

Review of the Faculty of Advocates' complaints process

Scottish Legal Complaints Commission's approach to oversight

The Court of Session is responsible for regulating the professional conduct and discipline of advocates. The Court of Session has delegated this responsibility to the Faculty of Advocates (**Faculty**). This means Faculty is responsible for investigating and determining complaints about the conduct of advocates.

Advocates are individually regulated by Faculty, and being self employed their professional duties and obligations are theirs alone. Faculty is solely responsible for ensuring its members are competent to practice and for protecting the public.

The Scottish Legal Complaints Commission's (**SLCC**) oversight function forms a core part of the regulatory system for legal services in Scotland. We provide independent oversight of the complaints and redress system of Faculty.

Our aim is to ensure Faculty runs a well functioning conduct complaint handling process. By analysing trends and data we aim to drive improvement and ultimately to promote public confidence in the regulation of legal services.

Introduction

When Faculty issues the decision of a Complaints Committee or Disciplinary Tribunal it has a statutory obligation to share the written decision with the SLCC. Recent decisions highlight the variety of routes complaints can take through Faculty's complaints process. Complaints appear to have also increased in complexity, with the timescales for the completion of investigations varying considerably. These trends raise questions about how accessible the complaints process is for individuals wishing to make a complaint.

As a result, this review is focused on the route recent complaints have taken through Faculty's complaints process, and the time taken to complete investigations. The purpose of the review is to support Faculty to improve the clarity and transparency of its complaints process. We make both observations and statutory recommendations in this report.

We agreed with Faculty this review would cover all conduct complaints referred to Faculty for investigation by the SLCC since January 2020. We shared with Faculty the data we held on the nineteen conduct complaints referred during that period and

gave Faculty an opportunity to check and comment on the dataset, and to make any factual corrections to the draft report.

Handling complaints

Both the person who makes a complaint and the advocate complained about can make a handling complaint to the SLCC about how Faculty dealt with the investigation of the conduct complaint. Since January 2020 we have received one handling complaint from a complainer.

Under Section 36 of the Legal Profession and Legal Aid (Scotland) 2007 Act, we can make recommendations about Faculty's procedures for, and methods of dealing with conduct complaints. As a result of our handling investigation, we recommended Faculty improves the clarity of its Rules; writes a complaints policy and procedure manual; and reviews its training for Complaints Committee members.

Faculty must consider the recommendations and notify the SLCC in writing of the results of the consideration; and any action it has taken or proposes to take in consequence of the recommendations. Faculty has responded positively to the recommendations and agreed to take the actions detailed in the recommendations section of this report.

Faculty's complaints process

The administrative management of the investigation and consideration of conduct complaints, including at the Disciplinary Tribunal, is carried out by the Faculty Secretariat.

Complaints are assessed against the [Faculty of Advocates Disciplinary Rules 2019 \(the Rules\)](#) and the [Guide to the Professional Conduct of Advocates \(the Guide\)](#).

A Complaints Committee made up of an equal number of advocates and lay members considers each complaint. The Complaints Committee can choose to decide the complaint on its merits, to seek further information, or if necessary, to refer the matter to a Disciplinary Tribunal. The Rules also allow a Complaints Committee to refer a complaint to an Investigating Committee to investigate and report back to the Complaints Committee.

The Complaints Committee decides whether professional misconduct (**PMC**) or unsatisfactory professional conduct (**UPC**) has been proved, or if the complaint should be dismissed. A complaint must be proved beyond reasonable doubt, which is the criminal standard of proof. The Complaints Committee issues its decision in writing and provides reasons for its decision.

A Complaints Committee can choose to refer a complaint to the Disciplinary Tribunal for determination. Or if a Complaints Committee upholds a complaint, it can remit it to the Disciplinary Tribunal for a decision on penalty. This is because the Disciplinary Tribunal can issue more serious penalties than a Complaints Committee. Complaints are also referred to the Disciplinary Tribunal on appeal. The permission of the

Complaints Committee is required before an appeal can proceed. A retired judge chairs the Disciplinary Tribunal which is made up of the Chair, three lay persons and two advocates.

