



**Regulations governing the conduct of
Enquiries under Section 23 of the
Companies (Auditing and Accounting) Act, 2003**

**Feedback Paper
in response to submissions received to the
Authority's Consultation Paper CP 1/07**

1. Introduction and overview

The Irish Auditing & Accounting Supervisory Authority ('the Authority') was established on a statutory basis in December, 2005, pursuant to the provisions of the Companies (Auditing and Accounting) Act, 2003 ('the Act'). The Authority was subsequently conferred with most of the statutory functions and powers provided to it under the Act by the Minister for Trade & Commerce in February 2006¹.

The Authority's principal functions, as provided for by the Act², are to:

- supervise how the prescribed accountancy bodies regulate and monitor their members;
- promote adherence to high professional standards in the auditing and accounting profession;
- monitor whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts and, where applicable, Article 4 of the IAS Regulation; and
- act as a specialist source of advice to the Minister on auditing and accounting matters.

A '*prescribed accountancy body*' is a body of accountants that comes within the Authority's supervisory remit. At present, there are nine prescribed accountancy bodies, *viz*:

- I. Association of Chartered Certified Accountants (ACCA);
- II. Association of International Accountants (AIA);
- III. Chartered Institute of Management Accountants (CIMA);
- IV. Chartered Institute of Public Finance & Accountancy (CIPFA);
- V. Institute of Chartered Accountants in England & Wales (ICAEW);
- VI. Institute of Chartered Accountants in Ireland (ICAI);
- VII. Institute of Chartered Accountants of Scotland (ICAS);
- VIII. Institute of Certified Public Accountants in Ireland (ICPAI); and
- IX. Institute of Incorporated Public Accountants (IIPA).

Further to its statutory supervisory remit, one of the Authority's key policy objectives is, through the exercise of effective oversight of the accountancy profession, to provide the public with independent assurance that:

- the prescribed accountancy bodies are regulating and monitoring their members in accordance with their approved investigation and disciplinary procedures; and
- in circumstances where this is found not to be the case, appropriate action is taken to address instances of non-compliance with approved investigation and disciplinary procedures and to dissuade further recurrence.

¹ S.I. 56 of 2006 (a copy of which can be accessed on the Authority's website at <http://www.iaasa.ie>)

² Section 8

The means by which the Authority exercises oversight of the profession include, *inter alia*:

- approving the Rules, Regulations and Standards with which members of the prescribed accountancy bodies are required to comply by virtue of their membership of those bodies, and proposed amendments thereto;
- approving the prescribed accountancy bodies' investigation and disciplinary procedures and proposed amendments thereto; and
- monitoring the prescribed accountancy bodies' compliance with their approved investigation and disciplinary procedures (including the manner in which they deal with complaints received regarding their members and member firms).

The Act provides the Authority with a range of powers for the purposes of, *inter alia*:

- enabling it to carry out its ongoing, general supervisory functions;
- enabling it to carry out enquiries, following a complaint or on its own initiative, for the purpose of determining whether a prescribed accountancy body has complied with its approved investigation and disciplinary procedures³;
- enabling it, where considered appropriate or to be in the public interest, to carry out investigations into possible breaches of a prescribed accountancy body's standards by a member⁴;
- empowering the Authority to impose sanctions on a prescribed accountancy body or member, as applicable, where non-compliance with approved investigation and disciplinary procedures or standards, as applicable, has been determined to have occurred⁵.

2. Public consultation on interim Section 23 Regulations

Further to the foregoing, in January, 2007, the Authority issued interim procedures governing the conduct of enquiries pursuant to Section 23 of the Companies (Auditing and Accounting) Act 2003 and, by means of an accompanying Consultation Paper (CP 1/07⁶), invited interested parties to comment thereon.

Specifically, the Consultation Paper sought interested parties' views on the following matters:

- I. Do you consider that the draft Regulations set out, and facilitate the implementation of, a fair and robust enforcement procedure, which by taking account of, *inter alia*, the principles of fair procedure and natural and constitutional justice, will result in the issuance of decisions that are just, reasonable and legally defensible?
- II. Do you consider that the Regulations as drafted achieve an appropriate balance between (i) protecting and promoting the public interest; (ii) ensuring that the subjects of enquiries and other potentially affected parties are fully afforded their rights as regards procedural fairness; and (iii) sanctioning non-compliance with the prescribed accountancy bodies' investigation and disciplinary procedures?

