ICAS response to the FRC consultation paper on proposed amendments to the Audit Enforcement Procedure

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Introduction

ICAS is pleased to have the opportunity to provide comments on the FRC's proposed amendments to the Audit Enforcement Procedure ('AEP').

The ICAS Royal Charter requires that we act in the public interest. With that in mind, our response aims to place that interest above others. We are, however, conscious of the ICAS Members and Firms who are subject to the AEP, and are therefore keen to ensure that any amendments are also mindful of their rights and interests.

As an experienced professional and regulatory body, as well as a Recognised Supervisory Body ('RSB') we hope that our comments will be helpful in the FRC's consideration of matters. If it would assist, we would be happy to discuss our comments, or any other issues arising in connection with this consultation.

Overarching comments

1. ICAS will always encourage and support any constructive attempts to introduce greater efficiency and effectiveness into enforcement processes. In this regard, we are pleased to see that one of the FRC's key motives in reviewing the AEP appears to be the desire to reduce the timescales of its enforcement processes.

2. It is noticeable how much power and responsibility the AEP vests in the role of Executive Counsel, increased now with the proposed abolition of the Enforcement Committee. As detailed below, there are instances where we believe that increased oversight should be incorporated to avoid too great a concentration of power in a single role (e.g. in relation to the decision to lodge an appeal).

3. As the body operating the AEP, we accept that the FRC is best-placed to assess how the process has worked to date, and identify how it might be improved. As ICAS has had very limited involvement with the AEP to date, our comments are primarily made in the context of our experiences with other regulatory and disciplinary processes.

4. The proposed amendments would see a significant increase in the length of the AEP, from 20 to 36 pages. Whilst there are some instances where more detailed provisions should bring greater clarity, account should also be taken of the accessibility of the document – particularly for individuals who are less familiar with this style of drafting. There are instances where greater detail does not necessarily equate to easier understanding, which raises questions over transparency (one example is the definitions section, which is nearly doubling in length). We also observe that more detailed and prescriptive drafting is likely to require more frequent amendment in the future

5. As with all substantive changes to processes, we would expect the FRC to closely monitor the implementation of whatever amendments are ultimately agreed, to assess how matters are working in practice, and to identify any unintended consequences.

Finally, given the extensive nature of the redrafting, we note that it has not been a straightforward exercise to identify all of the proposed amendments.

Response to the consultation questions

Our responses to the three questions in the consultation are set out below.

1. *Do you have any comments on the changes to the AEP set out above? Please respond by reference to specific Rule numbers of the amended AEP.*

The consultation highlights what are considered to be the more significant proposed amendments, and the first question asks for comments on these.

Part 1 – Interpretations / Glossary

We note the proposal to significantly increase the number of terms covered in this section. Whilst we have no reason to believe that the current wording has led to any confusion, and are mindful that

extensive lists of definitions do not always lead to greater clarity, we have no firm views on either the structure or the wording.

Part 2 – Initial Stages

The amended wording certainly provides a more extensive list of the powers available to a Case Examiner at the beginning of the process. Whilst we do not have any strong objections to the style of drafting, we question whether the key aim of the Rule could be achieved through simpler wording, thereby assisting accessibility (particular for people less familiar with documents of this nature).

For example, it is not immediately clear why the power in Rule 3(c) is not sufficiently wide to cover the powers which are set out in 3(a) and 3(d).

In making this comment, we accept that the FRC may have encountered practical difficulties with the simpler wording currently in place, leading to a desire for greater prescription.

Part 3 – Investigation

The new power to extend the scope of an investigation, set out in amended Rules 12 and 13, seems sensible, although we would hope that, in most cases, the original scope will have been set with sufficient flexibility in mind, to avoid having to use these Rules.

With regard to amended Rule 13(a), we believe that the relevant RSB should also be advised of an amendment in scope.

We agree with the proposal to remove the requirement for preparation of an Initial Investigation Report, with the process set out in amended Rules 16 and 17 likely to be more efficient. It will, or course, be crucial to ensure that the Respondent's representations are given appropriate weight in the final assessment of the case.

With regard to amended Rule 19, our only query is whether the wording in (a) is too definitive, insofar as the breach at this stage has only been established in the opinion of the Executive Counsel. Words such as "considers" or "believes" could be added to remove any confusion.

