

Complaints against lawyers and legal firms in Scotland

Consultation Analysis

July 2021



Scottish Government
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1. The Consultation Exercise

1.1. Why did we consult?

The Scottish Government is committed to improving the framework for the regulation of legal services and complaints handling in Scotland. Esther Robertson's report of the independent review of the regulation of legal services¹ made recommendations to Scottish Ministers on ways to reform and modernise the framework to protect consumer interests and promote a flourishing legal sector.

In the longer term, the report by Esther Robertson provides an opportunity to develop a new statutory framework for a modern, forward-looking legal services regulatory system for Scotland, with a complaints system adapted within that framework.

The Scottish Government response to that report² set out that a public consultation, currently anticipated for later in 2021, will inform Ministers' views as to the shape and extent of reform.

As progress on wider reform continues, the Scottish Government has worked with the Law Society of Scotland and the Scottish Legal Complaints Commission, with the agreement of the Faculty of Advocates and Association of Commercial Attorneys, to develop proposals for potential change that could deliver shorter term improvements to the way in which complaints are handled within the current legislative framework.

Those discussions identified potential improvements that might be made to the complaints system. A public consultation which sought views on those proposals ran between 23 December 2020 and 20 February 2021.

1.2. What did the consultation ask?

The changes proposed seek to build on previous changes made in 2014³ and are based on 10 years' working knowledge of the current legislation and the experience of the current system.

The proposals on which views were sought are intended to have a cumulative effect in meeting the five objectives below, and which fall into three packages:

- A. Changes to the process of complaint categorisation (to introduce a category of hybrid issue complaints);
- B. Changes to the process of complaint investigation, reporting, determination and conclusion of cases

¹ Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland, Esther a Robertson; available at: www.gov.scot/publications/review-of-legal-services-independent-report/.

² Scottish Government Response to the Independent Review of Legal Services Regulation in Scotland; available at: www.gov.scot/publications/scottish-government-response-fit-future-report-independent-review-legal-services-regulation-scotland/.

³ Amendments made by the Scottish Legal Complaints Commission (Modification of Duties and Powers) Regulations 2014 (S.S.I. 2014/232).

(comprised of 6 separate amendments with the aim of creating a more efficient and proportionate complaints process); and

- C. Changes to the rules for fee rebates
(where a rebate of fees cannot be paid by the practitioner because they are unable to pay due to death, insolvency or cessation, the equivalent amount can be treated as an actual loss for the client/complainer, and so instead be paid out by the professional indemnity insurance scheme)

The consultation sought views on whether the proposals would meet the objectives of:

- I. Reducing the overall time taken to deal with complaints.
- II. Achieving greater proportionality in the complaints system, allowing the SLCC to identify earlier in the process which issues are more likely to require investigation.
- III. Reducing the cost of the complaints system.
- IV. Continuing to ensure an independent and fair system.
- V. Providing greater flexibility in the system.

1.3. How did we consult?

Responses could be provided online through the Scottish Government's consultation hub, or submitted by post or email.

2. Methodology

2.1. The respondents

A total of 59 responses were received, and can be broken down into 6 categories.

Response Type	Number	Percentage
Individual	44	75%
Legal Profession	7	12%
Legal services regulatory body	4	7%
Public Body	2	3%
Consumer Panel	1	2%
Third Sector	1	2%

All questions were answered by at least one respondent. Responses were read and logged into a database, and all were screened to ensure that they were appropriate/valid. None were removed for analysis purposes. Although some responses to individual questions did not directly address what was being asked, all feedback was analysed and is presented under the appropriate sections below.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal is reported below. To provide an element of weighting to this exercise responses are reported with reference to numbers that include and do not include those respondents who rejected all, or the majority, of the

proposals. Those responses appear to be on the basis that the whole complaints system should be replaced. This is explored further below.

For all of the questions, respondents were asked to state if they agree or disagree, and the reasons for their views. The main reasons presented by respondents, both for and against the proposals set out across the consultation, were reviewed alongside specific examples or explanations, alternative suggestions, caveats to support and other related comments.

Respondents to the consultation document completed a Respondent Information Form (RIF) which allowed them to specify their publishing preferences. Respondents who choose to email their views and did not complete the RIF were contacted to ascertain their publishing preferences. Only extracts where the respondent indicated that they were content for their response to be published were referenced.

