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The Actuarial Profession

making financial sense of the future

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27 MAR 2008

18 March 2008

Dear Anna

AADB Consultation Paper about the accountancy scheme review

Thank you for your letter of 28 January 2008, for the consultation paper, and for the helpful discussion on 5 March about the proposals. The paper has been considered by the Actuarial Profession's Disciplinary Board ('the Board'), who have asked me to offer the following comments.

The Board's approach to these changes was informed by its understanding that the AADB wishes, as a matter of principle, to keep the accountancy and actuarial schemes reasonably in line with one another, albeit that the professional jurisdiction in each case differs. It looks forward in due course to receiving the revised draft actuarial scheme and meanwhile offers the following comments in the hope that they will be of help.

Taking in turn the questions in the consultation paper:

Question 1

- (a) *Do you agree in principle with the proposal to require a tribunal to find that any allegations proved amount to "Relevant Conduct" before making an adverse finding?*
- (b) *Do you agree with the proposed definition of "Relevant Conduct"?*

The Board understands that the accountancy bodies prefer the term 'misconduct', although it has no great difficulties itself with the concept of 'relevant conduct'. It notes that the new definition of relevant conduct includes three of the four elements of Misconduct which appear in the Actuarial Profession's own schemes, namely conduct (behaviour), integrity and competence, but excepting the concept of 'professional judgement'. You may wish to consider whether to add this. It has, for example, been one of the bases of a finding of Misconduct by a Faculty Disciplinary Tribunal Panel in the case of Mr A N Walton
(http://www.actuaries.org.uk/files/pdf/professional_affairs/discipline/tribunalrep_walton.pdf).

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Question 2

Do you agree with the proposal to provide for the Board, where it considers it relevant, to direct Executive Counsel to make preliminary enquiries before it reaches a decision on whether to investigate a matter?

There is a fine balance to be held between on the one hand ensuring a fair and thorough procedure and on the other adding undue delay and costs. Of itself there is nothing objectionable in this proposal but it is only one of many which will have the effect of adding considerably to the length and costs of the procedures under this disciplinary scheme.

Question 3

- (a) *Do you agree with the proposal that an independent committee will review the formal complaint and the evidence in support of that complaint before the formal complaint is served and a disciplinary tribunal is appointed?*
- (b) *What are your views on the proposed composition and the three main functions of the DDC?*

This proposal also adds to the procedure, length and costs of the process. If retained, it would at the very least be helpful to have – on the website - a flow chart explaining the DDC's place in the process, and indeed the revised procedures generally, which are difficult to follow in the revised scheme.

The DDC's principal virtues appear to be in demonstrating separation of the investigation from the decision to prosecute and, in relation to misfeasance, it provides an extra protection for the Respondent. No prosecution before a Tribunal will proceed unless the DDC agrees, and it includes lay membership. It provides another opportunity under the revised scheme for a Respondent to argue that the case against him, or it, should not proceed, under the third of three different sets of criteria.

Questions that occurred to the Board therefore stem from proportionality: whether these protections can be afforded without the elaborate mechanism of another committee within the process, and how to forestall the practical difficulty of stopping the DDC from becoming a preliminary tribunal hearing on the papers, which is not its purpose.

The first test of a case, the public interest test, will already have been applied by the AADB. The second test, the realistic prospect test, will already have been applied by Executive Counsel (in consultation with an independent QC) and the Respondent will have argued his case at that stage in relation to that test. It is difficult, without seeing them to argue for or against the DDC's third test, the desirability criteria, but the Board understands that these are likely to include some public interest elements as well as issues of the kind considered by the CPS before it mounts a prosecution.

The Board is also concerned that the somewhat complex processes foreseen of consulting the DDC at various stages might afford opportunities for judicial review, as the only available challenge, which could also add to costs and length of cases. No doubt the AADB already has this point in mind.

Question 4

Do you agree with the proposal to provide for the Board to reduce the scope of an investigation on request by Executive Counsel?

