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Our Ref: N:P&T/Professional Regulation/AADB

19 September 2012

PRIVATE AND CONFIDENTIAL
Addressee Only
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FIRST CLASS POST
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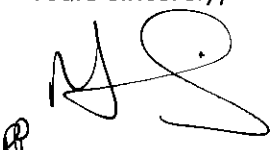
Dear Anna

Consultation on Disciplinary Scheme Proposed Changes

CIPFA is pleased to have the opportunity to comment on the proposed changes to the accountancy profession's independent Disciplinary Scheme.

CIPFA's detailed comments are set out in the attached consultation response. If you need further information on any of the issues we have raised in this response, please do not hesitate to contact me.

Yours sincerely,



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CIPFA The Chartered Institute of Public Finance & Accountancy

CIPFA's response to:

AADB consultation on Disciplinary Scheme Proposed Changes

September 2012

the people in public finance

CIPFA, the Chartered Institute of Public Finance and Accountancy, is the professional body for people in public finance. Our 14,000 members work throughout the public services, in national audit agencies, in major accountancy firms, and in other bodies where public money needs to be effectively and efficiently managed.

As the world's only professional accountancy body to specialise in public services, CIPFA's portfolio of qualifications are the foundation for a career in public finance. They include the benchmark professional qualification for public sector accountants as well as a postgraduate diploma for people already working in leadership positions. They are taught by our in-house CIPFA Education and Training Centre as well as other places of learning around the world.

We also champion high performance in public services, translating our experience and insight into clear advice and practical services. They include information and guidance, courses and conferences, property and asset management solutions, consultancy and interim people for a range of public sector clients.

Globally, CIPFA shows the way in public finance by standing up for sound public financial management and good governance. We work with donors, partner governments, accountancy bodies and the public sector around the world to advance public finance and support better public services.

RESPONSE TO AADB'S SPECIFIED QUESTIONS

1. **Should the Scheme be amended as set out in paragraphs 3.3 to 3.11 [of the consultation document], so as to enhance the independence of the disciplinary arrangements?**

The FRC proposes to remove the requirement to consult with the relevant professional body before launching an investigation on its own initiative.

The consultation states that the FRC expects to continue "close liaison" between the professional bodies and the FRC staff about whether situations warrant investigation and, in particular, whether a matter meets the public interest test. However, it is proposed to remove the *requirement* to consult. The FRC acknowledges that consultation with the professional bodies at this stage "can add value" and "may lead to a more informed decision being made". The reason for the proposed change is timing on the basis that this step "can add up to 3 months to the process of starting an investigation".

It is CIPFA's view that from a legal perspective, if there is no requirement to consult then this generally creates a risk that the FRC would not obtain all relevant information before reaching a decision on the commencement of an investigation. The FRC itself notes that consultation may lead to a more informed decision being made. It is a key requirement of public law that decisions are made on the basis of all relevant information and a failure to do so could invalidate a subsequent investigation carried out by the FRC. This risk is therefore significant in legal terms and in terms of its potential impact on investigations, participating bodies and their members.

Were there to be a discretion to consult only, it is likely to be precisely in those cases where the FRC does not already have a full understanding of the issues that it may wrongly decide that there is no need to consult with a participating body or that a participating body is not likely to have relevant information.

It cannot be correct to limit the steps taken by the FRC to obtain all information relevant to its decision to launch an investigation purely on the basis that this may take some time. If the concern is timescale, then the solution would be to place time limits on the consultation process, i.e. response time limits for participating bodies.

Paragraph 2.3 of the consultation states that the proposal to remove the requirement for consultation is one of the changes being proposed with a view to enhancing the independence of the Scheme. If consultation were incompatible with this independence then it ought to be ceased altogether, whereas paragraph 3.3 of the consultation clearly indicates that consultation is expected to continue to some extent.

We consider that the requirement to consult at a threshold stage does not compromise the independence of the Scheme, which, in any event, already provides for the FRC to be the ultimate decision-make as to the correct forum for a disciplinary case. In fact, it seems that there are more likely to be allegations of inappropriate influence where it is left to the discretion of the FRC as to whether or not to consult with the professional body in any one case – leaving a decision to consult in one case and not in an other open to allegations of favouritism in favour of, or particular influence by, one or more professional bodies. A consistent approach can be achieved by a requirement to consult in every case.

