



Architects Registration Board

## **Consultation on proposed amendments to the Investigations Rules and Professional Conduct Committee Rules**

### **Responders:**

- |           |                        |  |
|-----------|------------------------|--|
| <b>A.</b> | <b>Ian Salisbury</b>   | <b>Chartered Architect and Chartered Arbitrator</b>    |
| <b>B.</b> | <b>John Agnew</b>      | <b>Architect, NLC Design Services</b>                  |
| <b>C.</b> | <b>Nicola Hill</b>     | <b>Solicitor and Clerk to the PCC</b>                  |
| <b>D.</b> | <b>Simon Howard</b>    | <b>Professional Standards Manager, ARB</b>             |
| <b>E.</b> | <b>Anthony Walters</b> | <b>Policy Manager, Professional Regulation, RICS</b>   |
| <b>F.</b> | <b>Jane Duncan</b>     | <b>Vice President, Practice &amp; Profession, RIBA</b> |

<b>1. Do you think replacing Board members with appointed persons to investigate complaints is an improved model?</b>
<b>A.</b> Yes
<b>B.</b> No – Who will these “investigations pool members” be? This proposed model is open to abuse and could lead to a “jobs for the boys” scenario. <b>The appointment of IC members will be conducted through an open and transparent recruitment process</b>
<b>C.</b> Absolutely. The Board must be separate and be seen to be separate from the disciplinary process to ensure transparency and fairness.
<b>D.</b> No comment made
<b>E.</b> The proposals set out appear to offer an improved model in terms of ensuring that complaints are investigated in a timely manner and by suitably skilled individuals through the formation of an Investigations Panel
<b>F.</b> We agree that replacing Board members with a more general pool/panel of persons is an improved model.

**2. Do you think the Rules are fair and equitable to those involved in the disciplinary process? If not, where would you identify the unfairness as being?**

**A.** No. The Rules exceed the statutory requirements and are therefore unlawful, both as they are and as they are proposed to be. (This is not only my view, but one that has been reached by the Professional Conduct Committee.)

**B.** No comment made

**C.** Yes

**D.** No comment made

**E.** The proposed amendments appear fair and equitable

**F.** We do not feel that the Rules are currently fair and equitable, and as has been raised with the ARB before, there is a general feeling that the ARB process of using a paid barrister, advocate or solicitor to 'prosecute' the ARB's case in professional conduct cases leads to an adversarial and one-sided experience for the architect in question. Few architects can afford the luxury of full legal representation in such cases, and our enquiries through the RIBA Insurance Agency show that they are unaware of any PI policies which provide for legal advice/support in professional conduct cases (unless the outcome may be directly relevant to a claim or potential claim, which is rare).

**There is nothing contained in the Rules that prevents an architect being legally represented. The presumed solution proposed here would therefore appear to either preclude the ARB from using a legal representative, or for the Board**

**(and therefore the profession) to pay for the respondent's legal representation.**

**3. Do you think the proposal to create an Oversight Committee is appropriate?**

**A.** No.

**B.** Absolutely not

**C.** Yes although it is not clear from this documentation how it will be established or what its powers will be.

**D.** No comment made

**E.** The creation of an Oversight Committee to monitor the effectiveness of the process would seem sensible and appropriate. However, it is vital that any Oversight Committee has a clear and transparent remit. This could perhaps be achieved through establishing clear terms of reference for the committee that are available to all who wish to see them.

The Oversight Committee should be there to ensure the quality and consistency of the way in which enquiries/complaints are investigated, however, the Oversight Committee should not intervene with the agreed process unless there is a clear and just cause.

**F.** The separation of powers between an investigations panel and oversight committee seems sensible and appropriate, subject to details.