³ Section 23

⁴ Section 24

⁵ Sections 23 and 24

⁶ CP 1/07 can be accessed on the Authority's website at <http://www.iaasa.ie>

III. If not:

- i. Which aspect(s) of the draft Regulations do you consider to be inconsistent with the foregoing objectives? Please support your response(s) with the reasoning underpinning your conclusion(s).
 - ii. How would you propose that the issue(s) identified by you at (i) above might be addressed? In order that the Authority might derive maximum benefit from contributors' responses to this question, contributors are requested, to the extent practicable, to provide details of specific deletions, additions or amendments that they consider would serve to address the concerns identified.
- IV. Do you consider the Authority's proposals regarding publication of decisions to be fair and reasonable? If not, please support your conclusions with your reasoning.
- V. Do you consider that the factors currently listed as being among the considerations that an Enquiry Committee would have regard to in determining the level of sanctions to impose are fair and reasonable? If not, please support your views with your reasoning.
- VI. Do you consider that there are factors, other than those referred to at V above, that should be added to the specific list of considerations included in the Regulations? If so, please support your suggestions with your reasoning.

3. Responses received

In response to the invitation to comment, a total of 8 submissions were received. Responses were received from the:

1. Association of Chartered Certified Accountants (ACCA);
2. Association of International Accountants (AIA);
3. Chartered Institute of Public Finance & Accountancy (CIPFA);
4. Chartered Institute of Management Accountants (CIMA);
5. Institute of Chartered Accountants in England and Wales (ICAEW);
6. Institute of Chartered Accountants in Ireland (ICAI);
7. Institute of Chartered Accountants of Scotland (ICAS); and
8. Institute of Certified Public Accountants in Ireland (ICPAI).

The Authority found the submissions received to be both constructive and helpful and wishes to thank those who contributed to the process for doing so.

4. Feedback and final Section 23 Regulations

This document sets out the main issues raised by respondents and the Authority's responses thereto. The principal issues raised are set out hereunder, with the Authority's responses following each point (set out in italicised typeface).

Having considered respondents' views in detail and, where necessary having taken further legal advice, the Authority's interim Section 23 Regulations (as published in conjunction with CP 1/07) have been revised in certain respects. The resulting final Section 23 Regulations as adopted by the Authority, which take effect from **26 June, 2007**, are available on the Authority's website at <http://www.iaasa.ie>.

Principal issues raised by contributors and the Authority's responses thereto

5. General

Submissions received (or elements thereof) which related to terminology used in the interim Regulations (or similar matters) are not specifically addressed herein but have been taken into account in the course of the drafting of the final Regulations.

6. Proposed structures for the conduct of Section 23 Enquires

Other than the specific issues set out hereunder, none of the respondents indicated a fundamental objection to, or dissatisfaction with, the proposed structures for conducting Section 23 enquiries as set in the interim Regulations, including the establishment of Section 23 Committees of the Authority to which the functions and powers of the Authority would be delegated. On the contrary, most respondents specifically indicated their support for the bifurcated system, whereby separate Preliminary Enquiry and Enquiry Committees, whose membership would not overlap, would be established and would conduct separate investigations and issue decisions on the Authority's behalf.

In general, respondents indicated that, subject to comments made, they believe that the procedures are fair and robust and that no obvious issues were detected by them that might lead to legal challenge.

7. Scope and nature of Section 23 Enquiries

One respondent sought the insertion of explanatory text into the Regulations with a view to informing complainants that the Prescribed Accountancy Bodies ('PABs') continue to have primary responsibility for the investigation of complaints and the disciplining of their members.

The relationship between the Authority and PABs, together with their respective roles under the Act, was addressed at paragraph 2.7 of the Consultation Paper, which stated:

'It is important to note... that the Authority does not have primary responsibility for regulating members of the prescribed accountancy bodies or for dealing, in the first instance, with complaints against such members. Under the supervisory model provided for by the Act, the prescribed accountancy bodies remain primarily responsible for dealing with complaints against their members and for regulating and monitoring such members generally. Accordingly, in exercising its ongoing supervisory role, the Authority does not seek to supplant the prescribed accountancy bodies' investigation and disciplinary processes. Rather, the Authority's role is to supervise the operation of these processes.'

