

Raising Concerns – Consultation on Proposal to introduce new Practice Rules

Proposed draft rules

[To be inserted into Standards of Conduct at B1]

“B1.[x] Duty to Report

1.[x].1 Subject to your obligations in terms of rule B1.6¹, if you² know of, or have reasonable grounds to suspect, serious misconduct by any *regulated person*³ you must report that to the *Society* as soon as reasonably practicable.

For the purposes of this rule B1.[x].1, serious misconduct is conduct in the course of practise as a *regulated person* which:

- (1) breaches the requirements of any of these rules⁴; and
- (2) involves or suggests serious dishonesty or serious financial impropriety; and
- (3) may pose a significant risk of harm to the interests of clients, consumers or the public generally.

1.[x].2 You⁵ must not subject to detrimental treatment any person who, in good faith, has reported to the *Society* knowledge or reasonable suspicion of serious misconduct (as defined in rule B1.[x].1) because of the making of that report by that person”

Draft Guidance

To support understanding of the proposed new rules, the *Society* would also issue Guidance on their interpretation and implementation. At present the working draft of that Guidance is as follows:

Guidance related to Rule B1.[x]: Reporting serious misconduct

Introduction

The Law Society of Scotland’s Practice Rules 2011 set out the standards and professional requirements of the solicitor profession in Scotland. For example, the Standards of Conduct (see Rule B1) include obligations to act with honesty and personal integrity at all times, in the best interest of clients, and to carry out work with competence, diligence and the appropriate skills; and the Accounts Rules (see Rule B6) contain detailed requirements designed to protect client money.

¹ B1.6 says ‘You must maintain client confidentiality. This duty is not terminated by the passage of time. You must also supervise your employees to ensure that they keep client matters confidential. Only the client, Acts of the legislature, subordinate legislation or the court can waive or override the duty of confidentiality. The duty does not apply to information about any crime a client indicates they will commit.’

² ‘you’ would mean every individual or entity subject to the rules at B1 (i.e. everyone whom the *Society* has power to regulate, including all those on the roll)

³ As defined in the practice rules – i.e a *solicitor*, a *registered European lawyer*, a *registered foreign lawyer* or a *practice unit*

⁴ i.e. all of the practice rules of the *Society*

⁵ i.e. any person the *Society* may regulate

Failure to comply with practice rules (or other legal requirements) can put clients (and members of the public generally) at serious risk.

However prompt, lawful and responsible reporting of legitimate concerns that clients may be at risk can be vital in protecting clients – and preventing or reducing damage which could otherwise result.

In recognition of this, Rule B1.[x] requires you to report to the Society when you know of, or have reasonable grounds to suspect, serious misconduct by any regulated person. Serious misconduct has a special definition, for this purpose, which is included in the rule itself.

Important Points to Note on the Rule:

1. Client confidentiality – any obligation you may have in terms of Rule B1.[x] is expressly subject to your obligations in terms of Rule B1.6 (Client confidentiality). In any conflict, compliance with the latter obligations will take precedence over the reporting obligation – but you should always consider whether it is possible to resolve the conflict – by obtaining the consent of the client to the release of information or by restricting the terms of any report made to exclude any information confidential to your client;
2. Know or have reasonable grounds to suspect – you do not need to be able to prove the serious misconduct, but any suspicion needs to be genuinely held – whether it is objectively reasonable to hold such a suspicion, on the information available, will be considered when looking at whether a person had reasonable grounds to suspect serious misconduct. Vexatious reporting, making a report otherwise than in good faith (where the primary motivation is personal gain, for example) is not encouraged and may give rise to a complaint alleging breach of another practice rule (such as B1.2 or B1.14);
3. Serious misconduct – note the special definition – the test is in three parts and all must be satisfied. There must be a breach of practice rules, not of the law generally, as the Society can only deal with breaches of practice rules. Many breaches of common law or legislation will inevitably involve a breach of practice rules – to take an extreme example, misappropriation of client funds will necessarily mean a breach of accounts rules (at B6) and, generally, any dishonest actings as a regulated person would breach the standards of conduct (see, for example, B1.2 'You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful.')

Not every breach of practice rules is 'serious misconduct', however – the breach would have to involve or suggest dishonesty etc. and pose a significant risk of harm, although not necessarily only to specific clients. In this context, the serious misconduct must relate to practise as a regulated person.

The requirement for the risk of harm is intended to discourage spurious reporting of minor compliance failures which do not pose significant risks, allowing the Society to concentrate on the most serious cases.

The test reflects the Society's obligations to protect and promote the public interest.

4. Any regulated person – this includes you and other regulated persons within or outwith the practice unit (or other business) in which you work. A practice unit is a regulated person and hence conduct need not be ascribable to a particular individual or individuals to trigger the requirement to report – a report can be made in respect of the conduct of the practice unit generally;
5. To the Society – reports should be made to *[to be confirmed]*. Where you wish to make an anonymous report, please make that clear in your first communication with the Society. The Society will take such measures as it reasonably can - and which are consistent with the Society's own obligations to notify certain authorities and share information, and act in accordance with the regulatory objectives – to protect the confidentiality of the person making the report – but cannot guarantee to preserve that person's anonymity, or that information provided will not be disclosed to other regulators, authorities or the subject of the report;
6. As soon as reasonably practicable – as the conduct being reported may pose a significant risk of harm to the interests of clients it is clearly important for reports to be made promptly – but it is appreciated that concerns about preservation of client confidentiality may require some time to consider and resolve. Consider whether a partial report can be made pending client consent to fuller disclosure. Even a partial report can permit the Society to commence its own investigations at an early stage – and limit any potential damage to the interests of clients, or the reputation of the profession.

Policies and Protections

The Public Interest Disclosure Act 1998 (PIDA) introduced certain provisions aimed at providing protection from retaliation for 'workers' who make 'protected disclosures'. Those provisions were incorporated into the Employment Rights Act 1996 (ERA) and later amended by the Enterprise and Regulatory Reform Act 2013.

The Society cannot provide legal advice about whether a report made to the Society could be protected disclosure in terms of ERA but note that the Society is not a 'prescribed person'.

In broad terms, the protections are most likely to apply in respect of disclosures made 'internally' – i.e. by workers to their employer or in accordance with a procedure authorised by the employer. In line with Guidance issued by the Department for Business Innovation and Skills, the Society would encourage practice units and employers of regulated persons to demonstrate their support for workers who wish to raise concerns in the public interest by establishing their own policies. Such policies could also authorise reporting to the Society.

Sources of Help and Advice

If you are considering making a report there are a number of possible sources of help and advice including:

- colleagues,
- your employer,
- the Society,
- LawCare
- Public Concern at Work

LawCare is a free and confidential advisory service that helps lawyers, their immediate families and their staff deal with health problems such as stress, depression, addiction and emotional difficulties. The service offers the opportunity to discuss problems that are interfering with work or family life and can include referral to expert assistance. The Society supports LawCare, which is an independent charity, run by volunteers from the profession. The helpline is open Monday to Friday, 9am to 7.30pm, and Saturday and Sunday, 10am to 4pm. Solicitors and law students in Scotland should call 0800 279 6869.

Public Concern at Work is a charity which provides free, confidential advice to people who are not sure whether or how to raise concerns about practices that they have seen at work.