

Memo

To: Chappie Te Kani, Acting Chief Executive, Secretary for Children

From: Jane Fletcher, Acting DCE Governance and Engagement

Date: 26 November 2021

Security level: IN-CONFIDENCE

This memo may contain legal advice and be legally privileged. It should not be disclosed on an information request, without further legal advice.

Ministerial Advisory Board fees and payments

Purpose

1. The purpose of this memo is to provide you with an update on the treatment of Ministerial Advisory Board Members fees and the next steps required to correct the historical payments to date and confirm the future treatment of fees in line with the Cabinet Fees Framework (CFF).

Summary

2. Following a recent review of Board Member invoices, payments, and the Cabinet Fees Framework (CFF)¹ it was identified that Oranga Tamariki was not applying the appropriate treatment of tax consistent with the CFF.
3. Independent advice was sought from PwC to support Oranga Tamariki in applying the CFF appropriately and identify what actions were required to correct historical payments. PwC confirmed Board Member fees are not subject to GST but are subject to Withholding Tax (WHT) and several steps are needed to correct future payments and remedy historical payments. These steps and necessary adjustments are outlined in this memo.

Recommendations

4. It is recommended that you:
 - a) **Note** the contents of this memo **Yes / No**
 - b) **Agree to** the letters attached as Appendix A being sent to each Board member **Agree / Disagree**
 - c) **Note** that following receipt of the assurance from each Board Member, we will need to prepare a letter for Inland Revenue providing assurance of the steps we have taken **Yes / No**
 - d) **Agree** to transfer the Ministerial Advisory Board budget to the Director Secretariat. **Agree / Disagree**

Chappie Te Kani
Acting Chief Executive, Secretary for Children

Date

¹ [CO-19-1-Fees-Framework-for-members-appointed-to-bodies-in-which-the-Crown-has-an-interest.pdf \(publicservice.govt.nz\)](https://publicservice.govt.nz/CO-19-1-Fees-Framework-for-members-appointed-to-bodies-in-which-the-Crown-has-an-interest.pdf)

Background

5. The Oranga Tamariki Ministerial Advisory Board (the Board) was established by the Minister for Children in January 2021 commencing from 1 February 2021. There are four Board Members with one of the Board Members being the Chair.
6. In August 2021, we became aware that there may be issues with some of the Board members invoices and the application of the CFF so we initiated a review of all fees paid to the Board Members.
7. We found that we have paid several Board Member's incorrect invoices due to not receiving correct advice from the commencement of the Board, and not understanding the application of the CFF. Oranga Tamariki (at the request of the National Accounting Centre) requested the invoices from Board Members include GST and did not advise that the payments should have been subject to WHT.
8. Since September, and throughout October, we have continued to seek advice regarding tax treatment to ensure we align with the CFF. We sought independent advice from PwC as the recommended experts in applying the CFF; this advice is attached as Appendix B.

Summary of independent advice from PWC

9. The four Board Members are appointed to perform a schedular activity (being work or services performed by chair or member of a committee, board or council).
10. Payments to individuals for performing a schedular activity are known as schedular payments. Under legislation, an employer is required to deduct WHT on schedular payments unless an exemption applies.
11. The Board members have been appointed by the Minister for Children in their personal capacity. Both the relevant legislation and the CFF are compelling support for the requirement that Oranga Tamariki withholds WHT on the payments to the Board Members.
12. Recommendation that WHT should be deducted from payments to the Members at the appropriate rate, unless the Members provide a Certificate of Exemption, or another exemption applies. Based on their review of documentation, PwC consider it unlikely that another exemption applies.
13. Section 6(3) of the GST Act 1985 specifically excludes certain activities from being considered a taxable activity, including any engagement, occupation or employment as a chairman or member of any local authority or any statutory board, council, committee, other body, subject of Section 6(4) of the GST Act. Accordingly, both the GST Act and the CFF provides compelling support that the payments to the Board Members should not be subject to GST.
14. Going forward, the default position should be that WHT applies to payments to all the Board Members (and any additional members to the board), and GST should not apply to the payments to the Board Members.
15. As this treatment will differ from the tax treatment that Oranga Tamariki and the Board Members have been applying in the past, the requirement to deduct WHT, and the expectation that GST should not be charged, should be clearly communicated to the Board Members.
16. To address the tax treatment of payments in the past, the technically correct position may be for Oranga Tamariki to file a voluntary disclosure in regard to WHT, and request credit notes (or another method) from the Board Members in regards to GST. However, filing a voluntary disclosure could result in adverse consequences, including a situation where; Oranga Tamariki 'grosses up' payments made to the Board Members to calculate WHT and 'bears' the costs of WHT. This could result in the Board Members receiving additional income and a credit for excess tax deducted, therefore the over remuneration of Board Members.