While the foregoing reflects both the legal position and Authority policy, given that the purpose of the Regulations is to set out the procedures to be employed in the conduct of a Section 23 Enquiry, the Authority does not consider that it would be appropriate to insert such explanatory material into the text of the Regulations. Notwithstanding the foregoing, and as evidenced by the inclusion of the aforementioned text in the Consultation Paper, the Authority takes appropriate steps to ensure that complainants and prospective complainants are fully aware of the Authority's and PABs' respective roles vis a vis members of those bodies.

Most respondents expressed concern that the Authority's powers under Section 23 could be viewed by members of the public as being a means of appealing decisions of the PABs. In that context, one respondent sought the inclusion in the Regulations of further explanatory text to the effect that section 23 is not an 'appeals mechanism' against decisions taken by the PABs but,

rather, is an enquiry mechanism into the limited question as to whether a PAB has failed to comply with its approved investigation and disciplinary procedures.

In a similar vein, one respondent suggested that the Regulations should clarify that the Authority will not investigate a complaint unless the avenues of appeal provided in the PABs' own procedures have been exhausted and, if the matter has already been the subject of a decision following a PAB's own appeal process, unless the complaint relates to an alleged procedural error in that appeal process.

Where complaints are received by the Authority from members of the public under circumstances where either:

- *a complaint has not been lodged in the first instance with the relevant PAB; or*
- *the relevant PAB's internal processes have not been exhausted (i.e. appeal, referral to an independent reviewer etc.),*

complainants are ordinarily advised by the Authority that:

- *complaints should, in the first instance, be referred to the relevant PAB for processing under its internal procedures; or*
- *where a complaint has already been referred to a PAB:*
 - *the PAB's internal processes should be exhausted before referring the matter to the Authority; and*
 - *on the exhaustion of the relevant PAB's internal processes, a complaint may be referred to the Authority - where the complainant has reason to believe that the matter has not been dealt with in accordance with the PAB's approved investigation and disciplinary procedures.*

In light of the foregoing, and given that the purpose of the Regulations is to set out the procedures to be employed in the conduct of a Section 23 Enquiry by the Authority, the Authority does not consider that it would be appropriate to insert such explanatory material into the text of the Regulations.

It must be borne in mind however that, notwithstanding the foregoing, and as stated in the Consultation Paper:

- *members of the public are entitled to lodge complaints with the Authority regarding alleged non-compliance on the part of a PAB with its approved investigation and disciplinary procedures; and*
- *apparent instances of non-compliance with such procedures may also come to the Authority's attention through other channels (for example, as a consequence of the Authority's ongoing supervisory activities, reports from other regulatory bodies, press reportage etc.).*

It is, therefore, important, notwithstanding that the primary onus for investigating matters relating to members of the prescribed accountancy bodies resides with those bodies, that the Authority have the necessary powers to initiate and perform its own enquiries, where considered necessary, appropriate and/or in the public interest. Given that the Authority has been provided with these powers by the Act, it is not considered appropriate to insert provisions into the Regulations, the effect of which would, in effect, be to limit the Authority's statutory powers. That having been said, a Preliminary Enquiry Committee may determine that a matter is not ripe for

examination under Section 23 and may refer the matter back to a PAB if that PAB has not completed its consideration of the matter, if considered appropriate.

A number of respondents expressed concern that Section 23 may be used by the Authority to 'second guess' the PABs' decisions because it allows a Section 23 Committee to review any decision of a PAB relating to a possible breach of its standards by a member, including, for example, a finding that (i) there was no case for the member to answer; or (ii) that there was insufficient evidence to support an adverse finding. One respondent submitted that a Section 23 Committee should not, in the absence of evidence that a PAB has acted improperly in some way, be entitled effectively to substitute its own judgement for the PAB's.

As acknowledged by a number of respondents, references in the interim Regulations to the Authority's powers under Section 23 to enquire into 'any other decision [of a PAB] relating to a possible breach of its standards by a member' merely reflect the wording of the section.