This seems to be a sensible corollary to the existing power to permit the Board to extend the scope of an investigation on request by Executive Counsel.

Question 5

- (a) *Do you agree with the proposed test to be applied by Executive Counsel in deciding whether to deliver a formal complaint?*
- (b) *Do you agree with the proposed two-fold test to be applied by the DDC?*
- (c) *What are your views on the factors to be included in the Desirability Criteria?*

Please see the comments under question 3.

Question 6

Do you agree with the proposal that an independent Convener will appoint tribunals?

The Board supports the proposal to introduce greater independence of the Tribunal from the AADB, as this may help to improve public perceptions of the scheme. It recommends that the AADB might wish to consider going further, by removing from the AADB the task of appointing the pool of members from whom the Convener will convene panels. As the Board understands it, this would require a further amendment to the scheme. The Actuarial Profession's schemes include provision for a Disciplinary Appointments Committee whose sole task is to recruit and appoint all those actuaries and lay people (other than staff) with roles under the schemes. There can be no conflict of interest as it is completely separate from the governing Councils of the Faculty and the Institute, and from all of the bodies under the schemes, and plays no role whatever in the investigation, tribunal and appeal stages. This degree of independence was commended by Lord Penrose in his report¹.

Question 7

- (a) *Do you agree that a balance must be maintained between fairness to a successful respondent and ensuring that the regulator is not constrained from bringing proceedings because of the possibility that costs may be awarded against it?*
- (b) *Do you agree that the proposal in respect of costs assists in maintaining that balance?*

A regulator whose primary task is to protect the public should not be constrained in bringing a case, for that purpose, by fear of a costs award against it. That said, the Board has reservations about the proposed solution to the problem, which in practice raises an almost insurmountable barrier for successful Respondents. This is to some extent balanced by the additional protections introduced for the Respondent in the scheme and by paragraph 15. The question which occurs to the Board is whether the balances are sufficient to forestall successful legal challenge to this part of the scheme.

For example, paragraph 15 does not appear to the Board to go sufficiently far to be fair to Respondents as it provides for the AADB to meet 'the reasonable costs of [a] Member's legal representation before the Tribunal' and the appeal. The additional processes which are now proposed will add considerably to a Respondent's legal costs but fall outwith the scope of paragraph 15.

Question 8

- (a) *Do you agree with the proposal to remove the tribunal chairman's casting vote?*

¹ Report of the Equitable Life Inquiry 8 March 2004 by The Right Honourable Lord Penrose. HC 290

- (b) *Do you agree with the proposal that, where there is an equality of votes in respect of any motion, that the motion should not be carried?*

The Board's objection to the Tribunal Chairman's casting vote caused its removal from the actuarial scheme, and so it warmly supports a similar change to the accountancy scheme. It prefers the wording of paragraph 10(9) of the current actuarial scheme to the proposed change to the accountancy scheme:

"10(9) Any matter to be decided by a Tribunal shall be decided by a majority of votes. In the case of an equality of votes, the matter shall be decided in favour of the Member."

Other matters

The Board also offers the following comments and questions which arose during its consideration of the revised draft scheme.

Please would you confirm that the Board's understanding of the position, where accountancy cases do not proceed under the AADB scheme, is correct:

- a. Cases fail the public interest test: revert to the relevant accountancy body, if they have been called in by the AADB.
- b. Cases fail Executive Counsel's realistic prospect test: these cases cease to proceed at all under any scheme – AADB or the individual accountancy body's scheme.
- c. Cases fail the desirability criteria test: these also cease to proceed, as under (b) above.

If the Scheme applied the Interpretation Act 1978 to itself, the AADB would no longer have to explain that references to 'he' include 'she' etc or to update references to legislation when new finance Acts are passed.

The change in paragraph 11 from reference to 'balance of probabilities' to 'the civil standard of proof' may have ramifications under paragraph 10(13), which permits hearings in Scotland. The Board understands that the 'civil standard of proof' has a different meaning in Scotland from that in England.

Yours sincerely



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