

ARDL RESPONSE TO :

ACCOUNTANCY AND ACTUARIAL DISCIPLINE BOARD INDICATIVE SANCTIONS GUIDANCE TO TRIBUNALS CONSULTATION PAPER APRIL 2012



PREFACE TO THE ARDL RESPONSE

This response is submitted on behalf of the Association of Regulatory and Disciplinary Lawyers (“ARDL”).

ARDL is a professional association for lawyers practising in the fields of regulatory and disciplinary law. ARDL’s website may be found at www.ardl.co.uk.

The subject matter of the present Consultation is highly relevant to the interests and expertise of ARDL members, hence ARDL has established a working group to prepare this response – see details of the working group below. We have given ARDL’s members the opportunity to contribute to this response via our website.

ABOUT ARDL

ARDL was established in 2002 in response to the rapid growth in professional regulation and the recognition that regulatory and disciplinary law has become a defined area of legal practice.

ARDL now has approaching 1,000 members, who include barristers, solicitors, legal executives and trainee lawyers, at all levels of seniority in the respective professions.

ARDL members practice across a spectrum of professional discipline and regulatory areas, but with a strong representation in health and social care regulation.

Our members are a mixture of lawyers in private practice and lawyers working in- house at regulatory or representative organisations. Members represent a cross- section of those who primarily act for regulatory bodies and those who regularly defend individual professionals before their regulators.

ARDL is led by a Committee of 17 elected and co-opted members who represent the diverse interests within ARDL's membership. Amongst its activities for its members, ARDL runs a programme of educational seminars on relevant legal topics given by eminent speakers, produces a quarterly legal update bulletin and holds a number of networking and social events each year.

ARDL'S RESPONSE TO THE CONSULTATION

ARDL represents a broad cross-section of interests in professional discipline and regulation. ARDL members are likely to hold a range of different views on the questions raised in this important Consultation. We have therefore approached the preparation of this response by establishing a working group which represents a reasonable range of the membership's interests. However, we would ask that it be recognised that the views expressed in the response are those of the working group and may not be taken to represent a single, definitive view on behalf of the organisation as a whole.

Each member of the working group has contributed to answering the questions set out in the Consultation Paper. Unless the context suggests otherwise, defined terms used in this Response have the meaning given to them in the Consultation.

The members of the working group are:

- Mr Stephen Hockman QC, 6 Pump Court
- Dr Digby Jess, Exchange Chambers
- Mr Salim Hafejee, Nursing and Midwifery Council
- Mr Cameron Scott, 23 Essex Street Chambers
- Mr Deepun Haria, Ernst & Young LLP
- Mr Jonathan Lewis, Henderson Chambers

In addition the group enjoyed the benefit of invaluable advice from His Honour Geoffrey Rivlin QC, formerly Honorary Recorder of Westminster and Resident Judge at Southwark Crown Court, now appointed as a consultant to the Serious Fraud Office.

SECTION 3: SANCTIONS POLICY

1. Do you agree with the Board's objectives and approach to sanctions guidance?

We agree with the Board's objectives and general approach to sanctions Guidance subject to

- (i) our view that it is premature to issue indicative sanctions guidance at a time prior to the conclusion of the current review of the scope of the Scheme, and
- (ii) the observations that follow.

2. Do you agree that Tribunals need a clear framework for sanctions which reflects the nature of its cases and the wider context in which the accountancy profession operates today?

We agree that Tribunals need a clear framework for sanctions in order to promote consistency and transparency. We would add that it is important for both complainants and those subject to complaints to be fully aware of promulgated indicative sanctions guidance.

A further point of importance is that any guidance, particularly guidance which changes the position of those to whom it applies, should wherever possible be evidence based, and the Board should ask itself in relation to proposed significant changes whether it has sufficient evidence to support the effectiveness of its proposals in meeting its objectives. Alternatively the Board should be guided by established regulatory principles.

We note that the AADB's *Accountancy Scheme* at para.4(1)(i)(a) requires that the matter in question "...raises or appears to raise important issues

affecting the public interest in the United Kingdom” as its first criterion. Paragraph 4(2) goes on to state that in deciding whether a matter satisfies that first criterion, the Board will “consider whether it appears to give rise to serious public concern or to damage public confidence in the accountancy profession in the United Kingdom...” Paragraph 4.11 of the Consultation Paper again reflects the Scheme’s scope “i.e. serious cases which have implications for the public interest” and paragraph 3 of the draft Indicative Sanctions Guidance states that “All cases considered by the AADB Tribunals are by their nature serious and brought in the public interest.”