3. Key findings from the analysis of responses

3.1. General

A majority of respondents either 'mostly' or 'strongly' disagree with the majority of the proposals.

There is one exception, the majority of respondents agree with the proposal of providing greater transparency and information on complaints, set out in Chapter 2, Package B(vi).

The proposals in Package A and C were to be viewed as standalone amendments. Whilst Package B consists of 6 proposals intended to be viewed as whole package of amendments in order to gain maximum impact from the proposed changes.

A large number of responses submitted by individuals highlight frustration with the current complaints system as a whole, and do not support anything other than wide-ranging and comprehensive reform to the complaints system. It appears that those respondents disagree with the majority of the proposals in this consultation on that basis.

Whilst those views are valid and set out legitimate concerns, they are associated with wider reform of the regulatory framework as a whole. A separate consultation in respect of the independent review of the regulation of legal services is anticipated later in 2021. That consultation will inform primary legislation anticipated later in this parliamentary session, aimed to address those concerns. The focus of this consultation is around improvements that might be made to the legal complaints system in the short term and interim. Many respondents provided views of the proposals whilst also setting out support for wider reform.

As a result of the large discrepancy in responses between the individuals who opposed a large majority of the proposals and the other responses received, this analysis presents a summary of responses both including and excluding this group of individual respondents. A fuller description can be found in section 3.6.

3.2 Consumer interest: Individuals

It is difficult to discuss the responses from individuals without splitting those responses into two groups – those opposed to either all or a large majority of the proposals (the larger group) and those broadly supportive of the proposals (the smaller group).

The larger group:

28 respondents (47% of total responses) disagreed with all of the proposals or a large majority of the proposals. A subset of 4 of these 28 respondents opposed all proposals.

24 of these 28 respondents opposed all of the proposals with the exception of *Package B(vi) - Providing greater transparency and information on complaints*. Many of those included the caveat that they would only support this proposal on the basis of replacing the current complaints system and the SLCC. This group were generally of the view that the SLCC is not independent and is biased towards the legal profession despite the position of the independence of the SLCC in legislation⁴. It appears this is the main reason why many of those respondents disagree with the proposals set out in this consultation.

4 respondents, out with the 28 above, chose not to answer any of the questions. Instead submitted views in similar terms to the 28 respondents that there should be wide ranging reform of the legal complaints system, whilst being critical of the SLCC.

The smaller group:

A further 12 individual responses (20% of the total) differed from the responses discussed above in that they were broadly supportive of the proposals in the consultation. Whilst a majority of these 12 respondents did not agree with all of the proposals, those individuals agreed on all of the proposals by majority.

3.3 Regulatory Bodies and other Organisations

Regulatory Bodies and other organisations such as the Scottish Public Services Ombudsman (SPSO), the Competition and Markets Authority (CMA) and Citizens Advice Scotland (CAS) support the majority of the proposals. As does the SLCC Consumer Panel. The following organisations are currently represented on the SLCC Consumer Panel:

- Citizens Advice Scotland
- Competition and Markets Authority
- Scottish Independent Advocacy Alliance
- QMU Consumer Dispute Resolution Centre
- Scottish Women's Aid
- Young Scot

⁴ The Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act), which sets out that the SLCC must act independently of the legal profession, and of Government.

An extract of the SPSO response states:

“As a body who not only handles complaints but sets standards for the way others handle complaints, we welcome and strongly encourage the full package of proposed changes to simplify and provide more flexibility.”

Although the SPSO does not disagree with any of the proposals, it did not answer all of the questions, but does strongly agree with Package A, and Package B(i), (ii) (v) & (vi)

The CMA did not answer any of the questions, instead providing a submission, an extract states:

“The CMA therefore welcomes the progress that the Scottish Government has made with stakeholders to identify and consider improvements that may be made to the legal complaints system within the constraints of the existing legislative framework. While this particular consultation does not address the need for wholesale reform of the complaints system, it goes some way to improving it in the interim. The CMA encourages the Scottish Government not to lose sight of the need for wider reform.”

