

The Duty to Report Misconduct

The following guidance was approved by the Council on 4 August 1993. Amendments¹ have since been made to update references to legislation, bye-laws and guidance. The duty was introduced in December 1991 and the relevant bye-laws now are Disciplinary Bye-laws 9(1) and 9(2).

Introduction

- 1 The public interest requires the reporting of acts of misconduct which, if they were to go unreported, could adversely affect the good name of the profession. It does not require that members or Institute staff should be obliged to report the minor perceived faults of other members. This paper sets out the views of the Council as to the facts or matters which they are under a *duty* to report to the Institute in the public interest. It does not in any way affect the *right* of a member to report to the Institute or the *right* or *duty* to report elsewhere. (See paragraph 27 below.) Anyone in doubt as to the application of this guidance may consult the Institute. (See paragraphs 24-26 below.)
- 2 The purpose of the Institute's disciplinary arrangements is to allow consideration be given to allegations that members and provisional members may have fallen short of the high ethical and technical standards expected of them. In doing so the Institute furthers the public interest.
- 3 Because members are in a unique position to discover and appreciate the significance of the acts of fellow members and provisional members Disciplinary Bye-laws 9(1) and 9(2) place on members a duty to report certain facts or matters to the Institute's Professional Conduct Department at Metropolitan House, 321, Avebury Boulevard, Milton Keynes MK9 2FZ; (telephone: +44 (0)1908 546 235; email:psocomp@icaew.com) where such a report is in the public interest.

The duty to report

- 4 Disciplinary Bye-laws 9(1) and 9(2) provide that:
It shall be the duty of every *member* where it is in the public interest to do so to report any facts or matters indicating that a *member* and/or *firm* or *provisional member* may have become liable to disciplinary action. In determining whether it is in the public interest to report such facts or matters regard shall be had to such guidance as the *Council* shall give from time to time.
- 5 For the purpose of Disciplinary Bye-laws 9(1) and 9(2) it is in the public interest that a member's conduct should be considered by the Investigation Committee wherever a member or provisional member has or may have:
 - i committed any offence involving dishonesty, fraud or cheating;
 - ii committed any imprisonable offence under Part V of the Criminal Justice Act 1993, the Insolvency Act 1986, the Company Directors Disqualification Act 1986, the Companies Acts 1985 and 1989, the Financial Services and Markets Act 2000, the Proceeds of Crime Act 2002 (which includes provisions relating to

¹ Amended by the Professional Standards Board:

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- 31 August 2006
- 26 August 2004

- money laundering) or any similar or related legislation in the corporate or financial services spheres; or
- iii been convicted of any offence for which they have received a custodial sentence, whether suspended or not.
- 6** It is also in the public interest that a member's or provisional member's conduct should be considered by the Institute in the circumstances listed below. The circumstances are where the member or provisional member has or may have:
- i as a member or employee of a firm at any time authorised or licensed by the Institute for investment business, been responsible for a serious breach of the Institute's Investment Business Regulations or the regulations contained in the Institute's Designated Professional Body Handbook under the Financial Services and Markets Act 2000;
 - ii as a member or employee of a firm registered by the Institute as an auditor, been responsible for a serious breach of the Institute's Audit Regulations;
 - iii as an insolvency practitioner licensed by the Institute, committed a serious breach of the Insolvency Act or Rules or the Institute's Insolvency Licensing Regulations;
 - iv been responsible for a serious breach of the Institute's Client Money Regulations;
 - v been responsible for a serious breach of the Money Laundering Regulations 2003;
 - vi performed their professional work or the duties of their employment in a grossly incompetent manner;
 - vii committed a serious breach of faith in a professional respect; or
 - viii committed a serious financial irregularity.
- 7** In deciding whether the circumstances listed in paragraphs 5 and 6 above arise members should take note of the commentary below.

Suspicion alone is not enough

- 8** It is important to understand that the reporting member does not have to conduct any investigations or to take a decision as to whether a member or provisional member has been guilty of misconduct. What they are required to report are facts or matters indicating that a member or provisional member may have become liable to disciplinary action. It is not enough merely to have a suspicion that a member or provisional member has committed misconduct; nor is there any duty to report unsupported speculation or vexatious comment.