We therefore consider that the draft Guidance might be considered inappropriate in that it discusses the imposition of sanctions for cases that might not appear to the public to be sufficiently serious to be within the Scheme. We refer particularly to the first two of the five proposed levels of fines set out in paragraph 4.17 of the Consultation Paper (assuming that these five levels reflect the range of conduct which the Board considers would fall within the definition of misconduct). Levels 1 and 2 are apparently addressed to matters that are at a level below that which would constitute negligence (because negligent conduct is within this proposed Level 3 definition).

In this regard we suggest that the question that may legitimately be raised is how can or should such matters properly be considered as amounting to misconduct within the definition in paragraph 2(1) of the Scheme? The established test for professional negligence is that the act or omission was below the standard to be expected of a reasonably competent practitioner. This might be considered to be very similar to the Scheme’s definition of misconduct. We therefore bring to the attention of the Board that in the medical sphere, (where “misconduct” in the Medical Act 1983 is equated to “serious professional misconduct”), Jackson J, as he then was, summarised the authorities in that area by stating the following propositions:

- “1. *mere negligence does not constitute ‘misconduct’ within the Medical Act. Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to ‘misconduct’;*
2. *A single negligent act or omission is less likely to cross the threshold of ‘misconduct’ than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as ‘misconduct’...*”
- (R (on the application of Calhaem v GMC [2007] EWHC 2606 (Admin) at [39]).*

We note that the present Scheme’s definition of “misconduct” is a departure from the position under the predecessors to the current Scheme. This provided, in common with e.g. the Medical Act 1983 approach, that for an act or omission to amount to regulatory breach, such act or omission had to fall *significantly* short of the standard of the reasonable average. There was an evolving line of tribunal decisions on this from cases like *Mayflower* (actually decided on the basis of the definition of Misconduct as in the current Scheme), *Capital Corporation and Barings* which stated that only where there is a significant departure from the standard of conduct reasonably to be expected can a tribunal be confident that conduct falls sufficiently outside a range of conduct which might be regarded as acceptable practice.

Revising the definition of “misconduct” in line with these decisions and with other regulators of professions would bring greater clarity regarding the nature of cases which are properly the subject of disciplinary proceedings before the Tribunal.

We also suggest that there should be clear distinction between, on the one hand, sanctions for Members or Member Firms who engage in egregious misconduct and, on the other hand, sanctions for lesser forms of regulatory breach, such as mere negligence without deliberate wrongdoing.

Further, we suggest that there may be the associated question of how such conduct as described within Levels 1 and 2 could meet the test of “potentially damaging public confidence in the accountancy profession”? Even the proposed matters within level 3 are defined as matters that are negligent with no aggravating features save repetition.

Similarly, there is the legitimate question of whether the lower-level cases falling within the proposed levels 1 and 2, “*raise important issues affecting the public interest in the UK*” such as to be rightly within the province of the Scheme and the Board at all.

We note that this concern about, or questioning of, the gravity of matters to which the Scheme applies is now being addressed by the FRC in its Consultation document published on 27 June 2012. We refer to the following passages from that Consultation document:

“3.24 In reviewing the scope of the disciplinary arrangements, the FRC concluded that there would be merit in reviewing the test that must be satisfied before an investigation can be started. At present, other than where Members or Member Firms have failed to comply with their obligations to cooperate under the Scheme, Members and Member Firms are liable to investigation where:-

(a) the matter raises or appears to raise important issues affecting the public interest in the United Kingdom (“the first criterion”); and

(b) the matter needs to be investigated to determine whether there may have been an act of misconduct (“the second criterion”);

3.25 The second limb of this test (“the misconduct criterion”) lacks clarity and this may lead to confusion or uncertainty as to the sorts of cases the FRC investigates. In particular, the FRC considers that, as a result of the wide nature of the criterion, potential misconduct of any nature and

significance might be regarded as sufficient to support the commencement of an investigation. Whereas the FRC's view is that investigations should only be commenced if there are reasonable grounds for suspecting that misconduct has occurred which, if established through the investigation, would be sufficient to justify the commencement of disciplinary proceedings.

...

4.2 The FRC disciplinary arrangements deal with events of low probability but which, when they do occur, have a profound impact on those involved. Such events also have the potential to cause serious public concern and to undermine public confidence in the accountancy and/or actuarial professions in the UK."