Faculty's Disciplinary Rules define unsatisfactory professional conduct (**UPC**) as:

“conduct that is not of the standard that could reasonably be expected of a competent and reputable advocate, that does not amount to professional misconduct, and that is not merely Inadequate Professional Services.”

Professional misconduct (**PMC**) is defined as:

“any conduct that is a departure from the standards of competent and reputable advocates and that would be regarded by such advocates as serious and reprehensible.”

The table below sets out the different penalties that can be imposed by a Complaints Committee following a finding of unsatisfactory professional conduct or professional misconduct, and the penalties a Disciplinary Tribunal can impose.

Complaints Committee penalties – Unsatisfactory Professional Conduct (UPC)	Complaints Committee penalties – Professional Misconduct (PMC)	Disciplinary Tribunal penalties
a written direction, with or without conditions	a written direction, with or without conditions	a written direction, with or without conditions
a verbal admonition	a verbal admonition	a verbal admonition
a formal written reprimand	a formal written reprimand	a formal written reprimand
a severe written censure	a severe written censure	a severe written censure
an order for cancellation or repayment in whole or in part of any fees charged or chargeable by the Member in respect of the work which has given rise to the complaint	an order for cancellation or repayment in whole or in part of any fees charged or chargeable by the Member in respect of the work which has given rise to the complaint	an order for cancellation or repayment in whole or in part of any fees charged or chargeable by the Member in respect of the work which has given rise to the complaint
an order for compensation to be paid to the Complainer not exceeding £3,000	an order for compensation to be paid to the Complainer not exceeding £7,500	an order for compensation to be paid to the Complainer not exceeding £15,000
a fine not exceeding £3,000	a fine not exceeding £7,500	a fine not exceeding £15,000
	suspension from practice, with or without conditions for a specified period not exceeding one year	suspension from practice, with or without conditions for a specified period not exceeding five years
		suspension from membership of Faculty, with or without conditions, for a period not exceeding five years
		expulsion from membership of the Faculty

Complaints Committee decisions

Of the nineteen complaints we looked at, one complaint was withdrawn, and was subsequently discontinued. A Complaints Committee considered the remaining eighteen complaints. Three of the eighteen complaints were referred to an Investigating Committee.

The Complaints Committee made the following final decisions:

- dismissed twelve complaints
- upheld four complaints as professional misconduct
- upheld two complaints as unsatisfactory professional conduct.

Appealing a decision of the Complaints Committee

An appeal is used to review whether a decision that has been made should be overturned or changed. If the complainer or advocate is unhappy with the decision of the Complaints Committee, they can make an application for leave to appeal the decision. For example, if they think the disciplinary outcome is wrong, or any part of the disciplinary procedure was unfair. The application for leave to appeal is made to the same Complaints Committee that originally considered the complaint. If leave is granted, the appeal is heard by the Disciplinary Tribunal.

The Rules say that leave to appeal to the Disciplinary Tribunal will only be granted where there is a real prospect of success or another compelling reason to do so. If the Complaints Committee refuses a leave to appeal application, the Rules allow either party to notify the Dean of Faculty (**the Dean**) that they wish to appeal the refusal to a Review Committee of the Disciplinary Tribunal (**Review Committee**).

In a total of six complaints, seven applications for leave to appeal were made following receipt of the decision of the Complaints Committee. Out of the seven applications, five made by complainers were refused and two made by advocates on the same point of appeal were granted.

In relation to the two granted applications, the Complaints Committee interpreted the Rules as only allowing it to grant or refuse the application for leave to appeal in full. Leave to appeal was granted on that basis.

Appealing a refusal to grant leave to appeal

Following an application for leave to appeal being refused, two complainers requested a Review Committee look again at their appeal application. One review did not proceed due to the personal circumstances of the complainer. In the second complaint the Review Committee granted the application.

The Rules state that the Review Committee:

“shall not allow an appeal against a decision of the Complaints Committee refusing leave to appeal unless it is satisfied that the decision of the Complaints Committee to refuse leave to appeal was not in accordance with the requirements

of these rules or that the Complaints Committee proceeded on a basis of fact contrary to the weight of the evidence”.

