We recommend that academic institutions should play a larger role in providing early stage analysis of tax proposals, particularly where government resources are limited.

Wales and Wales also observe that since the mid-1990s, the IR has been particularly strong with respect to tax policy-making, and the NZ Treasury ‘weak’. In many respects this may account for the relatively minimal instances of explicit adoption of economic theory in tax policy-making, and a greater emphasis on administrative efficiency. Wales and Wales later state:<sup>55</sup>

The changes in both policy and policy-making processes that took place in the mid-1990s left Inland Revenue institutionally powerful. Ever since then, the department has been in a strong position to *uphold principles of consistency and neutrality in the system and to resist alternative strategies*. The strength of its position was reinforced by the firm grip of a particular senior official in Inland Revenue. At the time of our visit, we felt there was a new assertiveness among Treasury policy-makers that might lead to a re-balancing. However, Inland Revenue enjoyed the confidence of ministers and officials, and were able to use that to effect in policy discussions.

Prior analysis has reviewed the comments on the contributions of the TWG within the GTPP environment, including from those involved either as members of the GTPP (the Chair, Professor Bob Buckle), advisors (for example, Professor Norman Gemmell) and expert consultants (for example, Professor John Creedy). As the writer has previously observed,<sup>56</sup> collectively these academics emphasise the importance of the interdisciplinary backgrounds and expertise of those involved, the attempt to rationalise tax policy debate, and engaging the public in the debate. However, not one of these three academics are legally qualified; their main area of expertise is within the discipline of economics. A major constraining factor with most tax reviews, the TWG being no

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<sup>55</sup> Wales and Wales, n 54 above, at 39 (emphasis added).

<sup>56</sup> See Sawyer, n 46 above, at 322–327.

exception, is the revenue neutral constraint placed on the package of recommendations able to be made by these reviews.

Little et al.<sup>57</sup> argue that the TWG proved to be a considerable success, as it was an open forum for debate, with the papers provided to meetings and a summary of the debates published, and all reasonable steps taken to inform the wider public of the key tax policy issues. The media is also seen as playing a key role in tax policy matters in NZ, assisting with ensuring the BBLR framework is not been departed from without justifiable reason.<sup>58</sup> Nevertheless, the extent of the media's involvement in raising matters of tax policy is most notable in the lead up to a general election and when a controversial tax proposal is floated.<sup>59</sup>

This open approach to tax policy formation also works well from the NZ Government's perspective, with Wales and Wales observing:<sup>60</sup>

“It allowed possible tax changes to be aired publicly and debated openly, and it brought the academic community into important tax policy debates. However, *a large element in its success was the cooperation and engagement of key tax practitioners. This was built on the engagement and cooperation that had been built up through many years of working with the GTPP.*”

Wales and Wales then comment with respect to the TWG:<sup>61</sup>

The group was given public backing after the government was criticised for not establishing a review like that just held in Australia. *The support given by the government to the group gave them a national importance without imposing government control.* Instead of preventing certain options being considered; the government made it clear that they would not be ruling out any options until the report was complete, and that whilst officials participated

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<sup>57</sup> See Little et al., n 24 above, at 1052.

<sup>58</sup> Little et al, n 24 above, at 1053.

<sup>59</sup> A recent example of a controversial proposal is the debate over a capital gains tax for NZ; see for example, the references to the media in the work by: Jonathan Barrett and John Veal, “Equity versus Political Suicide: Framing the Capital Gains Tax Debate in the New Zealand Print Media” (2013) 19 NZJTL 91.

<sup>60</sup> Little et al, n 24 above, at 1053 (emphasis added).

