

Scottish Government Consultation

Amendments to Legal Complaints

December 2020



Scottish Government
Riaghaltas na h-Alba
gov.scot

SCOTTISH GOVERNMENT CONSULTATION

AMENDMENTS TO LEGAL COMPLAINTS

Chapter 1: General

A. Background to the proposal to make changes to the legal complaints system in Scotland

The Scottish Government established an independent review of the regulation of legal services in 2017. That review was asked to make recommendations to Scottish Ministers on ways to reform and modernise the framework for the regulation of legal services and complaints handling in Scotland.

The chair of that review, Esther Robertson, presented her report to Scottish Ministers in October 2018¹ and the Scottish Government response to that report was published in June 2019². Work by the Scottish Government is underway to consider how the recommendations made in the Robertson Report should be taken forward and a public consultation in due course will inform Ministers' views as to the extent to which they are to be implemented. Much of what is recommended in the Robertson Report will require primary legislative change to replace or amend the current legislative framework for the regulation of solicitors, advocates and commercial attorneys in Scotland including the Solicitors (Scotland) Act 1980³; or to amend or replace other relevant statute such as the Legal Profession and Legal Aid (Scotland) Act 2007⁴ ("the 2007 Act") or the Legal Services (Scotland) Act 2010⁵.

In the longer term, the Robertson Report provides an opportunity to develop a new statutory framework for a modern, forward-looking legal services regulatory system for Scotland. The complaints system will also be adapted within that framework.

As progress on reforms continues, the Scottish Government has been working with Law Society of Scotland (the "Law Society") and the Scottish Legal Complaints Commission (the "SLCC"), and 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 framework set out in the 2007 Act. These proposals are being developed with the intention of using powers available to Scottish Ministers under section 41 of the 2007 Act:

"41 Power by regulations to amend duties and powers of Commission

- (1) The Scottish Ministers may, after consulting—
(a) The Commission;

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 1980 c.46.

⁴ 2007 asp 5.

⁵ 2010 asp 16.

(b) The relevant professional organisations;

(c) Such other persons or groups of persons as they consider appropriate, by regulations modify the provisions of this Part for the purposes of adjusting the duties imposed, or the powers conferred, by it on the Commission (including imposing new duties or conferring new powers).

(2) Regulations under subsection (1) may contain such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient for the purposes of that subsection (including modification of any enactment, instrument or document).

Those discussions have identified a number of potential ways in which improvements might be made and this Consultation seeks views on a number of these proposals for change that have been informed by those discussions.

B. Introduction to the legal complaints handling system in Scotland

The handling of complaints is one of the most important parts of any regulatory system. It is crucial that users of legal services have access to an efficient, effective and fair process for dealing with their complaint. Equally, legal professionals rely on a complaints system which is efficient, effective and can resolve complaints in an impartial manner.

Many of those who have been involved in the current Scottish legal complaints process introduced by the 2007 Act, including the SLCC itself, have expressed frustration with the process, partly in terms of the length of time needed to reach a conclusion to a complaint as well as the structure of the process.

In her report on the regulation of legal services, Esther Robertson wrote of “*a unanimous view that the system for handling complaints is not fit for purpose*”⁶. In its response to the review’s call for evidence⁷, Citizens Advice Scotland highlighted the “relative slowness of complaints resolution”. Similarly, lawyers have reported their frustration with the time taken to resolve complaints and the overall cost of the complaints handling system.

There is therefore a compelling case for the consideration of amendments to the current regulatory framework for dealing with complaints that would seek to improve the way in which the legal services complaints system operates.

The current legal complaints system

The existing legislative framework under the 2007 Act is summarised in the diagram set out in the Annex to this Consultation.

Under the 2007 Act, the SLCC is the gateway for all legal complaints in Scotland against legal practitioners. After assessing the eligibility of a complaint by way of a number of tests, the SLCC categorises complaints as either service complaints or conduct complaints. Service complaints are then investigated and determined by the SLCC. Conduct complaints, or complaints which include a conduct element, are sent to the respective professional organisations for investigation and determination.

The tests applied by the SLCC on receipt of a complaint in assessing and in advance of confirming the eligibility of a complaint⁸, require to be applied by the SLCC in the specific order set out in the 2007 Act, irrespective of the nature of the case. As each decision is subject to appeal to the Court of Session⁹, the 2007 Act also requires that statutory notices are issued to each party of the complaint; meaning that at multiple stages of the complaint process a period of 28 days must elapse to allow time to appeal, before progressing to the next stage, or test, in the process.

⁶ *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, Esther A Robertson, page 2.

⁷ Call for Evidence, 2018. Responses available at: www.gov.scot/About/Review/Regulation-Legal-Services/RegulationLegalServices/Responses-to-Call-for-Evidence.

⁸ These tests are set out in section 2(1A) and (4) and sections 3 and 4 of the 2007 Act.

⁹ See sections 21 and 22 of the 2007 Act for details of the appeals process.

In support of appeal rights, and to enable a complainant to make an informed decision on whether or not to appeal, the SLCC is required to provide detailed reasoning for their decisions taken at each stage of the process. This detailed reasoning requires to include sufficient reasoning to satisfy the court that the correct procedure has been properly followed.