With regard to the concerns expressed regarding the 'second guessing' of PAB decisions and that the Authority should not, in the absence of evidence that a PAB has acted improperly in some way, be entitled effectively to substitute its own judgement for that of a PAB, the Authority, having reviewed the Regulations in light of these comments, is satisfied that the Regulations clearly and accurately reflect the wording of section 23 of the Act and do not seek to go beyond the scope of the decisions to be reviewed under that section, i.e. the possible failure of a PAB to comply with its approved investigation and disciplinary procedures.

8. Supervisory action in preference to the initiation of Enquiries

One respondent expressed the view that supervisory action (as opposed to the initiation of a full enquiry) is the preferable method of dealing with a failure by a PAB to comply with its approved investigation and disciplinary procedures. The respondent further expressed the view that a Preliminary Enquiry Committee should be precluded from determining that a full enquiry is to be initiated unless it finds:

- not only that a PAB has failed to comply with its approved investigation and disciplinary procedures; and
- that the circumstances are such as to warrant the initiation of a full enquiry; but also
- that the public interest would not be protected or promoted by dealing with the matter by way of supervisory action.

In recognition of the fact that a Preliminary Enquiry Committee may arrive at a determination that, while there is a prima facie case that a PAB has failed to comply with its approved investigation and disciplinary procedures, the circumstances of the case are such that, in the opinion of a Preliminary Enquiry Committee, the matter would be better dealt with by way of supervisory action as opposed to by initiating a full enquiry, the interim Regulations provided that, rather than having to automatically expose the Authority, the PAB and possibly other parties to the costs associated with a full Enquiry, a Preliminary Enquiry Committee can, at its discretion, decide not to inform the Authority of the necessity to initiate an Enquiry, but rather to advise the Authority that, in its view, the matter should be better dealt with as a supervisory matter. It is, of course, also the case that, in other circumstances, it may not, in a Preliminary Enquiry's opinion, be appropriate for the Authority to deal with a matter by means of supervisory action but, rather, that a full enquiry is the most appropriate course of action.

In the Authority's view, the foregoing provisions provide a Preliminary Enquiry Committee with sufficient latitude and discretion to consider, inter alia, public interest considerations and interested parties' submissions in arriving at its determination. The Authority is further of the view that the express imposition of a test in the Regulations whereby a Preliminary Enquiry Committee

would be precluded from initiating a full enquiry unless 'the public interest would not be protected or promoted by dealing with the matter by way of supervisory action', would serve to limit the Authority's powers as laid down by the Act and would, therefore, not be appropriate.

9. Initiation of an Enquiry during/pending Judicial Review

One respondent drew attention to the fact that a member of a PAB who believes that a disciplinary decision against him/her is procedurally flawed has the options of:

- (i) applying for a Judicial Review;
- (ii) lodging a complaint with the Authority; or
- (iii) both (i) and (ii) above (either separately or concurrently).

In that context, the respondent requested the insertion of additional material into the Regulations with a view to clarifying whether the Authority would investigate a complaint received:

- while Judicial Review proceedings related to matters raised in the complaint are pending or in progress or whether it would defer any investigation until after such proceedings have concluded; and
- whether the Authority would decline to investigate a complaint if the matter had already been the subject of a decision of the Court in a Judicial Review proceeding.

In the absence of a Court order providing to the contrary, there are no legal impediments to the exercise of the Authority's powers under Section 23 whilst a judicial review proceeding challenging the same decision of a PAB is pending or in progress. However, the Authority recognises that the initiation of a Section 23 Enquiry under such circumstances may not be appropriate. The Authority believes that, as drafted, the Regulations permit a Preliminary Enquiry Committee to take such circumstances into account in determining whether a full enquiry is warranted or appropriate at such time. The Regulations further provide that a Preliminary Enquiry Committee may seek legal advice at any time during a preliminary enquiry in the event that it has concerns as to the appropriateness of initiating a full enquiry for any reason.

For the same reasons set out above, the Authority also does not consider it necessary or appropriate to insert an express provision into the Regulations which would provide that a Preliminary Enquiry Committee may, or may not, investigate a complaint in circumstances where a matter is already the subject of a decision of the Court in a judicial review proceeding. Such decisions will be made by a Preliminary Enquiry Committee on a case by case basis, taking into account all of the circumstances of any particular matter and, where considered appropriate and/or necessary, having taken legal advice.