- 3. Do you agree that the sanctions imposed by Tribunals should act as a credible deterrent and be proportionate to the seriousness of the misconduct and to all the circumstances of the case, including the financial resources of Members and the size and financial resources of Member Firms?**

We agree, but not merely as a deterrent. Sanctions across all regulatory sectors have a clear public interest purpose of not only endeavouring directly to protect the particular profession's clients, but also seeking to maintain public confidence in that profession, and in declaring and upholding proper standards of conduct and behaviour of members of that profession. These aims and objectives are, of course, reflected in paragraphs 8 and 9 of the draft Indicative Sanctions Guidance.

As Sir Thomas Bingham MR observed in *Bolton v Law Society* [1994] 1 WLR 512, 517-519:

"In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence... The second purpose

is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth... Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.

Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases.... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.”

We make a further observation in respect of proportionality in our answer to Q.5 below, but add in this response that it is important for the Indicative Sanctions Guidance on fines to draw out the distinction between different types of case e.g.. between a case of deliberate conduct of a type falling within level 5 and an instance of negligent conduct.

SECTION 4: DETERMINING SANCTIONS

4. Have we included the sorts of factors in the sanctions guidance that you would expect to see taken into account by Tribunals?

Yes. We should make it clear that in this response however we have

concentrated on the factors that arise in the determination of financial penalties rather than other forms of sanction.

The consultation paper focuses to some extent on financial penalties. We would encourage the FRC/Board to give similarly detailed consideration to the factors to be taken into account in deciding on other sanctions including, in particular, exclusion and withdrawals of authorisation to conduct audits. Should, for example, concepts of fitness to practice, be considered by Tribunals as they are in the Healthcare sector? This will become increasingly important if, as suggested by the June 2012 consultation on the Scheme, the range of sanctions available to the FRC is to be broadened. We understand that equivalent overseas regulators also have at their disposal other non-monetary sanctions such as education and supervision orders.

5. Are there any factors you believe Tribunals should take into account when deciding sanction that we have overlooked?

There is one, in addition to the matters to which we refer in answer to question 4 above. In the bullet point in paragraph 10 and paragraphs 12 and 13 of the draft Indicative Sanctions Guidance, the principle of proportionality is, we suggest, too narrowly drawn. We believe that this principle of proportionality should not only reflect the matters referred to, but also the weighing up of the public interest in imposing a particular sanction in order to protect the public or the wider public interest, with the impact of the proposed sanction on the interests of the member or member firm before the Tribunal, so that the sanction is not disproportionate to the proven wrongdoing so that the minimum sanction sufficient to protect the public interest is imposed. This approach is one adopted by other regulators e.g. paragraph 21 of the General Medical Council's *Indicative Sanctions Guidance* April 2009 (with 7 August revisions).

6. Do you agree that there needs to be an adjustment in the level of fines imposed in AADB cases?

This is a question of policy on which we hesitate to pass comment, save to say that one would expect any such adjustment to be, so far as possible, evidence based, and/or guided by established regulatory principles.

7. If so, what adjustment do you consider to be appropriate?

Please see our answer to question 6 above and question 8 below, and note that there are issues of policy involved here which the FRC/AADB will need to resolve.

8. What is your view of the alternative mechanisms proposed for calculating fines?

We note that at paragraph 3.6 the Consultation refers to the judgment of the Supreme Court in *R (on the application of Coke-Wallis) v ICAEW* which states that the primary purpose of professional disciplinary proceedings is not to punish but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour.

Subject to that over-riding principle, the view has been strongly expressed within the group that starting points provide an essential tool in the imposition of financial penalties. It must, however, be emphasized that just as guidelines can be no more than that, starting points must also be no more than their name implies. The incorporation of starting points in penalty

guidance is well established in the criminal sphere, though we were, as will be seen below, not unanimous as to the extent to which guidance in the context of criminal sentencing is helpful in the present context.

In the discussion which follows, it will be seen that two broad views have emerged, one favouring the use of turnover as a starting point, the other favouring a somewhat different approach, and the response attempts to reflect these differing views whilst offering as much help to the Board as time constraints have allowed.