The Review Committee is not allowed to consider new information in relation to a complaint.

In the complaint considered by the Review Committee, the appeal was allowed in relation to part of the complaint only. This is in contrast to the view of the Complaints Committee referenced above, which was of the view the Rules only allowed it to grant or refuse a leave to appeal application in full.

The SLCC makes the following observations:

- The different interpretation of the Rules in relation to leave to appeal decisions reflects a lack of clarity in the Rules as currently written. This has the potential to undermine public confidence in the complaints process run by Faculty.
- The fact an application for leave to appeal must be made to the original decision makers has the potential to undermine the integrity of the process and the public’s trust in the process run by Faculty.

The Disciplinary Tribunal and Appeals

Under the current Rules a Disciplinary Tribunal, if allowing an appeal, may uphold the complaint in whole or in part. A Disciplinary Tribunal can also substitute or vary any of the penalties imposed by a Complaints Committee when upholding an appeal.

The Chair of the Tribunal decides the procedure to be followed by the Disciplinary Tribunal when hearing an appeal in circumstances where the Rules give no specific direction. From the complaints reviewed, it is clear the procedure followed by the Disciplinary Tribunal varies as a result of this rule. This raises questions about the transparency and consistency of the process at the Disciplinary Tribunal, and the impact on parties to a complaint.

The current Rules allow the Dean to submit Answers to the Grounds of Appeal. In one complaint, the Dean submitted answers with the aim of assisting the Disciplinary Tribunal. Due to the role the Dean can play in the disciplinary process, they appointed independent counsel, who took instructions from another Office Bearer.

The SLCC makes the following observations:

- If the Rules allow the Chair of the Disciplinary Tribunal to decide the procedure to be followed at appeal, the procedure must be clear to both parties to a complaint and must not be unpredictable or inconsistent. If changes are made to the expected procedure, reasons for this should be clear and parties given the opportunity to make representations.
- It is essential that parties, and particularly complainers, are provided with a clear explanation at the start of an investigation as to the different roles Faculty may play in the investigation of a conduct complaint.

Sanctions

Sanctions is the term used to describe the penalties that can be imposed if a complaint is upheld. The application of sanctions in a consistent and transparent manner is necessary to demonstrate to the public and the profession that they can have confidence Faculty is upholding standards of conduct and imposing proportionate and fair penalties when those standards are not met. However, there is no sanctions guidance issued by the Faculty of Advocates to assist Complaints Committees and the Disciplinary Tribunal with their decision making. In the complaints reviewed there is no obvious consistency in the penalties imposed.

As referenced in decisions of the Complaints Committee and Disciplinary Tribunal the purpose of sanctions is to:

- protect the public from misconduct and its consequences
- reflect the public interest in maintaining confidence in the profession and the administration of justice
- deter future misconduct by the member or others
- maintain trust in the Faculty and its disciplinary processes.

The table on page 4 of this report sets out the range of penalties and how these differ between the Complaints Committee and Disciplinary Tribunal.

Both Complaints Committees and the Disciplinary Tribunal refer to the Sanctions Guidance of the Bar Tribunals and Adjudication Service, in the absence of Scottish guidance. However, the Disciplinary Tribunal is also clear it is not bound by the guidance issued by the regulator in England and Wales.

The SLCC undertook work on [sanctions guidance in 2016 with input from Faculty](#). The absence of any sanctions guidance issued by Faculty is something the SLCC has continued to highlight.

The SLCC makes the following observation:

- It is not clear from the Rules what the difference is, in either severity or effect, of a written direction, verbal admonition, a formal written reprimand or a severe written censure. We believe this should be clarified in the Rules.

The SLCC makes the following recommendation:

- Faculty should issue sanctions guidance to improve the consistency and transparency of decision making in relation to the penalties imposed by Complaints Committees and the Disciplinary Tribunal.