10. Confidentiality

One respondent disagreed with the Authority's view that, as stated in the Consultation Paper, publication of Authority decisions is critical to an effective and transparent oversight regime and with the proposal to publish the results of enquiries as soon as possible after the necessary notice periods provided for by the Act have elapsed. In contrast, another respondent commented that publication of decisions is important in order to maintain transparency and public confidence and proposed amending the Regulations to impose an obligation on the Authority to publish all decisions.

The respondent that did express opposition to the publication aspects of the interim Regulations was particularly concerned that the identities of PAB members affected by Section 23 decisions issued by the Authority might come into the public domain and, in that context, sought

confirmation from the Authority that details of underlying case(s) (including the identities of members concerned) will not be made public.

The Authority is subject to a statutory duty of confidentiality, which is set out in Section 31 of the Act. In summary, Section 31 provides that, subject to certain exceptions, information obtained by the Authority in the performance of its functions and exercise of its powers may not be disclosed. Section 31 further provides that a breach of the foregoing constitutes a criminal offence, capable of being tried on indictment. The Regulations provide that any information obtained by the Authority in the course of a Section 23 enquiry is governed by the provisions of section 31.

Section 31(3)(a), however, provides that the Authority is permitted to disclose information that would otherwise be confidential if, inter alia, disclosure is in accordance with law or is, in the Authority's opinion, necessary to enable it to state the grounds on which it made a decision under Section 23. Consequently, the extent to which the Authority may disclose details of an enquiry (including the identity of the PAB and/or the member concerned) may depend, inter alia, on:

- (a) whether such disclosure is, in any given case, necessary in order to satisfy a legal obligation on the part of the Authority; or*
- (b) whether disclosure of such information is necessary in order to enable the Authority to state the grounds upon which a particular decision was made.*

The decision whether to disclose information in any given case will, therefore, have to be determined by the Authority on a case by case basis, taking into account all of the surrounding circumstances. Under such circumstances, it is not possible for the Authority to provide confirmation as to whether, in any given case, it will, or will not, disclose any information obtained during the course of a Section 23 enquiry. The Authority is further of the view that, having regard to the provisions of the Act, the provision of such a confirmation could, in any event, serve to limit the Authority's powers under the Act and would, therefore, not be appropriate.

11. Composition of Section 23 Committees

One respondent expressed the view that it would be inappropriate for Authority staff to be members of Section 23 Committees (although the respondent did express the view that Authority staff should provide advice and assistance to Preliminary Enquiry Committees).

The Authority has accepted this comment and has deleted reference to staff members in the permissible membership of Section 23 Committees. Authority staff may, however, assist the Committees in their investigations and enquiries, but will not participate in decision-making.

Another respondent questioned whether it is appropriate for any member of a PAB to be a member of a Section 23 Committee - on the grounds that their presence on a Committee '...could give the appearance of bias:

- *in favour of the PAB the subject of the enquiry (i.e. if the individual in question were to be a member of that PAB); or*
- *against the PAB the subject of the enquiry (i.e. if the individual in question were to be member of a 'competitor' body),*

unless there was always an equal number of each.'

Another respondent opined that, as the issues being considered by a Section 23 Committee will not be technical issues but, rather, will be issues of whether or not the PAB has complied with its approved investigation and disciplinary procedures, the presence of PAB members on either Committee should not be necessary and could adversely affect the public perception of whether

the process is independent and fair. The respondent further argued that if PAB members are to be appointed to a Section 23 Committee, there should be an equal number of members of the PAB which is the subject of the investigation or enquiry and of members of other PABs.