17. In addition, because Oranga Tamariki was seeking advice on the GST treatment from Inland Revenue, PwC consider a better option for WHT may be to apply the correct treatment going forward and discuss the approach of not addressing the WHT in the past with Inland Revenue, along with the historical GST treatment.
18. Regardless of whether Oranga Tamariki chooses to address the tax treatment of payments in the past, the final approach to addressing the past should be clearly communicated to the current Board Members, as it will likely impact their personal tax circumstances.

Engagement with Inland Revenue

19. PwC have also had discussions with the Inland Revenue, on behalf of Oranga Tamariki.
20. PwC confirmed to Inland Revenue that for future invoices Oranga Tamariki will deduct WHT, this applies to invoices from September 2021 onwards. With respect to the historical payments, PwC set out the issues of grossing up, enrichment etc and PwC suggested to Inland Revenue that for payments already made, the best course of action would be to leave things as they are provided that each Board Member provide assurances that they will return the income in their respective 2021 and 2022 income tax returns.
21. Inland Revenue have now confirmed that it will provide an 'in principle' agreement to this approach, however they (Inland Revenue) will require some assurances from Oranga Tamariki which include:
 - Oranga Tamariki to communicate with the Board Members and clearly set out what is to happen for historical payments and what will happen for their invoices from September 2021 onwards;
 - Oranga Tamariki to provide confirmation to Inland Revenue that it will deduct WHT going forward and from what date;
 - Oranga Tamariki needs to obtain assurance from each Board Member that they have/will return the income in their 2021 and 2022 income tax returns (WHT); and
 - Oranga Tamariki to provide Inland Revenue with details of what has been paid to the Board Members to date (with no WHT deducted) s 9(2)(a) OIA

Member Fees and corrections required

22. After receiving the advice from PwC and Inland Revenue we have worked with the Finance team to support what corrections and steps are required for each Board Member historically and for future payments.
23. To enable us to consider what corrections were required for each individual Board Member we requested each member to provide an IR330C form which details and confirms their appropriate WHT rate.
24. During the past two weeks we have received the completed IR330C form and it has been confirmed that a WHT rate of 33 percent will be deducted from Board Member fees onwards from September 2021.
25. Oranga Tamariki have now provided a form titled 'Committee member expense form' to submit each month, which will be their claim to us for their fees and any expenses. This will mean that the Board Members will no longer need to submit their own invoices, they will just need to complete the form and provide this to Finance to process their payments.
26. The Board Members are awaiting Oranga Tamariki advice as to the next steps required to correct historical payments and written confirmation on how the member fees will be treated for future payments.

27. We have drafted letters for each Board Member (drafts attached) confirming future tax treatment of invoices and what each member needs to do to rectify the historical payments we have already made. These letters will be provided to the Board Members, signed out by me as the Acting Deputy Chief Executive, Governance and Engagement.
28. The letters confirm that Inland Revenue has asked us to provide the payment details to them for each Board Member to ensure they are able to spot check that the necessary tax obligations are being met.
29. I will speak with the Board members prior to their letters being sent to ensure the letters do not contain any surprises for the Board members.
30. The Director of the Secretariat will be responsible for approving future invoices and confirming they are in line with the CFF. The Director of the Secretariat will also approve any expenditure related to the MAB. The Secretariat have confirmed that they have implemented new controls to support future expenditure and that these are in line with the Oranga Tamariki financial policies and procedures.
31. The following corrections, assurances and adjustments are required for each individual Board Member.
32. **Matthew Tukaki – Chair**

Future invoices will reflect:

- WHT to be deducted at a rate of 33%
- No GST is to be charged on invoices
- Charging of fees is in line with the CFF.