This process can be time consuming for both the complainant and the legal services provider. It has the effect of potentially delaying a clearly serious complaint being investigated swiftly as the SLCC must proceed through the initial stage, or tests, of assessing the complaint before an investigation can be commenced.

The decision on whether to accept and investigate a complaint may also, on occasion, be made on limited evidence provided by the complainant, as the SLCC has no power to investigate until it has accepted a complaint. However, once accepted, if the SLCC investigation reveals that the complaint ought not to have been accepted, statute does not allow that initial decision to accept a complaint to be overturned or reversed. The complaint must then be taken through each step of the process, potentially until the point of determination.

All of this takes place simply to assess if the case can be accepted by the SLCC as a complaint to be looked at, something which in many complaints bodies would be a low level administrative decision. This is despite both Parliament and the courts stating that this decision is intended to be an initial sift, rather than a detailed examination of the case.

C. Overview of the proposals in this consultation

The objectives behind these proposals

This Consultation seeks views on whether these proposals would meet the objectives of:

1. Reducing the overall time taken to deal with complaints.
2. Achieving greater proportionality in the complaints system, allowing the SLCC to identify earlier in the process which issues are more likely to require investigation.
3. Reducing the cost of the complaints system.
4. Continuing to ensure an independent and fair system.
5. Providing greater flexibility in the system.

The changes proposed in this paper seek to build on previous changes made in 2014¹⁰ and are based on 10 years' working knowledge of the current legislation and the experience of the current system.

The current proposals in this Consultation on which views are sought, and which are intended to have a cumulative effect in meeting the objectives, fall into three categories:

1. Changes to the process of complaint categorisation;
2. Changes to the process of complaint investigation, reporting, determination and conclusion of cases; and
3. Changes to the rules for fee rebates.

The proposed changes listed at 1 and 3 can be viewed as standalone amendments but those listed at 2 should be viewed as a package of amendments in order to gain the maximum impact from the changes.

The proposals – a summary

The aim of the proposals detailed below is to explore options to create a more flexible and proportionate complaints system, that will be more efficient yet just as effective, if not more so. Views on whether these proposals address stated frustrations of those who have been involved in the complaints system, who often perceive it to be time consuming and overly complex, are also sought in response to this consultation.

Why is this important?

Those who make or are subject to complaints in respect of legal services have indicated that they would wish for a speedy, robust and proportionate response to each complaint. While all complaints are equally important, there is a recognition that not all complaints are the same. Those who manage the complaints process, as well as many of those who have experienced it, have stated that they consider the current statutory framework insufficiently flexible to enable the process to be adapted to the specific subject of the complaint in each individual case.

¹⁰ Amendments made by the Scottish Legal Complaints Commission (Modification of Duties and Powers) Regulations 2014 (S.S.I. 2014/232).

While a one-size-fits-all-approach provides consistency in the application of the complaints process, there is an argument that this does not always lead to an efficient system, with the result in the current system that the end of the complaints process can often be some time away from the time of the original incident that led to the complaint. This can be unsatisfactory for all of those involved in the process. These proposals are intended to reduce this time period and improve efficiency while continuing to maintain a robust and fair system.

Costs

The cost of the legal services complaints process administered by the SLCC is met by way of levies on the legal profession. These take the form of an annual general levy paid by all legal services providers¹¹ as well as a separate complaints levy¹² which is payable only by those legal professionals who are subject to a complaint which is upheld.

Should the proposals set out in this Consultation be taken forward then they will likely take time to be fully implemented. There is also likely to be a cost implication for implementation. Depending on the range of amendments ultimately decided to be taken forward, implementation in year one is likely to have associated costs in terms of changing rules, process and IT systems. These costs will be borne by the SLCC and it is not presently expected that these will require an increase in funding to either of the above levies. However, in the first full year of operation, and likely after set-up costs are offset, the proposed changes in this Consultation could lead to longer term savings.

¹¹ See section 27 of the Legal Profession and Legal Services (Scotland) Act 2007.

¹² See section 28 of the 2007 Act.

D. About this Consultation

The objective of this consultation paper is to offer an opportunity for targeted views to be gathered on the technicalities of making specific changes to the legal complaints system in Scotland.

The main proposals relate to possible changes to the categorisation of complaints to introduce hybrid-issue complaints as well as changes to the processes of assessment, investigation, reporting, determination and conclusion of complaints. Possible changes to the rules on fee rebates are also proposed.

Responding to this consultation

We are inviting responses to this consultation by **20 February 2021**.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/amendments-to-legal-complaints/>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 20 February 2021.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Access to Justice Unit
Scottish Government
Justice Directorate
St Andrew's House
Edinburgh
EH1 3DG

Or by email to: LegalServicesRegulationReform@gov.scot

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact or email address above.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Chapter 2: The Proposals

Package A: To introduce a category of hybrid issue complaints

Overview

While complaints that raise both service and conduct issues are commonplace, the 2007 Act does not make any specific provision for dealing with both of these issues as one complaint.