As provided for in the interim Regulations, the Authority considers that it would be inappropriate for a member of the PAB that is the subject of the enquiry to be a member of a Section 23 Committee charged with dealing with the matter and that his or her presence on such Committee would give rise to a perception of bias and to a material risk of actual bias. The Authority further considers that, in the interests of equity and balance, it is desirable to permit members of PABs (which could include Board members) to act as members of Section 23 Committees provided that the subject of the enquiry is not the PAB of which they are members. The Authority is further of the view that the independence and objectivity of Section 23 Committees is further strengthened by the inclusion of the following provisions in the Regulations:

- *No person who may have (or may appear to have) any interest in the outcome of the enquiry or any relationship with any party to the matters which are the subject of the enquiry which may create or appear to create a conflict of interest may be appointed to a Section 23 Committee; and*
- *A Section 23 Committee shall not be quorate unless a majority of those present are non-members of the PABs.*

Given that a number of the Authority's directors are members of PABs, the Authority considers that it is important to emphasise that such directors do not sit on the Board as representatives of the PABs of which they are members but, rather, have been nominated by the PABs in accordance with the provisions of the Act. In the context of the foregoing, the Authority's Code of Conduct for Directors ('the Code') provides, inter alia, that:

'Members of the Board are reminded that the nature of service on a Statutory Board such as the Authority requires a high degree of integrity, independence and good faith on their part. While it is recognised that members of the Board have responsibilities to their nominating organisations/constituencies, their overriding responsibility as directors is to act in accordance with the relevant legislation and to act in, and protect and promote, the best interests of the Authority. Inevitably, this will from time to time require individual members to adopt and agree to positions that may be at variance with the views of their constituencies. Public confidence in the Authority requires that all members of the Board be seen at all times to be above reproach in the area of actual or potential conflict of interest situations.'

The Code further provides that:

'On appointment to the Board of the Authority, each member is required to furnish to the Secretary of the Authority details relating to his/her employment and all other business interests including shareholdings, professional relationships etc. which could involve a conflict of interest or could materially influence the member in relation to the performance of his/her functions as a member of the Board. Any interests of a member's family of which he/she could be expected to be reasonably aware or a person or body connected with the member which could involve a conflict of interest or could materially influence the member in the performance of his/her functions should also be disclosed.'

12. Notification of initiation of a Preliminary Enquiry

One respondent expressed the view that it would inappropriate for the Authority to notify the member(s) of a PAB that had been the subject of the decision(s) being enquired into by the Authority of the initiation of an enquiry by a Preliminary Enquiry Committee. While agreeing that any member, of a PAB who was the subject of the decision of the PAB under enquiry must be informed of the initiation and conduct of a preliminary and full enquiry by the Authority, the respondent is of the view that keeping the member(s) informed is the responsibility of the PAB and not of a Section 23 Committee.

The Authority fundamentally disagrees with this view. The Authority is of the view that there is no valid reason as to why it would prohibit a Section 23 Committee from informing any member(s) of a PAB of its initiation of an enquiry into a PAB and of the fact that the decisions(s) under enquiry may affect the member(s) concerned. On the contrary, while the subject of a Section 23 enquiry is a PAB (as opposed to a PAB's member(s)), by definition, the member(s) concerned has/have a legitimate interest in the enquiry and may, potentially, be adversely affected by the Authority's decision(s). Given such to be the case, the Authority considers that it has an obligation to provide such member(s) with notice of the proceedings and that there is no scope for delegating such obligations to a PAB.

The Authority further noted that other respondents expressed the view that the Authority should notify others (i.e. in addition to the PAB member(s) concerned) of the initiation of any section 23 proceedings. Of foot of these views, the Regulations now provide that a Preliminary Enquiry or an Enquiry Committee may provide notification of the initiation of its proceedings to the complainant (if any) provided that such notification is in accordance with law (including the confidentiality provisions of section 31 of the Act)

13. Oral hearings

One respondent opposed the holding of oral hearings – on the basis of its concerns regarding breaches of confidentiality and based on the view that there is little public interest in holding such hearings. The respondent further expressed the view that, if oral hearings are to be held, the Regulations should include provisions to the effect that the specific facts of any case will not be discussed or disclosed in open forum. The respondent also suggested that participation in oral hearings should be limited to the relevant PAB and to witnesses only (and proposed deleting the provision contained in the interim Regulations whereby a member of a PAB who is the subject of the underlying PAB decision may participate and present evidence and submissions in their behalf) on the basis that such members 'have no status' in Section 23 proceedings. In contrast, another respondent expressed the belief that the PAB which is the subject of the enquiry should have an automatic right to an oral hearing if it so requests.