CAS mostly, or strongly, agree with all of the proposals except *Package B(v): Closing a case when a reasonable settlement has been offered*, where they comment:

“This package proposes that the SLCC is granted the discretion to treat a complaint as “determined” where a firm is willing to agree the recommendation made at the conclusion of an investigation, but a complainer is not. CAS strongly disagrees with this proposal. CAS notes that the statutory right to appeal any SLCC Determination is direct to the Court of Session. This is not an easily accessible route and carries the potential for any complainer to incur considerable costs as well as potential liability for judicial expenses. CAS believes that an internal review within the Commission system is likely to be the most effective and accessible way of scrutinising the facts and findings of each case.”

On proposal B(ii) CAS express mixed views, indicating that they mostly agree. They are less convinced of the rationale for lowering the threshold for dismissing a complaint and advise it remains important that complainers receive clear, straightforward and understandable explanations if their complaint is not being taken forward.

In relation to the consultation as a whole, an extract from the CAS response states:

“CAS welcomes the majority of the reforms set out in this paper and believes that they will have the effect of making the current system more timely, efficient and responsive. However, the proposals in this paper do not fully address the significant and long-standing need for structural reform of regulation of the legal sector in Scotland. Whilst understanding the pressures on the Scottish Government as it responds to the demands of Brexit and COVID, CAS would urge the Scottish Government to bring forward fresh

proposals for reform as soon as possible following the election in 2021 and the formation of a new government.”

The SLCC Consumer Panel mostly, or strongly, agree with all of the proposals. The Consumer Panel broadly welcomes the proposals, however notes it is difficult at this stage to understand the combined impact of the proposals on consumers, and ask that this is carefully monitored as these reforms are developed and implemented.

The Panel goes on to share concerns over the current process which, in their view, is:

“Over-complex, as a result of the current legislation but also resulting from subsequent Court of Session decisions which have caused the process to become more complicated. The result is a process which is difficult to understand, overly long, and frustrating for consumers looking for redress. Complexity also results in a process which is slow and this is not in the interest of consumers – or other parties involved in a complaint.

The Panel also state that:

“Anything which will help to address this is therefore very welcome. However, we are also aware that there are a number of challenges within the current system which are not addressed by these proposals. For example, one of the major shortfalls we identify in the current process is the duplication caused by different bodies being involved in the process and, in some cases, investigating different aspects of the same complaint – duplication to any degree inevitably builds delay into the process. While we appreciate that it may not be possible to address some of these issues through amendments to the current legislation, that makes the case for more fundamental reform even stronger. Finally, the Panel would note its view that these proposals have been developed without consumer input, so it is vital that the Scottish Government ensures that sufficient attention is paid to consumer responses to the consultation.”

3.4 Legal profession

Kilmarnock Faculty of Solicitors agrees with all of the proposals but seeks stronger and independent scrutiny of the SLCC's use of funds, citing increases in the Annual Levy over the years.

The Scottish Law Agents' Society (SLAS) mostly disagree with Package A, as legal services providers could be subject to both disciplinary and compensatory outcomes if a complaint is upheld. Their view is that where solicitors face more than £5000 in damages there should be a route of appeal to the Sherriff Court rather than the Court of Session as is currently the case. SLAS agree with four of the six proposals in Package B - they disagree with proposal B(iv) designed to conclude cases at an earlier stage when appropriate, and B(vi) providing greater transparency and information on complaints. SLAS also mostly disagree with Package C on the basis that they are unaware of any issues.

Blackadders LLP strongly disagree with Package A raising concerns in their view around “double-jeopardy”. This is a reference to the potential for legal services providers being subject to both disciplinary and compensatory outcomes if a complaint is upheld. On Package B, Blackadders’ view is split evenly and they agree with proposals B(ii), (iii) and (v), but disagree with B(i),(iv) and (vi). In addition Blackadders disagree with package C expressing a view that an increase in the maximum compensation limit may encourage more complaints, whilst they view that fee rebates could be recovered from within the general levy.

Morton Fraser disagree with Package A expressing concerns around increased time to resolve, resource and cost complaints, as currently a complaint with aspects of both conduct and service would only follow the conduct route. Morton Fraser agree with all of the proposals in package B. They disagree with package C citing concerns around a potential impact to the legal profession in relation to professional indemnity insurance premiums.

3.5 Body’s within the legal services regulatory framework

The Scottish Government worked with the Law Society of Scotland and the Scottish Legal Complaints Commission to develop the proposals for consultation. It was therefore anticipated, and is the case, that both the Law Society and SLCC agree with all of the proposals.