The introduction of the Independent Reviewer process in Rules 23 to 28 ought to increase public confidence in the decisions/sanctions which are applied with consent. We do, however, have two comments to make. Firstly, there should be greater clarity of the test applied by the Independent Examiner when undertaking the assessment (e.g. does the Examiner have to positively agree with the Final Decision Notice, or is it enough that they consider it is not an outcome which a reasonable Executive Counsel would have agreed to?) Secondly, it would be helpful for timescales for review to be stipulated, to mitigate the risk of delays in this part of the process.

It is somewhat curious that the FRC proposes to abolish the Enforcement Committee. As this body has not yet been used, it must surely be difficult to properly assess its effectiveness in fulfilling the purposes for which it was introduced. Whilst its removal would clearly speed up the process, it could lead to difficulties in the event of a deficient investigation by the Executive Counsel (which might otherwise have been identified and corrected by the Committee).

Finally, with reference to amended Rules 29(a) and (b), we note that the Executive Counsel must refer a matter to a Tribunal where a Respondent ignores or rejects a Proposed Decision Notice. In the absence of any consideration by the Enforcement Committee, we believe that review of the notice by an Independent Reviewer might be appropriate. This additional – but hopefully brief – level of oversight would reduce the risks created by having a case referred to a Tribunal solely on the basis of one person's view, and would ensure external consideration of the Respondent's position.

As a general point, we highlight that we have consistently questioned the level of power and autonomy afforded to the role of Executive Counsel. There is an inherent danger of building an enforcement regime around an individual rather than a framework which fits an organisation.

Part 4 – The Tribunal

It is not immediately clear why the Tribunal process does not commence with the service of the Allegation by the Executive Counsel, following which the Tribunal would be appointed. The process set

out in amended Rules 32 and 34 could lead to Tribunal members declaring conflicts of interest at a later stage (i.e. once they've been able to consider the matter in detail). It might also inhibit selection of Tribunal members based on relevant experience. Consideration might therefore be given to re-ordering these provisions.

With regard to amended Rule 52, we agree with the underlying principles here, which are also reflected in ICAS' Rules and Regulations. However, we query the breadth of sub-clauses (c) and (d) and wonder whether the use of the word "shall" might unduly fetter the discretion of the Tribunal. There could be a risk of argument from one of the parties that the findings of less-respected, or otherwise controversial bodies, have to be taken as *prima facie* evidence of the facts found.

We have no objections to the provisions set out in amended Rules 73 and 75 to 78, all of which appear sensible.

Part 5 – Interim Orders

We believe it is appropriate that this part of the process should be set out in greater detail, and therefore support the approach proposed by the FRC with the amended wording. It also appears correct that this process sits only with the Tribunal (rather than the Enforcement Committee).

We offer the following comments for consideration:

(i) The definition of an Interim Order is very wide, allowing a Tribunal to "impose any other requirement in relation to the exercise of Statutory Audit work". We suspect that there could be orders allowed by this definition which would be subject to successful challenge.
(ii) Is the FRC fully satisfied that there would be no instances where an Interim Order application could be heard in public? We note that the amended wording offers no flexibility.
(iii) We believe that the Rules should provide throughout for intimation on the relevant RSB (not least because there might be concerns identified which also require the RSB to take its own action).
(iv) The three-day review timescale in amended Rule 91(a) seems unrealistically tight, even accounting for the likely the desire of the Respondent for an early hearing. Perhaps provision could be made for an extended timescale at the request of the Respondent?

Part 6 – Settlement

It is not immediately clear how the provisions in Part 6 interact with the Proposed / Final Decision Notice procedure in Rules 21 to 28. We suspect there is some overlap between the processes.

Based on our reading, both Rules allow for a liability and sanction to be applied with the agreement of the Respondent. Amended Rules 22 and 104 are identical in terms of what the Executive Counsel must be set out in the respective notices. We assume, therefore, that in each instance the Executive Counsel must be satisfied that there is sufficient evidence of the breach, and is in no way restricting the proper amount of investigation work which is required.

In the absence of further explanation from the FRC, we are not convinced that Rule 6 is required, with the same outcomes achievable under Part 3, albeit without use of the word "settlement".