Firms

With regard to firms, it is to be noted that in the AADB Consultation, the test alighted upon in Para. 32 is 'annual group turnover', and that 'turnover' is adopted as the primary test in each of its alternative 'mechanisms'. In the FSA guidelines (see below) the test is that of 'revenue'. What is the difference between turnover and revenue? The answer is that although by some definitions turnover is represented by the total amount of stock and products sold within a specific time period, usually a year, turnover is more often, indeed, usually, expressed in monetary terms. The Wikipedia entry for 'Turnover' reads 'business revenue is income that a company receives from its normal business activities, usually from the sale of goods and services to customers. In many countries, such as the United Kingdom, revenue (including e.g. revenue from interest) is referred to as turnover.' It may be thought unnecessary to draw any distinction between 'turnover' and 'revenue'. They should be regarded as amounting to the same thing i.e. the amount of money actually taken by a business in a particular period.

In the view of several members of the group, an assessment of turnover is likely to be the most acceptable criterion and should, in the absence of some strong reason to the contrary, normally be regarded as the starting point. These members saw a turnover-based approach as the

only logical path to a set of starting points apart from one based on predetermined monetary figures which for reasons indicated below they did not favour. However, the presumption of turnover as the best test should be rebuttable, if it can be shown to be irrational or unfair. It should be noted in particular that as we understand the position accountancy firms are typically not corporate structures with branches or subsidiaries which are under common ownership. Typically the global organisations are structured as networks, with each member firm being independently owned and controlled and with no global sharing of profits.

The alternative view questioned the evidential basis for the use of turnover as a starting point. On this view, whilst the aims of transparency and consistency, and the strong desirability of achieving simplicity, are fully understood, there may be difficulties in taking a percentage of turnover as the starting point in financial terms, both as regards:

- (a) the ascertainment of the appropriate percentage of turnover/income, and
- (b) the ascertainment of a Member Firm's "*annual group turnover from all services*", or "*annual turnover as reported in its most recently published set of consolidated financial statements*", or "*annual group turnover as reported in its most recently published set of consolidated financial statements*".

In the case of (a), the concept of a particular percentage of turnover/income in itself, it has been suggested, may be regarded as arbitrary given the wide variety of different circumstances that are likely to be involved in cases coming before the Tribunal. It might justifiably also be said that if only one department/group of individuals in the Member Firm is involved, why should the sanction be visited upon the remaining wholly

innocent other departments/individuals in the Member Firm, who may have had no ability to influence the behaviour giving rise to the misconduct?

As regards (b), we can see that the second and third alternative definitions can produce some certainty without much difficulty, but would suggest that a single year's figures may be an unreliable guide. We therefore suggest that on any view consideration be given to requiring three years' figures to ensure that the year in question is not exceptional. We suggest that the first definition could lead to considerable argument, depending on the particular structure of the Member Firm concerned. We would also stress at this point that we have expressed our concerns above about cases within the proposed Levels 1 and 2 being within the Scheme at all, but if they are to be treated as within the Scheme, we query whether they would normally be appropriately dealt with by a fine rather than some other sanction.

The view has also been expressed that, even accepting that a percentage of turnover is to be the starting point, Level 3 and 4 type cases might in fact more appropriately be dealt with by a fine of a multiple of the engagement fee, or, if not that, certainly some fine reflecting the turnover/income from that type of work for the Member Firm, rather than the whole turnover/income of the Member Firm worldwide.

Those members who accept the relevance of criminal sentencing guidance feel that although the context is different the aims of such guidance overlap in significant respects with the aims of the guidance proposed by the Board. They would draw to the Board's attention the following passages from the Sentencing Guidelines Council's "Definitive Guidelines" of February 2010 for the sentencing of offences of Corporate Manslaughter and Health and Safety. We accept that the Board will give due allowance for the fact that this deals with criminal sentencing rather than professional regulation by the imposition of sanctions.

"D. Level of fines

22. There will inevitably be a broad range of fines because of the

range of seriousness involved and the differences in the circumstances of the defendants. Fines must be punitive and sufficient to have an impact on the defendant.

23. Fines cannot and do not attempt to value a human life in money. Civil compensation will be payable separately. The fine is designed to punish the defendant and is therefore tailored not only to what it has done but also to its individual circumstances.

24. The offence of corporate manslaughter, because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds.

25. The range of seriousness involved in health and safety offences is greater than for corporate manslaughter. However, where the offence is shown to have caused death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more.

26. A plea of guilty should be recognised by the appropriate reduction.”

In Annexe A, however, the Council does give some valuable guidance as to the relevant information required for assessing a fine.

