RESPONSE

of the

FACULTY OF ADVOCATES

to

THE SCOTTISH GOVERNMENT CONSULTATION ON AMENDMENTS TO LEGAL COMPLAINTS

Scope

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 disagree

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

As noted in the report, where a complaint raises a number of issues, it ought to be possible, in most cases, to identify the conduct and service issues within each complaint and direct the issues accordingly. This accords with the existing practice of the SLCC. Only where a question of inadequate service and conduct are intrinsically

linked will it be impossible to separate these. The consultation document suggests that, since the case of Anderson Strathern, the practice has been to treat any issue that raises both service and conduct questions as raising a conduct issue and referring it accordingly.

The consultation document makes no reference at all to the Faculty of Advocates disciplinary procedure, which is distinct from the Law Society's. The Faculty of Advocates' procedure caters for circumstances in which the conduct also created an inadequacy of service by allowing for a refund of fees paid and compensation of up to £7,500 (by the Complaints Committee) and up to £15,000 (by the Disciplinary Tribunal). If these amounts are considered insufficient (by comparison to the £20,000 compensation that can be awarded by the SLCC) it would be preferable to adjust the compensation available under the Faculty scheme rather than divert a professional conduct complaint to the SLCC which has never been considered the appropriate body to determine conduct issues. The same could be said of the Law Society's scheme which, it is important to emphasise, is entirely distinct from the Faculty's.

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 disagree

This proposal appears to the Faculty to go far beyond the desire to streamline the methods for applying what appear to us to be legitimate eligibility tests. The proposal is to create a presumption that every complaint will be accepted for investigation and only if there are "obvious reasons", to apply the eligibility test. The right of appeal would remain against the closure of a complaint but the proposal effectively removes the right of appeal by the lawyer against a complaint being treated as eligible. The proposal gives 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.

The proposal, if enacted, would have removed the right of appeal in the case of Benson v SLCC [2019] CSIH 33 in which a solicitor in the procurator fiscal's office was subjected to a complaint as part of a long running campaign of grievances raised by the complainer. This was accepted for investigation but this decision was reversed by the court, thus sparing the solicitor from having to face an unfounded complaint.

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 disagree

The Faculty considers that removing the word "totally" from this test would fundamentally change the nature of the test from being a sifting mechanism to one that necessarily includes an element of pre-judging the merits of the case. It may well be that a letter explaining that a case is not being accepted into the complaints system because the complaints body have taken the initial view that it is "without merit" is just as upsetting to receive as a letter explaining the same thing using the phrase "totally without merit". We would be against such a change.

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 disagree

It is appropriate for investigation and reasoning to be proportionate, but this element arises from conducting an investigation and providing clear and concise reasons. If it

is otherwise, the matter is being pre-judged, as "simple" or "low value". Any proposal 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. There is no reason why it should be decided, at a preliminary stage and before investigation, that a complaint should only receive a reduced level of scrutiny. It should not be assumed that a "low value" or "lower public interest" complaint, if upheld, will not have a significant impact on the lawyer who is subject to the complaint. Professional complaints can have significant impact on lawyers, including on their ability to secure professional or judicial appointments. Lawyers are entitled to expect proper reasons when decisions on their professional competency are being made.

As for the reduced detail of reasoning, the consultation document suggests this might produce more appeals by complainers who do not consider their complaint to have been adequately scrutinised. This in itself seems to recognise that complainers will be left feeling aggrieved. Likewise it may produce more appeals by lawyers where complaints have been upheld. Without adequate reasoning the decisions are unlikely to survive appeal and are likely to be remitted back to the SLCC for reconsideration.

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?*

- Mostly agree

While we do not have any financial information about the impact this would have on where the burden of payment for the SLCC falls, we certainly support in principle removal of any financial incentive to prolong resolution of complaints.

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?*

- Mostly agree

We would consider that this power would be of use to the SLCC and to the professional. We would consider that claims with lower values would be particularly apt to be closed in this way even were the complainer to be unsatisfied with the recommendation made.

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

The Faculty considers that carefully controlled publication subject to the safeguards outlined does have a legitimate role to play in the public interest, and this accords with the Faculty's own rules about publication of its disciplinary decisions.

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?*

- Mostly disagree

This proposed reform is designed to allow a complainer to recover both compensation and a refund of fees, even if the practitioner becomes unable to repay the fees.

Applying normal compensatory principles, the role of compensation is to place the complainer in the same position they would have been in if they had received an adequate service. It appears to be a matter for the SLCC, in each case, to determine what combination of compensation and refund of fees is necessary to achieve their

objective. If fees are to be refunded then that refund ought to be taken into account in assessing the amount of compensation. If, on the other hand, a refund of fees seems impossible, or unlikely, we see no reason why that too cannot be taken into account in assessing the level of compensation. It therefore seems that, in the vast majority of cases, the inability of a practitioner to be able to repay fees can be addressed under the existing framework.

In the rare case where a practitioner is unable to repay fees and the only issue is whether the fee was excessive or unjustified, this proposal, as framed, puts complainers in a stronger position than other creditors of an insolvent or deceased practitioner, and changes the basis on which they would have to be insured. We are uncertain about the need to drive public confidence in the regulatory system by providing this benefit. However, we note the observation that these cases can attract negative public comments, and it may be that the proposal can be justified because of the types of circumstance in which the problem tends to arise.