Information available to more than one member

- 9** Where a partner² or employee in a practising firm becomes aware of the misconduct of a fellow partner or employee of the same firm which is reportable under Disciplinary Bye-laws 9(1) and 9(2) and that misconduct is known to other members in the same firm the primary duty to report rests on the senior partner with knowledge of the conduct in question. In such a case the duty to report may be discharged on their behalf by another partner, such as the compliance partner, according to the arrangements of the firm or the decision of the senior partner concerned. Where misconduct has been drawn to the attention of the senior or other responsible partner other partners and employees privy to the information may rely on their decision as to whether a report should be made under Disciplinary Bye-laws 9(1) and 9(2) and the fact that no such report has been made does not place them under a duty to report

² References to 'partner' include director of a corporate practice engaged in public practice and member of a limited liability partnership engaged in public practice.

unless they have clear evidence that the facts have been concealed for an improper motive. A similar approach should be adopted by members in business, but only if the more senior person is a member of the Institute.

Matters of public knowledge

- 10** Once facts are in the public arena, as a result of being reported in the national press or media, the Institute may be presumed to be aware of them and no duty to report arises. Members must nevertheless report to the director of the Professional Conduct Department any facts concerning a matter so reported which might give rise to a disciplinary action against another member if they had information additional to that which is generally available and which might be of assistance to the Professional Conduct Department. Where a member is uncertain whether the Institute is aware of particular matters e.g. facts disclosed in the local press they should take all reasonable steps to check the position, for example by the Professional Conduct Department (Helpline: +44 (0)1908 546 235).

Confidentiality and legal constraints

- 11** Before making a report under Disciplinary Bye-laws 9(1) and 9(2) a member should consider whether they are in any way constrained by a duty of confidentiality to a client, their employer or anyone else. There are circumstances in which the public interest may justify a breach of confidence and crime, fraud and other serious misconduct are not protected by the duty of confidentiality. This is a difficult area of law on which further guidance may be found in the *Members' Handbook* Section **3.2** at Section 140 of the Code of Ethics – 'Confidentiality', and in Section **7.1** – 'Professional conduct and disclosure in relation to defaults or unlawful acts'. Auditors should refer to the relevant standards and guidance issued by the Auditing Practices Board, for example the Auditing Standard ISA (UK and Ireland) 240 – 'The auditor's responsibility to consider fraud in an audit of financial statements', and ISA (UK and Ireland) 250 - 'Consideration of laws and regulations in an audit of financial statements'. Where necessary, members should seek legal advice.
- 12** The disclosure of information may also be prohibited by Acts of Parliament or court order. In considering any suspected failure to comply with Disciplinary Bye-laws 9(1) and 9(2) the Investigation Committee will have regard to any legal advice which the member has received concerning the obligation of confidentiality. If the member is aware that a Suspicious Activity Report (SAR) has been made of known or suspected money laundering, then caution should be taken to avoid committing the tipping off offence under money laundering legislation. Further guidance on this offence can be found in the *Members' Handbook* Section **7.2** 'Anti-money laundering (proceeds of crime and terrorism)'.³

Members in business

- 13** The duty to report applies to members in business as it does to members in practice.
- 14** The duty to report applies to the conduct of a member in business as it does to the conduct of a member in practice, but note particularly paragraphs 11 and 12 above.

³ Members should be aware it is anticipated that this guidance will be revised in the near future.

A member's own conduct

- 15** A member is as responsible for reporting their own conduct (to the extent described in this guidance) as they are responsible for reporting the conduct of another. In the event of disciplinary proceedings the fact that a member has made such a report will count in their favour.

When to report

- 16** The duty to report arises when a member is aware of facts or matters which should in light of the information known to that member at that time indicate that a duty to report has arisen in accordance with this guidance. Any substantial delay in reporting could amount to a failure to report.
- 17** Occasionally (but not in circumstances to which paragraphs 12 and 27 apply), it may be reasonable and prudent for a member before making a report to invite the member the subject of a possible report to comment on the facts in the first member's possession. The purpose of such consultation would be to draw the suspected shortcomings to the member's attention and give him the opportunity of correcting any misunderstanding. It would be highly improper for a member to use the threat of reporting as a means of securing any advantage over another member. Where a member delays reporting in order to consult the member in question and such delay is not unreasonable this will not amount to a failure to report.

How to report

- 18** The report, which should be in writing and accompanied by any relevant documents or copies thereof, should be sent to the director, Professional Conduct Department.

The consequences of reporting

- 19** A report received under Disciplinary Bye-laws 9(1) and 9(2) will be considered and processed in accordance with the Disciplinary Bye-laws.
- 20** Reports will be assessed and if appropriate referred either for investigation or conciliation.
- 21** A member who is concerned that a report made under Disciplinary Bye-laws 9(1) and 9(2) to the Institute could result in a liability for defamation may wish to take their own legal advice. A report which is made exclusively to the Institute in good faith and without malice would however attract a defence of qualified privilege i.e. the statement was made in fulfilment of an obligation to a person who had a duty to receive it.