“ *Financial information expected to be provided to the court* ”

1. For companies: published audited accounts. Particular attention should be paid to (a) turnover, (b) profit before tax, (c) directors’ remuneration, loan accounts and pension provision, (d) assets as disclosed by the balance sheet (note that they may be valued at cost of acquisition which may not be the same as current value). Most companies are required to lodge accounts at Companies House. Failure to produce relevant recent accounts on request may properly

lead to the conclusion that the company can pay any appropriate fine.

2. For partnerships: annual audited accounts. Particular attention should be paid to (a) turnover, (b) profit before tax, (c) partner's drawings, loan accounts and pension provision, (d) assets as above. If accounts are not produced on request, see paragraph 1."

and

"C. Financial information; size and nature of organization.

"14. Size is, however, relevant. The means of any defendant are relevant to a fine, which is the principal available penalty for organisations. The court should require information about the financial circumstances of the defendant before it. The best practice will usually be to call for the relevant information for a three-year period including the year of the offence, so as to avoid any risk of atypical figures in a single year.

*15. **A fixed correlation between the fine and either turnover or profit is not appropriate.** The circumstances of defendant organisations and the financial consequences of the fine will vary too much; similar offences committed by companies structured in differing ways ought not to attract fines which are vastly different; a fixed correlation might provide a perverse incentive to manipulation of corporate structure. "*

We also draw the Board's attention to the FSA's statement of policy as from March 2010 in relation to the amount of a financial penalty. This is set out in DEPP 6.5 to DEPP 6.5D of the Full Handbook. We note that a significant feature of the FSA's approach is that the fine should relate to the income of the business linked to the breach that has occurred, rather than the business' income across all its activities *simpliciter* which appears to be the Board's presently contemplated approach.

In summary, under this new framework, fines are linked more closely to income and are based on:

Up to 20% of a firm's revenue from the product or business area linked to the breach over the relevant period;

Up to 40% of an individual's salary and benefits (including bonuses) from their job relating to the breach in non-market abuse cases; and

A minimum starting point of £100,000 for individuals in serious market-abuse cases.

The new policy was announced as:-

- a) supporting the FSA's ongoing commitment to the principle of credible deterrence and the improvement of standards within firms in relation to market misconduct and their dealings with customers. The imposition of harder hitting financial penalties which better reflect the scale of a firm's wrongdoing will become a feature of enforcement activity in the future;
- b) creating a new and structured five-step penalty-setting framework. This has been established following a period of consultation with the industry subsequent to the publication of a Consultation Paper in July 2009. The new framework is based on the three principles of disgorgement, discipline and deterrence and consists of the following steps:
 1. Removing any profits made from the misconduct;
 2. Setting a figure to reflect the seriousness of the breach;
 3. Considering any aggravating and mitigating factors;
 4. Achieving the appropriate deterrent effect; and
 5. Applying any settlement discount.
- c) setting out a new policy in relation to the circumstances when the FSA may reduce a fine because of its financial impact; and it clarifies the

situations in which the FSA may publicise enforcement action in criminal cases, thereby bringing it in line with other agencies.

There was some support in our working group for the alternative approach of identifying maximum fines per finding as adopted by the US disciplinary body for auditors, the PCAOB. For lower level misconduct this is set at \$250k (individual) or \$2m (firm), and for the worst cases \$750k (individual) or \$15m (firm), per finding.

We also see however that the mechanism of maximum fines expressed in finite figures for specified types of misconduct would lack flexibility, with the added difficulty of the need to review as the value of money changes over time. For more serious misconduct, there was support by one member of the group for the views expressed by the Tribunal in the recent JP Morgan case which held that the starting point for the financial penalty in AADB cases should be the sum of £2m subject to aggravating factors which in that case the Tribunal doubted, save in exceptional cases, could take the penalty beyond the £5million level. This member noted that in the JP Morgan case the Tribunal had considered in detail many of the concerns outlined in the Consultation in considering its unlimited power to impose a penalty under paragraph 7(7) of, and appendix 1 to the Scheme and in particular taken into account inflation, the increase in size and scale of the Member Firm in question and the expectation of the public that the penalty should be substantial. The member also noted that the Tribunal in that case clearly saw a distinction between considerations which applied to the primary actor and its regulator and those which apply to the auditor/reporting accountant and its regulator. The member noted that the adoption of any of the proposed three mechanisms referred to in the Consultation would result in a similar approach to that adopted by the FSA and that in doing so the Board risked conflating the sanctions regimes applicable to primary and secondary actors. Others felt that these issues

could safely be left to the Tribunal in applying the starting point in the actual process of determining penalty.