Two situations commonly emerge:

1. A hybrid complaint – this is a single complaint from a member of the public where some **issues** which form part of the complaint are clearly conduct issues while other aspects of the complaint are clearly service issues. The categorisation of these separate issues of a complaint is already provided for at section 2(1A) of the 2007 Act.
2. A hybrid issue – this is an issue within a complaint which has aspects of both service and conduct. For instance, if solicitor refuses to transfer a case to another lawyer despite a validly signed mandate or authority to do so, this is a conduct issue (where the solicitor has not carried out the client's instructions to transfer the case), but also has elements of poor service (the case is delayed from progressing). No provision in the 2007 Act exists for the categorisation of such a complaint where a single issue has both service and conduct elements.

Hybrid issue complaints represent a significant number of complaints each year.

Complaints Process prior to 2016

A process for dealing with issues of complaint that could be described as “hybrid issues” was developed by the SLCC. It drew on the operation of the process used prior to the establishment of the Scottish Legal Complaints Commission in the 2007 Act when all complaints were dealt with by the Law Society with the oversight of a legal ombudsman.

This process developed by the SLCC meant that each issue raised in a complaint could be looked at as both a service and a conduct issue.

As a service issue, where the focus was on the impact on the complainant client, the final complaint decision or outcome was made based on what was fair and reasonable in the circumstances. The focus was on restoring the complainer to the situation as if the poor service had not taken place.

As a conduct issue, where the focus was on the behaviour of the lawyer, the final complaint decision or outcome was made based on either the balance of probability (for unsatisfactory professional conduct decisions) or the standard of ‘beyond all reasonable doubt’ (for professional misconduct cases prosecuted before the Scottish Solicitors Discipline Tribunal “SSDT”). The ultimate outcome was a sanction on the lawyer. In cases of unsatisfactory professional conduct, compensation could be awarded to the complainer but in cases prosecuted before the SSDT, compensation was only occasionally awarded to the complainer.

Current Complaints Process under the 2007 Act

A court ruling in 2016¹³ determined that the 2007 Act did not allow for complaints that raised an issue with both service and conduct elements to be dealt with as “hybrid issue” complaints, and that the existing practice in this regard developed by the SLCC should be discontinued. A complaint that raised both a conduct and a service issue was to be dealt with under only one category, either as a conduct issue or a service issue.

As a result, issues currently raised in complaints are to only be treated as either service or conduct, not as both or ‘hybrid’, which is in line with section 2(1A) of the current 2007 Act. The court in *Anderson Strathern v Scottish Legal Complaints Commission* indicated that where there was any suggestion of a conduct issue within a complaint, then the complaint needed to be treated as a conduct issue complaint, even where it also had elements which could be considered as service issues. In such a scenario, it is argued by some that complainers could be seen to miss the opportunity for the service elements of their complaint to be dealt with through the service complaint route, where the focus of the complainer’s attention is on the service they have received from a lawyer, and which the complainer is seeking to put right. Instead, in such a scenario, these complaints require to be dealt with through the conduct issue route, which favours of a complaint process focused on the ‘discipline’ of the solicitor.

Conduct complaints which are dealt with by the Law Society are progressed as a disciplinary matter¹⁴. The Law Society has the power to make findings of unsatisfactory professional conduct, which can result in a solicitor being censured, fined up to £2,000, directed to pay compensation to the complainer of up to £5,000, or directed to undertake further training in law or legal practice. More serious cases may be prosecuted before the SSDT, where a solicitor could be subject to a censure, a fine of up to £10,000, restriction of his or her practising certificate, suspension from practise (or a combination of these sanctions), or be struck off the Solicitors Roll¹⁵. The SSDT also has the power to award a complainer up to £5,000 by way of compensation for loss, inconvenience or distress resulting from the solicitor's misconduct.

Service complaints which are investigated by the SLCC are progressed within a context of reparation to the complainer¹⁶. A solicitor, advocate or commercial attorney can be subject to a compensation order (up to a maximum of £20,000) which is payable direct to the complainer.

Under the current process, a complainer whose complaint raises a single issue capable of being considered as both a service issue and a conduct issue risks that complaint being dealt with only as a conduct complaint. As a result the complainer does not have the opportunity to benefit from any compensation above the statutory ceiling of £5,000 for conduct issue complaints, which the Law Society can award for unsatisfactory professional conduct or the SSDT can award for professional misconduct, should that complaint be upheld in either of those two circumstances.

¹³ *Anderson Strathern LLP v Scottish Legal Complaints Commission* 2016 SLT 967.

¹⁴ See section 42ZA of the Solicitors (Scotland) Act 1980.

¹⁵ See section 53ZB of the 1980 Act.

¹⁶ Section 10(2)(d) of the 2007 Act.

Potential amendments

This consultation seeks views on the proposed principle of introducing a new, third categorisation of complaints, being that of a hybrid issue complaint. This would allow for the process developed and used by the SLCC for categorisation before 2016 to be reinstated into the complaints process.

It is considered that powers under section 41 of the 2007 Act allow for this change to be made by way of secondary legislation.

