**Citizens Advice Scotland: Response to the Scottish Government Consultation on Amendments to Legal Complaints**



Scotland’s Citizens Advice Network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people’s real-life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.



**Summary**

This Consultation seeks views on whether the proposals made 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 the issues which 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 stated aim of the proposals is to explore options to create a more flexible and proportionate complaints system that will be more efficient, yet just as effective. The proposals are intended to have a cumulative effect in meeting the objectives, and they 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; (this package includes 6 questions) and
3. Changes to the rules for fee rebates.

CAS generally supports the majority of the proposals set out in the paper, subject to two issues detailed below.

CAS would note that the proposed changes in this paper are not minor or administrative in nature. CAS has some concerns about whether the use of subordinate legislation to implement proposals to introduce new complaint categories and to alter thresholds for eligibility of complaints is appropriate. In many cases, the detail of the proposals will be subject to further consultation by the SLCC, which is unlikely to take place before the regulations are passed. While CAS is very happy to engage with the SLCC on these proposals, the lack of detail provided means that it is difficult to be definitive about the effect of the proposals on consumers.

In relation to the specific proposals, CAS has mixed views on the removal of the word “totally” from the phrase “totally without merit” when determining the eligibility of complaints. We mostly agree with the proposal to change the current wording, which can cause distress to complainers. However, for the reasons set out below we are less convinced by the proposal that the threshold for dismissing a complaint should be lowered.

For the reasons set out below, CAS does not support the proposal to allow the SLCC the discretion to close an issue as “determined” where a firm is willing to agree a suggested outcome at the conclusion of an investigation, but a complainer is not.

CAS does not believe that these two changes are in the best interests of consumers. We have concerns that these proposals place a greater emphasis on the speed and ease of administration of the complaints system than they do on the needs and rights of consumers. In so doing, they miss the opportunity to place consumers at the heart of any complaints process.

Finally, CAS would note that these proposals, whilst in most cases welcome, do not detract from the need for further reform of the regulation of the sector by means of primary legislation. CAS calls on the Scottish Government to prioritise these promised reforms, and those to legal aid, after the forthcoming election.

**Answers to consultation questions**

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?

CAS mostly agrees with the proposal to introduce a new, third complaint category to cover the situation where a single complaint issue may contain elements of both service and conduct. CAS notes that this would effectively re-introduce the process that was in place prior to the *Anderson Strathern* court ruling. CAS considers that this proposal has the potential to address the consumer detriment which this ruling has caused.

CAS is of the view that a single complaint issue may well contain elements of both conduct and service. Where this is the case, the issue must currently be treated as a conduct issue. This ruling has meant that the complainer cannot receive the same level of compensation as they would if the issue had been treated solely as a service complaint. Treating these issues as hybrid will allow the SLCC to consider the effects of any inadequate professional service on the client and allow the SLCC to award redress. This is one step towards placing the consumer at the heart of the complaints process.

However, CAS would note that there is potential for the differing tests and evidential standards which apply to service and conduct complaints to be confusing for the complainer. This aspect will need to be clearly explained. We know from research conducted by CAS as part of the Open Government Partnership that current levels of general consumer awareness around complaint processes are low[[1]](#footnote-2). We are concerned that if consumers cannot understand the process, then it may encourage unrealistic expectations and lead to an eventual loss of faith in the complaints process.

Further, the need for both bodies to investigate may run a risk of lengthening the time taken to investigate a complaint containing hybrid issues. This is not in the interests of either party and may potentially increase the costs of the system. CAS notes that the pandemic has increased the capacity of the system to use electronic files in the investigation process, rather than relying on paper files. This is especially pertinent in relation to solicitor’s case files. Where this is the case, it would clearly enable conduct and service investigations to take place in tandem, rather than one process needing to be complete before the other can commence. CAS would urge the Law Society of Scotland and the SLCC to take all possible steps to allow for the development of parallel investigations to help ensure less of a time lag for the complainer/consumer. CAS would note that it will still be important to provide capacity for some documents to be received in hard copy, either due to the complainer lacking digital access or skills or because the nature of the documentation makes it difficult to supply electronically.