The Faculty, whilst supporting Package B(iv), (v) and (vi), disagree with Package A, Package B(i), (ii), (iii) and Package C.

In Package A, the Faculty view a system of categorising issues as predominantly conduct or predominantly service issues and dealing with them accordingly preferable to having two investigations running concurrently. The Faculty view running two investigations concurrently as onerous on the practitioner, confusing for the public and may lead to the possibility of conflicting decisions by the SLCC and the professional body.

In respect of Package B(i), the Faculty view the proposal as giving no recognition of the potential impact, personally, professionally and financially, to a practitioner of having to go through the investigation process and defend themselves against a complaint, even if it ultimately is rejected. On Package B(ii), the Faculty view the removal of the word “totally” from this test would fundamentally change the nature of the test from being a sifting mechanism to one that includes an element of pre-judging the merits of the case. In respect of Package B(iii), the Faculty set out that it is appropriate for investigation and reasoning to be proportionate, but this arises from conducting an investigation and provision of clear and concise reasons. The Faculty consider that Package B(iii) to undertake less detailed investigations into “simpler” complaints raises an issue of how a complaint can be identified as “simple” unless and until it has been adequately investigated.

The Faculty disagree with Package C but do note it may be that the proposal can be justified because of the types of circumstance in which the problem tends to arise.

The Scottish Solicitors' Discipline Tribunal (SSDT) chose to only respond to Package A as they consider that this is the only area directly affecting the operation of the Tribunal. The SSDT indicate that it 'mostly' disagrees with Package A, however goes on to comment:

“Some members of the Tribunal were broadly in favour of the idea of the introduction of a category of hybrid issue complaints, believing that it would allow complainers to feel that they had been properly heard. However, others disagreed.”

In addition, the SSDT raised concerns around the reintroduction of hybrid issue complaints with the view that it will increase complexity and be counter to the objectives of the proposals being made. (reduction of time, proportionality, reduction of costs, independence and flexibility). As two investigations will be carried out in hybrid issue complaints, the practitioner and complainer will have to deal with two different bodies. In these cases the practitioner may face two separate penalties. In the SSDT's view this is likely to increase the time taken to deal with a complaint, without being proportionate in most cases, and whilst also likely to increase costs.

3.6 Illustration of analysis

Whilst a number of individuals have responded to this consultation to reject the majority of the proposals, and set out that the current complaints system should be replaced instead of simply amended in place, there is broad support for the proposals from those open to interim improvements.

When considering the remaining respondents, those who support interim improvements, there is support for each proposal to some degree by a majority, in addition to broad support for wider reform.

To illustrate, the charts below set out the responses to each proposal. Differentiating between, firstly those 28 individual respondents, and those who indicate support for interim improvements to the legal complaints system.

Package A

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?

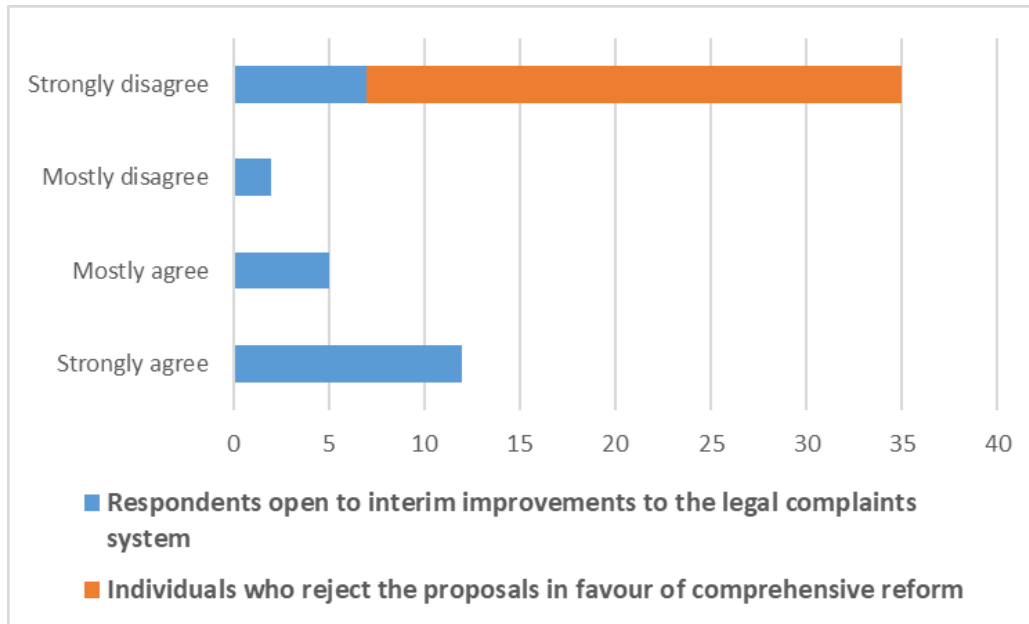


Chart 1: responses to question 1

Package B

To what extent do you agree or disagree with the proposal set out in Chapter 2, 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?

