



# The Consultative Committee of Accountancy Bodies

28 March 2008

## Private and Confidential

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Dear Anna

## **ACCOUNTANCY AND ACTUARIAL DISCIPLINE BOARD – THE ACCOUNTANCY SCHEME REVIEW – CONSULTATION**

I am writing to give the collective response of the CCAB bodies to the consultation paper issued in January 2008.

### **1. A change to the definition of “misconduct” (*paragraph 2(1)*)**

In my letter of 18 February we acknowledged the difficulty of establishing a comprehensive test applicable to all participants. However we expressed considerable reservation about the adoption of the expression “relevant conduct.” More significantly we had concerns about the appropriateness of the inclusion in the definition of “(i) is likely to damage public confidence in the accountancy profession.” We explained that it was difficult to envisage how this test would be applied and, in any event, it seemed to us that the “discredit” test set out in (ii) of the definition would be sufficient. We also wished it to be clear that not every failure (e.g. a departure from guidance) would automatically result in action.

When we met with representatives of the Board on 25 February you agreed to reconsider both the term “relevant conduct” and the definition of that term. We hope that any revised formulation will take account of the concerns mentioned above, in particular the need to avoid a test which, in theory at least, could give rise to disciplinary action for minor matters, even if there are safeguards designed to prevent this becoming a reality.

With regard to the first limb of the proposed definition of “relevant conduct” (“is likely to damage confidence in the accountancy profession”) we noted your reference to the fact that the current scheme includes the phrase “damage to public confidence”) at paragraph 5(2). We respectfully point out that the current paragraph 2 is concerned with grounds for investigation, not with liability to disciplinary action.

### **2. A new power to conduct preliminary enquiries before making a decision to investigate (*paragraph 5(10)*).**

We remain in complete agreement that decisions to refer or call-in cases should be made on the basis of the fullest available information. However, we do not consider that this necessitates the conferring of additional powers on the AADB. The individual participants retain regulatory responsibility until a matter has been referred to and accepted by the AADB, or has been called in.

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We remain of the view that it is perfectly possible and indeed desirable that the AADB and individual participants should collaborate in eliciting relevant information. Where the involvement of all the parties is brought to bear it is more likely that the decision ultimately arrived at will be the correct one because of the experience and knowledge of all those who have been involved.

In our view it is important that the body with immediate regulatory responsibility should have opportunity to initiate and be responsible for enquiries. The alternative proposed will lead to confusion in the minds of those the subject of enquiry and of other regulators. We remain of the view that if AADB and participants simultaneously have power to initiate enquiries there will be a real risk that neither will exercise them, each assuming that the other will do so.

In our submission the proper approach in investigation, in the absence of any specific agreement to the contrary, is for the relevant participant to be the procurer of information, albeit at the request of and in conjunction with the AADB. Clearly, where the AADB has indicated an interest in a matter, it should be kept fully informed and be given opportunity if it wishes to participate in meetings and the assessment of information obtained. If this approach is followed roles would be clear, matters would be pursued promptly, regulatory inertia avoided, expense and duplication of effort minimised. Most importantly such an approach – involving a wide range of expertise – would be conducive to the achievement of a soundly based decision as to the appropriate forum for the investigation of a significant case.

At our meeting on 25 February it became apparent that the real issue underlying the proposals is whether participants in the scheme should have a role in determining whether a matter should be investigated under the auspices of the scheme. It was noted that in practice AADB had resorted to powers of “call-in” in a majority of cases. This was cited as “a vindication of the *raison d’être* for establishing the AADB.” We respectfully disagree. The current situation has resulted not because of any unwillingness on the part of participants to refer cases but simply because the practice of the AADB has been to claim jurisdiction immediately there has been some reporting in the press based on the argument that the relevant participant had not been investigating the matter. This practice completely ignores the fact that until the publicity was given neither the AADB nor a participant could have had any reason to consider that investigation would be necessary.

The CCAB has contended throughout that “call-in” powers should be exercised in default of appropriate action by a participant not as a matter of first resort. This does not in any sense compromise AADB’s independence or ability to act.

It was acknowledged at the meeting on 25 February that a power to make preliminary enquiries was not essential, for as far as the AADB was concerned, and in the light of this and the comments above we suggest that it now be abandoned. However, we did agree that the issue of the exercise of call in powers should be the subject of further discussion.

**3. Changes to Procedures relating to the decision to lay complaints, including the formation of a *Disciplinary Decisions Committee (DDC)* (paragraphs 6 and 7)**

In our earlier letter we pointed out that some bodies had considerable reservations about this proposal, although it was acknowledged that one of them already had similar arrangements in place. All of the bodies were concerned about the costs involved in the proposal. Moreover, we agreed that there should be no need for a change to the current arrangements provided that in every case the Executive Counsel took advice from independent senior counsel following completion of his investigation and prior to the laying of formal complaints. Certainly, if the proposal were to be retained, it is the experience of one of the bodies that the desired objectives of the DDC could not be met unless its powers were significantly circumscribed.