Preliminary Enquiries

CIPFA agrees that the FRC should be able to conduct preliminary enquiries. However, this is another area where liaison with the relevant participating body will be important - in this instance to ensure that individuals and organisations holding relevant information are not over-burdened with requests for assistance.

We believe that the draft protocol, on which CIPFA commented, would have provided an appropriate process for this stage of the proceedings.

Scope Extension

CIPFA has no concerns about the proposal to vary the scope of an investigation without the requirement to consult the relevant professional body or bodies. Once an investigation has been commenced by the FRC, the relevant professional body is unlikely to have any useful information that can influence that decision.

Amending the Scheme

The proposal is to remove the requirement on the FRC to obtain the consent of the professional bodies to future changes to the Scheme. This will be replaced by a requirement on the FRC to consult with the professional bodies about proposed changes and a mechanism for resolving disputes about the proposals. Under this mechanism, any continuing dispute about proposed changes would be referred to an independent adjudicator, whose decision would be binding.

CIPFA has no objection to this proposal in principle although we would welcome further explanation of the nature of the process by which the adjudicator will make his/her decision, which we consider should include provision for the professional bodies to make representations to the adjudicator. This should include not just provision for representations from the professional body who disputes the proposed changes and is prompting the adjudication, but also provision for other professional bodies to express their views about a dispute, whether in support of the FRC, in support of the "disputing" professional body or with a third opinion.

We are however concerned that CIPFA may not be able to effect this change constitutionally. CIPFA's current Charter requires CIPFA Council to take its own decision as to whether to accept any amendments to the Scheme by passing a resolution accepting/adopting changes. In addition, the Bye-Laws prevent CIPFA Council from accepting or adopting a Scheme which is inconsistent with its Charter and Bye-Laws. Accordingly, CIPFA may be vulnerable to legal challenge from its own members if it were to accept revised wording to the FRC Scheme without taking a robust decision as to whether the changes are appropriate, or if it were to accept amendments to the Scheme which it had not determined to be appropriate for its members and in line with the provisions of the Charter and Bye-Laws.

We are also concerned as to whether a change in the Charter and Bye-Laws could be effected to implement a proposal to delegate CIPFA's functions without ultimate control as to how that function will be exercised. CIPFA is proposing to obtain legal advice on this matter with a view to discussing the position and necessary changes to the Charter and Bye-Laws with the Privy Council.

2. **Are the proposals to conclude cases without the need for a tribunal hearing appropriate (paragraphs 3.12 to 3.13 above)?**

The FRC is proposing to introduce a process by which cases could be settled without a tribunal hearing taking place (in fact before a Formal Complaint is served on the Member or Member Firm).

CIPFA notes the Government's and the FRC's commitment to this proposal following its consideration of responses to its earlier consultation (relating to the restructuring of the FRC) and the increasing use of such procedures in the regulatory field. In light of these considerations, CIPFA no longer maintains its opposition to this proposal.

However, given the public interest threshold to be met before cases are subject to FRC investigation at all, it is important that the parameters of the settlement power are not drawn too widely and that there is close scrutiny of the way in which the power is exercised. In this context, the detail of the proposals will be important.

Firstly, we note that the settlement agreements would be published unless the Conduct Committee considers that this would not be in the public interest. This proviso on publication is already stated in respect of publication of other decisions taken within the Scheme. However, it is particularly important to be transparent about settlement agreements. We consider that there should be a clear statement of policy about the basis on which settlement agreements might be kept confidential. In this context, the AADB published a policy that would benefit from a stronger statement that non publication should be regarded as the exception, should only occur where full account has been taken of public interest nature of the Scheme itself, and should only be agreed where other public interest considerations clearly outweigh the public interest in transparency about the type of case investigated by the FRC. This will be particularly important with reference to settlement agreements.