The Authority's legal advice is that, while an Enquiry Committee is not legally obliged to hold oral hearings in all cases, it should have the discretion in all cases to determine whether a hearing is appropriate and/or necessary. As with other aspects of the Regulations, it is anticipated that Enquiry Committees would, in making such determinations, have regard to all relevant circumstances and to interested parties' views.

All respondents sought to amend the interim Regulations in order to provide that a PAB would have the right to present information, cross-examine witnesses, be legally represented and submit submissions on their own behalf if an oral hearing is held.

The regulations have been amended to effect this amendment.

14. Decisions of the Authority

One respondent indicated a preference that the term '*negative finding*' be amended to '*positive finding*'.

This amendment has not been made as it is not considered necessary.

15. Publication

Most respondents indicated their acceptance of the Authority's statutory entitlement to publish decisions arrived at under section 23(5) of the Act. Most respondents also voiced support for the publication of decisions in order to maintain transparency and public confidence in the Authority's enquiry activities.

One respondent objected to the publication of details of the original complaint or the identity of the member(s) concerned and proposed that the Authority should be required to inform the relevant PAB as to the exact nature of what it proposes to publish, including '*confirmation that details relating to the original complaint and of the member subject to the investigation by the PAB will not be included*'.

Other respondents stated that any concerns in particular cases as to revealing the identity of the PAB or other parties could be resolved by also providing that, if the Authority so determines, that the PAB or any other parties should not be named.

The Authority considers that its statutory entitlement to publish its decisions, and the grounds on which those decisions have been made, includes the right to determine the content of its publication. This includes, to the extent permitted by law, the right to decide whether to publish names of individuals or member firms if, for example, the Authority determines that disclosure is necessary to state the grounds on which the decision was made. As the primary purpose of the Section 23 proceeding is to review possible breaches of approved procedures by the PABs, and not the conduct of a member, it may not be necessary or judged to be appropriate in any given case to identify the member(s) concerned. However, this decision is within the sole discretion of the Authority and is specifically provided for by section 23(7) of the Act. For that reason, the Authority does not consider it appropriate that it should give a guarantee to any party that details relating to an original complaint and/or of a member affected by a decision made by a PAB and subject to an enquiry by the Authority will not be included in any publication of an Authority decision.

In the context of the foregoing, it should also be noted that the Authority is required to seek a Court order confirming a decision of the Authority to:

- *annul all or part of a decision of a PAB;*
- *direct a fresh investigation; or*
- *impose a monetary sanction,*

in order to confirm the Authority's decision. The Authority would not, in any event, be in a position under such circumstances to ensure that details of any such application to the High Court would not enter the public domain.

With respect to settlements, one respondent expressed the view that it is appropriate that the Authority should have the flexibility to maintain confidentiality of any settlement terms. However, the respondent also believes that there should be mandatory publicity of a decision to enter into a settlement, unless the Authority determines that publication of the terms of settlement would be contrary to the public interest. The respondent further opined that any concerns as to publishing

the identity of a PAB or other parties concerned could be resolved by also providing that, if the Authority so determines, the body or other parties should not be named in the notice.

As stated above, the Authority believes that the Authority's entitlement to publish its decisions, and the grounds upon which such decisions have been reached, includes the right to determine whether to publicise a decision and the content of any public statement.

16. Investigations procedure

One respondent suggested that it may be sensible to have a less formal initial phase before a complaint is referred to a Preliminary Enquiry Committee and proposed that the Secretary to the Authority be permitted to 'filter' out complaints that are outside the scope of section 23 prior to the initiation of the preliminary enquiry.

The Authority already has procedures in place whereby all complaints received by the Authority are examined on receipt for the purposes of determining, inter alia:

- *whether the subject matter comes within the Authority's remit; and, if so,*
- *whether the subject matter comes within the scope of Section 23.*

Two respondents indicated the view that the Authority, and not a Preliminary Enquiry Committee, should have the final decision making power as to whether or not a full enquiry should be initiated. In a similar vein, one respondent proposed that a Preliminary Enquiry Committee should make a recommendation to the Authority as whether to initiate an enquiry, which the Authority could then reject if considered appropriate.