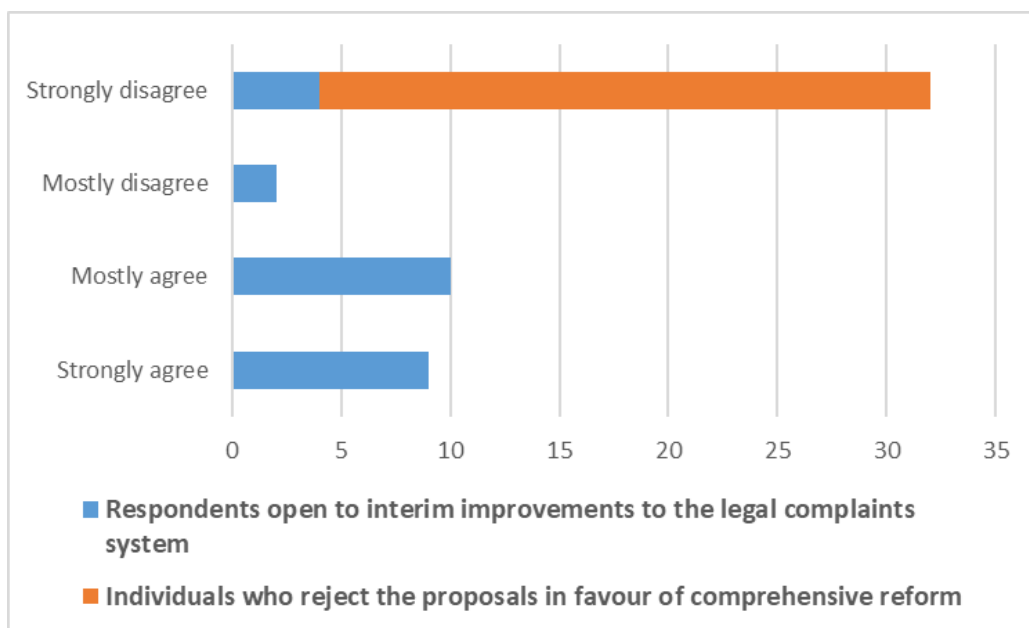


Chart 2: responses to question 2

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?