Secondly, we would agree that objective scrutiny of proposed settlements must be carried out. We also note that scrutiny by the Settlement Approvers only takes place once Executive Counsel has completed a full negotiation process with the Member or Member Firm concerned and that the decision to enter into settlement discussions is at the sole discretion of Executive Counsel. Therefore, there is no ability for the Case Management Committee to influence the nature of the settlement suggested at any formative stage and this seems likely to make it difficult for the Committee to exercise any influence on the course of settlement discussions. There is only provision for an "all or nothing" approval/rejection. If a proposed settlement agreement is rejected by the Case Management Committee, it is likely to be very difficult for Executive Counsel to return to negotiations and agree a different settlement. We appreciate that it may be unrealistic to expect the Case Management Committee to exercise scrutiny throughout the negotiations process, but some interim reporting should be possible.

In addition, we suggest that the FRC should commit to publishing a guidance document on settlement negotiations and agreements i.e. the nature of arrangements which might be made (what sanctions might be imposed through this process and the principles which will be applied by the Case Management Committee in considering whether to accept proposed amendments). This should help with achieving a reasonable level of consistency in approaches to settlements and safeguarding public interest considerations.

3. **Do you agree with the role envisaged for the Case Management Committee (paragraph 3.15)?**

Given the scope of the powers and discretions exercised by Executive Counsel, the introduction of a mechanism to scrutinise and challenge Executive Counsel's decisions is broadly to be welcomed.

However CIPFA considers that the nature of the Case Management Committee's role is not clear from the consultation document and the amended Scheme. While it may be clarified in subsequent guidance, there is a risk that lack of clarity will give rise to inconsistency or uncertainty around responsibility for decisions and quality of decisions, which could damage the creditability of the Scheme and increase the risk of challenge to decisions under it.

Paragraph 6(6)(ii) of the amended Scheme states that the role of the Case Management Committee (or the Group of the Committee appointed in relation to a particular investigation) is to "monitor Executive Counsel's investigations, including where applicable, any settlement discussions and up to delivery of a Formal Complaint". There is a concern that "monitor" is a vague term open to a variety of interpretations. This opens a way for disagreements either between the FRC and Members or Member Firms or between the FRC and the Executive Counsel as to the scope of the roles under the Scheme and whether they are being carried out appropriately.

Paragraph 3.14 of the consultation document confirms that "the conduct of any investigation will continue to be the responsibility of the Executive Counsel" and this is not surprising. Any other position would be a fundamental change to the nature of the FRC Scheme. Presumably the Case Management Committee is intended to exercise influence on Executive Counsel through presenting counterviews and probing as to the reasoning of these decisions. However if the monitoring role is to be effective it will be important to specify (i) more about how the exchange of views and explanations will take place; and (ii) what, if any, reporting mechanisms exist if the Case Management Committee is concerned about Executive Counsel's approach and its views are not being taken on board.

Paragraph 3.14 of the consultation document says that the Executive Counsel "will consult... as appropriate" with the Case Management Committee. This could be included as a procedural step within the Scheme. In addition, paragraph 3.15 indicates that the Executive Counsel will present the case to the Case Management Committee for review before a decision is taken to deliver a Formal Complaint and where Executive Counsel considers there is evidence to proceed with the case he will consult with the Case Management Committee as to whether the case should proceed to hearing or whether it would be appropriate to consider settlement discussions. However, neither of these steps is provided for within the amended Scheme. Again, if the intention is that this consultation will take place in every case, then it seems that this should be included within the Scheme itself.

Under paragraph 3(1)(ii) of the amended Scheme, the Executive Counsel is required to have regard to any guidance issued by the Conduct Committee but there is not a similar obligation with regard to guidance or comment from the Case Management Committee. This means that the Scheme imposes no requirement on Executive Counsel to respect the views of the Case Management Committee.

4. **Are the proposals to facilitate the timely completion of investigations and disciplinary proceedings appropriate (paragraphs 3.16 to 3.18 above)?**

The proposal to introduce time limits within which Members and Member Firms must respond to Formal Complaints appears to be a reasonable and appropriate step.