<sup>61</sup> Wales and Wales, n 54 above, at 58.

in the group they had no final say over its conclusions. In fact, *government officials were not only allowed to attend group meetings, they were encouraged to think and speak freely, to the extent that officials could publicly disagree with each other about the future of the tax system.*

With respect to the GTPP, Wales and Wales observe:<sup>62</sup>

Within the Generic Tax Policy Process (GTPP) academia has good opportunities to contribute effectively. Communication with the government is regular and high-level. External experts are not only consulted early into the development of tax policy, but are able to see government officials at any time to express concern about an element of the tax system. Discussion with external experts is a recognised step in policy development through the GTPP. *Tax academics have not only had the opportunity to make an impact on policy development in New Zealand, they also make good use of it.* Intellectual transmission is fluid. The Treasury and the Inland Revenue Department recognise that they lack internal resources and appear to welcome input on both a general level and on specific matters. *It was an academic who was invited to lead the Tax Working Group that carried out what was regarded in New Zealand as a very successful review of the New Zealand tax system.*

Wales and Wales firmly endorse NZ's GTPP, stating:<sup>63</sup>

*New Zealand's Generic Tax Policy Process is perhaps the best example of how policy ought to be documented.* Acknowledging that several phases of policy development were inadequate, a senior and experienced policy maker was commissioned to create a new model of tax policy development with a group of distinguished and strong-minded individuals in support. *We believe that other governments could usefully follow this example.*

While Wales and Wales are very complimentary about NZ's GTPP, recommending it as a useful example to other governments, it should be remembered that the GTPP (as set out), is only likely to work in a country like New Zealand. Should it be considered

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<sup>62</sup> Wales and Wales, n 54 above, at 79-80 (emphasis added).

<sup>63</sup> Wales and Wales, n 54 above, at 158 (emphasis added).

elsewhere, apart from adaptation to fit the political and regulatory environment of a jurisdiction, it is only likely to have a chance of being successful, in the author's view, if that jurisdiction has consultation and transparency as the hallmarks of its tax policy-making process.

Overall, what has proven to be successful in tax policy development in NZ is the clear structure evident in the GTPP, the platforms of transparency and consultation, and active involvement of the tax community (including tax lawyers) in the process at all levels. This ranges from within the Executive and parliamentary branches of the NZ government, to serving on tax review bodies and making numerous submissions on bills and other policy documents. With a relatively small specialist tax community in NZ, this has placed a sizeable burden on a relatively small number of tax experts to engage in the consultation process. These tax experts are predominately accountants rather than lawyers. Alternatively, rather than viewing the specialist tax community as being under pressure, there is a potential danger of regulatory capture where such a small group of government officials, private sector practitioners and academics regularly meet to 'make' policy. This view could give rise to the argument that is a rather exclusive club of tax grandees, rather than a small overworked group. The FEC, amongst others, needs to maintain a close watch over the consultation and policy-making process.

There is also relatively little evidence of legal or other theoretical approaches being overtly incorporated into tax policy design, other than through various consultative and tax review bodies. Perhaps with the almost universal acceptance of the concepts behind BBLR across the political spectrum, the debate over which theoretical approaches to apply (if any) is largely settled. This could change should the BBLR come under significant pressure with future governments.

#### V. PROVIDING CONTEXT – A BRIEF OVERVIEW OF THE REPUBLIC OF IRELAND'S TAX POLICY PROCESS

As noted earlier in the paper, the Republic of Ireland is a similar size nation (population wise) to NZ. It operates under a Westminster-type parliamentary system, and incorporates consultation into its law making process, albeit in a different manner to NZ. Unlike NZ, there is no equivalent to the GTPP, and Ireland does not operate formally under a BBLR-type platform. Ireland is well known internationally for its competitive

corporate tax rate of 12.5 percent, making it a popular location for MNEs to set up their headquarters.<sup>64</sup> Ireland is also ‘constrained’ through its membership of the EU in that it needs to ensure it meets all of its EU obligations.