Such a change would require consideration of how one issue, which has both service and conduct elements, can be dealt with where service complaints have different compensation levels, sanctions and time bar periods to those which are set for conduct complaints. More importantly, a situation where the service element of an issue is upheld by the SLCC while the conduct element of the same issue is dismissed by the professional body would need to be carefully considered and resolved¹⁷.

Given the scope of this proposal, views are sought on the principle of taking this work forward. Further consultation will be undertaken on the details of any regulatory changes that are undertaken as a result of this consultation.

Likely Impact

Such a change could improve the complainer's interests in the complaints process, by increasing the potential availability of compensation to them. There could, however, be an impact on legal services providers who could be subject to both disciplinary and compensatory outcomes if a complaint is upheld.

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**

Please give reasons for your answer.

¹⁷ See the case of *Bartos v Scottish Legal Complaints Commission* [2015] CSIH 50 where such a situation occurred.

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

Overview

The 2007 Act set out the process for dealing with a complaint in respect of legal services. Each complaint must proceed through the same initial process, regardless of the scale of the complaint¹⁸. While this ensures consistency in the operation of the complaints process, it does not necessarily allow for proportionality.

In addition, the 2007 Act has in place opportunities for challenge at each stage of that process, which allows parties to appeal certain key stages of the process before the next stage can take place. This has the effect of increasing the timescale for acting on the complaints as specific time periods need to be allowed for appeals (appeals which may or may not take place). This can lead to complaints taking some time to conclude, affecting the experience of both complainers and those who are subject to complaints. It also impacts on the cost of operating the complaints system, which is borne by the legal profession, and is very likely to impact on the business expenses which inform fees for legal service providers' clients.

Since the implementation of the 2007 Act, knowledge and experience of operating both the legal complaints system, and complaints systems more generally, has developed. The proposals contained in this consultation on creating a more efficient and proportionate complaints process, which would not impact unreasonably on either the fairness or robustness of the current system, have been informed by this modern practice.

These fall into 6 categories:

i. Moving complaints into stages which deal with the dispute resolution, investigation and resolution more quickly

Not all complaints are the same. In some cases, based on the information and evidence provided, some very clearly require investigation while others may be more finely balanced. However, the preliminary tests set out in the 2007 Act¹⁹ must be carried out in every case, and in a set order, before a decision can be taken to either progress the complaint into the investigation stage, or not. In addition, the SLCC requires to provide a detailed report, by notice in writing²⁰, on the outcome of each of these tests to the parties - this can be time consuming and, as a result, frustrating for the complainer and the legal services provider.

Each decision made by the SLCC may be appealed to the Court of Session²¹ by either party. The reasoning for decisions taken on each test by the SLCC is shared with both parties involved in the complaint who have 28 days to elect to submit an appeal. Therefore, each decision in a complaint must also exhaust each appeals process if an appeal is made to the court on that particular matter. This means that in some cases it can take a considerable amount of time for a final decision to be reached as to whether a complaint should be investigated or not, depending on the number of appeals.

¹⁸ See Part 1 of the 2007 Act.

¹⁹ See sections 2 and 4 of the 2007 Act as well as the diagram in the Annex to this consultation.

²⁰ See section 7 and 10 of the 2007 Act.

²¹ See section 21 of the 2007 Act.

Potential amendments

Views from consultees are sought on amending Section 2(1A), 6(2)(b)(ii), 7(2) and 8 of the 2007 Act that would have the effect of allowing the SLCC to move certain cases into investigation more quickly, or pass more serious conduct issues to professional bodies sooner. At present, complaint cases go through each of the tests in the 2007 Act before a case can move on to the investigation stage. These proposals would instead create a presumption that every case would be investigated, with reasoning as to this decision only provided if the case was being closed without investigation at this stage. It is intended that this would not affect the statutory rights of appeal of a case which was closed at this stage (nor appeal rights later in the process). It is expected that this proposed change would help to set clearer expectations for complainants by helping to reduce the period of uncertainty before they learn whether their complaint has been accepted for investigation or not.

As a result of these proposed amendments, all complaint cases would be considered eligible to be accepted as a complaint, unless there are obvious reasons to apply the eligibility tests. The SLCC would 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.

In addition, the consultation is seeking views on the proposal to make changes to the position on mediation in Section 8 of the 2007 Act to ensure that the option of mediation remains available in line with any changes made to the way in which preliminary stages are to be handled. The use of mediation in resolving service complaints has been successful in reducing the number of complaints that proceed to a final determination committee, as evidenced in SLCC data, and the proposal would be to retain the option of mediation in any amended complaints process.

Likely Impact

It is considered that the above proposed changes are unlikely to cause detriment to users of legal services. If a complaint case is to be closed at a preliminary stage, all the current stages and protections of the 2007 Act will apply. However, lawyers may be concerned that some cases will be automatically admitted for investigation when such cases would currently receive a full eligibility assessment being doing so. To mitigate this risk, the proposal is that the SLCC will be expected to introduce additional internal quality assurance and a scheme of delegation, approved by the non-executive Board to ensure appropriate internal scrutiny of complaints and that only appropriate complaints will be taken forward for investigation.