At our meeting on 25 February you told us that this proposal had been the subject of differing views within the AADB itself and you have since kindly provided the legal advice upon which you have relied in concluding that the independence of the decision to prosecute needed strengthening.

It is of course of fundamental importance that there are no inherent defects in the scheme. However, in our opinion, the legal advice obtained thus far is not sufficiently forceful or authoritative to justify the change proposed. Further, as we indicated at our meeting we believe that the financial implications of making such a change will be much greater than indicated in your regulatory impact assessment.

If you conclude that this proposal should be pursued further we think it would be advisable to obtain the advice of senior Queen's Counsel experienced in the regulatory field.

**4. A new power for the Board to reduce the scope of the investigation (*paragraph 6(6)*)**

As previously explained, whilst we have no strong objection to the inclusion of this provision, we are not persuaded there is a real need for change. We remain concerned that the inclusion of a power to reduce the scope of an investigation might well result in speculative applications by those the subject of enquiry with all the inherent cost, impact on timeliness and general inconvenience associated with such applications.

At our meeting on 25 February you indicated that appropriate drafting of the proposed provision ought to eliminate the risks that we anticipate might arise. We look forward to hearing from you further with a more developed proposal should you intend to pursue the matter.

**5. New tests to be applied by Executive Counsel before delivering a formal complaint (*paragraph 6(9)*) and by the DDC before a matter proceeds to a disciplinary tribunal (*paragraph 7(9)*)**

In our earlier letter, and at our meeting of 25 February, we indicated a reluctance to comment on this proposal in detail without having sight of the proposed desirability criteria. In your letter of 17 March you helpfully set out your initial thoughts.

We agree that the factors you have identified will all be relevant considerations to be taken into account. At this stage we do not propose to comment further since you clearly intend to develop your thoughts further. We assume that you intend producing a document bearing some similarity, in terms of approach at least, to the Crown Prosecutor's Code. We think it will be important to make it clear, in any such document, that no single consideration will necessarily result in a matter either being proceeded with or abandoned. What is required is a balancing exercise. This may mean, for example, that the conduct of an individual is so reprehensible that notwithstanding age or infirmity a matter ought nevertheless to be pursued to a tribunal. The factors which pointed initially against prosecution could then be considered as mitigation in the event of an adverse finding.

As discussed at our meeting we remain concerned that desirability criteria should not be changed in the future without reference to us and we would like to know how you propose to address this concern.

**6. New procedures to appoint tribunal (*paragraph 8(2)*) or appeal tribunal (*paragraph 9(4)*) members by an independent convener**

In our previous response we indicated that we were not persuaded that fairness and independence would be enhanced by this proposal and were concerned about the financial implications. At our meeting you indicated that the proposal resulted from legal advice (which we have not seen) and that the costs were expected to be approximately £5,000 per annum. Whilst we accept that the costs may be relatively small we consider that the need for this change ought to be further reviewed by Queen's Counsel when considering, inter alia, the need for a DDC.

**7. Restriction of the tribunal's discretion to award costs against the board to circumstances where there has been misfeasance on the part of the Executive Counsel, the DDC or any person engaged to assist with the investigation or tribunal (*paragraph 8(9)*)**

In our earlier response we indicated that if the power to award costs were to be restricted it would be important to use language clearer than "misfeasance". We suggested that consideration be given to "deliberate or reckless misuse of power" or "dishonesty or a lack of good faith."

At our meeting on 25 February you acknowledged that further legal advice on this point would be beneficial.

Although not previously raised with you we consider, on reflection, that there may, or may not, be some merit in retaining in the scheme a provision which would enable an order for costs to be made in favour of individuals in respect of whom all complaints had been dismissed. In such cases those individuals would not have been supported by insurers or others (e.g. employers) and would not have had assistance provided under the equality of arms principle. The tribunal would have to consider both that in all the circumstances of the case, it would be just to make such an order and that were it not to do so hardship would be likely to result.

**8. Removal of the Chairman's casting vote (*paragraph 10(8)*)**

In our earlier response we indicated that we considered it appropriate that this power be retained and that its omission might have unforeseen consequences.

It is important to distinguish between a second and a casting vote. In our view a casting vote needs to be available to a chairman where a formal vote has been taken but he has abstained on an initial vote. We also think there are difficulties in denying a chairman a second vote. It has to be remembered that equality of voting is only likely to arise where for some reason, e.g. ill health, one of the tribunal members has not been able to continue. Should that situation arise it seems to us important that the independent and legally qualified chairman's view should prevail rather than simply providing that any proposition, where there is equality of votes, will lapse.

**9. Removal of the power relating to the transfer of cases from the Joint Disciplinary Scheme (*paragraph 18*)**

We have no objection to this proposal.

**10. Generally**

We look forward to hearing from you further once you have assimilated the responses to your consultation exercise. If it would be helpful we would be particularly happy to be involved, both in the selection of appropriate leading Counsel to advise further on certain of the matters referred to above and in the preparation of instructions to and consultations that will no doubt be necessary.

Yours sincerely

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