Publicity

The SLCC has previously raised with Faculty the need to modernise its approach to the publication of both Complaints Committee and Disciplinary Tribunal decisions, to ensure that information on the outcome of complaints is accessible, useful, and transparent.

As the Rules currently stand, if a complaint is upheld (in whole or in part) by a Complaints Committee or the Disciplinary Tribunal, details of the determination and of any penalty imposed are maintained in a register kept by Faculty. The current register consists of the name of the advocate complained about, a note of the final determination (unsatisfactory professional conduct or professional misconduct), and of the penalty imposed. It is necessary for a complainer, or any other interested party, to visit Parliament House to inspect the register.

The Rules allow a Complaints Committee or the Disciplinary Tribunal to order additional publicity if it considers that the circumstances of the complaint justify this. The result is a lack of consistency and transparency in what and how disciplinary decisions are published. For example, in one complaint the Disciplinary Tribunal ordered that its decisions should be available on Faculty's website in full. The Disciplinary Tribunal considered it important that the public had access to the full terms of the decision, including the nature of the conduct and the reasons why the Disciplinary Tribunal reached its decisions. The Disciplinary Tribunal noted this would aid public understanding of the disciplinary process which Faculty has in place.

In a different complaint, the Disciplinary Tribunal decided the decision should be recorded in the register and a brief reference to the decision be made on Faculty's website. The Disciplinary Tribunal had concluded its written decision by drawing to the attention of all members of Faculty its views on the use of social messaging. The

SLCC considers this was an extremely important element of the decision, but a failure to publicise the full decision made it null and void.

The SLCC observes that Faculty's current Rules regarding publication are out of step with those in England and Wales where the Bar Tribunals & Adjudication Service publishes the finding and sanctions of past hearings. They are also out of step with the publication policy of the Scottish Solicitors' Disciplinary Tribunal.

The SLCC understands that Faculty is finalising a new publication policy and intends to implement it as soon as practicable. Once finalised the policy will require approval by the Lord President.

The SLCC makes the following observation:

- All regulators have to expect that parties may choose to make decisions public, which in turn may be picked up by the press or shared on social media. In this context a clear policy on how decisions will be published has never been more vital. This would also promote public confidence by demonstrating appropriate action is taken when a complaint is upheld. It would also ensure that the sanctions imposed and learning from complaints is shared with all members of Faculty.

Timescales

Faculty does not publish information on its website about its target timescale for the completion of investigations. However, the SLCC is aware Faculty aims to resolve most complaints within 9 months (approximately 270 days), prior to any appeal.

For each complaint, we analysed the time taken from the date we transferred our file to Faculty, to the date of completion of key stages of Faculty's complaints process.