Part 7 – Appeal

While we do not anticipate it will used with any frequency, we agree that the FRC should have the right to appeal the decision of a Tribunal. However, if the Enforcement Committee is abolished, it appears that the decision to appeal is taken by the Executive Counsel alone. Given that it was the Executive Counsel's decision to raise and prosecute a formal complaint which has, to some extent at least, been unsuccessful, it is questionable whether this person is best-placed to take the decision to appeal. Some level of oversight here would be preferable (possibly involving an Independent Examiner). We refer, again, to our concerns over the extensive powers vested in the role of the Executive Counsel.

Amended Rules 113 and 119 appear uncontroversial.

Part 8 – Reconsideration

The proposed amendments to Part 8 seem sensible.

Parts 9 to 11 – Sanctions, Costs and General

We have no comments to make on amended Rules 146 to 150.

While we agree with the proposal to remove the upper limit of a temporary prohibition on a Respondent from carrying out Statutory Audits or signing an audit report, we are not clear on the logic for removing the provisions relating to conditions and undertakings. Given that both actions are available to the RSBs in the shared Audit Regulations, we would appreciate an explanation of the FRC's reasoning.

We agree than amended Rule 142 is necessary and appropriate. It is a power which is available to ICAS' Discipline and Appeal Tribunals.

Regarding amended Rule 155(b), we would suggest that there is explicit provision for the Chair of the Joint Tribunal to decide to appoint separate tribunals *ex proprio motu*. As presently drafted, the Rule implies that the decision will be taken solely on the basis of the representations made by the parties.

More generally with regard to Joint Tribunals, we would be interested in an explanation of the practical circumstances in which the FRC would consider this appropriate, and the anticipated frequency of use.

We have no comments to make on amended Rules 165-166 or 169-170.

2. *Do you agree with the proposed amendments to the AEP? Please respond by reference to specific Rule numbers of the amended AEP.*

3. *Do you have any general comments on the amended AEP?*

We will answer both of these questions together, using our response to address proposed amendments to the AEP which have not been highlighted by the FRC on pages 6-8 of the consultation document, and which have not otherwise been covered in our comments on the first question.

Case Management Hearings and Directions

Our reading of amended Rule 39 is that a Case Management Hearing will only be called by the Chair where the parties do not agree proposed Case Management Directions within the stipulated period of time. Whilst we appreciate that the Chair may issue Case Management Directions without the need for a hearing, we would suggest increased flexibility in the drafting, to allow the Chair to assign a hearing wherever the Chair deems appropriate.

Postponements and Adjournments

We have some concerns over the provisions in amended Rules 65 and 66, dealing with instances where a member of the Tribunal is unable to continue to participate in a hearing:

- With regard to amended Rule 65(a), is there any reason why an additional Tribunal member could not be appointed at this stage, given that the case has still to be heard? A hearing with fewer Tribunal members is unlikely to offer better decision-making, and it would appear to be an outcome that could fairly easily be avoided. At the least, wording along the following lines could be added: "if no replacement member is available".
- Amended Rule 65(b)(ii) provides for the re-hearing of the case in the event that the Tribunal Chair is unavailable. If a Liability Hearing has not yet been held then the case would technically not need to be re-heard.
- It may be that the wording of amended Rule 65 is intended to only cover unavailability where the Liability Hearing has commenced, but not concluded (in which instance, our preceding comments would not apply). If that is the intention, we would suggest that the wording is amended along the lines of: "In the event that a member of the Tribunal is unable to continue to participate in a Liability Hearing <u>which has commenced but not concluded</u>".
- With regard to amended Rule 66(b)(ii), it would seem very undesirable for a Liability Hearing to be rescheduled once a Tribunal has already spent significant time considering and determining a case. This would clearly require extensive additional time, which is unlikely to be in the interests of the parties. We wonder whether a better option might be to appoint a replacement Chair, whose underlying experience – together with input from the other Tribunal members, and review of the hearing transcript – would hopefully assist in the determination of sanction.

General structure

With regard to Part 8 onwards, we believe that there could be an argument to incorporate some provisions into earlier stages of the AEP, to provide for a more logical / chronological flow. By way of example:

- Amended Rules 131 to 134 apply to decisions made under Part 2 of the AEP, and might therefore be better placed at the conclusion of Part 2.
- Sanctions are listed at Part 9, by which point the AEP has already covered all hearings, including appeals. It might be better to list sanctions in Part 4.