Invoices are to be submitted using the 'Committee member expense form' onwards from September 2021.

Rectifying historical invoices, the Chair will need to:

s 9(2)(a) OIA

- Provide assurance to Oranga Tamariki, by way of letter, advising that the payments will be made directly to Inland Revenue as required for the 2021 and 2022 income tax returns and that the GST component has been paid to Inland Revenue
- Return the overpayment direct to Oranga Tamariki. The Chair received an amount which was incorrectly overpaid by Oranga Tamariki outside of the CFF. This has been factored into historic treatment of WHT and included in the amount of WHT to be paid directly to Inland Revenue. As previously advised, I have met with the Chair to discuss the incorrect overpayment. He is aware of and does not contest the amount. A separate letter has been drafted regarding the overpayment

s 9(2)(a) OIA

33. **Shannon Pakura**

Future invoices will reflect:

- WHT to be deducted at a rate of 33%
- No GST is to be charged on invoices
- Charging of fees is in line with the CFF.
- Invoices are to be submitted using the 'Committee member expense form' onwards from September 2021.

Rectifying historical invoices, the member will need to:

s 9(2)(a) OIA

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- Provide assurance to Oranga Tamariki, by way of letter, advising that the payments will be made directly to Inland Revenue as required for the 2021 and 2022 income tax returns.

34. **Dame Naida Glavish**

Future invoices will reflect:

- WHT to be deducted at a rate of 33%
- No GST is to be charged on invoices
- Charging of fees is in line with the CFF
- Invoices are to be submitted using the 'Committee member expense form' onwards from September 2021.

Rectifying historical invoices, the member will need to:

s 9(2)(a) OIA

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- Provide assurance to Oranga Tamariki, by way of letter, advising that the payments will be made directly to Inland Revenue as required for the 2021 and 2022 income tax returns and that the GST component has been paid to Inland Revenue.

35. **Tā Mark Solomon**

Future invoices will reflect:

- WHT to be deducted at a rate of 33%
- No GST is to be charged on invoices
- Charging of fees is in line with the CFF.
- Invoices are to be submitted using the 'Committee member expense form' onwards from September 2021.

Rectifying historical invoices, the member will need to:

§ 9(2)(a) OIA

- When the member submits their next invoice a credit amount § 9(2)(a) OIA will need to be included as we have incorrectly paid the member twice for services on 10 March 2021
- Provide assurance to Oranga Tamariki, by way of letter, advising that the payments will be made directly to Inland Revenue as required for the 2022 income tax return and that the GST component has been paid to Inland Revenue.

Lessons Learnt

36. This whole course of events has been messy and embarrassing for Oranga Tamariki but of more concern is the inconvenience and distress it has caused the Board Members. My letter to the Board members will acknowledge and apologise for this.
37. While there are complex tax issues, we could have identified these issues much earlier in the life of the Board if we had the systems in place to be alerted to them.
38. I am confident we are now applying the correct approach to the invoicing and have the controls in place, including with the support of the Director of the Secretariat, to prevent this happening again in respect of the Ministerial Advisory Board. We will also be strengthening the induction approach and material for the new Board members.
39. We will complete a detailed lessons learnt exercise and put in place arrangements to mitigate against this happening again with other Boards or external groups we support. We will provide a summary to you once we have completed this.

Next steps

40. Subject to your review and approval, letters will be sent to each Board Member asking that they respond in writing to us no later than 10 December 2021 to provide the assurance Oranga Tamariki needs to provide to Inland Revenue.
41. Following receipt of the assurance from each Board Member, we will need to prepare a letter for Inland Revenue providing assurance of the steps we have taken. Ideally this will be provided to Inland Revenue no later than 17 December 2021.
42. We are progressing allocating the Ministerial Advisory Board budget to the Director, Secretariat to support accountability of the future budget, expenditure and the steps needed to ensure fees are paid in line with the CFF.