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**

Please give reasons for your answer.

ii. Identifying valid complaints

The current wording of the 2007 Act allows complaints that are “totally without merit” to be dismissed at an early stage²². This is a significant test and requires all but the most obviously inappropriate complaints to progress through the full complaints process. As a result the SLCC can be required to direct resource to complaints that have poor prospects of being upheld, based on previous similar complaints. This not only uses resource where there is little prospect of success but prolongs the process for complainers and legal services providers.

It is understood that complainers whose complaints are refused under the term “totally without merit” can find the terminology dismissive and this can have a negative impact on their experience of using the complaints system. Direct feedback from users of legal services as well as feedback from the SLCC Consumer Panel and the Law Society Regulatory Committee also clearly show consumers can find the term ‘totally without merit’ to be offensive and upsetting when used in reference to their complaint.

Potential amendments

Views are sought on the proposal to amend section 2(4)(a) and (b) of the 2007 Act to remove the word “totally” from the phrase “totally without merit”. This would also involve the consequential amendments to Part 1 of the 2007 Act (e.g. at section 9A) to take account of the removal of the word “totally”. The result of this proposed change would have the effect of lowering the benchmark for dismissing a complaint whilst also softening the language around a term that can cause distress to some complainers. Overall, it could reduce the timescale for responding to complaints in progress as a smaller number of complaints will go forward through the complaints process, and this may result in moving valid complaints into the system more quickly. Conversely, this change might also lead to fewer complaints being progressed to investigation, and this in turn may result in an increase in the number appeals being pursued against these decisions.

²² See sections 2(4) and 9A(4) of the 2007 Act.

The proposal would also include the requirement for the SLCC to consult on, and publish, guidance as to how the new test would be applied by the SLCC when considering whether a case is to be classed as “without merit” to ensure consistency and transparency. The SLCC would also require to report on the use of these powers in its annual report. In any event, it is proposed that the existing appeal rights of parties would not be affected by this proposed change.

Likely Impact

It is considered that this change would have no detriment to legal services providers given that fewer cases would likely be taken forward into the complaints process. However, users of legal services may take a view that some complaints cases may be prematurely closed before investigation when applying this amended benchmark. To mitigate the effect of this, the intention would be to retain the current requirement for the SLCC to provide a reasoning for their decision, which is reserved to an independent Commissioner – a member of the SLCC Board who individually makes the final decision at eligibility stage. Again, the existing appeal rights of parties would not be affected.

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**

Please give reasons for your answer.

iii. Completing investigations and reporting more quickly

Complaints vary in scale and scope. Some require complex investigation while others are fairly straightforward. The level of appropriate compensation in respect of an upheld complaint can also vary significantly. The 2007 Act requires that every complaint be handled in the same way, through the same complaints process and with the same level of detailed reporting no matter the complexity or scale. This can add to the timescale for dealing with a complaint, perhaps unnecessarily in certain more straightforward complaints cases, as well as having an impact on the use of SLCC staff members as a resource.

It is argued by some that a more proportionate process, which allows for an investigation appropriate to the scale, level and complexity of a complaint or complaints being made, could improve the experience of all who are involved in the complaints process.

Potential amendments

Views are sought on the proposed amendment to Sections 9 and 12(2) of the 2007 Act to allow for investigations by, and reports from, the SLCC to be more proportionate to the circumstances of each service complaint, the parties involved and, where appropriate, the level of public interest. For example, a complex service complaint in respect of a high value fee would likely require a more detailed investigation and report than a simple service complaint of a lower value. Again, the intention would be for the SLCC to consult on, and publish, its policy for determining the appropriate level of investigation to be carried out for differing levels of complaints to ensure consistency and transparency. The SLCC will also be required to report on the use of this power in its annual report. Again, existing appeal rights for both parties would not be affected.

These proposed changes would have the effect of enabling the SLCC to reduce the detail of reasoning it produces for simpler, lower value and lower public interest complaints, thereby taking a more proportionate approach. The intention would be for high quality decisions to continue to underpin the complaints process but where the process would be shorter and reach a conclusion more quickly in appropriate cases.

Likely Impact

It is considered there is unlikely to be any material detriment to lawyers or users of legal services in respect of this proposal. There may be a risk that the shorter reasoning in shorter reports in more straightforward cases lead to a greater number of appeals by complainers where they consider that insufficient scrutiny of their complaint has been undertaken. Again, it would not be the intention that the appeal rights of any party would be affected by these proposals. The statutory right to a notice in writing, albeit a shorter one, would remain.

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**

Please give reasons for your answer.

iv. Concluding cases at an earlier stage when appropriate

The process set out in the 2007 Act includes provisions for an early settlement of a service complaint, before a case goes on to be considered for determination by the

SLCC determination committee²³. However, these provisions also provide a disincentive in certain circumstances to both parties in reaching and accepting an early settlement.

