



Law Society
of Scotland

Consultation response

Scottish Government consultation: Amendments to Legal Complaints

February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We therefore welcome the opportunity to consider and respond to the Scottish Government's consultation; *Amendments to Legal Complaints*¹ and we have the following comments and responses to put forward.

General Comments

The system of complaints against Scottish solicitors changed dramatically following the passage of the Legal Profession and Legal Aid (Scotland) Act 2007 (2007 Act)², which established the Scottish Legal Complaints Commission (SLCC). Fourteen years on, both the Law Society and the SLCC agree that the current legal complaints process needs significant improvement. There is a consensus that the current system is slow, bureaucratic, expensive, and does not meet the recognised expectations of service users or those who are subject to the legal complaints regime. As the consultation paper correctly recognises, an effective, efficient, impartial, and fair redress process is crucial to underpin and promote confidence in a robust regulatory system. Possibly even more so where individuals accessing legal services may be doing so at a vulnerable time in their lives.

The current complaints process has been the focus of many discussions since the introduction of the 2007 Act and has been subject to much criticism from legal sector stakeholders, consumer groups and the legal profession alike. We have stated on many occasions³ that we believe there are several aspects of the present legal complaints process which are barriers to effective and equitable investigation of complaints.

As the statutory regulator for the Scottish solicitor profession, we are responsible for investigating all conduct complaints referred to us from the Scottish Legal Complaints Commission (SLCC). We rigorously investigate

¹ Scottish Government Consultation: [Amendments to Legal Complaints](#) December 2020.

² Legal Profession and Legal Aid (Scotland) Act 2007: see <https://www.legislation.gov.uk/asp/2007/5/contents>

³ For example see the Law Society's papers relating to the review of legal services at: <https://www.lawscot.org.uk/research-and-policy/legal-services-review/>

these complaints, and carefully consider all the evidence, in accordance with the provisions of the Solicitors (Scotland) Act 1980 and the Legal Profession and Legal Aid (Scotland) Act 2007.

Over the past three years we have been working in collaboration with the SLCC and the Scottish Government to identify and reach a consensus on possible reforms to the legal complaints process which will improve the service user experience by achieving greater proportionality and flexibility within the system. These reforms have been considered under the constraints of what can reasonably be done within the current statutory provisions and have been informed by modern practice and what has been learned since the introduction of the 2007 Act.

It is acknowledged by all stakeholders that greater reforms are needed to the complaints process in the longer term. However, these are only possible through amended or new primary legislation and this is unlikely to be forthcoming until the introduction of wider reform to legal services regulation more generally. Therefore, the proposals within the current consultation present shorter term, interim measures which we believe will significantly improve and speed up the process and which can be delivered by way of regulations⁴, ahead of more significant reforms delivered through primary legislation, which we hope to see in the next term of the Scottish Parliament.

The proposed interim reforms, which modify the powers of the SLCC, are focused on delivering greater efficiencies across the complaints process whilst providing more flexibility to recognise and react to the specific nature and unique issues that can arise in legal complaints. Packaged together, we believe that these reforms will go some way to overcome the current cumbersome and prescriptive regime imposed by the 2007 Act and will provide a fairer and speedier resolution to legal complaints. Although we are supportive of the proposed reforms, it is important that corresponding robust checks and balances are in place to ensure that there is no detriment to complainers and that both the profession and the public can have confidence that the reforms are proportionate, equitable and achieve a fair outcome.

Following the conclusion of this consultation, we would encourage the Scottish Government to take forward the agreed proposals for reform without undue delay. We look forward to continuing to work with the SLCC, Scottish Government and other stakeholders in achieving this.

Specific Comments

⁴ Legal Profession and Legal Aid (Scotland) Act 2007 section 41: [Power by regulations to amend duties and powers of the commission](#)

Package A: To introduce a category of hybrid issue complaints

Question 1: To what extent do you agree or disagree with the principle of the proposal set out in Chapter 2, Package A: To introduce a category of hybrid issue complaints?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We strongly agree with the principle of the proposal at Package A regarding the proposed amendments which will enable the reintroduction of hybrid service and conduct issues of complaint.

The complaints process prior to 2016, as set out in the consultation document, was a practical continuation of the process formerly operated by the Law Society in complaints investigation between 1989 and the implementation of the Legal Profession and Legal Aid (Scotland) Act 2007. During this time complaints, and individual aspects or issues within those complaints, were categorised as involving allegations of poor service by a solicitor or their firm on the one hand, but also improper or inappropriate conduct on the part of the individual solicitor on the other.

