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**Institute of  
Chartered Accountants  
Australia**

International Ethics Standards Board for Accountants  
Submitted electronically via ifac.org

### **Exposure Draft on *Responding to a Suspected Illegal Act***

The Institute of Chartered Accountants Australia (the Institute) is pleased to have the opportunity to respond to this Exposure Draft. The Institute is Australia's premier accounting body, representing over 70,000 professional accountants. Our members work in diverse roles across public practice, commerce, industry, government and academia throughout Australia and internationally.

#### **General comments**

The Institute feels strongly that it is inappropriate for the exposure draft to propose placing an *obligation* on professional accountants to breach confidentiality, and therefore the Institute is unable to support the exposure draft in its current format.

A professional obligation to breach confidentiality raises the following major concerns:

- The absence of any legal protections for the accountant provided by this Code.
- The risk of actionable consequences arising from such disclosure, particularly where suspicions turn out to be erroneous.
- The consequent erosion of the trusted advisor relationship which is at the heart of the accounting profession, which in our view would negatively impact the public interest.

The *Code of Ethics for Professional Accountants* by its nature is not able to provide accountants with any form of legal protection, particularly as the Code will be utilised across many and various legal jurisdictions. However, in the context of responding to a suspected illegal act, the need for legal protections is in our view most acute, as evidenced by the protections built into whistleblower and anti-money laundering legislation in various jurisdictions. In the absence of those protections, we consider that it is not appropriate for the Code to *oblige* accountants to breach confidentiality.

We do however support the identification of the accountant's *right* to breach confidentiality in certain circumstances, and feel that it is appropriate for the Code to address this.

The Institute believes that there is value in the IESBA providing guidance to professional accountants, expanding on the existing indication in Section 140 of the Code that disclosure is permitted where there is a legal or professional right or duty to disclose. We therefore encourage the development of principles-based provisions which clarify the issues that a professional accountant needs to identify and consider, where they believe they have grounds to exercise a professional right to disclose a suspected illegal act, and provisions which identify appropriate steps to take in that context. While a professional accountant may in certain circumstances have a *legal* duty to breach confidentiality, we reiterate our strongly held view that a *professional* duty should not be imposed.

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## Specific Comments

1. *Do respondents agree that if a professional accountant identifies a suspected illegal act, and the accountant is unable to dispel the suspicion, the accountant should be required to discuss the matter with the appropriate level of management and then escalate the matter to the extent the response is not appropriate? If not, why not and what action should be taken?*

The Institute considers that there should not be a stated *requirement* in these circumstances. It is our view that a principles-based document such as the *Code of Ethics for Professional Accountants* should, where possible, move away from dictating through detailed, prescriptive rules and required actions how accountants should behave. Rather, it should give accountants the responsibility to decide how best to align their behaviour with the ethical and professional outcomes that the Code has identified.

In the context of responding to a suspected illegal act, the professional accountant will need to exercise their professional judgement on a number of occasions and across a range of issues, such as whether they have a reasonable level of suspicion, whether actions taken are considered appropriate, and whether disclosure would be in the public interest. In this context, we do not consider that it is appropriate to *require* the accountant to discuss the matter or escalate it. In our view the Code, as a principles-based document, should identify the appropriate actions to be taken, and the issues to be considered by the accountant in dealing with a suspected illegal act.

2. *Do respondents agree that if the matter has not been appropriately addressed by the entity, a professional accountant should at least have a right to override confidentiality and disclose certain illegal acts to an appropriate authority?*

Yes.

3. *Do respondents agree that the threshold for reporting to an appropriate authority should be when the suspected illegal act is of such consequence that disclosure would be in the public interest? If not, why not and what should be the appropriate threshold?*

Yes, although it is noted that some considerable degree of subjectivity can be present in determining what is in the public interest. And the public interest in disclosure must always be contrasted with the public interest in clients and employers being able to confide in the professional accountants they engage with or employ. In any event, only the professional accountant involved is going to be in a position to be able to make the assessment as to whether in the particular circumstances disclosure would override the fundamental principle of confidentiality to the client or employer, which in our view is a further argument against obliging the accountant to disclose.