The 2007 Act makes provision for a complaints levy²⁴ to be charged at various stages throughout the service complaints process:

- at mediation, but only if both parties agree the settlement;
- at investigation, but only if both parties agree the settlement; or
- at determination – if the committee uphold the complaint, in which case any levy set by the committee is mandatory.

This system was set out in the 2007 Act to place the emphasis on the principle of ‘polluter pays’ – so that where poor service is identified, the lawyer or firm pays a contribution to the cost of the complaint.

However, if complaints levies are applied at mediation or investigation, where the lawyer or firm has to voluntarily accept them, the SLCC experience of this practice has shown that this simply encourages lawyers and firms to wait until the end of the process when a formal determination has been made by the SLCC committee. The chance that a levy might not be applied is more attractive to lawyers and firms than knowing for certain that they will have to pay, probably a smaller levy, by voluntarily accepting that lower levy earlier in the complaints process

This in turn can create further cost in dealing with the complaint and prolong the complaint’s resolution for all parties. For these reasons, the SLCC does not currently charge the complaints levy at the voluntary stages (being mediation and investigation) of the process – even though this undermines the ‘polluter pays’ model. While it was initially intended that the ‘polluter pays’ income would make up around 50% of the SLCC’s funding, the SLCC’s experience is that it has instead consistently been much less than this at around 1%. Instead, this has meant the ‘general annual levy’ paid by all lawyers has been the main funder of the complaints process in Scotland and therefore the general annual levy as required to be higher and continually increased to fund the work of the SLCC.

Potential amendments

Views are sought on how to better meet the original expectation that those lawyers and firms actually generating complaints meet a greater share of the cost of complaints. The proposal is that this will require the SLCC to enforce payment of a complaints levy if a complaints case progresses to investigation, or on whether a recommendation to uphold the complaint is made (not on whether the lawyer or firm accepts that recommendation).

The intention would be that the SLCC would continue to ensure a proper, published tariff is applied to the complaints levy as it currently does for cases which proceed to determination at committee. The SLCC policy on the use of these powers would require to be published and the use of the powers phased in using the SLCC’s Independent Commissioners to monitor quality control.

²³ See principally section 9 of the 2007 Act.

²⁴ See sections 28 and 29 of the 2007 Act.

Likely Impact

We do not consider there to be a substantial detriment to complainers or providers of legal services in respect of these proposed amendments. The proposed changes may help to ensure those complainers or lawyers whose choices to delay settlement by extending the work for the complaints system will make a greater contribution to the costs of that system. It should, in turn, likely lessen the financial burden on the wider profession.

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**

Please give reasons for your answer.

v. Closing a case when a reasonable settlement has been offered

Provisions in the 2007 Act set out that the SLCC can make a recommendation on the outcome of a service complaint at the investigation stage²⁵ of a complaint. This recommendation can include a suggested settlement being proposed by the SLCC; and must be accepted by both parties if a settlement is to be agreed at this stage and not proceed to determination by the SLCC. If the SLCC recommendation is not accepted by either, or both parties, then the case proceeds on to the SLCC determination committee.

The operation of this process provides the positive situation where there is an incentive to legal services providers to accept the proposed settlement in order to avoid the cost of a complaints levy were the case allowed to proceed to a decision by the SLCC Determination Committee. However, for the complainer, there is little or no incentive to accept the proposed settlement because they lose nothing if the case proceeds on to a decision by the Determination Committee in the hope of getting a more favourable award, even if it is clear from previous similar cases that there is little prospect of the Committee reaching a different outcome or settlement determinations.

This means that while the legal services provider is more likely to accept a recommendation made by the SLCC case handler, a complainer is less likely to do so. Data from the SLCC suggests that it is rare for a determination committee to recommend a higher compensation award than that recommended by the SLCC case handler, but it still means that the legal services provider must pay that compensation award as well as a complaints levy (of which the complainer receives none), a complaints levy which the legal services provider could have avoided.

²⁵ See section 9(4) of the 2007 Act.

Potential amendments

Views are sought on the amendment of section 9 of the 2007 Act to allow the SLCC the discretion to close an issue as “determined” where a legal services provider is willing to agree the recommendation made at the conclusion of an investigation, without the need to have agreement from a complainer or for the case to be considered by the determination committee. Amendment to paragraph 13(2)(d) of Schedule 1 of the 2007 Act may also be required to effect these intended changes.

This proposal would likely lead to cases being concluded earlier in the process without the need for the complaint to be considered separately by a SLCC determination committee, which can, as mentioned above, be a duplication of effort in certain circumstances.

In implementing these proposals, safeguards would require to be introduced by the SLCC with its policy for exercising these discretionary powers requiring to be consulted on and published. Consideration would be given as to whether it may be preferable to put in place these provisions to apply only to cases of lower value, distress or where there is no significant public interest involved in the complaint. Views on the scope of these proposed amendments are also sought from consultees in this consultation.

Again, the existing appeal rights of parties would not be affected by these amendments. In addition, the SLCC would be required to report on the use of these powers in its annual report.

Likely Impact

Both legal services providers and complainers may be concerned that the proposed amendments would remove a “right to a full hearing” of the complaint with SLCC independent commissioners at a determination committee. However, it would be the intention that the statutory right to appeal the decision would remain and the SLCC would be required consult on, and publish, their policy on the use this power.