Throughout that period, until the decision in *Anderson Strathern v Scottish Legal Complaints Commission*⁵, the competency of such an approach was neither questioned nor criticised by the profession or the courts. In our view, it is an unintended consequence of the drafting of the 2007 Act that the binary separation of service and conduct complaints which had not previously existed, and which had not been lobbied for, was created.

In support of that position, it should be noted that there are different compensatory ceilings for the SLCC for service complaints and the relevant professional bodies for conduct complaints. We suggest that it cannot have been the parliamentary intention to disqualify a complainer from receiving compensation for the higher amount available to the SLCC in a service complaint context simply because the same complaint was considered to possess a professional disciplinary element which required, in the public interest, to be categorised by the SLCC as a conduct issue.

We believe this proposal will have a clear benefit to users of legal services who raise complaints. Introducing hybrid issue complaints will ensure that overlapping elements of poor service and departure from professional

⁵ *Anderson Strathern LLP v Scottish Legal Complaints Commission* [2016] CSIH 71
See: <https://www.scotcourts.gov.uk/search-judgments/judgment?id=1d0c1da7-8980-69d2-b500-ff0000d74aa7>

standards of conduct are each fully addressed by investigations undertaken respectively by the SLCC and the relevant professional body. We do not consider there to be any detriment to legal practitioners. Such an amendment represents a return to a model which operated uninterrupted for almost 30 years previously without demur from the profession, the Scottish Solicitors' Discipline Tribunal (SSDT) or the courts.

Safeguards already exist in the form of distinct tests against which poor service and improper conduct are measured. In the assessment of any compensatory award, the statute requires (per Section 10(4) of the 2007 Act⁶) the SLCC to take into account any prior award which has been made to the complainer (whether by SLCC itself, the relevant professional body, the SSDT or any other tribunal, or the courts by way of damages) in relation to the subject matter of the complaint.

However, there is no corresponding provision that would require us to take account of a prior award made to the complainer. Whilst we would endeavour to take into consideration the whole circumstances of any complaint, it may be beneficial to make express provision in relation to awards of compensation made by the Law Society in similar terms to those that apply to the SLCC at s10(4) of the 2007 Act

Package B. Changes to the process of assessment investigation, reporting, determination and conclusion

Question 2: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package B(i): Changes to the process of assessment investigation, reporting, determination and conclusion – Moving complaints into stages which deal with the dispute resolution, investigation and resolution more quickly?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: The Society strongly agrees with the proposal set out at Package B(i).

We agree that the present requirements, which require the SLCC to produce often lengthy and detailed reports as to why a complaint is eligible to the investigative process can be cumbersome and time consuming. This is because the SLCC is required to work through several statutory tests in a set order in every case. That

⁶ Section 10(4) 2007 Act see: <https://www.legislation.gov.uk/asp/2007/5/section/10>

is the case even where there may be no material argument by either complainer or practitioner as to the eligibility of the complaint. Empowering the SLCC to consider complaints as eligible, unless there are obvious reasons to apply the eligibility tests would be more proportionate.

These tests would apply where they are relevant instead of in every case. This would allow uncontroversial complaints to be moved quickly to investigation at the SLCC for service matters, or straight to remission to the appropriate relevant professional body for conduct matters. As it is not the intention to affect the statutory rights of appeal, there will remain a safeguard in cases where there is a material argument about eligibility.

We believe that this would be of benefit to the public by simplifying the process. It is in the best interest of all parties that complaints are progressed as quickly as possible. There is no detriment to the profession as the right to respond to a complaint remains throughout the investigation process. In addition, parties retain their rights of appeal.

We agree with the proposals to retain mediation for service complaints and issues. However, our position remains that any conduct complaint, or conduct aspect of a broader hybrid complaint should not be subject to mediation. This is because a conduct complaint involves matters of professional discipline which encompass issues of public protection and the wider public interest. We consider that these types of complaint should not be open to informal or commercial resolution.

Question 3: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package B(ii): Changes to the process of assessment investigation, reporting, determination and conclusion – Identifying valid complaints?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We mostly agree with the proposal set out under Package B(ii), with regards to the removal of the word “totally” from the “totally without merit” eligibility test. We recognise that the use of the phrase “totally without merit” could be considered dismissive and could negatively impact a user’s experience of the complaints system.