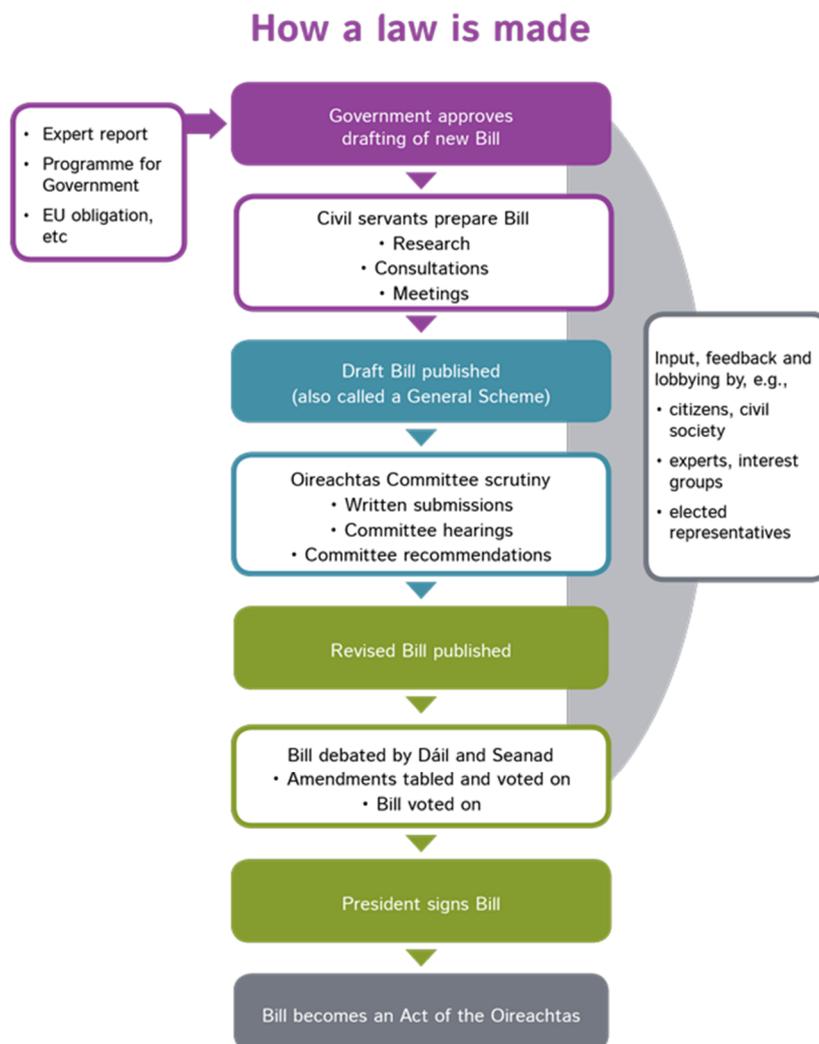
Leaving aside the debate over Ireland’s corporate tax system, Ireland operates an EU-style VAT, along with an income tax that has similarities to NZ in terms of family support, but with greater use of tax credits and deductions.<sup>65</sup> The legislative process in Ireland is set out in Figure 2.

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<sup>64</sup> This system has come under scrutiny following an investigation by the European Commission (EC), which concluded in August 2016 that Ireland granted undue tax benefits of up to €13 billion to Apple Inc. Such benefits are illegal under EU State Aid Rules, because it allowed Apple to pay substantially less tax than other businesses. Ireland must now recover the illegal aid. See further: European Commission, *Press release: State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion* (Brussels, 30 August 2016); available at: [http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm). While Ireland is entitled to recoup this money, the Irish Government has indicated that it does not intend to do so. It has lodged an appeal, accusing the EC of overstepping its powers, infringing on national sovereignty and misunderstanding the law by ordering Ireland to claw back taxes from Apple of up to €13 billion, plus interest. See further: <http://www.politico.eu/article/ireland-says-eu-exceeded-powers-in-apple-case/>.

<sup>65</sup> There are plans for reform of the Irish income tax system; see Tax Policy Division, *Income Tax Reform Plan* (July 2016, An Roinn Airgeadais, Department of Finance).

**Figure 2: How laws are made in Ireland**



The key player in tax policy development in Ireland is the Department of Finance. The department manages the Finance Bill process, coordinates the Tax Strategy Group (TSG) and has oversight for the Irish Government’s tax policy objectives. The TSG is an interdepartmental committee chaired by the Department of Finance, with membership comprising senior officials and advisors from various departments and the Revenue Commissioners. While the TSG has no decision making powers, it provides a number of policy papers that are published in advance of the annual budget. It is similar to (but with

internal membership only) the TWG in NZ, although it has the advantage of a continued existence, thereby enabling it to be utilised to look at tax policy when necessary.