In the longer term, CAS would welcome the development of a single investigation process and a single report to the parties, covering all issues of complaint, as this would significantly reduce the complexities of the system for both the bodies involved and the complainer themselves.

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?

This proposal would see the introduction of a presumption that every case would be investigated, with reasoning for a decision only provided if the case is being closed without investigation at this stage. CAS strongly agrees with this proposal.

CAS is of the view that the current eligibility process system is repetitive, cumbersome and time consuming, with the same tests having to be applied, in the same order, for each single issue of each complaint. CAS would support the move to a more streamlined system as this would be of benefit both to the parties and to those administering the process. This should allow for greater proportionality in the treatment of complaints, where serious conduct issues - with greater potential risk to consumers - can be passed to the professional bodies more quickly, enabling more effective consumer protection.

CAS notes that the SLCC is to develop, and publish, its policy on the use of its discretion. CAS would be happy to engage further with the SLCC on the development of this policy.

Finally, CAS supports the easy availability of mediation throughout the complaints process. A quick eligibility process has capacity to enable more rapid referrals to mediation before the parties’ positions become entrenched and may assist in resolving issues at an earlier stage.

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?

This proposal would amend one of the eligibility tests for complaints by removing the word “totally” from the phrase “totally without merit”. Together with other consequential amendments this would have the effect of lowering the threshold for dismissing a complaint.

CAS has mixed views regarding this proposal. We mostly agree with the proposal to change the current wording. However, we are less convinced of the rationale for lowering the threshold for dismissing a complaint.

The language of “totally without merit” used in the 2007 Act is unsympathetic and likely to make consumers feel that their complaints have been dismissed in their entirely. CAS would welcome the development of alternative phrasing that is less dismissive of a complainer’s concerns and may cause less offence or distress.

The proposal to replace the current wording with the words “without merit” would effectively lower the threshold for determining that a complaint is ineligible. It is proposed that the SLCC would consult on, and publish, guidance as to how this new test would be applied.

CAS believes that reducing the number of complaints being investigated may increase the number of cases in which a complainer feels their concerns have simply been dismissed. This may reduce public faith and confidence in the system and add to the perception that the system favours the profession. This is a key concern that needs to be borne in mind in relation to this issue in terms of determining when a complaint is ineligible. For this reason, CAS would encourage the SLCC to undertake as wide a public consultation on this issue as possible, to gauge consumer views in relation to this proposal.

CAS acknowledges that there are some cases where complaints should be sifted out at initial consideration, for example where they are repetitive, trivial, or where the behaviour complained of would not constitute a breach of the Service Standards. However, we believe that a more straightforward and proportionate application of the eligibility tests, as proposed elsewhere in this paper, would still allow these complaints to be dismissed, therefore also making the process more understandable for complainers if their complaint is sifted out.

For these reasons, CAS would support a reformulation of the wording “totally without merit” without a change to the meaning of the underlying test. For example, consideration could potentially be given to wording such as “has no prospect of success” or “has no basis in the Service Standards” or “is bound to fail”.

Whatever the wording settled on, it remains important that complainers receive clear, straightforward and understandable explanations if their complaint is not being taken forward. Otherwise, as outlined above this will potentially damage faith and public confidence in the process.

CAS would note that Legal Services are often purchased by clients in distressing or vulnerable situations. In such circumstances, any power imbalance between the parties can be exacerbated and it may be difficult for consumers to feel comfortable in expressing concerns about service. Even small matters may become magnified and it is important that any complaints system retains a degree of empathy, and encourages effective resolution, even where complaints are not being taken forward for investigation.