The consultation document states that the amendment to the wording of this test would have the effect of lowering the benchmark for dismissing a complaint⁷. This could negatively impact on public confidence in the complaints system. Care should be taken when considering and taking forward this proposed reform to ensure minimal detriment to complainers and that expectations are managed accordingly. However, we are reassured that the proposal would require the SLCC to consult on, and publish guidance, as to how the amended test would be applied and we look forward to considering and commenting upon the proposed guidance in due course. Further reassurance is taken from the proposals that “without merit” decisions would be reserved to one of the SLCC’s independent Commissioners and that existing rights of appeal (which extend to us) will remain. In addition, given the potential negative impact the proposal may have, we would expect the SLCC to closely monitor the effect of the proposals in practice to ensure any detriment to the complainer is minimal.

We also take this opportunity to highlight our concerns with some of the other wording also associated with the eligibility criteria. The 2007 Act uses language such as ‘frivolous’ and ‘vexatious’⁸, these also being factors to consider in determining the eligibility of a complaint. We believe that the use of such language is outdated, ambiguous and, from the perception of the consumer, does not demonstrate an accessible redress route. Although we accept that this is beyond the scope of the current proposals under consultation, and we are not proposing alternative wording at this time, we suggest that consideration is given to using more consumer friendly and clearer wording when greater reforms are brought forward through primary legislation.

Question 4: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package B(iii): Changes to the process of assessment investigation, reporting, determination and conclusion – Completing investigations and reporting more quickly?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We strongly agree with the proposal set out in Package B(iii) with regards to providing the SLCC with flexibility to tailor its reports according to its assessment of the complexity or level of public or professional interest involved.

We agree that the proposed amendment may result in a greater number of appeals by legal services users. However, we understand, and take some comfort from the fact that, the SLCC's written investigation

⁷ Amendments to Legal Complaints Consultation: page 15, paragraph 4.

⁸ Section 2(4)(a) 2007 Act

processes will continue to provide parties to complaints an opportunity to outline their position. Accordingly, the proposal will merely simplify the analysis and determination stages of that process.

We are also content that the retention of rights of appeal is a proportionate balance to the proposed simplification of the internal investigatory process. We agree that the proposed amendment may permit the SLCC to deploy its resources in a more efficient way.

However, it is crucial that clear policy and guidance is developed by the SLCC to ensure a consistent and transparent approach and we look forward to considering the detail of this when on the SLCC consult on it.

Question 5: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package B(iv): Changes to the process of assessment investigation, reporting, determination and conclusion – Concluding cases at an earlier stage when appropriate?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We strongly agree with the proposal set out in Package B(iv) with regards to how the levy operates.

Early settlement of valid complaints is in the interest of all parties and we agree with the “polluter pays” principle which underpins the intended operation of the levy. We understand that the way the current levy operates could act as a disincentive to early settlement in some circumstances. However, it is important that applying the levy to complaints resolved at an earlier stage in the process, does not in itself act as an unintended incentive to settle in cases where a practitioner has a valid defence.

We welcome the proposals that the SLCC would consult on its policy and guidance on the application of the levy. This would provide further detail of how the levy will operate and clarity for the profession. We look forward to considering this in due course. We also agree with the proposal that the SLCC’s Independent Commissioner would monitor quality control. This provides reassurance that the application of the proposal could be reviewed following implementation and any necessary improvements could be made.

Question 6: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package B(v): Changes to the process of assessment investigation, reporting, determination and conclusion – Closing a case when a reasonable settlement has been offered?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We strongly agree with the proposal set out under Package B(v), on the basis that it is in the interests of all parties for the investigation process to be concluded at the earliest reasonable opportunity.

The consultation document sets out that there is little or no incentive for a complainer to accept the SLCC's recommended settlement for service complaints because they "lose nothing" by proceeding to a Determination Committee. However, the SLCC's data shows that it is rare for the Determination Committee to recommend a higher award of compensation. Accordingly, the latter part of the process is an additional burden on the SLCC and the legal service provider with little material benefit to individual complainers. Complainers must wait for a resolution which will likely be no more favourable than the one available to them at an early stage in the process.

