



Position Paper on Whistle-blowing Requirements

Introduction

The IAA Professionalism Committee has developed this position paper in order to draw attention to the importance of whistle-blowing policies for IAA member associations. The explanations and practical approaches which follow can be used as a basis for urging regulators to support actuaries when acting in good faith for the public good, through legislative protection or other means.

1. Background

At the Meeting of the IAA's Professionalism Committee in Edinburgh (November 2006), a small subgroup of the committee undertook (after consultation) to issue a questionnaire to member associations, dealing with three professional conduct issues that had been raised and discussed in the committee following the Morris Review in the UK.

A questionnaire was issued and 14 Full Member associations of the IAA responded in some detail. By country, these were: Australia, Austria, Canada, Croatia, Finland, Germany, Greece, Ireland, Japan (JSCPA), The Netherlands, Sweden, Switzerland, United Kingdom and United States (AAA).

The three key issues investigated through the questionnaire were:

- Actions of actuaries for the public good (or "in the public interest");
- Whistle-blowing; and
- Conflicts of interest.

(It is noted that there is some overlap. Some readers would probably regard the two issues of whistle-blowing and conflicts of interest as important examples of "public good" issues.)

At Mexico City (June 2007), a summary of the results of the questionnaire was presented to the Professionalism Committee. It was agreed that a more detailed paper would be useful in facilitating a more structured discussion of the issues.

A detailed paper on "Three Key Professional Conduct Issues" was prepared and discussed at Québec City (June 2008). At that meeting it was decided that a position paper on whistle-blowing would be of practical help in communicating with regulators and supervisors, and could contribute towards building an appropriate actuarial role within the regulatory framework in many jurisdictions.

There was general support for the recommendation in the final paragraph of the paper which reads:

Following the discussion of this paper, the working group recommends that a public statement is prepared by the committee as a basis for urging regulators to support actuaries taking actions for the public good, and to legislate or otherwise provide for their protection when acting in good faith.

This paper, therefore, develops the thinking of the previous discussion paper in the light of our deliberations in Québec City, as a step towards fulfilling that resolution.

2. What do we mean by “whistle-blowing”?

It became clear during discussions in Québec City that most committee members are broadly familiar with the concept of a whistle-blowing duty, but that two clear and separate concepts exist. Although these duties were not by any means seen as applying uniformly in the many cultural settings in which actuaries work, it was identified that in some jurisdictions they are mandatory.

Both forms of whistle-blowing can be seen as significant examples of public good actions.

- A. **Supervisory whistle-blowing.** This may be defined as a legal or professional duty requiring an actuary to inform a responsible (non-actuarial) supervisory or other authority, if he or she becomes aware of a breach of laws or regulations, or has an unresolved concern in that direction.
- B. **Professional disciplinary reporting.** This may be defined as a professional duty requiring an actuary to notify an actuarial association (usually one of which he or she is a member) if he or she becomes aware of a breach of professional standards or the association’s Code of Professional Conduct, or has an unresolved concern in that direction.

In each case, the decision whether or not to take action is usually influenced by legal and procedural considerations regarding defamation, privacy, etc., and perhaps also by contractual obligations regarding confidentiality. Both concepts seem to require more than the existence of mere *suspicion*.

The requirement in each case seems to be that any suspicion is reasonably supported by *evidence*. In order to empower the actuary to take action when evidence may be quite weak, some *legal protection* would serve the public interest and be extremely helpful. The two cases above are examined below separately in relation to these two key aspects.

3. Supervisory Whistle-blowing

Supervisory whistle-blowing responsibilities – case A above – apply to actuaries in many significant, but by no means all, jurisdictions served by the IAA's member associations.

3.1 Evidence

In the case of supervisory whistle-blowing, the actuary needs to have a reasonable belief that there has been an actual or potential breach of professional or fiduciary duty or of the statute law and/or regulations, and to have access to whatever extent of proof is required by that law or regulation. It is noted that the requirement for proof or evidence may be weak: action may be required when the only evidence available is first-hand and when no corroborating evidence (e.g., documents or testimony) are freely available to the actuary.

Where there is a requirement to take action based on evidence that may be weak, it is usually supplemented by the investigative powers of the supervisor concerned. In this way, the initial base of evidence can be quickly and materially increased after the matter is reported – by enforcing the production of documentary evidence or testimony under oath.

3.2 The importance of legal protection

A requirement to take action of this type is often supplemented by legal provisions that protect the actuary. These powers can take the form of “qualified privilege” – implying a form of conditional immunity to civil prosecution by the parties affected by the reporting. In some cases the applicability of qualified privilege may be made more certain by references in statute law. Stronger forms of immunity apply in some jurisdictions (e.g., Canada).

In addition, in some jurisdictions, it is a specific offence for directors to attempt to influence improperly the behaviour and/or advice of an actuary or other person with a formal role in the regulatory framework. Such behaviour can also be expected to influence adversely any “fit-and-proper tests” applied subsequently to the directors concerned (wherever applicable, i.e., even in respect of unrelated entities).

The reasons for these various protections are obvious, in terms of safeguarding the well-being of the actuary who may be required to take potentially damaging action (in good faith) that his or her employer or client may oppose.