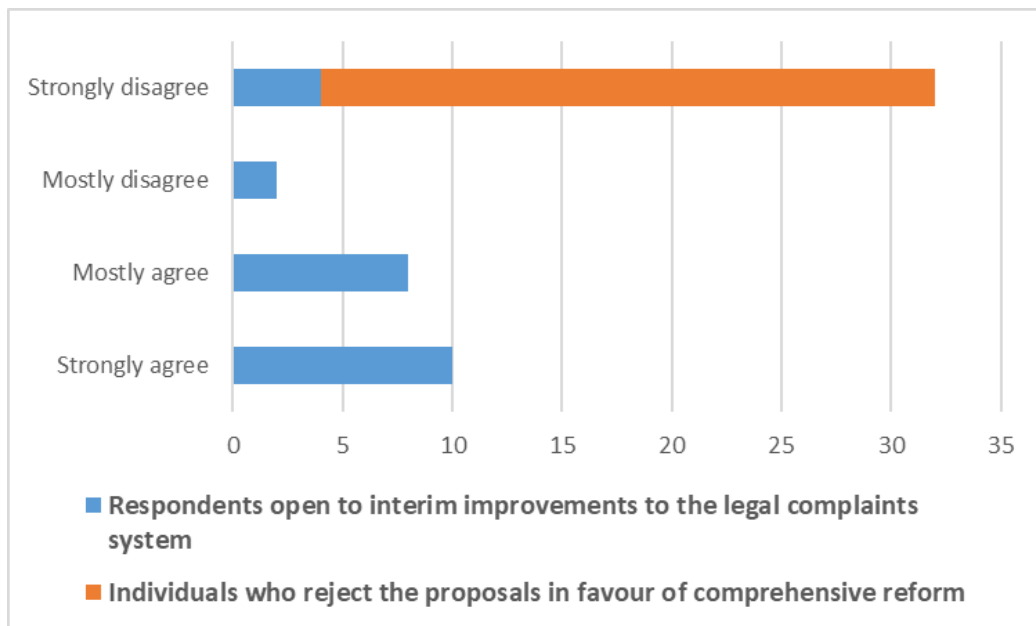


Chart 3: responses to question 3

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?

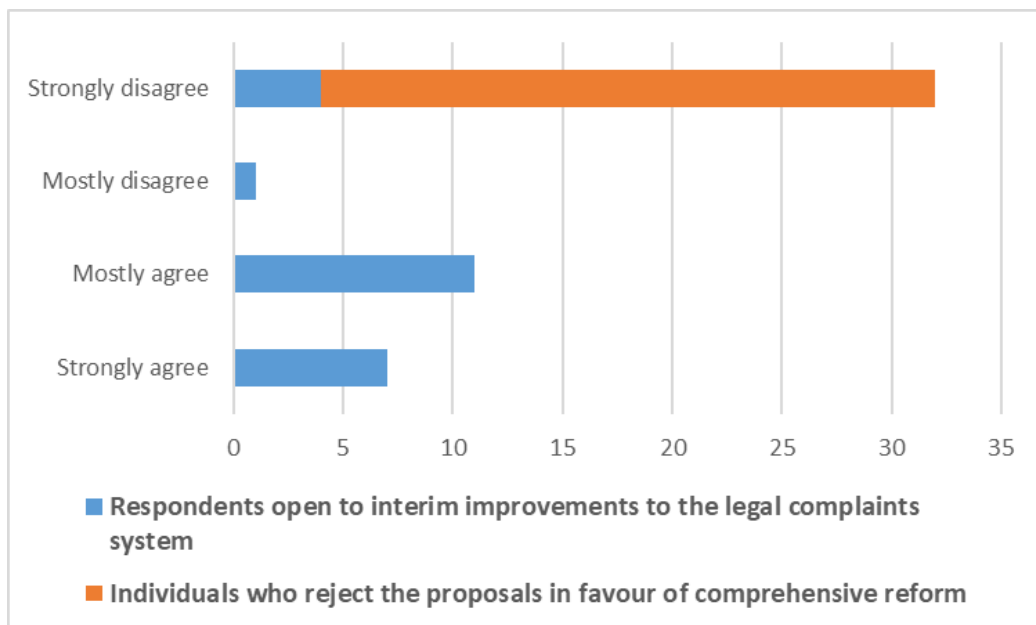


Chart 4: responses to question 4

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?

