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# Analysis of responses to consultation on proposed amendments to the Accountancy and Actuarial Schemes

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## ANALYSIS OF RESPONSES TO CONSULTATION ON PROPOSED AMENDMENTS TO THE ACCOUNTANCY AND ACTUARIAL SCHEMES

As at 4 December 2012

Issue	Consultation responses	FRC response (including amendments to be made to the draft Scheme)	Paragraph No. (in latest draft) and comment
<b>Obligation to consult Participant</b>	<ul style="list-style-type: none"> <li>• The Participants argued for the retention of this provision.</li> <li>• Others argued that the removal of the provision would be acceptable provided that                             <ul style="list-style-type: none"> <li>○ steps would be taken to check whether a duplicate investigation was being taken by the relevant Participant, and</li> <li>○ if the FRC decides not to investigate, action would be taken to enable the Participant to decide whether it should proceed.</li> </ul> </li> </ul>	<p>The FRC believes that these points are adequately addressed in paragraph 6.</p> <p>Paragraph 6(9) ensures that duplicate investigations will not proceed.</p>	<b>Para 6(9)</b>
<b>Removal of requirement to obtain Participants agreement to future changes to the Scheme</b>	<ul style="list-style-type: none"> <li>• The Participants contended that                             <ul style="list-style-type: none"> <li>○ the FRC should consult on any provision that would affect their financial exposure;</li> </ul> </li> </ul>	<p>The Scheme has been amended to provide that future amendments to the Scheme will</p> <ul style="list-style-type: none"> <li>• only be made after public consultation</li> </ul>	<b>Para 21</b>

	<ul style="list-style-type: none"> <li>○ they should be able to make submissions;</li> <li>○ they should be consulted on the identity of the adjudicator (where a proposal is resisted after consultation);</li> <li>○ any amendments should be approved by the FRC Board Directors.</li> </ul> <ul style="list-style-type: none"> <li>● CIPFA and ICAS were concerned as to whether such an amendment would be permissible under their Charter/Constitution.</li> </ul>	<ul style="list-style-type: none"> <li>● following approval by the FRC board of directors</li> </ul> <p>The adjudication provision has been amended to provide for the Participants to be consulted on the identity of the adjudicator and make submissions.</p>	
<b>Settlement Provisions</b>	<p>There was substantial support for the inclusion in the Scheme of provisions enabling settlements. The points made included:</p> <ul style="list-style-type: none"> <li>● It is essential that the details of any settlement should be published (unless a greater public interest justified non-publication) and the process by which it is reached should be transparent;</li> <li>● The role of the CMC should be set out in the Scheme</li> <li>● The Member/Member Firm should be able to propose a settlement;</li> <li>● It should be possible to initiate settlement discussions at any stage;</li> <li>● It should be possible to settle <ul style="list-style-type: none"> <li>○ part of any Complaint,</li> <li>○ liability but not the sanction, or</li> <li>○ on a "Neither Admit nor Deny" basis.</li> </ul> </li> <li>● The CMC group should decide by majority (not unanimity);</li> <li>● Settlement discussions should be "without</li> </ul>	<p>The Scheme has been amended to:</p> <ul style="list-style-type: none"> <li>● Provide that Settlements will be published in all but the most exceptional circumstances;</li> <li>● Set out the CMC's role in its (published) Terms of Reference;</li> <li>● Provide that discussions may take place on a Without Prejudice basis;</li> <li>● Enable a Member/member Firm to propose a settlement at any time after an investigation is commenced and prior to the final determination of the Complaint, and on any basis;</li> <li>● Provide that settlements will be approved by <ul style="list-style-type: none"> <li>○ the CMC before a Formal Complaint is served and</li> <li>○ a Tribunal designated to consider the settlement proposal after a Formal Complaint has been served.</li> </ul> </li> </ul>	<b>Para 8</b>

