

## Anna Colban

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**From:** Eugene McGivern [emcgivern@btopenworld.com]  
**Sent:** 26 March 2008 16:25  
**To:** Anna Colban  
**Subject:** Emailing: Comments on Consultation Paper Mar 2008

**Attachments:** Comments on Consultation Paper Mar 2008.doc



Comments on  
Consultation Paper..

Anna

Here are some comments on what I think is a very good Consultative Paper. I would be grateful if you would confirm that they hve reached you in readable form.

Perhaps I might ask you to note that I would be interested in serving on the Disciplinary Decisions Committee in due course.

Regards

Eugene McGivern

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Comments on Consultation Paper Mar 2008

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**AADB ACCOUNTANCY SCHEME REVIEW**  
**CONSULTATION PAPER**  
**COMMENTS BY E MCGIVERN (PANEL MEMBER)**

**General Remarks**

1. I welcome the opportunity to comment on the Board's proposals set out in the Consultation Paper, particularly in the light of the decision in the Mayfair case. I found the paper to be well written and structured in a way that greatly assists in both grasping the points at issue and framing a response to the various proposals.

2. I can support almost all the proposed changes, but as I bring out in my comments on specific proposals, I am concerned that changes which may be desirable in principle risk adding significantly to the time taken in bringing cases to a final resolution. This is particularly relevant in those cases which have been the subject of police or other investigations before reaching the Board where years may have passed since the event in question. It must be open to question whether the benefits from refining the rules in the interests of greater transparency or independence of the decision process are not outweighed by the continuing uncertainty and stress on individuals from more protracted procedures. My understanding is that the Government were anxious when the Board was set up that its procedures should help expedite decision in the major cases with which it would be concerned. No doubt the Board will consider carefully any views which the representative bodies may express on this point.

3. My responses to the specific proposals are set out in the following paragraphs.

**4. Questions 1(a) and (b)**

Yes, I agree that "Relevant Conduct" is a better approach. I also agree with the definition of "Relevant Conduct". However, is there a need to include "an approved professional practice"? The reason I ask is that in contacts with the Accountancy profession I sometimes came across instances of practices which although not formally incorporated into formal guidelines or regulations were generally accepted within the profession as an acceptable way to deal with a matter. I expect that in practice, "regulations or guidance" will cover most if not all the issues which may come up in cases reaching the Board, but I raise the point in case it may be of relevance.



## **5. Question 2**

Yes, I agree. However, this is an example of a change which is likely to lengthen the disciplinary process. It is important that the preliminary investigation must not be a protracted or an in-depth affair, otherwise there is a risk of duplication (if followed by a full investigation) and extending the time before the case can be taken to a conclusion. This power should therefore be used sparingly. As the Consultation Paper recognises, the Board should normally be able to make an informed decision from the information already before it. It would be interesting to know whether the proposal arose from actual experience of one of the cases presently before the Board or is put forward for consideration simply on the basis that the change is theoretically desirable.

## **6. Question 3(a)**

Yes I support the proposal for a DDC, There are particularly strong arguments here of fairness and independence of process which I consider outweigh the delay which may arise from the preliminary review. In employment cases, the Investigation Officer does not (or at least should not) have the power to lay charges of misconduct; and in criminal cases, it is for the police to investigate and the CPS to lay charges. I wonder, however, whether the DDC need have the power to invite representations, even though they will be written representations. The Member or Member Firm will have had every opportunity to make representations during the EC's investigation and will have a further opportunity to do so if the case proceeds to the formal tribunal stage. I am not clear what benefit there is in inviting representations at the review stage, as opposed to seeking clarification or further factual information.

In keeping with the point I made above about delay, may I suggest that the DDC should exercise its power to seek further information only where the required information is so central to their decision on the EC's recommendation that it could of itself lead to the Committee deciding whether to accept or reject the recommendation to lay a formal complaint. Other matters requiring explanation or further information should be left to the formal tribunal stage.

## **7. Question 3(b)**

I agree with the proposed functions and constitution of the DDC.

## **8. Question 4**

I agree. This seems a sensible proposal.



**9. Question 5(a)**

I agree that the test should be changed to whether there is a realistic prospect of a finding of "Relevant Conduct". I suggest there should however be some guidance on what constitutes "a realistic prospect" which I believe is the test applied by the CPS. Is it the same as "a reasonable prospect"; or does it mean that it is more likely than not that there will be such a finding; or does it require a judgement on the probability of such a finding, for example, 75% to 25%.

**10. Question 5(b)**

Yes, I agree with the two-fold test to be applied by the DDC.

**11. Question 5(c)**

Yes, I agree with the proposed factors to be considered by the DDC. I suggest that a further factor may need to be considered. In some cases the Committee may also wish to take account of the length of time the matter has been under investigation not just by the Executive Counsel but by other bodies including the police. The passage of a very substantial period of time, coupled, for example, with evidence about the Member's health and the reliability of witnesses' recollection of events, may have a bearing on whether a hearing is desirable.

**12. Question 6**

I am not persuaded that the additional time and cost (albeit relatively small) involved in using a Convener justifies introducing this further step in the proceedings. The Board will already be familiar with the case, either from reports by the Executive Counsel or the recommendation of the DDC. They should also know which Panel members would be best suited to sit on the formal tribunal and it should be a relatively simple and speedy matter for them to appoint the tribunal. By contrast, a Convener would have to inform him or herself of the case in order to decide which of the Panel Members has the experience and background best suited to hearing the case. The Board is an independent body which will not have been involved in the actual investigation and I firmly believe that it already brings a very high degree of fairness and independence to the appointment of tribunals. The timescale for these investigations is inevitably rather long and should only be increased for compelling reasons which is not the case here.



13. **Question 7(a)**

Yes. I find the argumentation in paragraphs 6.33 and 6.44 most compelling. It is not acceptable that the Board should be faced with the possibility of substantial costs being awarded against it as a result of decisions made in good faith by it or its agents in complying with its duty to protect the public interests in this very important area.

14. **Question 7(b)**

Yes, the proposal on when costs should be awarded against the Board would maintain the balance between fairness and the Board's duty to regulate and bring proceedings where it considers necessary. But I greatly dislike (and not sure I fully understand) the test of "misfeasance" and the somewhat tortuous guidance on what might constitute the term. Why cannot the much clearer and simpler test of whether in laying the complaint the Board acted "vexatiously, frivolously or unreasonably" be used?

15. **Question 8**

May I suggest that the views of the Participating Bodies be given particular weight on the decision here. I personally do not like, in effect, a "not proven" verdict and would prefer the matter to be resolved by the Chairman's casting vote in what I would expect would be the highly exceptional circumstances of a tied vote. The reputation of the Member or Firm will have been seriously affected by the decision to lay the complaint and they may be desirous of a clear decision either way. But on a matter of such importance to them I would leave the decision to them.

16. **Question 9**

I believe the Board have identified the likely main financial costs of their proposals and have gone as far as is reasonably possible in putting a figure on them. However, before it reaches final decisions on the matters raised in their Consultation Paper, the Board should attempt to quantify the likely overall net increase in time which their proposals could add to an already (but inevitably) long process, particularly if the remit from Government was to expedite decision in these important cases, within the constraints of fairness and independence.