The Authority disagrees with these proposals. The structure of the Section 23 process, i.e. whereby an enquiry is split into two discrete phases, is designed to preserve the independence of the process. Moreover, were, as is suggested, a Preliminary Enquiry Committee required to refer its recommendations back to the Board of the Authority, the result would be that no member of the Board of the Authority who might subsequently be appointed to the following Enquiry Committee could come to the matter in an impartial and objective manner, by virtue of having previously had to participate in a decision as to whether to initiate a full enquiry.

17. Enquiry procedure

One respondent commented that section 11 of the interim regulations were confusing and that the matter of who (i.e. an Enquiry Committee or the Authority) is responsible for the final decision should be clarified.

In response to this suggestion, a number of drafting amendments have been made to the text in order to clarify the respective responsibilities of the Authority and the Enquiry Committee.

In addition, in response, inter alia, to this contribution, the two stages of the proceedings outlined in the interim Regulations are now referred to as the 'preliminary enquiry' and the 'full enquiry'. As a consequence, the Committees have been re-designated the 'Preliminary Enquiry Committee' and the 'Enquiry Committee'. This is intended to clarify that both stages are part of the overall 'enquiry' that is provided for in section 23 of the Act. Both Committees are 'Section 23 Committees'.

One respondent expressed the view that the Regulations should provide that any member of an Enquiry Committee who has not been present throughout (i.e. not only at the oral hearing(s)) should not participate in the decision-making of the Committee.

This suggestion has not been reflected in the Regulations as the Authority believes that the Committees must have a certain degree of flexibility in their operations if they are to operate effectively.

One respondent expressed the view that the Regulations should require the Chairperson of Enquiry Committees to be a senior lawyer.

While the Authority will have regard, inter alia, to considerations of this nature in constituting Committees, the Authority does not consider it appropriate that the Regulations should be so prescriptive.

18. Burden of proof - test to be applied

One respondent questioned the application of the standard of proof provided for in the interim Regulations and opined that 'on the balance of probabilities' is not the proper test and that a higher test should apply. Other respondents expressed the view that a decision of a PAB should only be quashed by the Authority where such decision is 'demonstrably perverse or irrational'.

Having taken advice from Senior Counsel on this matter, the Authority is satisfied that 'on the balance of probabilities' is the appropriate burden of proof applicable to this type of proceeding.

19. Sanctions

One respondent expressed the belief that the Authority's power to direct a fresh investigation under section 23(5)(b) of the Act includes the power to order that a matter be heard afresh by a different Disciplinary Committee (howsoever called) and requested that interim Regulation 12.1 be clarified in this respect. The respondent further commented that if the Authority annuls a decision of a PAB, it must also issue a direction to the PAB to re-hear the matter.

The Authority believes that the Regulations, as drafted, permit an Enquiry Committee to issue such an order if it deems it appropriate without further clarification.

20. Costs

Several respondents raised the issue of the payment of costs by either party (i.e. a PAB or the Authority). One respondent queried whether:

- the Authority could be assessed the costs of a PAB in defending an action in the event that the Authority issues a negative finding; or
- a PAB may be subject to the payment of the costs of the Authority in the event of an adverse finding.

The Act is silent with respect to the issue of the payment of the costs of any party to an enquiry and it is not the intention of the Regulations to create new obligations in this respect.

One respondent expressed the view that draft interim Regulation 12.2(d) should be deleted. This Regulation provided that an Enquiry Committee may take into account the loss, or risk of loss, to clients and/or others when determining the imposition and level of sanctions. The respondent further expressed the view that, while such a factor is relevant when a PAB is considering the sanction to be imposed upon a member, it is not an appropriate factor for the Authority to consider when considering the sanction to be imposed on a PAB for a 'procedural error'. The respondent argues that any loss, or risk of loss, would have been caused not by the procedural error but by the conduct of the member.

One respondent expressed a wish to see interim Regulation 12.2(e) amended. The Regulation stated that in determining the level of sanctions to be applied, the Enquiry Committee will have regard to, among other things, *'whether there have been previous similar acts or failures to act'*. The amendment sought would have resulted in the insertion of the words *'identified by previous Enquiry Committees'* after the aforementioned text.

Having considered these views, the Authority has elected to remove reference to these criteria. The Enquiry Committee is, however, required to consider 'all of the circumstances of the matter.'

Irish Auditing & Accounting Supervisory Authority
26 June, 2007