The consequences of not reporting

- 22** A failure to report where there is a requirement to report under Disciplinary Bye-laws 9(1) and 9(2) would constitute grounds for disciplinary action against a member under Disciplinary Bye-law 4(1)(c). In deciding whether a member is in breach of the Disciplinary Bye-laws for failing to make a report the Investigation Committee will have regard to any duty of confidentiality to which the member may be subject (paragraphs 11 and 12 above) and to the promptness of the report (paragraphs 16 and 17 above). They also take their decisions on the basis of the facts as they were known to the member at the time rather than as they might seem with the benefits of hindsight.

Commencement

- 23** This duty came into force on 19 December 1991. It applies to facts which occurred prior to that date, but only if they first became (sufficiently) known to the member in question on or after that date.

Consulting the Institute

- 24** Members who, having studied this guidance, are still unsure whether they are under a duty to report may consult the Ethics Advisory Services, if necessary on a no-name basis. The Ethics Advisory Services are confidential and free from the duty to report misconduct within the Institute (see paragraph 25). Further information on the Ethics Advisory Services can be found at www.icaew.com/ethicsadvice.
- 25** It is not in the public interest that the duty to report misconduct should constrain members or Institute staff appointed by or on behalf of the Council to offer ethical advice to members from doing so or inhibit members or Institute staff needing advice from seeking it. Consequently, members and staff appointed by or on behalf of the Council to offer ethical advice to members will not be under a duty to report information received by them in confidence from members seeking such advice, subject only to the requirements of the general law which apply to all citizens. The same exemption applies to members of the Support Members Scheme registered with the Ethics Advisory Services.
- 26** Members, when acting on behalf of the Chartered Accountants Benevolent Association, are also exempt from the duty to report misconduct.⁴
- 27** It should be noted that discussion with a counsellor does not relieve a member of the duty to report under Disciplinary Bye-laws 9(1) and 9(2) where such duty exists.

Duty to report to other regulators

- 28** Members in practice, and others working in the regulated sector for the purposes of the money laundering legislation, have a duty to report the acquisition of criminal proceeds and other activities within the definition of 'money laundering' to their Money Laundering Reporting Officer or to the Serious Organised Crime Agency (SOCA). Known or suspected terrorist activity must also be reported without delay. Further guidance on this is given in the *Members' Handbook*, Section 7.2 'Anti-money laundering (proceeds of crime and terrorism)'⁵. There are a number of other specific requirements to report criminal activities, misconduct or other matters to clients, their management or governing bodies, to regulators or to other third parties. In addition, members may be in a position where they judge that it would be appropriate (and they have a right) to make further disclosures to third parties in the public interest. Further guidance on reporting defaults and unlawful acts by clients, employers or their staff is given in the *Members' Handbook* at Section 7.1 'Professional conduct and disclosure in relation to unlawful acts', or its successor. Auditors should refer to current Auditing Standards and guidance. In particular attention is drawn to Auditing Standard ISA (UK and Ireland) 240 'The auditor's responsibility to consider fraud in an audit of financial statements', section A – Considerations of laws and regulations in an audit of financial statements' and section B – 'The auditor's right and duty to report to regulators in the financial sector'; and related practice notes for example Practice Notes 18 (Building Societies), 19 (Banks), 20 (Insurers) and 21 (Investment Business)

⁴ Paragraph 26 is effective from 3 September 2007.

⁵ Members should be aware it is anticipated that this guidance will be revised in the near future.

and 24 (Friendly Societies). Auditors also have a duty to report matters of material regulatory significance to a number of regulators outside the financial services sector. Members are reminded that where they have a duty to report crime to the police or other proper authority that a report to the Professional Conduct Department does not relieve them of that duty.

Commentary on paragraphs 5 and 6

Paragraph 5

It would be wrong for a member when agreeing to a partner or employee leaving or resigning from a practising firm to accept a condition that the criminal acts of the latter would go unreported. Such an arrangement must be distinguished from the situation where a partner or employee leaves after denying allegations which it has not been possible to substantiate. Members should bear in mind that disciplinary action based on a criminal act would have to be established before the Disciplinary Committee to a level of proof similar to the high degree of proof called for in a criminal trial.

Paragraph 6

Members are not liable to disciplinary action for every mistake or omission, but only in the circumstances mentioned in Disciplinary Bye-law 4(1)(b) where those circumstances evidence serious incompetence.

Professional indemnity cases

It is not in the public interest that clients who have suffered financial loss as a result of the acts of members should be deterred from obtaining financial compensation where they are entitled to it at law. The mere fact that conduct has been or is the subject of a claim under a professional indemnity policy is not of itself sufficient to give rise to a duty to report.