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Exposure Draft ED0117 Recording Inland Revenue Interviews

The Society appreciates the opportunity to comment on the above draft Standard Practice Statement on “Recording Inland Revenue Interviews” (the statement).

The statement clearly sets out the circumstances in which an interview will be recorded. The statement generally revises the earlier statement (SPS INV-330) to take into account changes in technology, including the availability of video recording. The Society considers the further legislative references to the Privacy Act 1993 in particular, to be an appropriate addition to the statement.

In terms of specific comments made in the statement, the Society would like to see some further information included. These items and the reasons why they should be included in the Commissioner’s standard policy are set out below, followed by a summary.

Preliminary matters

Interviews conducted under s19 of the Tax Administration Act 1994 (s19 interviews) amount to a detention in terms of s23(1) of the New Zealand Bill of Rights Act 1990; rights to legal representation are triggered as a result. The Society understands that Inland Revenue does not object to a taxpayer having some form of representation at s19 interviews.

The statement itself should make a comment concerning these legislative rights. A statement acknowledging that interviewees are entitled to get legal advice in relation to the interview process and their rights, and to be accompanied by an adviser to the interview would be helpful. Also, that the interviewee has the right to consult privately with an adviser during the interview and may request that the interview is stopped for this purpose.

The Society further understands that the Commissioner considers that it is fair for interviewees in voluntary interview situations to have legal representation and that too should be acknowledged.

In relation to recording of interviews, if a decision about whether to record an interview changes, the interviewee should be informed of that decision a reasonable time **before** the interview starts (paragraph 16). As noted below, compulsory interviews in particular impinge significantly on personal liberties, and as such, an interviewee should be entitled as of right to a record of what was said.

The Inland Revenue cannot prevent an interviewee taking their own notes or making their own electronic recording of the interview. An interviewee should also be given the opportunity to request that an interview be recorded and, if declined, informed of their right to make their own arrangements to record an interview. They may not consider it necessary to do so if the Inland Revenue will record the interview in a satisfactory manner. As such, any change to the recording process should be notified a reasonable period of time before the interview starts.

It should be made clear that any electronic record will be of the whole and not part of the interview, and that any written notes may be added to and edited by the interviewee recording dissent from the record, or adding to the record.

Copies

Paragraph 28 of the statement provides that the interviewee may request a copy of the interview. This should be the default position, and a specific request by the interviewee should not be required. The presumption should be that the interviewee will be given a copy of any notes taken, and of any recording made, unless either the interviewee clearly states (preferably in writing) that he or she does not wish to receive a copy, or the administration of the Inland Revenue Acts would be prejudiced.

Interviews by the State impinge on civil liberties, significantly where interviews are compulsory and the privilege against self-incrimination is stripped away (as is the case under s19 of the Tax Administration Act 1994). In those circumstances, a citizen will be entitled to a record of what the State has required him or her to say. It cannot be detrimental to the maintenance of law or the principles of natural justice to have what such a person has said accurately recorded, and delivered to them. Failure to do so will impact on their ability to take advice, and satisfy themselves what they have said is accurate, and borne out by any further research they may wish to undertake into their own records.

While the Society appreciates there are circumstances where the Inland Revenue considers it desirable to delay providing a copy of a recorded interview. Typically that is where another person is to be interviewed regarding the same subject-matter, and the interviewer does not wish the first interviewee to assist the second interviewee to anticipate questions.

However, it is a right not generally given to the Commissioner, or other agencies of the State. Citizens are free to discuss interviews and the contents of them, except in exceptional circumstances, such as a court, where such safeguards are employed. If there are occasions when exceptional safeguards are required, the Commission should use the powers under s18 of the Tax Administration Act 1994, where a District Court Judge can make appropriate orders relating to recording, and where necessary making suppression orders. The statement should make that clear.

In other circumstances, a recording can only make the information more accurate. An informed interviewee taking notes will be well capable of conveying what transpired to others. Furthermore, any person who is interviewed will be entitled to make their own electronic recording of an interview. For an interviewee to have an accurate record of what they have said will only promote the maintenance of law, and is consistent with principles of natural justice and s27 of the New Zealand Bill of Rights Act 1990; notably by allowing them to take meaningful legal advice. Failing to provide the recording to an interviewee or failing to advise them of their rights to record the interview themselves, would only disadvantage the ignorant or ill-advised, which cannot be consistent with the interviewees rights.

If there are circumstances in which the Commissioner may consider it appropriate not to provide or delay providing copies (outside of an inquiry under s18), the statement should restate the specific legislative references to the provisions in the Privacy Act 1993 and Official Information Act 1992 which allow the Inland Revenue to withhold this information in paragraph 30. It may be helpful to

know what kinds of circumstances the Inland Revenue is referring to in this regard. The Inland Revenue should acknowledge that it will not seek to prevent interviewees taking their own records, and will warn interviewees in advance of the interview on any occasion when the record will not be supplied as soon as practicable after an interview.

Evidence

Given the significant infringement on the interviewee's rights, particularly when required to attend an interview and the fact that content of the interview may be used as evidence in legal proceedings, none of the interview should be referred to in correspondence, discussions or documents without all of the records of the full interview being made available. An interviewee is entitled not to have information taken in isolation, which may affect the reliance that can be placed on a statement they have made.

For example, if a third party, Court or even separate team within the Inland Revenue Department is to review any aspect of the interview or comment made by the interviewee, it is important that the full interview and, therefore, the full context of what was said, be made available to that third party. This comment should be made in the Statement.

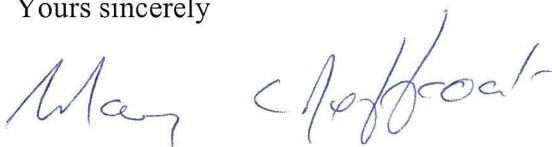
Summary

In summary, the Society would like to see the following included in the statement:

- A statement acknowledging that interviewees are entitled to obtain legal advice in relation to the interview process and their rights, be accompanied by an adviser to the interview and consult privately during the interview.
- That the interviewee is informed of whether the interview will be recorded and whether or not a copy of the interview notes or recording will be withheld, a reasonable time **before** the commencement of the interview.
- For a third copy of the interview to be provided automatically to an interviewee without delay. That in exceptional occasions when that is not appropriate, that the Commissioner will usually employ an inquiry under s19 of the Tax Administration Act 1994. In other cases, the interviewee is entitled to make their own record, and advance notification to allow that to occur will be given.
- That none of the interview be referred to in correspondence, discussions or documents without all of the records of the full interview being made available to the other parties involved (provided there are not legitimate confidentiality reasons, but in no case will information be selectively used to mislead).

The Society trusts these comments are helpful. If you require further assistance please do not hesitate to contact Kim Oelofse, by phone (04) 463-2991 or email kim.oelofse@lawsociety.org.nz.

Yours sincerely



Mary Jeffcoat
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