Affording a power to the SLCC to draw an investigation to a conclusion has clear operational and resource benefits to the SLCC, and by extension to the profession at large in terms of its contribution to the SLCC's operational budget. We recognise that complainers may consider it unsatisfactory that the option to proceed to a Determination Committee is removed. The SLCC's policy would need to balance the various competing interests. The parties retain the safeguard of rights of appeal, and we are content that any policy under which the SLCC proposed to operate such a power would be published and implemented only after consultation. Accordingly, we support this proposal.

Question 7: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package B(vi): Changes to the process of assessment investigation, reporting, determination and conclusion – Providing greater transparency and information on complaints?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We strongly agree with the proposal set out in Package B(vi) with regards to providing greater transparency and information on complaints, subject to the safeguards outlined within the consultation document.

We support the principle of providing consumers with service quality data about practitioners. We recognise that users of legal services will want to make informed choices as to the service providers they instruct. For some users, complaints information will be a relevant and valuable factor in making their choice as to who to instruct. We also recognise that solicitors may be concerned about reputational damage if data on upheld complaints is published. Publication of this information may infringe rights under the European Convention on Human Rights.

We note that for publication to occur:

- i. the case or cases must be exceptional,
- ii. that it must be in the public interest for the firm or practitioner to be identified; and
- iii. the SLCC must give notice of its decision to publish along with its reasons for publication.

We further note a decision to publish will be taken by the SLCC Determination Committee of three Independent Commissioners and there will be a right of appeal. We are therefore satisfied that these multiple statutory safeguards provide a robust framework to ensure that a full and detailed consideration will be given to the potential competing interests before a decision to publish is made.

Package C. Changes to the rules in respect of fee rebates

Question 8: To what extent do you agree or disagree with the proposal set out in Chapter 2, Package C: Changes to the rules in respect of fee rebates?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Response: We strongly agree with the proposal set out at Package C with regards as to how fee rebates may be treated on the death or insolvency of a liable practitioner.

The proposal seeks to address a long-term issue which has arisen in the context of section 10 of the 2007 Act⁹. This provides the power to the SLCC to award compensation and fee rebates to complainers where a service complaint has been successful. Over the years there have been several instances where awards, for both compensation and fee rebates have been made by the SLCC but unfortunately the practitioner has been unable to pay (as opposed to unwilling) due to circumstances such as death, cessation of practice or insolvency.

In these circumstances, a claim may be made on the Law Society's Master Policy in relation to the compensation amount. However, the fee rebate element cannot be paid under the Master Policy as the policy provides indemnity against loss or damage only, which excludes fee rebates. These unpaid fee rebates have been a focus of concern for us and the SLCC for some time as non-payment is detrimental to complainers and reflects poorly on the reputation of the profession. Public confidence in the regulatory regime may be damaged by the small number of cases where complainers do not receive the awards made to them.

Following detailed discussions with the Master Policy brokers (Lockton) and the lead insurers (RSA), as well as the SLCC, a consensus was reached to propose amending section 10 of the 2007 Act so that where a fee rebate cannot be paid by either the practitioner, or the practice, due to insolvency, death or the enforced cessation to trade, then after a period of 90 days, it can be treated as a loss and therefore forms part of the compensation award which can be paid under the provisions of the Law Society's Master Policy.

The proposed reforms detailed in Package 3 are therefore a culmination of the agreed approach and we believe that these are the best way forward to address the issues raised and strengthen public confidence in the regulatory system.

With regards to the suggestion of an increase to the statutory ceiling available for awards of compensation, from £20k to £35k, our understanding is that the intention is that the increase should only apply in those limited circumstances when an amount equivalent to the fee rebate is later added to the original compensation award. The additional amount of up to £15,000 would cover most fee rebate amounts, even in cases where the maximum compensation of £20,000 had already been awarded. We do not support a general increase in the statutory ceiling for compensation awards to £35,000, not least because this would lead to situations where the maximum compensation amount was awarded and there was no scope to add an amount equivalent to the fee rebate at a later date.

⁹ Section 10; Commission upholds services complaint; see <https://www.legislation.gov.uk/asp/2007/5/section/10>



Although the consultation is silent on policy and guidelines regarding the application of the proposed reforms to fee rebates, we presume that these will accompany the proposed reforms and we look forward to considering the detail of these at the time of consultation.

It is with this understanding that we support the proposed increase to the statutory ceiling to £35k in cases which fall within the limited circumstances where fee rebates cannot otherwise be recovered.



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