In addition, the SLCC currently monitors case outcomes and this monitoring would continue in light of these amendments. This change would form part of the scrutiny currently performed by stakeholders and the Scottish Parliament. Figures would be published in the SLCC annual report.

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**

Please give reasons for your answer.

vi. Providing greater transparency and information on complaints

The role of the SLCC allows it to have oversight of the range of issues that can lead to complaints. Trends published in SLCC annual reports also provide an oversight of the types of complaints received. Provisions in the 2007 Act allow the SLCC to publish reports on individual cases²⁶ with the consent of those involved, or in narrow, specified circumstances.

However, the Act does not allow for the publication of information on the scale or number of complaints made against any one specific legal services provider, for example, where a pattern of cases on the same issue arise. This may mean the public are exposed to risk which is known about, but where the SLCC is prohibited from publishing details of it.

More modern views on the purpose of a complaints system places emphasis on enabling users to make informed choices as to the service providers they instruct, as well as supporting providers to prevent complaints. The SLCC is currently limited by the 2007 Act in the range of information it can share publicly: for example, information on those specific lawyers or firms who are subject to a high number of complaints.

²⁶ See section 13 of the 2007 Act; also see sections 29, 35 and 36 of the 2007 Act on more general publishing matters.

Potential amendments

Views are sought on amending sections 13(1) to (4) of the 2007 Act to permit publication of a wider range of information when the SLCC considers that it is in the public interest for it to do so, and to allow the SLCC to proceed without any requirement of consent from the lawyer or firm prior to publication.

One example the SLCC has seen in the past is where a high number of complaints about similar issues with the same firm are received. The first approach by the SLCC might be to contact the firm involved to discuss if action was being taken or to suggest sources of support. However, if the pattern continued, then under these proposed changes, the SLCC would then be permitted to considering whether to publish information to the general public to allow informed consumer choices. It may even be considered that the SLCC would be fulfilling a public protection role in flagging such a pattern of concern.

Under these proposals, decisions on whether, and what information, to publish would be taken by the SLCC Determination Committee and the policy around the criteria for publication will be consulted on and published by the SLCC. A mechanism to appeal such a decision to publish is already provided in the Act.

Likely Impact

We do not consider there would be any detriment to users of legal services. Indeed they are likely to see some benefit from early notice. However, lawyers may be concerned about the potential for reputational damage if data on upheld complaints is published. There is a potential for Article 8 of the European Convention on Human Rights on the right to protection of reputation being engaged. However, multiple statutory safeguards that the SLCC must currently consider will remain – that the case or cases must be exceptional, that it must be in the public interest for the practitioner or firm to be identified, and that the SLCC must have given notice that it intends to publish information, specifying the reasons for its decision. A decision to publish will be taken by the SLCC Determination Committee of three independent Commissioners, and there is a right of appeal.

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**

Please give reasons for your answer.

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

Overview

The 2007 Act provides the SLCC with the power to award compensation and rebate of fees to the complainer where their service complaint has been successful²⁷. Where a solicitor firm is no longer trading, the Master Policy will still pay out for the compensation element of redress awarded by the SLCC (subject to an “excess”). However, the Master Policy does not pay out for a rebate of fees incurred by the complainer in respect of their legal service/work provided which is the subject of their complaint.

This is because the insurance under the Master Policy is for the protection of the practitioner, not the client or complainer, and covers only loss or damage suffered by the practitioner. Any award of fee rebate by the SLCC is decided because the fee charged by the practitioner in respect of the work is either excessive, not earned at all or not earned in full. Practitioners would ordinarily make payment of the fee rebate to complainers from their own finances. For insurers to meet that fee would put the insured practitioner in a better position than they should be, on the basis that the practitioner should never have had that fee/money in the first place, which falls foul of the indemnity principle. Therefore a professional indemnity policy (including those that cover other professions) does not cover a fee rebate. Unfortunately, however, this means that the complainer never receives that redress of a fee refund from the practitioner, or must apply for it alongside other debtors of a deceased or sequestrated sole practitioner or ceased firm.

This means that in a small number of cases (where a practitioner has died or a firm has ceased to operate) each year an expensive complaints process is followed through the SLCC, an award to a complainer is made that includes a fee rebate, but that the complainer never receives the amount equal to the fee rebate. This can be the case even when it is apparent from the start of the complaints process that a rebate of fees will not be paid, even though the statute still requires the complaint to be fully handled through the whole process.

This is frustrating for the complainer as they do not receive full redress in respect of their complaint despite a statutory complaints process they will have invested significant time in. It is also not ideal for the profession; these cases can attract negative public comments and the profession has paid for a process which does not deliver a full result.

Potential amendments

Views are sought on amendments to Section 10 of the 2007 Act to allow for a process 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.

In addition, views are sought on the proposal to increasing the cap on the total amount of compensation payable to complainers. This is because currently rebate of fees is uncapped (whereas actual loss is capped at £20,000).

²⁷ See section 10 of the 2007 Act.

