



RESPONSE BY THE FACULTY OF ADVOCATES

To

THE SCOTTISH LEGAL COMPLAINTS COMMISSION'S CONSULTATION ON RULE CHANGES

INTRODUCTION

1. This is the response on behalf of the Faculty of Advocates ("the Faculty") to the Scottish Legal Complaints Commission's ("SLCC") consultation regarding proposed changes to their Rules.
2. The Faculty welcomes the SLCC's review of the Rules and agrees with the policy aims of ensuring that the Rules reflect modern systems of communication and paperless working. The Faculty is supportive of the proposed amendments to the Rules, subject to the comments made below in relation to certain specific proposals.

DEFINITION OF "THIRD PARTY COMPLAINER"

3. The proposed definition of Third Party Complainer is:

"a complainer in a complaint concerning a matter in which the practitioner was not instructed by the complainer or by any person on whose behalf the complaint is made."

4. For the sake of clarity, the Faculty suggests that this definition makes specific reference to the terms of s. 2 (2) of the Legal Profession and Legal Aid (Scotland) Act 2007. This may assist in ensuring that the public is aware that a complaint cannot necessarily be made by any third party in relation to any matter.

COMMUNICATIONS IN WRITING

5. The proposed Rule 5 (1) provides that:

Any communication which is required by these Rules to be in writing will be treated as being in writing if it is received in a form which is legible and capable of being used for subsequent reference.

6. The Faculty is concerned that this definition appears cumbersome and lacks clarity. It is not clear what the test of “being capable of being used for subsequent reference” is designed to exclude from the general definition of communications in writing. If there are communications which the SLCC wishes to exclude from the general definition of communications in writing, the Faculty suggests that this definition be revisited.
7. It may be that simply requiring that communications be “in writing” and noting that “writing” includes written communication by electronic means is sufficient to achieve the SLCC’s goals. We have reviewed the disciplinary rules of the Faculty of Advocates, Scottish Solicitors Disciplinary Tribunal, General Teaching Council for Scotland, General Medical Council, Nursing and Midwifery Council and Scottish Social Services Council. None of these has considered it necessary to define what constitutes “communication in writing”. Failing any specific definition, the phrase is likely to be considered in accordance with the definition in Sch. 1 of the Interpretation Act 1978:

“writing” includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.

8. The purpose of the proposed Rule 5 (1) is accordingly, in the Faculty’s view, not clear.

PREMATURE COMPLAINTS

9. The proposed Rule 9 (2) provides:

(2) A person is not to be considered, for the purposes of section 4(4)(a) of the Act or paragraph (1)(b) above, to have been given a reasonable opportunity to deal with a complaint unless at least 4 weeks have elapsed since that communication was made.

10. The Faculty is concerned that this is a potentially unhelpful way to express the underlying point. If the intention is that the **minimum period** in which it may be reasonable to respond is four weeks, then that could be expressed more directly. The Faculty is concerned that, as currently drafted, the Rule may suggest to members of the public that they should **in all circumstances** be able to expect a response within four weeks. That may not be appropriate in relation to complaints which are particularly complex or which require review of substantial papers.

11. Put shortly, the Faculty suggests that the Rules should make clear that there may be circumstances in which it will be reasonable for the subject of a complaint to take more than four weeks to respond to the complaint. In those circumstances, a complaint to the SLCC will remain premature.

OBTAINING INFORMATION

12. The proposed Rule 11 (1) provides *inter alia*:

Any such invitation by the Commission may identify the specific nature of the information the Commission wishes to receive and the form in which the Commission considers the information would be most usefully provided.

13. The Faculty proposes that in this provision “may” should be amended to “must”. The Faculty cannot see any reason why the requirement to include such information should be discretionary.

DEALING WITH A COMPLAINT IN THE PRESENCE OF PARTIES

14. The proposed Rule 24 (3) provides that the committee to which a complaint has been allocated will decide, on a case by case basis, taking into account all relevant information, whether any oral hearing may take place is to (a) be held in public or private; “and/or” (b) take place via video conference. The Faculty considers that it would be beneficial expressly to provide for the possibility of “hybrid” hearings, which could take place partly in person and partly via video conference. It may be that this is encompassed by the words “and/or” but in the Faculty’s view it would be preferable to state this explicitly.

15. The proposed Rule 24 (4) provides:

(4) The committee will not determine that an oral hearing is to proceed by way of video conference under paragraph (3)(b) above unless it is satisfied that each of the parties and any person who is to give evidence at the oral hearing has access to electronic equipment and internet connection of appropriate quality and robustness for the anticipated duration of the oral hearing.

16. The Faculty suggests that this Rule should also provide for the committee to take the views of all parties who will be in attendance as to their preferred form of hearing. The **ability** to attend a remote hearing should not be determinative as to whether such a hearing would be appropriate, particularly if one or more parties proposes that the hearing should take place in person.

CONCLUSIONS

17. The Faculty is grateful for the opportunity to respond to this consultation. We hope this response is of assistance.