## **Matters specific to professional accountants in public practice (Section 225 of the Code)**

4. *Do respondents agree that the standard for a professional accountant in public practice providing services to an audit client should differ from the standard for a professional accountant in public practice providing services to a client that is not an audit client? If not, why not?*

The Institute notes that in this context the standard for a professional accountant in public practice providing services to an audit client **already differs** from the standard for a professional accountant in public practice providing services to a client that is not an audit client, due to the operation of auditing and assurance standards, and, in Australia, to the legislative requirements of the *Corporations Act*, which provide obligations for auditors to deal with certain suspected illegal acts.

*Because of the effect of those obligations*, we do not consider that any further distinction should apply within the Code's treatment of suspected illegal acts, as this would potentially involve duplication of or conflict with existing requirements.

5. *Do respondents agree that an auditor should be required to override confidentiality and disclose certain suspected illegal acts to an appropriate authority if the entity has not made adequate disclosure within a reasonable period of time after being advised to do so? If not, why not and what action should be taken?*

No. See our response to Question 1.

6. *Do respondents agree that a professional accountant providing professional services to an audit client of the firm or a network firm should have the same obligation as an auditor? If not, why not and what action should be taken?*

As noted in our response to Question 1, we do not consider that the Code should be imposing *obligations* in this context. However, we do agree that the provisions identified for responding to suspected illegal acts should be expressed as equally applicable to all professional accountants, and that no distinction as identified in this question is necessary.

7. *Do respondents agree that the suspected illegal acts to be disclosed referred to in question 5 should be those that affect the client's financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant? If not, why not and which suspected illegal acts should be disclosed?*

Agree, subject to our view that there should not be an obligation to disclose.

8. *Do respondents agree that a professional accountant providing professional services to a client that is not an audit client of the firm or a network firm who is unable to escalate the matter within the client should be required to disclose the suspected illegal act to the entity's external auditor, if any? If not, why not and what action should be taken?*

See our response to Question 1 concerning our view that these provisions should not be expressed as requirements. We do agree that the Code could identify the external auditor as a likely appropriate party with whom concerns could be raised. However, because we understand that such concerns can already be brought to auditors, we consider that this would be a recognition of the existing landscape for audited entities, rather than any introduction of a new arrangement.

9. *Do respondents agree that a professional accountant providing professional services to a client that is not an audit client of the firm or a network firm should have a right to override confidentiality and disclose certain illegal acts to an appropriate authority and be expected to exercise this right? If not, why not and what action should be taken?*

Yes, we agree that accountants should have this right, and that it is appropriate for the Code to identify that. We note that where the Code identifies an expectation that the right would be exercised, this would be equivalent to an obligation to disclose, which in our view is not appropriate for the reasons set out in our response to Question 1.

10. *Do respondents agree that the suspected illegal acts to be disclosed referred to in question 9 should be those acts that relate to the subject matter of the professional services being provided by the professional accountant? If not, why not and which suspected illegal acts should be disclosed?*

Agree, subject to our view that there should not be an obligation to disclose.

**Matters specific to professional accountants in business (Section 360 of the Code)**

11. *Do respondents agree that a professional accountant in business who is unable to escalate the matter within the client or who has doubts about the integrity of management should be required to disclose the suspected illegal act to the entity's external auditor, if any? If not, why not and what action should be taken?*

No. See our response to Question 1.

12. *Do respondents agree that a professional accountant in business should have a right to override confidentiality and disclose certain illegal acts to an appropriate authority and be expected to exercise this right? If not, why not and what action should be taken?*

Yes, we agree that accountants should have this right, and that it is appropriate for the Code to identify that. We note that where the Code identifies an expectation that the right would be exercised, this would be equivalent to an obligation to disclose, which in our view is not appropriate for the reasons set out in our response to Question 1.