Within the wider Department of Finance, submissions are able to be received from individuals and organisations ahead of the annual budget planning process; these submissions may inform aspects of the content of the budget.<sup>66</sup> It is not clear from publicly available material as to the composition of these various groups in terms of those members who have a legal background.

Donal de Buitelir of the Irish Fiscal Policy Research Centre comments:<sup>67</sup>

In an area where the responsibilities of the Department of Finance and the Revenue Commissioners are not precisely defined, *much depends on the personality and ideas of the leading civil servants. The working relationship between them seems unusually close, if informal.* Broadly speaking, while the Department of Finance carries the last word on policy matters, the Revenue Commissioners have a substantial input and carry considerable weight. The Revenue Commissioners have substantial responsibility for the implementation and administration of any tax change and supply all the technical detail, while the Department of Finance has the final say on broad policy matters.

The similarities here with the NZ Treasury and IR regarding a close working relations are notable, although the respective roles in NZ are more clearly defined. An information sharing/liaison group comprising senior officials from the Department of Finance and the Chairman of Revenue and the two Commissioners from the Irish Inland Revenue meet several times a year to exchange high level policy relevant information of mutual interest to the two organisations. As the Irish Inland Revenue is statutorily independent in its administration of the tax system, no individual tax cases are discussed.

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<sup>66</sup> For a more in-depth analysis of the legislative process in Ireland, see Revenue Commissioners, *Guide to the Legislative Process* (Irish Government, May 2016).

<sup>67</sup> Donald de Buitelir, “The role of the revenue department in policy-making”, in *Structures, Processes and Governance in Tax Policy-Making: An Initial Report*, Oxford University Centre for Business Taxation, (8-9 March, 2012). These are notes made by de Buitelir (emphasis added).

Outside of the bureaucracy, special interest groups, such as the Irish Business and Employer's Confederation (IBEC), exert a significant influence on Irish taxation policy. This is particularly focussed on the Pre-Budget Submissions process, a system that is significantly different to that which operates in NZ (where the government drives the budget process in confidence with a number of releases pre-delivery). A number of issues that have been introduced via the budget process have come from members of the public through submissions as part of this consultation process.

Legislation in Ireland is drafted by the Office of the Parliamentary Council (OPC), including tax legislation.<sup>68</sup> Its major input is to draft the annual Finance Bill. Membership unsurprisingly is dominated by lawyers. Specifically, when a decision has been obtained from the Minister, they will request the Attorney General to arrange for the drafting of a bill. This request is then be sent to the Group Manager in the OPC whose group deals with requests from the relevant department. The Group Manager will then assign a Parliamentary Counsel to draft the bill. Lawyers play a pivotal role in the OPC.

Another important body is the Government Legislation Committee (GLC),<sup>69</sup> whose members include the Attorney General, the Chief Parliamentary Counsel, the Programme Managers of the main parties in Irish Government, the Leader of Seanad Éireann (Upper House of the Irish Parliament) and representatives of the Department of the Taoiseach and the OPC. Lawyers would be expected to play a key role in the GLC. The OPC works closely with the GLC in ensuring that the Irish Government's legislation programme is implemented. The GLC assists the Irish Government in fixing legislative priorities for the forthcoming parliamentary session (such as by recommending the level of priority for drafting various bills), and oversees the implementation of the government's legislation programme.

Before the commencement of each Dáil session and following internal review, the Irish Government publishes a press release which sets out its legislative priorities for that session. The legislative priorities set out in the press release determine the work programme for the OPC for the Dáil session concerned. In part this is similar to the

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<sup>68</sup> For further details on the OPC, see: <http://www.attorneygeneral.ie/pc/pc.html>. As noted earlier, in NZ the IR drafts tax legislation.