	<p>prejudice";</p> <p>There were conflicting views on the process by which the settlement should be approved:</p> <ul style="list-style-type: none"> <li>• Some argued that settlements should be approved by a Tribunal to ensure that approval is independent of the FRC;</li> <li>• Others argued that the FRC, like the FSA, should be able to approve a settlement.</li> </ul> <p>Concern was expressed that publication of investigations will inhibit settlement and that Executive Counsel might be able to 'pressurise' respondents to settle.</p> <p>A number of respondents were concerned that settlements, including those that were not concluded, would not be taken into account when any costs orders are made.</p>		
<b>Interim Orders</b>	<p>Generally, respondents acknowledged that, in very exceptional circumstances, it would be appropriate for the FRC to be able to obtain an interim order against a Member/Member Firm.</p> <p>Observations made by respondents included that:</p> <ul style="list-style-type: none"> <li>• no application should be made without the prior approval of the Conduct Committee;</li> <li>• the test should be focussed on public protection (together with the public interest);</li> <li>• any application should be made on notice to the affected Member/Member Firm, which should be entitled to attend any hearing;</li> <li>• such an order should only be sought after a</li> </ul>	<p>The Scheme has been amended to provide that the criteria for the grant of an interim order should be the need to protect the public and/or be required in the public interest.</p> <p>The Member/Member Firm is already entitled to receive notice and to attend any hearing</p> <p>The FRC has been advised that a Tribunal that heard an application for an interim order would be able to hear the Complaint in due course.</p> <p>The Scheme already provides that the Tribunal must review</p>	<b>Para 15</b>

	<p>Complaint has been served (and the factual position established to a reasonable level);</p> <ul style="list-style-type: none"> <li>the composition of the Tribunal hearing the application for an interim order might need to be different to that hearing the Complaint;</li> <li>there would be benefit in including guidance on the making of an interim order in the eventual Sanctions Guidance.</li> </ul> <p>There were differing views on the maximum length of any order (with a right to Executive Counsel to apply to extend the order):</p> <ul style="list-style-type: none"> <li>For a maximum of 18 months;</li> <li>For a maximum of 12 months;</li> <li>For a maximum 6 months or such shorter period as the Tribunal may determine;</li> </ul> <p>CIPFA has observed that it may need to amend its Charter/Constitution.</p>	any interim order every 6 months	
<b>Investigation Test</b>	It was suggested that the test for the commencement of an investigation should provide that the Conduct Committee is satisfied that there are 'reasonable grounds' to conclude that the events could support the service of a Complaint.		<b>Para 5(1)</b>
<b>Definition of Misconduct</b>	<p>Respondents urged the FRC to amend the current definition of misconduct to 'raise the bar'.</p> <p>Respondents suggested that the misconduct should be defined by reference to where:</p> <ul style="list-style-type: none"> <li>the events complained of discredited the profession;</li> <li>the conduct falls significantly short of that</li> </ul>	<p>The FRC proposes to amend the definition of 'misconduct' to read as follows:</p> <p><b><i>"Misconduct means an act or omission or series of acts or omissions, by a Member or Member Firm in the course of his or its professional, business or financial activities (including as a partner, member, director, consultant, agent, or employee in or of any</i></b></p>	<b>Para 2(1)</b>

	<p>expected of a professional accountant;</p> <ul style="list-style-type: none"> <li>there had been a serious departure from professional standards.</li> </ul>	<p><i>organisation or as an individual), which falls significantly short of the standards reasonably to be expected of a Member or Member Firm or has brought, or is likely to bring, discredit to the Member or the Member Firm or to the accountancy profession."</i></p> <p>Respondents' views on the proposed drafting is requested</p>	
<b>Preliminary Enquiries</b>	<p>It was suggested that the FRC should not initiate Preliminary enquiries if it is satisfied that the Investigation test was met.</p> <p>Respondents were generally content that no protocol is required</p>	<p>The FRC does not agree that its ability to commence a Preliminary Enquiry should be constrained – save that it should be for the purpose for which the Scheme is established.</p>	<b>Para 6(10)(i)</b>
<b>Role of the Case Management Committee</b>	<p>Respondents welcomed the proposed formalisation of the role of the CMC.</p> <p>A number of points were raised:</p> <ul style="list-style-type: none"> <li>the composition of the CMC should ensure a broad range of skills;</li> <li>the CMC should receive regular progress reports from the Executive Counsel;</li> <li>the CMC should be entitled to ask the Executive Counsel to provide information;</li> <li>The Executive Counsel should be obliged to consider CMC guidance</li> <li>The CMC should have the power to give directions on the conduct of investigations;</li> <li>The CMC should be empowered to review the decision to pursue a Complaint;</li> <li>The CMC's oversight after service of a Complaint should not be limited to the consideration of settlement proposals, but</li> </ul>	<p>The Scheme has been amended to provide for the CMC to:</p> <ul style="list-style-type: none"> <li>receive such information as it believes necessary to discharge its monitoring role;</li> <li>to consider <ul style="list-style-type: none"> <li>the adequacy of the evidence supporting the Executive Counsel's decision to proceed with a complaint; and</li> <li>whether it would be in the public interest to proceed.</li> </ul> </li> <li>to monitor developments through to final determination of a complaint or investigation;</li> </ul> <p>The Scheme has been amended to require the Executive Counsel to consider the recommendations of the CMC. The Executive Counsel is not bound by any such recommendations or directions (other than as regards the acceptability of a proposed settlement).</p>	<b>New draft para 4 and para 7(6)</b>