This protection is valuable in such cases because, without it, the desire to avoid personal consequences may inhibit the actuary from taking action until a higher degree of certainty or evidence can be achieved. Inevitably this implies delay.

Worse still, an individual actuary who begins to suspect that matters are not what they should be may leave the employment of that institution, rather than face an onerous ethical choice without financial support or legal protection. This avoidance may postpone the eventual reporting well beyond the date at which it might be most useful.

Importantly, therefore, by protecting the actuary's position, measures of this type can be expected to increase the probability that the supervisor will receive adequate and timely information to safeguard the institution concerned.

3.3 Related Duties

It is noted that duties of this type might be accompanied by a legal and/or professional duty first to notify the client of the issue and then to attempt to get it resolved. It is noted that this related duty could create difficulties in itself, since it would alert a recalcitrant principal (or employer) to the nature of the actuary's concern and to the identity of the person who might later need to blow the whistle.

Any matters reported to the supervisor of a financial institution can reasonably be expected also to give rise to professional conduct issues, where that is a contributory factor to the issues reported to the supervisor. The means for dealing with these professional conduct issues are dealt with below.

3.4 Gaps in Some Jurisdictions

Protection of the individual actuary would be very helpful in matters of this type, not only for fairness in protecting the individuals in difficult circumstances, but for protecting the mechanism itself from failures that will result if the individual is placed in a weak position.

Nevertheless, responses to previous questionnaires have indicated that some jurisdictions do not provide legal protection, even when they impose a duty of this type.

The actuarial profession has made itself available globally to assist regulators and supervisors in their roles. In many cases this assistance has included specifying roles for actuaries that may require them to report to the supervisors in difficult times. All efforts should be made, by Member Associations, and on behalf of others, to urge supervisors and regulators to set up appropriate protections to support actuaries in these roles.

4. Professional Disciplinary Reporting

4.1 Evidence

In the case of professional disciplinary reporting – case B. above – the actuary needs to have a reasonable belief that there has been an actual or potential breach of professional or fiduciary duty or of the statute law and/or regulations. If the case is to be made within the disciplinary processes of the Association, the actuary needs to have access (at least) to whatever extent of *prima facie* proof is required by the rules governing that process.

The whole issue of evidence is much more difficult in this type of environment. Unlike a Court, most actuarial Associations cannot compel witnesses to appear or testify, or require production of documents or other evidence.

Even companies that have received defective actuarial work or suffered as a result of unsatisfactory conduct may (for their own reasons) be unwilling to disclose the evidence necessary to pursue the disciplinary process. Even where the client is willing to produce its own evidence, an internal disciplinary process is not usually able to require the client to produce evidence for the defence.

Furthermore, the provision of evidence by witnesses to the disciplinary process may be inhibited by concerns that charges might be brought, alleging defamation or breach of confidentiality.

4.2 Legal Protections?

In such cases, there is usually much less protection for the complainant, since an actuarial Association cannot usually provide any immunity against civil prosecution either to its members or others. This may leave participants vulnerable to legal action on grounds of defamation/privacy etc and to civil actions around confidentiality – especially if the proceedings are public.

Therefore, although internal disciplinary schemes are generally effective in cases where the matter is fairly straightforward and the actuary's client is cooperative, the particular characteristics of the jurisdiction and limitations on the powers of a disciplinary scheme might occasionally invalidate the entire process.

4.3 Related Duties

It is noted that disciplinary reporting duties might be accompanied by a legal and/or professional duty first to notify the relevant actuary (against whom a complaint is being contemplated) of the issue and then to attempt to get it resolved. In cases of this type, it is presumed that considerations in regard to the regulated context of the work may take precedence over the professional matter, and that some disciplinary systems are designed to make due allowances for this – perhaps by delaying any action until legal or other action by the regulator is completed.

4.4 Observation on the Role of Professional Conduct & Discipline

From the above, it may be deduced that whenever matters relate to the supervision of financial or other entities, the scope and powers of professional standards of practice and codes of professional conduct and a professional disciplinary scheme (however good) are unlikely to meet the requirement without a significant component of interaction and linkage with external regulation and supervision. The appropriate role for each should be carefully considered.

5. Support available from IAA member associations

IAA Member Associations affected by the issues mentioned above provide varying types and levels of support to their members. Some typical support measures are:

- Professionalism education – aid to identifying and addressing relevant situations.
- Professionalism education – information regarding the legal and professional requirements applicable in the member association's jurisdiction(s), including Code and Professional Standards.
- Mentoring/counselling (in uncertain situations) by independent senior actuaries.

In addition, member associations have implemented varying measures to induce their members to comply with professional requirements dealing with whistle-blowing issues. All Full Member associations have a Code of Professional Conduct and an associated Disciplinary Scheme.

The Professionalism Committee also stands ready to assist Member Associations (directly or indirectly) in implementing measures to improve professionalism and compliance on the part of actuaries worldwide.

6. Conclusion

An earlier draft of this paper was submitted to the Professionalism Committee with the intention of fulfilling the recommendation (see above) supported in the committee at the Québec City meeting. It was then adopted as a committee paper following the Limassol meeting (November 2008).

It is hoped that it will be useful to help to build, support and protect the position of the profession and its individual members in discussion with financial regulators and/or supervisors, especially where the regulated roles of actuaries are less well developed.



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