These changes are unlikely to be to the detriment of complainers, so an increase is required to ensure an amount equivalent to a typical fees rebate could be added even if maximum compensation at the current level is awarded. It is recognised that there needs to be some overall cap to cover situations where an amount equivalent to a fee rebate award would exceed the current cap of £20,000, and so the increase to £35,000 is suggested.

Likely Impact

The impact of this would, as far as possible, be to ensure that where awards of redress are made under the statutory complaints process, the complainer always receives the redress in full. It is considered that this would have a significant impact for individual complainers who may otherwise not receive the redress which has been awarded to them. It will also help to drive wider public confidence in the regulatory system.

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**

Please give reasons for your answer.

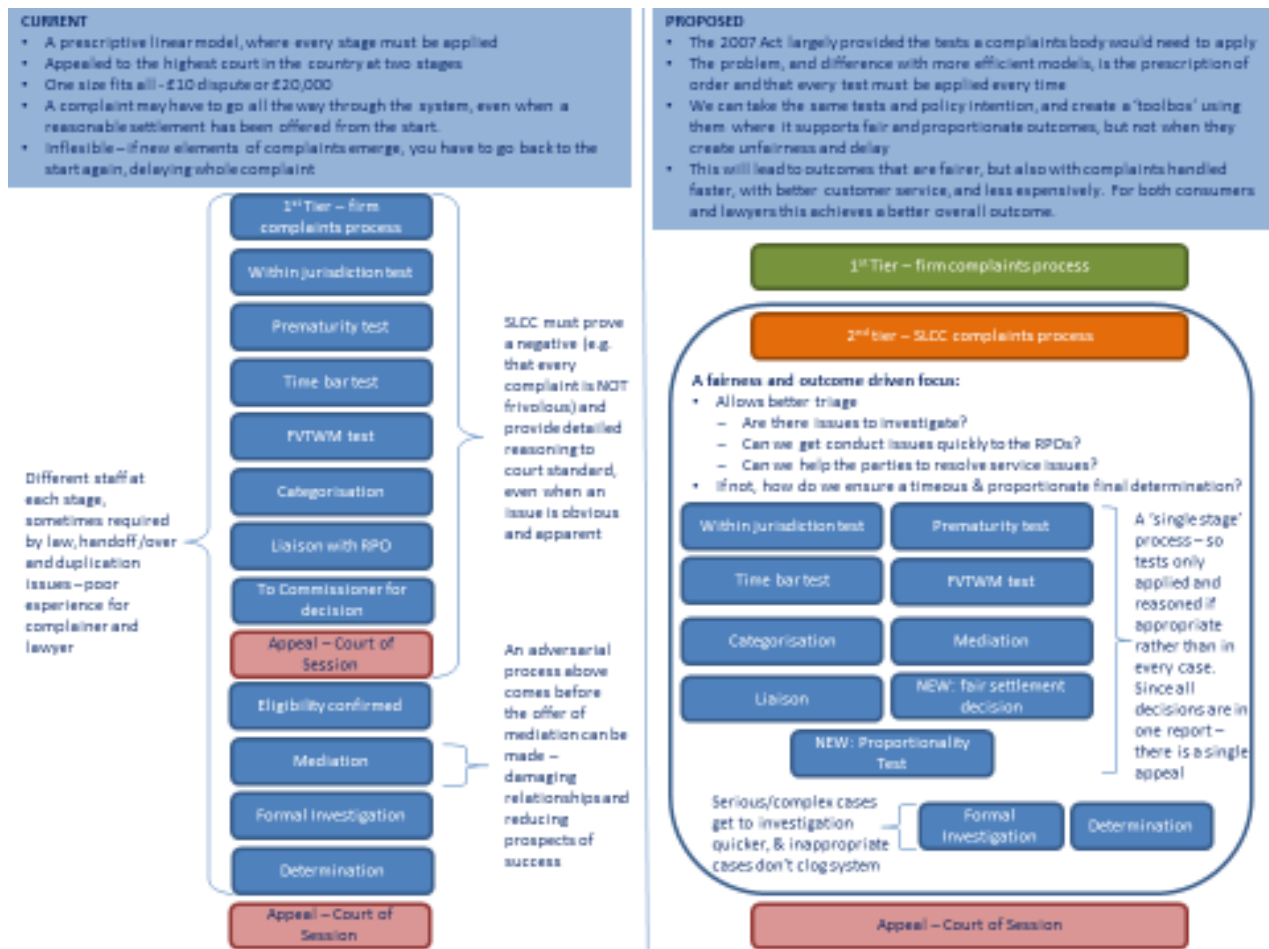
Question 9

Please provide any further comments on the proposals set out in this consultation in the box below.

Annex

Impact of proposals

The overall changes to the system that might be achieved by implementing these proposals are set out below:





Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- ☐ Individual
- ☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- ☐ Publish response with name
- ☐ Publish response only (without name)
- ☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- ☐ Yes
- ☐ No



© Crown copyright 2020



This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80004-499-9 (web only)

Published by The Scottish Government, December 2020

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS750706 (12/20)