	<p>should extend to the conduct of the Complaint generally;</p> <ul style="list-style-type: none"> <li>The CMC should oversee the costs incurred in pursuing investigations and complaints.</li> </ul> <p>The Scheme description of the role of the CMC (Para 6(6)(iii)) should reflect the way the role is described in the Consultation Paper.</p>		
<b>Procedural Timetable</b>	<p>Respondents supported the proposal that time limits be used to ensure the timely disposition of the proceedings.</p> <p>Some thought that the proposed 8 week limit would be too short, whilst some thought it should be sufficient given the interaction between the Professional Discipline team and the proposed respondents (paragraph 6(10)) . Others thought the proposed provision would be acceptable if respondents could seek extensions in time (and appeal if refused).</p> <p>Respondents regard it as important that the Executive Counsel should be required to report on the progress made in any particular matter on a regular basis.</p>	The Scheme provides for respondents to request extensions of time.	<b>Para 7(10)(iii)</b>
<b>Costs Awards</b>	<p>Several respondents argued that</p> <ul style="list-style-type: none"> <li>Tribunals should be able to award costs against the FRC</li> <li>Admissions should be taken into account when a Tribunal considers making a costs award.</li> </ul>	<p>The FRC does not intend to amend the existing draft of the Scheme.</p> <p>The Sanctions Guidance expressly provides that admissions should be taken into account when determining the sanction(s) that would be appropriate.</p>	
<b>Successor Member Firms</b>	<p>Respondents argued that it would not be appropriate to extend the Scheme to Successor Member Firms because:</p> <ul style="list-style-type: none"> <li>the introduction of a successor Member Firm is</li> </ul>	The provisions relating to Successor Member Firms have been retained.	

	<p>not necessary to ensure that a Member cannot avoid responsibility;</p> <ul style="list-style-type: none"> <li>absent the failure of an LLP, the liabilities of a Member Firm would transfer to the successor Member Firm in any event;</li> <li>the requirement to co-operate would ensure that a successor Member Firm would ensure the provision of documents and information that the Member Firm would otherwise have been responsible for providing.</li> </ul> <p>The definition of 'Member of the Same Group' brings in inappropriate individuals etc. (through the use of the term 'Associate')</p>	<p>However, the definition of 'Members of the Same Group' has been amended to remove the reference to 'Associate'.</p>	
<b>Sanctions</b>	<p>Some Participants noted that it would be important to consult on any proposed new sanctions to ensure that they have the requisite authority to delegate the imposition of such sanctions to the FRC.</p>	<p>Appendix 1 – which sets out the sanctions that Tribunals may impose - has been extended and respondents are asked to indicate if there are any reasons why it would not be appropriate to amend the Schedule in the way proposed.</p>	
<b>Tribunal</b>	<p>A number of respondents argued that the Conduct Committee should not appoint individuals to the Panel from which members of a Tribunal would be drawn (by an independent Convener).</p>	<p>The FRC has amended the Scheme to ensure that those appointing the Tribunal Panel (from which the members of a particular Tribunal will be selected) are independent of the Conduct Committee..</p> <p>Those appointing the Tribunal Panel will be appointed by the Nominations Committee and will include:</p> <ul style="list-style-type: none"> <li>A senior judge, barrister or solicitor;</li> <li>An accountant (not in private practice); and</li> <li>An actuary (not in private practice).</li> </ul>	<b>Para 11(1)(ii)</b>
<b>Transitional Provisions</b>	<p>Some respondents argued that the proposed amendments should not apply to investigations and</p>	<p>The FRC will develop transitional provisions based on the</p>	