<sup>69</sup> For further details on the GLC, see: [http://www.attorneygeneral.ie/pc/pc\\_govleg.html](http://www.attorneygeneral.ie/pc/pc_govleg.html).

RTYWP that the IR issues every 12-18 months, although this is only in relation to tax policy.

The Irish approach to tax policy development has a number of deficiencies. Wales and Wales<sup>70</sup> argue that the ‘rushed’ budget policy process, coupled with the associated secrecy, lack of strong external institutions focussing on tax policy, and limited consultation, is inhibiting the quality of the resulting legislation. That said, the level of contact with the Department of Finance and overall public awareness of tax issues is considered to be very good. On the other hand, Irish parliamentary committees are considered to be particularly weak, and arguably were weakened even further by the Supreme Court decision in the *Abbeylara* case.<sup>71</sup> In contrast, the FEC in NZ has a major role in reviewing draft legislation and scrutinizing official’s actions.

In terms of the number of lawyers involved in the two houses – the Dáil and the Seanad – from the patchy information provided in the register of members interests for each house, 6 of the 158 Dáil and 8 of the 60 Seanad self-declared themselves to be a lawyer as their occupation.<sup>72</sup> The extent to which key personnel in the various Irish Government departments are lawyers is not clear from publicly available evidence. Lawyers and legal firms have been prominent in providing submissions on tax policy proposals.

## VI. CONCLUSIONS, LIMITATIONS AND FUTURE RESEARCH

In response to the question: “Do lawyers make a distinctive contribution to tax policy-making?” the NZ experience would suggest lawyers have made a significant contribution. This needs to be viewed in the context of tax policy-making in NZ under the GTPP which is a unique and distinctive model. This in itself would suggest that the contributions of lawyers to tax policy-making in NZ should be distinctive with respect to lawyers in other jurisdictions, such as in Australia, Canada and the United Kingdom (UK). Comparing NZ with Ireland, a similar size jurisdiction to NZ with a Westminster-style parliament,

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<sup>70</sup> Wales and Wales, n 54 above, at 182.

<sup>71</sup> The Irish Supreme Court in its 2001 judgment in the *Abbeylara* case decided the Irish Constitution gave no power to the Oireachtas to hold inquiries in which the findings could adversely affect private individuals. A referendum was held in 2011 which proved unsuccessful in overturning this decision. See further: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/ParliamentaryInquiries/Abbeylara.htm>.

<sup>72</sup> See further: <http://www.oireachtas.ie/parliament/tdssenators/registerofmembersinterests/>.

the level of contribution of lawyers in NZ to tax policy would appear to be higher, including input via the consultation process.

The significant role of the IR, as compared to the NZ Treasury, in developing and managing tax policy, has reduced the influence of NZ Treasury economists. This may be a factor in the minimal overt use of economic and other theories being applied when developing tax policy. Currently the PSG within the IR is led by a lawyer; it also includes a number of lawyers, accountants and economists. The FEC has a specialist tax adviser who is a lawyer. Thus lawyers with tax experience are prominent and active at the highest levels of tax policy development in NZ. This is not such a strong feature of the Irish approach to tax policy development.

However, does this mean that lawyers make a distinctive contribution to tax policy in New Zealand vis-à-vis other contributors, such as accountants and economists? In this regard, it would be fair to say that given the dominance of the tax profession by accountants, the extent of lawyers' involvement is severely constrained. Outside of the NZLS's Tax Law Committee and a number of large law firms which have a specialist tax area of practice, lawyers do not play a large role in tax policy development in NZ. Accounting firms (who would usually have a number of tax lawyers on staff), in terms of quantum, are the major contributors. That said, both lawyers and accountants frequently have similar concerns over the direction of tax policy and its implementation, and in that sense offer complementary advice to the NZ Government and Officials. In Ireland, through the pre-Budget submissions process, lobby groups including lawyers, can potentially have an influence on the content of the annual Budget and associated Finance Bill.