<b>4. Are any of the proposed amendments to the detriment of the Rules?</b>
<p><b>A. Yes.</b></p> <ol style="list-style-type: none"> <li>1. The opportunity should be taken to correct the Rules where these go beyond the statutory remit; see 5. Below.</li> <li>2. Where the Registrar refers a case to be investigated having concluded of her own motion that the registered person may be guilty under Part III of the Act, it would appear to be prejudicial if she then also appointed the Investigations Panel under proposed Rule 4(c). This should be done reasonably independently, perhaps by a person nominated from among themselves by those appointed to the Investigations Pool. For the same reason the Registrar should not be responsible for appointing a chairman of the chosen panel; this responsibility should also be set apart from the duties of the prosecuting authority.</li> </ol> <p><b>While any appearance of bias might be hypothetical, it is agreed that this rule should be amended to remove the power to appoint the individual Investigations Panels from the Registrar. That amendment is included within the amended rule 4c at Appendix C</b></p>
<b>B. Yes, for the reasons given</b>
<b>C. No – to the contrary, they make the process fairer.</b>
<b>D. No comment made</b>
<b>E. No comments to note.</b>

F. Not that can be ascertained from the information provided.

**5. Are there any omissions which, if included, you feel would be to the benefit of the Rules?**

A. Yes. The rules should clearly state the guidance provided in ARB v Vranicky, namely that nothing shall be reported to the Professional Conduct Committee by way of an allegation of unacceptable professional conduct, made either by the Registrar or a third party, unless it is clear to those making inquiry that there is a serious UPC case to answer. The same threshold should be stated as guidance for serious professional incompetence. (q.v. <http://www.aaruk.info/PCC/HighCt-reV.htm>) –

**It would not be appropriate to incorporate judicial guidance into the rules; details as to what might constitute unacceptable professional conduct and serious professional incompetence may be provided through separate guidance**

B. See above

C. Following on from the hearing yesterday and as discussed you may wish to reconsider the role of the Clerk in relation to adjournment requests both before and during a hearing.

**An amendment to the proposed PCC Rule 9a has been made**

D. No comment made

E. The remit and role of the Inquiry Panel and its relationship with the Investigation Panel should be made clearer. Having

reviewed the information available the links between the two panels are unclear. Terms of reference should be established for the Inquiry Panel setting out what that panel does and how it interacts with the Investigations Panel. As it stands it appears that the Inquiry Panel simply adds another tier to the process which in turn could slow the process and potentially create conflicts between the two panels.

**Terms of Reference for the Inquiry Panel have been drafted and will be brought to the Board when the Inquirers are re-appointed later in the year.**

F. Please see response to point 2

#### 6. Any further comments

A. With reference to Answer 3 above, those parts of the proposed Investigations Rules that are without statutory authority and thus *ultra vires* are:

1. Under proposed Rule 6, if the Registrar were to carry out an investigation without allowing the investigation to be carried out by persons appointed in accordance with rules made by the Board she would be acting unlawfully. The words “the Registrar may carry out such investigations pursuant to Section 14(1) and obtain such advice as the Registrar sees fit and if it then appears to the Registrar that a Registered Person may be so guilty,” should be deleted.

**The Registrar is a person appointed in accordance with the Rules**

2. For clarity, Rule 7 should set out as a headline the primary purpose of the proposed Investigations Panel under s.14(2) of the Act, namely whether or not there is a case to answer. The wording, I suggest, should be “The role of the Investigations Panel is to decide, after investigation, whether or not a registered person has a case to answer on any matter referred to it by the Registrar under Rule 6”.

**See response to point 3 (below)**

3. Concerning those consequential tasks set out in Proposed Rule 7, neither the Architects Registration Board nor anyone connected with it has the power under the Architects Act to provide “cautionary advice”. The proposed Investigations Panel may either report to the Professional Conduct Committee or it must pronounce there is “no case

to answer” taking into account the proper weight of seriousness. There is no other lawful response: proposed Rule 7c should be deleted. The words of Rule 7d “require no further action” should be substituted by the words “Inform the Registrar that there is no case to answer”. It is suggested that the following words be substituted:

*7. The role of the Investigations Panel is to decide, after investigation, whether or not a registered person has a case to answer on any matter referred to it by the Registrar under Rule 6. Depending upon that decision the Investigations Panel shall then either report the matter to the Professional Conduct Committee or inform the Registrar that there is no case to answer.*

It is not necessary for the Investigations Panel to decide that further investigation is required: that is a natural consequence of having insufficient material on which to reach a decision.

