



**THE LAW SOCIETY
of SCOTLAND**

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Law Society of Scotland

Response to the SLCC Trend Analysis Report

September 2015

The Society welcomes the publication of the SLCC's report, and considers it to be informative and helpful. The Society considers that the report will be particularly useful as a means of assisting it to identify areas in which improvements to the handling of conduct complaints may be possible, to the benefit of both the public and the profession; and in that regard the stated purpose of the report has been fulfilled.

With regard to the substantive terms of the report, retaining the SLCC's numbering for ease of reference in respect of the paragraphs to which a formal comment or observation is considered to be necessary, the Society would respond as follows.

1.3 There are very good reasons why hybrid investigations are not carried out simultaneously.

The Society notes that whilst the availability of files is one of the reasons why simultaneous investigations are not carried out by the Society and the SLCC, there are other compelling reasons why that is avoided. There is a likelihood that the parties to a complaint would become confused by the receipt of contemporaneous correspondence from two organisations who are investigating separate aspects (and frequently the same specific issues) of the same overall matter from different perspectives. There is the possibility of a procedural quagmire if the parties submit either appeals to the court in respect of the SLCC's decisions, or handling complaints in respect of the Society's investigations, or indeed both, during the currency of a simultaneous investigation.

2.1-2 The number of conduct complaints assessed as eligible has fallen dramatically since the inception of the SLCC, despite the eligibility criteria having been relaxed.

The Society notes that 1,161 conduct complaints have been admitted to the investigative process between January 2009 and December 2014. During that time, the proportion of hybrid complaints to conduct-only matters within that number have steadily increased. Various possible reasons underlie that trend. At the SLCC's inception, it decided to consider only complaints where the service from which they arose had been instituted (or, in third party conduct complaints, the conduct event complained of occurred) after 1 October 2008. It follows from that policy that hybrid complaints would take some time to manifest themselves, and that in the period 2008 to 2010, a greater proportion of complaints with a conduct element would consist of conduct-only matters. It is in any event to be expected that the majority of conduct complaints would include at least some element of service, and that the proportion of hybrid cases would reflect that.

The overall number of complaints categorised as conduct matters by the SLCC has diminished markedly from the level of conduct complaints which were previously admitted to the investigative process by the Society under the pre-2008 statutory

regime (in 2007 alone, the Society investigated and determined in excess of 550 conduct complaints), despite the definition of a conduct complaint and the category of persons with an interest to make one having been broadened, and the threshold for eligibility having been lowered substantially by the advent of the 2007 Act. The decline in conduct complaints since 2007 is less apt to logical explanation, and is suggestive of a different approach being applied by the SLCC to the question of eligibility of conduct issues than had previously been applied by the Society.

The Society accepts that the global financial crisis, and the consequent collapse of the property market after 2008, may have led to there being fewer conveyancing complaints overall, but does not consider that that can wholly explain the very stark contrast between the number of conduct complaints identified by the Society as potentially meeting the *Sharp* test for professional misconduct in 2007, and the greatly reduced number of complaints identified by the SLCC as potentially meeting the lower test for unsatisfactory professional conduct ("UPC") in 2009 and thereafter. The Society notes that the SLCC's external regulation is, on this evidence, by no means more rigorous than the internal regulation previously exercised by the Society. The Society considers that there may be scope for it and the SLCC to explore whether matters which would previously have been admitted by the Society to the investigative process were also being identified by the SLCC as conduct issues.

2.4 The Society cannot competently institute or operate a discretionary fast track investigation process.

The Society does not consider that it has the power under the current statutory framework to operate a discretionary fast-track investigation process. The Society is satisfied that it requires, under the prevailing statutory framework, to investigate matters fully in every case, and requires to be in a position to prove complaints before the Scottish Solicitors' Discipline Tribunal ("SSDT"), regardless of whether a solicitor has previously accepted the factual basis of a complaint against him or her – there is recent precedent of a solicitor having accepted a complaint during the investigative process only to change his mind and plead 'not guilty' before the SSDT, thereby putting the Society's ability to prove the complaint to the test; and of a solicitor having submitted a plea of guilty to the SSDT in response to a charge of professional misconduct, only for the SSDT to conclude that the alleged conduct did not, in fact, amount to professional misconduct.

The SLCC suggests that a "fast track" process be considered for "serious" conduct issues. The Society considers, however, that at least for the parties involved in a complaint every conduct issue has a degree of seriousness - it is capable of impacting adversely on the rights of the solicitor who is the subject of the complaint.



It is in any event often not possible for the gravity of an allegation to be measured accurately without the matter firstly being investigated fully.