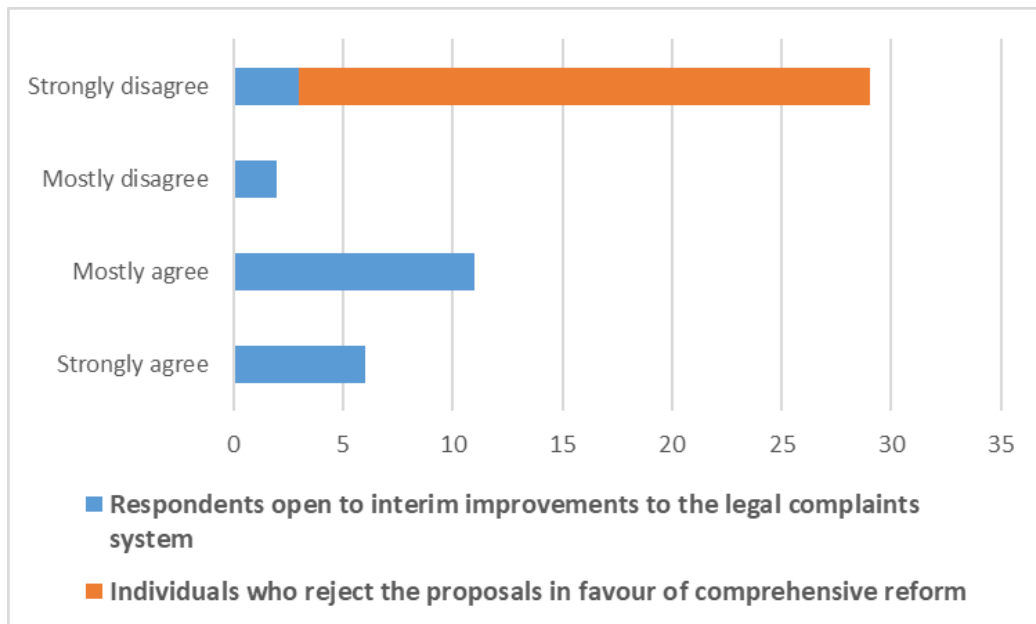


Chart 5: responses to question 5

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?

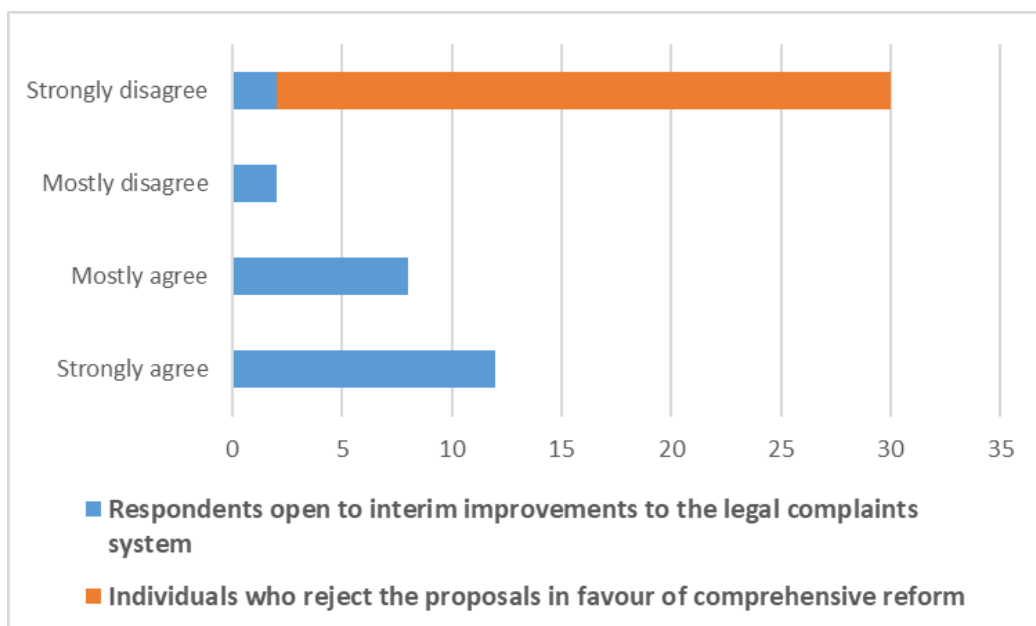


Chart 6: responses to question 6

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?