**The amendment to the wording of Rule 7d to include ‘there is no case to answer’ is adopted.**

**The Board has previously satisfied itself that the inclusion of the power to give cautionary advice is legal and appropriate.**

**In respect of ‘further investigation is required’, the suggested wording has not been adopted as this Rule provides clarity for all parties.**

4. With regard to proposed Rule 11, as already stated those investigating an allegation are given the power only to decide whether or not there is a case to answer (s.14(2)). That is all that they are permitted to investigate. They may not investigate or take into account “whether the evidence provides a realistic prospect of a finding of unacceptable professional conduct and/or serious professional incompetence and whether it is in the public interest for the case to proceed”. These words are extraneous to the purpose and scope of the Act and should be removed. –

**These two factors are relevant considerations for the Investigations Committee to take into account when deciding whether an architect has a case to answer at the Professional Conduct Committee.**



5. Under proposed Rule 12, if a registered person has been found guilty of a relevant criminal offence, then with regard to s.15(1)(b) of the Act the matter must be referred directly to the Professional Conduct Committee. There is no purpose in the investigation proposed and there is no provision under the Architects Act that would permit such an investigation to take place under s.14. –

**Section 23 of the Act permits the Board to make rules generally for carrying out or facilitating the purposes of the Act. Section 15 of the Act empowers the PCC to make a disciplinary order in respect of a relevant criminal conviction. It is sensible for the Board to make rules as to how the facts of such a case are to be established and the matter presented to the PCC, and there is nothing that has been identified to suggest that the rules is anything other than of assistance to those concerned.**

6. Once the Investigations Panel has decided whether or not there is a case to answer under Rule 7, the Registrar has no jurisdiction under the Act to interfere with that decision. Such an intervention would be both unfair to the accused person and unlawful. Once a decision has been reached under s.14(2) there can be no undoing it. Having performed and discharged their statutory duties under Part III of the Act, there is no power remaining for either the Registrar or the Investigations Panel to revisit the matter. Proposed Rule 13 should be removed. –

**It is appropriate and legal for the Board to have a procedure whereby the charges being put forward by the Investigations Panel can be modified; however the circumstances in which this can occur should be limited to the receipt of legal advice or new evidence. The appropriate amendment has been made to this rule, and those that emanate from it.**

7. Under Rule 14, once a report has been made to the Professional Conduct Committee, the Professional Conduct Committee must consider and make its decision on the presented report pursuant to s.14(3) of the Act. The Act makes no provision for a report to be amended once made. If a charge is withdrawn then the registered person is entitled to an immediate exoneration under s.15(5) of the Act. It is extraneous to the provisions of the Act, and therefore not permitted, that the Professional Conduct Committee should ever concede to a request from the Registrar that a

report be amended. The proposed rule persists in promoting a procedure that can have no justification in law even after the Board has been successfully challenged on this very point. The Board is here demonstrating a recurrent tendency to offend against the constraints laid upon it by the Act. –

**The appropriate amendments have been made to Rules 13, 14 and 15 of the Investigations Rules and Rules 5a and 6c of the Professional Conduct Committee Rules to provide for this eventuality.**

8. In consequence of the matters addressed immediately above, Rule 15 is redundant and should be removed. –

**See response to point 6.**

9. Bearing in mind the provision under Rule 16 for Third Party Review, provision should be made in the Rules that a report shall not be made to the Professional Conduct Committee until the passing of the 30-day window or until such time as a review has been concluded. –

**The Third Party Review process is not applicable to decisions to refer a case to the Professional Conduct Committee.**

10. Arising from point 4. above, proposed Rule 18b should be removed.

**See response under point 5.**

- B.** The ARB should be using their time to look at ways in which architects remuneration and standing can be improved rather than concentrating on the best way to punish architects. We pay the ARB's salaries, so we want to see some action on this. The profession is dying out here in the real world and the number of architects I know who are now working in Tesco or McDonalds is an absolute disgrace and a very poor reflection on the profession. One architect friend I know just finished building a new store for ASDA. As soon as the job was finished, there was no more work for him so he was made redundant. He now works in that ASDA building, stacking shelves to pay his bills. This is absolutely

shocking.