The Society considers it to be important to bear in mind that every conduct complaint engages the provisions of the European Convention on Human Rights (cf. service complaints, which do not) and the conduct complaint investigation process cannot deviate from a standard which fully complies with the rights conferred by the Convention in terms of the right to fair notice of (and fair opportunity to respond to) a complaint, and the right to a fair trial. Were the Society to depart from the process set down in the legislation it would be likely to be subject to judicial review.

That said, the Society considers that a case can be made for a shorter and more streamlined procedure where the matters raised in a complaint could patently amount to no more than unsatisfactory professional conduct, and considers that in such cases the option of a “guilty” plea to unsatisfactory professional conduct, with a particular sanction, should be permitted. Such a change in procedure would require a change to primary legislation and would also require consideration of appropriate safeguards eg. in case more serious matters were to emerge at a subsequent stage.

2.8 The Society's timescales for dealing with hybrid complaints are diminishing.

The Society welcomes the SLCC's recognition that the overall timescales for its investigations has decreased. The Society notes that the time taken by the Society to deal with the conduct element in hybrid complaints is no longer than the time taken by the SLCC to deal with the service element.

2.9 The SLCC's involvement in hybrid cases more than doubles the average time for them to be fully investigated.

The Society notes that standing that each body's investigations require different aspects of the complaint to be assessed against discrete, and technically different tests, it is inevitable that the time taken end to end will be substantially longer than for a service-only or conduct-only matter. The SLCC's graph on hybrid complaints nevertheless exhibits that a significantly greater proportion of that time is taken by the SLCC than by the Society.

In terms of the statute, the Society cannot rely upon the SLCC's investigations, and the Society considers that that inevitability is therefore not a matter for which the Society or the SLCC can be unduly criticised. Neither the SLCC nor any other observer should expect there to be a material diminution of the overall time frame for hybrid complaints to be fully investigated, within the parameters of each body's investigative process. The Society reiterates that there is simply no legal scope for it to accelerate its investigations, even if it wished to do so.

2.12 The number of hybrid referrals made to the Society is increasing.

The Society notes the increase in decision-making identified in the report, which is objectively explained by the increase in the number of hybrid cases coming through the process.

2.14 The proportion of conduct complaints upheld by the Society is <50%.

Fewer than 50% of conduct complaints which were investigated were upheld. The Society is aware that it might be argued that this is a low proportion considering that (a) conduct complaints are subject to the SLCC's gateway sift (at which a significant proportion of complaints are rejected on eligibility grounds); and (b) that the 2007 Act has introduced the lesser conduct offence of unsatisfactory professional conduct. It is not however possible to conclude on the basis of the report whether the figure is concerningly low. Further research requires to be made into (a) the eligibility decisions of the SLCC and (b) rejections by the Professional Conduct Sub Committees.

The Society is scheduled to address the latter question by examining the consistency and quality of the Professional Conduct Sub Committees' decisions, via a working party of the Complaints Sub Committee. That analysis will follow.

As for the former question, the Law Society notes that the SLCC's Annual Reports appear to suggest that the number of complaints it sifted out at the eligibility assessment stage has been approximately 50%. It follows that only a relatively small number of complaints which are received by the SLCC actually result in any kind of conduct finding. The Society would be interested to learn the breakdown between service and conduct matters which were rejected as ineligible by the SLCC at the outset historically; and intends to undertake an analysis of eligibility decisions which have since May 2015 been disclosed to the Society by the SLCC.

3.3-8 There is room for improvement in relation to the Society's imposition of sanctions in relation to Unsatisfactory Professional Conduct (UPC).

The Society accepts that there is a disparity between the amounts of compensation awarded for unsatisfactory professional and the amounts awarded by the SLCC for inadequate professional service. However, the Society would observe that in most hybrid complaints the service issues will already have been dealt with by the SLCC, and that when considering whether to award compensation for UPC, it is required by statute to take into account any compensation that has already been awarded to the complainer.

The Society nevertheless accepts that the levels of compensation and fines imposed by the Professional Conduct Sub Committees does appear to be relatively low, and



that the number of training orders imposed is minimal; and acknowledges that the service aspects are not investigated first in every hybrid case.

The Society therefore accepts that each aspect of the imposition of sanction should be further examined, and this will be addressed in its forthcoming analysis of the quality and consistency of decisions. The Society also confirms that guidance in relation to the level of fines will be drafted and published, and that steps have already been taken to ensure that the Professional Conduct Sub Committees have information in respect of a solicitor's means which enable them to properly consider in each case the question of whether a fine ought to be imposed. The Society further confirms that the guidance in relation to compensation will be updated.