The extent to which legal and other theoretical approaches are directly incorporated into tax policy design, the evidence would suggest this is minimal; the exceptions to this are the consultative committees and tax review bodies. What not should be lost here is that tax policy in NZ is premised on the BBLR, which in itself, is based on economic theory modified to an extent to ensure administrative efficiencies and a degree of practicality are achieved. Furthermore, through the consultation process, academics are encouraged and on occasions, have provided advice to tax policy development that incorporates theoretical dimensions. Such advice has principally come from economists and as such,

there is minimal legal theory involved. Successful tax reform requires goodwill and co-operation from all involved in the tax reform process; these are evident in NZ.

While it may be stating the obvious, NZ's legal system works on a number of well-established principles, including applying the rule of law, operating under a traditional Westminster form of parliamentary governance, and adopting the doctrine of the separation of powers. While not directly related to taxation, these concepts underpin the way in which tax policy is developed in NZ, and therefore indirectly demonstrate the incorporation of legal theories into tax policy development. In many ways this statement can also be used to summarise the approach to tax policy in Ireland, although there is much less of a focus on BBLR and a greater degree of outside influence, such as through the EU.

Furthermore, NZ taxpayers appear to be overall ambivalent towards neo-liberal economic policy which has underpinned much of the tax system since the mid-1980s. In this regard, the opportunity for alternative economic and social policy theories to permeate the NZ tax policy scene has been very limited. Indeed, the TWG's core principles, along with its endorsement of the BBLR, continue to form the foundations for tax policy development in NZ. With the potential for income tax reform in Ireland, and the need to address the ongoing publicity over the nation's approach to corporate tax policy post the EC findings over Apple, there is the potential for change. Certainly with corporate tax, the neoliberal philosophy is at the forefront in Ireland through the very low 12.5 percent nominal rate.

Lawyers, regardless of their area of contribution to tax policy (such as through being in the Legislature, bureaucracy, or the private sector) are premised, by necessity, to offer their advice without really questioning these fundamental principles. Their input relates more to highlighting the practical implications and best practice approaches to developing tax policy, and the subsequent conversion of policy into draft legislation (and other forms of regulation), when engaging in the consultation process. The level of input from (legal) academics is minimal, which is not surprising given the relatively small number actively involved in tax-related research and provision of advice to the NZ Government and Officials. Nonetheless, their input is important in offering further perspectives on tax policy development.

The analysis in this paper comes with a number of limitations, with the most significant being that it seeks to provide an *overview* of how lawyers have made a (distinctive) contribution to tax policy in NZ. It has not sought to examine the extent to which lawyers' contributions have had a significant impact on reshaping tax policy and its implementation. Given the nature of tax policy development, it would be extremely difficult to identify their impact. Thus while this would be an enormous undertaking, it is an area that could be considered in future research. Undoubtedly, the analysis in this paper will have overlooked some areas where lawyers in NZ make a contribution to tax policy but these are likely to be "on the margin". It is also acknowledged that with less publicly available data, the degree of involvement of lawyers in Ireland may be underestimated in this paper.

A further limitation is that this paper has left out of its scope an analysis of the extent to which the judiciary, in their judgments, have an indirect influence on future tax policy when they identify unintended consequences of legislation. Future research could also take a more critical approach as to whether the current BBLR model is optimally applied in a NZ context, such as whether the base can be further broadened to include other areas of the economy, the most notable being introducing a comprehensive CGT.

Overall, tax policy formulation and development works reasonably well in NZ. Important to this is the 'formalised' but not legislated for GTPP. It is critical to have a policy framework that the private sector 'buys into', which is supported by the evidence in NZ. On the 'flip side', it is also critical that Officials are willing to take on board good ideas that emerge from the private sector, including those from lawyers. In an Irish context, there would appear to be room for improvement in terms of tax policy formulation and development.

To conclude, lawyers in NZ have made, and are expected to continue to make, an important, but not necessarily distinctive, contribution to tax policy as compared to accountants for example. This statement is made in the context of the BBLR and GTPP shaping the overall economic theories and policy development in NZ. Nevertheless, NZ tax policy would be worse off if lawyers did not continue to be actively involved in contributing to tax policy development. The same comment can also be said for Ireland.