The answer to this problem is to do two things:

- 1) Bring back fee scales, which are used by many other reputable professions to very good effect.
- 2) Reduce the number of architects on the register by increasing the level of qualifications required for new students to enter the architecture course.

If the ARB do nothing, there will be very little experience left in the profession in a few years' time, once the recession has passed.

**Whilst acknowledging the consultee's feedback, such it would not appear to be relevant to this consultation**

**C.** No comment made

**D.** In light of the PCC hearing that took place on 18 June 2012, PCC Rule 9a should be amended to remove the power from the Clerk to the Committee to adjourn proceedings once the hearing has begun. Such a decision ought to rest with the PCC itself once proceedings are underway. This view was supported by the PCC, the Clerk to the Committee and the Board's solicitor.

The Rule should therefore read:

*9a The Professional Conduct Committee (or the Clerk to the Committee on a day prior to the relevant hearing) may adjourn any hearing at any time if they consider that it is appropriate to do so. Written notice of the date, time and place of the adjourned hearing shall be served upon the Respondent.*

**The appropriate amendment has been made**

- E.** The new process, considered against the principles of better regulation, appears to offer accountability and consistency but in certain areas lacks transparency, for example with regards to the Inquiry Panel and its purpose and remit.

The model seems slightly cumbersome in terms of the number and complexity of the various tiers involved. However, we welcome the fact that the model is designed to focus investigations on professional competence which is in keeping with our own approach to such matters.

The complexity of the model may pose challenges if the volume of enquiries were to increase. The proposed process would seem appropriate for handling a relatively small number of complaints effectively, however, the system may start to struggle if volumes rose substantially. This could lead to a significant 'slow down' in the time taken to deal with enquiries.

The complexity of the model may also increase the potential for challenge when dealing with investigations. The more tiers involved in the process and the greater the number of panels/individuals making decisions along the way will increase vulnerability to challenge.

However, in summary the model proposed would seem to offer an improved approach to the existing arrangements.

- F.** Whilst we do not have further comments in terms of the specific amendments under consultation here, we do have a number of concerns regarding the ARB investigation and hearing processes as a whole. We would therefore take this opportunity to notify you that we will be contacting the ARB further with a more detailed analysis once the relevant

group has met to discuss the detailed matters raised. In the meantime, for your information, listed below are some of the main areas of concern:

- Inequality of representation between an unrepresented architect and an ARB appointed solicitor or barrister, particularly as PI insurance does not generally cover professional disciplinary proceedings.
- Rule 6 – the role of the Registrar and the substance of any report provided to the Investigations Committee is unclear
- ‘*Unacceptable professional conduct*’ and ‘*serious professional incompetence*’ are not defined in the legislation or by the ARB
- Requests for additional material by the ARB and its appointees require greater levels of justification
- The burden of proof at hearings (balance of probabilities) is too low and should be increased to that of beyond reasonable doubt
- Rule 13 – we have concern that the Registrar has the power to return matters to the Investigations Committee whatever their decision, not only where the decision is to refer the matter to the PCC as was previously the case

## 6. Generally

**A.** Section 23(1) of the Act provides that before making any rules under the Act (which naturally includes making any changes to the Rules), the Board must publish a draft of the proposed Rules. It has done that. However, given that the draft appears in several respects unlawful under the Architects Act, I suggest it should be immediately withdrawn and redrafted *intra vires*.

As for consultation, the Act requires the Board to “give those to whom the rules would be applicable an opportunity of making representations to the Board” (s.23(2)). If the Board is changing Rules that may affect registered persons, then a small notice on the website in my view is insufficient to give those affected notice of the opportunity to make a representation. (It was only by chance that I saw the notice because the Board emailed me about a promotional matter of dubious legality and I had reason to visit the Board’s website. If the Board can be bothered to provide everyone on the register with a website and notify them of it by email, then I suggest there can be no excuse for giving less attention to communications giving notice of changes made in the exercise of the Board’s proper statutory functions.)

**This consultation was provided to the Board's standard list of bodies referred to for all consultations, posted on the ARB website, and sent to all architects who receive the e-bulletin.**