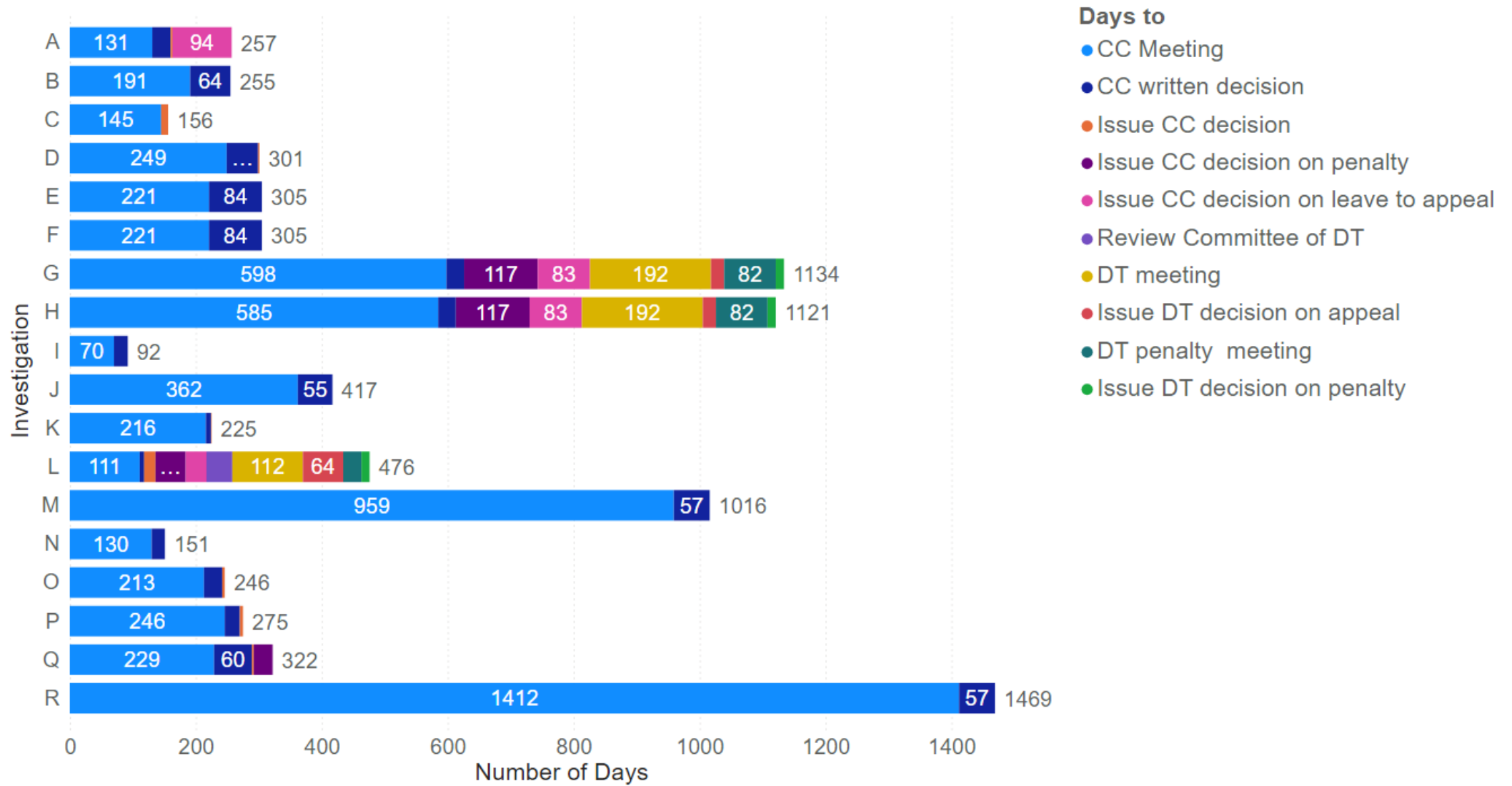
The timescales for completion of the complaints committee stage range from 92 days to just over 4 years. We found that the average time taken to complete the complaints committee stage was 450 days and the median time was 301 days. Of the eighteen investigations, nine were completed in under 300 days, and therefore close to Faculty's target timescale. However, we did find the following examples of delay in relation to five complaints:

- in one complaint the time between the date we transferred our file to Faculty and the completion of the complaints committee stage was 417 days.
- in two linked complaints the complaints committee stage took 813 days and 826 days to complete, respectively.
- in a further two linked complaints, one took just over 4 years to complete the complaints committee stage, and the other 2 years and 9 months.

When we include the three complaints referred to a Disciplinary Tribunal, the average timescale for the completion of the eighteen investigations increases slightly to 452 days, and the median time to 305 days.

The chart below breaks down each investigation into the time taken for different stages of the process and gives the total days for each investigation. In the key CC stands for Complaints Committee and DT for Disciplinary Tribunal. Full details on the data shown in the charts are available in the table in Appendix one at the end of this document.

Number of days per investigation with stages



The SLCC notes the wide variation in timescales across the eighteen complaints.

The SLCC makes the following observation:

- By simplifying its complaints process Faculty's aim of completing Complaints Committee investigations within 9 months will be more achievable.

Conclusions

We recognise that each complaint is unique and there are often multiple factors influencing both the route a complaint takes through Faculty's process and the time taken to complete an investigation. However, the SLCC considers Faculty's current complaints process to be overly complex and extremely challenging to navigate.