3.9 The Society will take steps to publish information regarding findings of UPC.

The Society accepts that there is no formal publication of any findings of UPC. A project is in progress in terms of which a database of anonymised accounts of UPC findings will ultimately be made available to the profession and the public on the Society's website.

4.1 The test for professional misconduct is not arbitrary, it is founded in law.

The Society notes that the test applied by it and the SSDT, whilst not defined in statute, is taken from the Lord President's opinion in *Sharp –v- The Council of the Law Society of Scotland 1984 SLT 313*.

4.5 A balance requires to be struck between the dissuasion of frivolous claims for compensation before the Discipline Tribunal, and enablement of genuine claims.

The Society agrees that the potential for the Scottish Solicitors' Discipline Tribunal to award expenses against a secondary complainer in respect of a failed compensation claim is a disincentive to complainers to make such a claim. The Society considers that there is a balance to be struck between a system which dissuades frivolous claims, but does not have a similar effect on complainers who have legitimate claims for compensation. The Society is unsure as to whether that balance has been struck appropriately at present. The Society observes that in the prevailing legislative framework there is a duty on the SSDT to inform potential claimants that the submission of a claim as a secondary complainer is not necessarily risk free.

4.6 The SLCC's data does not accord with the SSDT's annual reports.

The Society notes that, per the report, the SSDT had made only 4 decisions in 2011. The Society is unsure as to where the SLCC has obtained the data on 2011. The



SSDT's Annual Report for the same period indicates that, although relatively quiet, it had in the course of that year made 12 findings of professional misconduct, with a further 7 complaints either withdrawn, dismissed or no finding made. The report also appears to understate the number of findings made by the SSDT in 2012 and 2013; and to slightly overstate the figure for 2014. Further, it appears from the report that findings of misconduct were very low indeed in 2009. The Society considers that further research requires to be conducted to establish what the true figures for misconduct cases coming before the SSDT were from 2007 onwards.

4.11-12 The Society's fiscals do not make unilateral decisions regarding the prosecution of complaints.

The Society does not accept that its fiscals *ad hoc* have the level of influence which the SLCC attributes to them. The role of the fiscals in prosecuting complaints before the SSDT is one of assessing the sufficiency of evidence, and thereafter presenting that evidence to the SSDT. It is entirely proper, and fully compliant with the Society's statutory and ECHR responsibilities, for a fiscal who has formed the view that the evidence is not, or is likely not to be, sufficiently robust to persuade the SSDT to make a finding of professional misconduct to report that view to the Professional Conduct Sub Committees in order that the decision to pursue a prosecution may be reviewed.

The Professional Conduct Sub Committees can accept or reject the advice of the fiscal. There is ample precedent of the Professional Conduct Sub Committees having declined the fiscal's advice, and instructed the prosecution to proceed (see for example cases under Society's references 135 and C/09/1093). There is no question of the fiscal, in any cases, having unilateral authority to discontinue a prosecution; that remains a matter which can only be decided by the Professional Conduct Sub Committee.

The fiscals have no locus to advise the Professional Conduct Sub Committees as to what is or is not professional misconduct. In that regard, the SLCC's analysis, and recommendation at paragraph 5.15, is founded on a misunderstanding of the procedure which does not afford sufficient credence to the separation which exists between the role of the fiscal and the Professional Conduct Sub Committees.

Recommendations

5.3 The Society **accepts** the recommendation that the Society and the SLCC should continue to work together on reducing timescales for the investigation of hybrid complaints.



The Society nevertheless cannot accept the recommendation that the Society utilise the investigation reports compiled by the SLCC, because it would be irreconcilable with its obligations under the 2007 Act, and rules of evidence.

5.6 The Society considers that with regard to the second recommendation, there may be scope for considering alternative ways in which cases involving UPC (but not professional misconduct) may be disposed of, but that there would be a requirement for legislative revision, with appropriate safeguards, before any changes could be implemented.

The Society nevertheless cannot accept the first recommendation that it should consider instituting a fast track process for the expedition of certain complaints, as to do so would run the risk of breaching the legal rights of the parties, and the legal duties with which the Society is obliged to comply.

5.9 The Society **accepts** the recommendation that guidance ought to be issued to the Professional Conduct Sub Committees in respect of the imposition of fines for UPC. Guidance on compensation shall also be updated, and both sets of guidance shall be published on the Society's website.

5.12 The Society **accepts** the recommendation that findings of UPC should be published.

5.15 The Society **rejects** the recommendation that it should review the practice whereby complaints are, where it is considered to be necessary, remitted back to the Professional Conduct Sub Committees by the fiscals appointed to prosecute complaints to the SSDT. The practice is procedurally proper and competent, and the SLCC's criticisms of it are based upon a misapprehension of the role of the fiscals.

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