	complaints currently being pursued by Executive Counsel.	<p>following principles:</p> <ul style="list-style-type: none"> <li>• Amendments that relate to <ul style="list-style-type: none"> <li>○ relations between the FRC and the Participants,</li> <li>○ the roles and powers of the Conduct Committee, the CMC and the Executive Counsel,</li> <li>○ case management (e.g. time for commenting on a draft complaint, settlement)</li> </ul> </li> </ul> <p>will take immediate effect (and therefore apply to current investigations and complaints).</p> <ul style="list-style-type: none"> <li>• Amendments that <ul style="list-style-type: none"> <li>○ Affect the identity of parties to a Complaint (successor firms)</li> </ul> </li> </ul> <p>Will apply only to investigations commenced and complaints served after the effective date of the Amended Scheme.</p>	
<b>Miscellaneous</b>	<ol style="list-style-type: none"> <li>1. I&amp;FA/KPMG - drafting errors in draft amended Actuarial Scheme to be addressed.</li> <li>2. What is the justification for the change from 'indictable' to 'criminal' in paragraph 14(i)</li> <li>3. Tribunal to have the power to strike out a Complaint if there is no realistic prospect of success.</li> <li>4. The power to delegate decisions to the Chair of the Conduct Committee should be deleted (paragraph 3(1)(v)).</li> <li>5. The deletion of Paragraph 4(5) should be reversed. The Scheme should not have extra-territorial effect.</li> <li>6. The power to investigate/pursue a complaint in</li> </ol>	<ol style="list-style-type: none"> <li>1. Done</li> <li>2. This amendment is intended to anticipate and avoid difficulties. This amendment should be considered in the context of the revised definition of 'Misconduct'.</li> <li>3. There is appropriate oversight of a decision to serve a Formal Complaint. This issue is properly addressed in the course of the full hearing before the Tribunal and after the Executive Counsel's case has been put.</li> <li>4. Done</li> <li>5. Paragraph 4(5) has been reinstated – see paragraph 5(5).</li> <li>6. Not necessary – the paragraph appropriately reflects the Member's obligations.</li> </ol>	

	<p>respect of conduct occurring prior to an individual becoming a Member (Paragraph 4(5)).</p> <p>7. The time period specified in Paragraph 12(2)(iii) should be extended.</p> <p>8. The circumstances in which former Members would be required to co-operate should be explained.</p> <p>9. The Scheme should provide that evidence should only be admissible if it would be admissible in civil proceedings.</p> <p>10. The Scheme should provide that Executive Counsel is bound by the same disclosure obligations as are applicable in civil proceedings (paragraphs 7(6) and 8(10)).</p> <p>11. The replacement of the FRRP by the Conduct Committee in paragraph 14(5)(iii) produces an unintended and inappropriate result</p>	<p>7. Not necessary - the paragraph provides for an extension of the time provided.</p> <p>8. It is impractical to provide additional guidance as the circumstances may vary considerably – and will be for a Tribunal to determine whether cooperation should be provided (or should have been provided).</p> <p>9. Not necessary - the current provision reflects existing authority – <i>Mahon v Air New Zealand and Others [1984] A.C. 808</i></p> <p>10. Not done – the current provision correctly reflects existing authority – <i>R v Brown (Winston) [1998] A.C. 367</i></p> <p>11. Agreed – sub-paragraph deleted</p>	
<b>Decision to serve a Complaint</b>	<p>Respondents suggested that the Conduct Committee should review Executive Counsel's decision to serve a Complaint. This suggestion was predicated on the argument that the Conduct Committee is best placed to assess whether the pursuit of the Complaint would be in the public interest.</p>	<p>It is fundamental to the structure of the Scheme that the decision to pursue a Complaint is exclusively within the discretion of the Executive Counsel. Checks and balances are provided through the oversight of the CMC and the powers of the Tribunal.</p>	

## **Respondents**

1. Association of Chartered Certified Accountants (ACCA)
2. Chartered Institute of Management Accountants (CIMA)
3. Chartered Institute of Public Finance Accountants (CIPFA)
4. Deloitte LLP
5. Ernst & Young LLP
6. Freshfields Bruckhaus Deringer LLP
7. Group 'A' Firms
8. Institute of Chartered Accountants of England and Wales (ICAEW)
9. Institute of Chartered Accountants of Scotland (ICAS)
10. Institute and Faculty of Actuaries
11. KPMG LLP
12. BDO LLP
13. PricewaterhouseCoopers LLP
14. Taylor Wessing LLP
15. Jim Shannon MP
16. Mira Makar



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