5. **Should the Executive Counsel be able to seek an interim order against a Member or Member Firm? If so, are the proposed provisions (paragraph 3.19) appropriate?**

It should be noted that CIPFA itself does not have the power to make interim orders. Therefore, provision would have to be made to allow CIPFA to implement any such order by the FRC Tribunal.

Our concern with regard to this proposal is on the basis on which it is thought that a power to impose interim orders is required. Paragraph 3.19 of the consultation document refers quite generally to "reasons of public interest" but does not make it clear whether there have in the past being cases in which it is thought that an interim order would have been appropriate or that the public was insufficiently protected because such orders were not available. We would welcome further clarification of the basis on which this proposal is being considered because the imposition of interim orders can have a very significant impact on individuals before any disciplinary finding is made against them and consequently decisions to impose interim orders can be fought fiercely by respondents in disciplinary proceedings – giving rise to increased costs and potential delay to the disciplinary process.

6. **Do you have any comments on the proposals to amend the investigation test (paragraphs 3.24 – 3.29)?**

The consultation sets out a potential change to the second limb of the test for determining whether a matter falls within the FRC Scheme. The first limb is the test as to whether the matter raises or appears to raise important issues affecting the public interest in the UK. The second limb is whether "the matter needs to be investigated to determine whether there may have been an act of misconduct". It is proposed that the second limb be replaced by a provision that "investigations should only be commenced if there are reasonable grounds for suspecting misconduct has occurred which, if established through the investigation, would be sufficient to justify the commencement of disciplinary proceedings".

CIPFA is concerned that the proposed new test appears to have two distinct elements to it: (i) a requirement that there are reasonable grounds for suspecting misconduct has occurred; and (ii) a requirement that the misconduct would, if established, be sufficient to justify the commencement of proceedings. The first element seems sensible and a more precise translation of the current "needs to be investigated" test. However the additional sufficiency test seems superfluous on top of the first limb, the public interest test. Surely any misconduct that raises "important issues affecting the public interest in the UK" would also be "sufficient to justify the commencement of disciplinary proceedings"?

The amended Scheme does not set out the proposed amended test. It may be that a two part second limb is not what is intended i.e. that the first sentence of paragraph 3.25 of the consultation document is meant to represent an amended second limb of "reasonable grounds for suspecting" plus the existing public interest test.

The consultation document also refers to the possibility that the two limbs of the test should be presented in reverse order, i.e. the public interest test should be the second limb. We agree that this would make the test much clearer and might clarify the debate about the drafting of the current second limb.

We suggest therefore that full test should be along the following lines:

(a) There are reasonable grounds for suspecting that misconduct has occurred; and

(b) The matter raises or appears to raise important issues affecting the public interest in the UK.

7. **Do you have any other comments on the proposed Schemes or the points raised in this paper?**

We note that the amended Scheme shows the deletion of the previous paragraph 4(5), which provided that a Member would only be liable to disciplinary proceedings if he/she was (at the time a Formal Complaint was delivered or at the time of the alleged misconduct) connected to the UK through citizenship, residency/work or through his/her work for a UK registered or connected business. This proposed change is not discussed in the consultation document. It may well be thought that the threshold requirement for a matter to raise important issues affecting the public interest in the UK renders this provision effectively redundant, but we consider it would be helpful to have further explanation in any event.

Paragraph 3.28 of the consultation document states that the FRC is considering whether to broaden the range of sanctions available under the Scheme. Licence conditions (such as requirement to re-train) are given as an example of additional sanctions under consideration. However no further details of the possible changes are given either in the consultation document or in the amended Scheme. It may be that a further consultation is anticipated in respect of this issue, as it will certainly need to be considered in more detail by the participating bodies.

Paragraph 14(i) of the Scheme provides that certain criminal convictions constitute conclusive evidence of misconduct. This is being changed in the amended Scheme (although not discussed in the consultation document) so that it applies to any conviction for "a criminal offence", rather than a conviction for "an indictable offence". It is our understanding that indictable offences is a category which excludes more minor offences dealt with by the Magistrates Court. The change would appear to mean that any criminal conviction, however minor would potentially bring a Member within the scope of the Scheme. There does not seem to be any justification for this.