13. *Do respondents agree that the suspected illegal acts to be disclosed referred to in question 12 above should be acts that affect the employing organization's financial reporting, and acts the subject matter of which falls within the expertise of the professional accountant? If not, why not and which suspected illegal acts should be disclosed?*

Agree, subject to our view that there should not be an obligation to disclose.

**Other**

14. *Do respondents agree that in exceptional circumstances a professional accountant should not be required, or expected to exercise the right, to disclose certain illegal acts to an appropriate authority? If not, why not and what action should be taken?*

Agree.

15. *If respondents agree that in exceptional circumstances a professional accountant should not be required, or expected to exercise the right, to disclose certain illegal acts to an appropriate authority, are the exceptional circumstances as described in the proposal appropriate? If not, how should the exceptional circumstances be described?*

Our understanding of the exceptional circumstances as described is that threats to the physical safety of the professional accountant or other individuals are an **example** of such circumstances, which would mean in our view that such circumstances are not exclusively restricted to these threats. We consider that exceptional circumstances should be capable of including other matters, including where an accountant might identify significant legal or societal risks to themselves or their dependants. While the exposure draft has referred to circumstances of a commercial nature as not being exceptional, it has referred to matters which appear to relate to a single client or income of a single employer. We consider that the loss of *all* clients or of *all* earning capacity by a professional accountant, with consequent impact on the accountant's dependants, could constitute exceptional circumstances, and note that these are entirely possible outcomes for a whistleblower accountant.

16. *Do respondents agree with the documentation requirements? If not, why not and what documentation should be required?*

While we note that documentation can play a role in protecting the professional accountant's interests, we do not agree that it should be mandated in this context. In line with a principles-based approach, we consider that the Code could usefully identify the pros and cons of documentation in relation to suspected illegal acts, and encourage the professional accountant to consider the question of documentation in their specific circumstances.

We note that one of the risks associated with documentation in this context is that of litigation from the client or employer, where the client or employer came into possession of the documentation. This problem would be pronounced where the accountant's suspicions turned out to be false. The typical absence of any privilege attaching to documentation in most jurisdictions would add to this risk.

17. *Do respondents agree with the proposed changes to the existing sections of the Code? If not, why not and what changes should be made?*

We do not agree with the proposed changes to the existing sections of the Code, for the reasons expressed in our response to Question 1 and in our General Comments. We consider that these changes should be redrafted to remove the expression of obligations, and should rather be expressed as a principles-based document, identifying the appropriate actions to be taken, and the issues to be considered by the accountant in dealing with a suspected illegal act

18. *Do respondents agree with the impact analysis as presented? Are there any other stakeholders, or other impacts on stakeholders, that should be considered and addressed by the IESBA?*

It is noted that the analysis makes reference to the fact that not all jurisdictions afford protection from retaliation to a professional accountant who makes a disclosure. However in our view the potential impact of this lack of protection has not been adequately identified in the analysis. We consider that the lack of such protection has an impact which makes an obligation to disclose unworkable.

## Conclusion

The pace of change in standard-setting and related regulatory prescription has been pronounced across all jurisdictions and at the international level in recent times. Within this environment, it is unclear to us whether the ability of professional accountants to accommodate, process, assimilate, support and introduce new requirements in the timeframe in which they are being introduced has been acknowledged by standard-setters, particularly in the context of the SMP sector. While we recognise the need for robust ethical and professional standards for the profession, we do not consider that the IESBA has made out a pressing case for reform of provisions dealing with responding to a suspected illegal act. Without any such justification for reform, and given the current volume of regulatory changes, we consider that the proposed changes in this exposure draft have the potential to impact negatively on the attractiveness and ongoing viability of the accounting profession. We therefore encourage the IESBA to consider these concerns within the specific framework of this exposure draft.

The Institute would welcome the opportunity to provide additional clarification of the above comments if required.

Yours sincerely



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