The starting point for any complaints process is that it should be understandable and accessible. Improving the clarity of the Rules and simplifying the complaints process is necessary to ensure it can be navigated by unrepresented complainers and easily understood by all parties. The inclusion of a revised publication policy is essential to ensure Faculty is accountable to the public for the decisions taken.

It is the responsibility of Faculty to provide complainers with information to ensure they fully understand the complaints process and can respond effectively. Clear timescales and an understanding of the process and what will happen next, are necessary to successfully manage the expectations of complainers and ensure they are not put under additional stress. Advocates often instruct counsel to represent them and respond to complaints. Without guidance a complainer representing themselves is at a significant disadvantage. However we note that in the complaints that progressed to a Disciplinary Tribunal Faculty provided support to the complainers through its free legal services unit without charge.

In addition to the Disciplinary Rules and Guide to the Professional Conduct of Advocates, a process document, with indicative timescales, would be of benefit to complainers, advocates and those managing and determining complaints. Currently, the absence of such a document makes it difficult for the SLCC to assess if Faculty is following its own standard process. Faculty may also wish to consider setting out more explicitly and succinctly the standards of conduct an advocate is expected to meet.

The SLCC makes the following recommendation:

- Faculty should create comprehensive guidance for complainers that explains the new Rules and complaints process, and the actions they are required to take at different stages of the process.

Recommendations

The completion of this review coincides with the response from Faculty to the statutory recommendations made in our handling report issued in December 2023. Faculty has responded positively to the recommendations and agreed to take the following actions:

Improve the clarity of its Rules

Faculty has committed to drafting new Rules and has approved the instruction of a parliamentary draftsmen to undertake this work. This work is anticipated to start in July 2024.

Faculty is also consulting on a proposal that the burden of proof be changed from the criminal standard (beyond reasonable doubt) to the civil standard (balance of probabilities).

Write a complaints policy and procedure manual

Faculty has committed to drafting a new policy and procedure manual, following completion of its work on the Rules and its new publication policy.

Review its training for Complaints Committee members

Faculty has agreed to review the training it provides for Complaints Committee members with the aim of introducing a new approach aligned to changes to its complaints procedures and the introduction of a complaints policy. The training will be developed alongside the new processes and implemented once the Lord President has approved the new Rules.

The SLCC welcomes Faculty's response to the statutory recommendations in the handling report and its commitment to implementing these improvements.

The SLCC makes the following additional statutory recommendations based on this review:

- Faculty should issue sanctions guidance to improve the consistency and transparency of decision making in relation to the penalties imposed by Complaints Committees and the Disciplinary Tribunal.
- Faculty should create comprehensive guidance for complainers that explains the new Rules and complaints process, and the actions they are required to take at different stages of the process.

We will monitor the progress of Faculty against the statutory recommendations at our quarterly meetings and when undertaking future handling complaint investigations. We have also made a number of observations in the report where we did not go as far as making a formal recommendation, but that we hope Faculty will consider and reflect on.

To engage and continue to support Faculty to comply with the recommendations in a reasonable timescale, we will in December 2024 seek a formal written update on progress. In June 2025 we plan to publish an update report on the progress Faculty has made in relation to our statutory recommendations.

Appendix One – Full data table

The table below shows how many days from the previous stage the investigation took to reach each stage.

Case	CC meeting	CC written decision	Issue CC decision	Issue CC decision on penalty	Issue CC decision on leave to appeal	Review Committee of DT	DT meeting	Issue DT decision on appeal	DT penalty meeting	Issue DT decision on penalty	Total time
A	131	29	3		94						257
B	191	64	0								255
C	145	0	11								156
D	249	50	2								301
E	221	84	0								305
F	221	84	0								305
G	598	28	0	117	83		192	21	82	13	1134
H	585	28	0	117	83		192	21	82	13	1121
I	70	22	0								92
J	362	55	0								417
K	216	8	1								225
L	111	7	18	48	33	41	112	64	29	13	476
M	959	57	0								1016
N	130	21	0								151
O	213	29	4								246
P	246	24	5								275
Q	229	60	3	30							322
R	1412	57	0								1469