Individual Members

With regard to individual Members, an important limitation should obviously be that of financial means. In the context of sentencing for corporate manslaughter and health and safety offences, the relevant guidance states as follows:

“16. The court should, however, look carefully at both turnover and profit, and also at assets, in order to gauge the resources of the defendant. When taking account of financial circumstances, statute (and here the Council refers to ss.164 (1) and 164(4) of the Criminal Justice Act 2003) provides for that to either increase or decrease the amount of the fine and it is just that a wealthy defendant should pay a larger fine than a poor one; whilst a fine is intended to inflict painful punishment, it should be one which the defendant is capable of paying, if appropriate over a period which may be up to a number of years.”

S.164 now sets out six sub-sections indicating the statutory criteria to be adopted when considering fining individuals. These considerations, together with any more thought to be of particular relevance to the professions, could be adopted by the AADB. The AADB would need to seek information and take into account income, turnover (if e.g. the individual has a stake in the firm) profits and accrued bonuses, whether already paid or earned / promised and to be carried forward.

The group does in any event recognise the importance of Indicative Sanctions Guidance and accept that there needs to be some mechanism to assist the Tribunal in determining the appropriate financial penalty, where a fine is an appropriate sanction to impose. Appropriately specified Levels are a good way to increase the transparency of indicative sanctions Guidance, and “Starting Points” (be it a percentage or a finite sum) are very desirable because they provide a valuable and straightforward tool in the imposition of financial penalties where these are appropriate.

9. What level of turnover / income do you consider would be appropriate in respect of each mechanism?

We do not feel able to comment comprehensively on this. The answer will depend on the mechanism to be chosen. One member suggested the following by way of hypothetical example (assuming, despite the comments made above, that all five levels remain within the scheme): **Level 1 0-5 %**, **Level 2 5-10 %**, **Level 3 10-20 %**, **Level 4 20-30 %**, **Level 5 30-40 %**, stressing of course that these would be starting points only.

We suggest that on any view transparency in the Indicative Sanctions Guidance should be achieved by the clear statement of the matters that the Tribunal must bear in mind in each case.

We would also strongly suggest that transparency should be increased by the indication of the appropriate type of sanction or alternative sanctions that should be considered by the Tribunal in defined cases - as the ICAEW has done in its *Guidance on Sentencing*, and the ACCA in its *Guideline Disciplinary Sanctions*.

10. Do you agree that Tribunals should not take account of the costs that it is considering awarding against a Member or Member Firm when determining the appropriate level for a Fine?

We agree, see further below.

11. Do you have any other comments about the proposed structure or content of the sanctions guidance?

The principal aim of the guidelines for these professions should be deterrence of offending, the encouragement of self-reporting and co-operation. Where appropriate this co-operation should include swift and where possible generous financial compensation to victims, sufficient to repair the damage done, and the introduction of improved systems to prevent future offending.

We consider that the actual level of any financial penalty must vary with the circumstances. Fines should be adjusted downwards where, for instance, a Member Firm has all reasonable internal controls in place but one determined individual has thwarted those reasonable internal controls. A previous good disciplinary history is another factor that could lead to an adjustment of a sanction downwards. We note that the draft Indicative Sanctions Guidance appropriately seeks to set out the factors that the Tribunal should bear in mind for adjustment for sanctions purposes in paragraphs 46 to 49.

As regards the discount for admissions set out in paragraphs 50-56 of the draft. We agree that there needs to be consideration of the AADB's investigative processes, by which we mean consideration of when a Member or Member Firm could reasonably first have admitted the misconduct.

Harm to others and motivation (e.g. dishonesty or profit-driven) are obvious aggravating features.

Normally, the amount of the fine imposed should be calculated without regard either to the imposition of costs or the payment of reparations to 'victims' (i.e. payment of complainant's expenses in bringing complaint plus compensation to repair loss sustained) *unless* reparations have been made in full or to the satisfaction of the 'victims' in advance of the hearing and in any event at such an early stage as to enable it to form part of the mitigation of the offence. This is to encourage the early recognition of wrongdoing and the need to repay loss as quickly as possible.

Owing to the range of circumstances, despite the admirable aim of transparency and openness, we suggest that indicative percentage uplifts and reductions for indicated possible circumstances, based on a given starting point, should not be part of the Indicative Sanctions Guidance. The Guidance should set out the factors for the Tribunal to take into account rather than propose particular uplifts or reductions in respect of those factors.