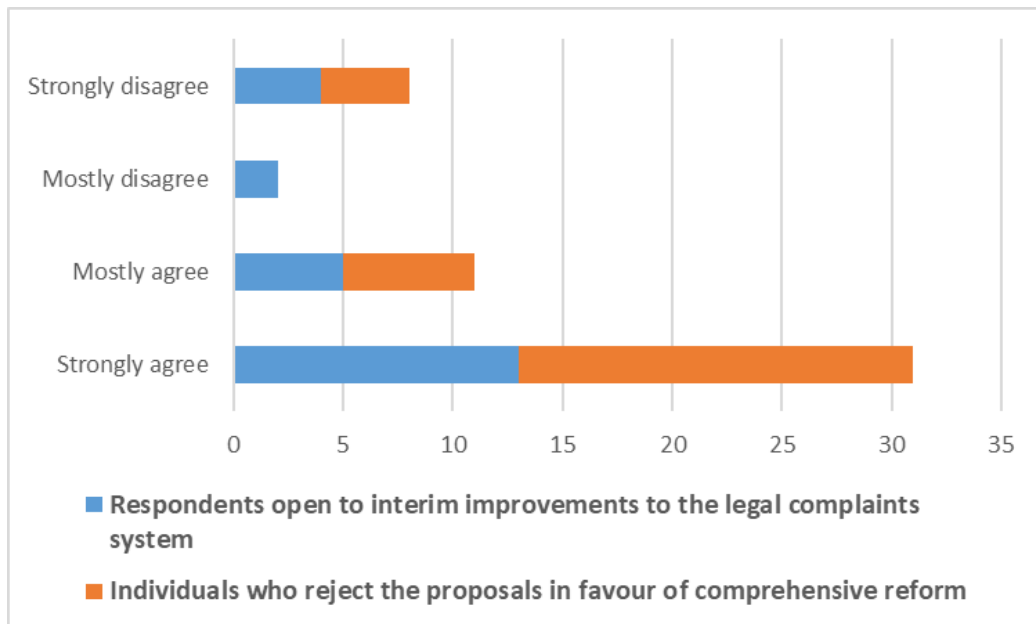


Chart 7: responses to question 7

Package C

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?

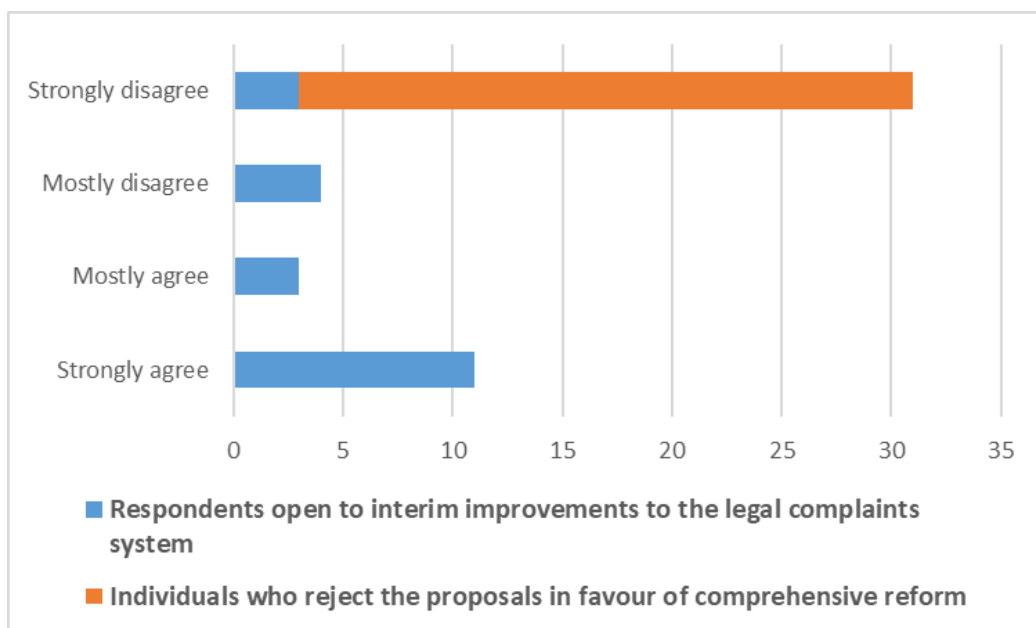


Chart 8: responses to question 8

4. Next steps

The Scottish Government recognises the level of support for wide-ranging and comprehensive reform to the complaints system. A consultation seeking views based on the recommendations made by Esther Robertson's independent review of the regulation of legal services is anticipated to be published later in 2021.

However, if such reforms are to be implemented, likely by way of primary legislation, the Scottish Government recognises the pressures that remain on the legislative capacity of the Scottish Parliament as a result of the Covid-19 pandemic and that the reform process may take a consequential amount of time. The Scottish Government therefore does not see a strong rationale for retaining the status quo in the shorter term. Based on the responses to this consultation the Scottish Government believes that there is support to bring forward the proposals, albeit with consideration of further reforms in the future. We will seek to introduce secondary legislation early in this new session of the Scottish Parliament to that effect.

Further consultation will be undertaken on the details of any regulatory changes that are undertaken as a result of this consultation. The SLCC will require to develop, and publish, its policy on how it would use its discretion to ensure fairness and consistency in consultation with consumers/complainers and legal services regulators. While similar discretion is dealt with as an administrative decision by the Scottish Public Services Ombudsman and the Legal Ombudsman in England, the proposals in this case are that the SLCC would report on the use of these powers in its annual report to the Parliament.

The combination of this work highlights the Scottish Government's commitment to reform legal services regulation and the system for legal complaints both in the short and long term.



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