In addition, the arrangements for any review of a determination that a complaint is (totally) without merit must be clear. CAS is of the view that both parties should be entitled to one form of review within the Commission system, rather than any initial appeal lying direct to the Court of Session. An internal review is much more accessible to consumers. It does not require legal advice, or the expense of court dues or lodging fees, and does not engage any potential liability for judicial expenses. Further, it avoids the obvious argument that formal appeals are considerably easier and less intimidating for law firms to undertake than they are for consumers, thus raising arguments about inequality of arms. For these reasons, CAS would support the retention of one form of review within the Commission system, with an appeal to the Court of Session being available as an option of last resort in terms of the changes being proposed at this time.

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?

This proposal sets out possible amendments to allow for investigations and reports to be more proportionate to the circumstances of each service complaint, the parties involved and, where appropriate, the level of public interest. Again, it is proposed that the SLCC will consult on, and publish, its policy for determining the appropriate level of investigation to be carried out for differing levels of complaints.

The proposal would allow 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.

CAS mostly agrees with this proposal, which has potential to increase the timeliness and efficiency of complaint handling and to prioritise the most serious cases. CAS would again welcome engagement with the SLCC on the development of the detailed policy underlying this proposal.

However, there remains a risk that this proposal could increase the number of cases in which a complainer feels that their complaints have not been heard or have not been perceived as important. CAS would note that Legal Services are often purchased by clients in distressing or vulnerable situations. For this reason, it is vital that complainers receive accessible and understandable information on the disposal of their complaint together with clear information regarding the arrangements for lodging any appeal or requesting any review of a Commission decision. There remains a risk that this proposal will create a multi-tier system of complaints and that those complainers whose issues are classed as less serious will lose faith in the system, leading to an overall loss of public confidence.

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?

This proposal is that the SLCC may impose a complaints levy where a complaint progresses to investigation, or where a recommendation to uphold the complaint is made. Levies would be imposed in accordance with a published tariff, as currently occurs for cases which proceed to Determination.

CAS mostly agrees with this proposal. The proposed changes may help to ensure that those who choose to delay settlement by extending the work of the complaints system make a greater contribution to the costs of that system. CAS considers that the proposal may increase incentives for practitioners to undertake effective resolution at first tier or to enter mediation to avoid the need for a formal complaint to be investigated.

Currently complaint levies are only imposed on cases upheld at Determination. If levies were also imposed where a complaint is upheld at Investigation, this has the potential to lessen the financial burden on the wider profession, which currently contributes much of the running costs of the SLCC via the general levy.

However, where a firm has made every effort to resolve matters or where the recommended settlement following Investigation is no more than had already been offered by the firm, it may seem unduly harsh to impose a levy. CAS would note that the Legal Services Ombudsman has potential to waive a case fee in these circumstances and would recommend that consideration be given to similar arrangements.

In addition, where a firm would have accepted a recommended settlement at Investigation, but the complainer wished to proceed to Determination, CAS considers that the firm should not be required to pay a higher levy at Determination stage than that which would have been imposed at Investigation stage.

CAS considers that the argument for imposing a levy on all cases which proceed to Investigation, even where there has not yet been any finding of inadequate professional service is less clear. It may run the risk of discriminating against firms who practise in subject areas which are more likely to generate complaints, such as Executry or Conveyancing, and may make these areas less attractive to practitioners, thus increasing the difficulties consumers may already experience in obtaining representation. If such an approach is adopted, the SLCC may wish to consider whether a trigger level is applied, with a certain number of complaints per year being tolerated before levies are imposed. CAS would be happy to engage further with the SLCC on the details of any policy.

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?

This package proposes that the SLCC is granted the discretion to treat a complaint as “determined” where a firm is willing to agree the recommendation made at the conclusion of an investigation, but a complainer is not. The paper states that this will likely lead to cases being concluded earlier in the process without the need for consideration by a SLCC Determination Committee. Additional safeguards will be introduced by the SLCC, who will consult on, and publish, a policy for exercising these discretionary powers. The paper notes that it may be preferable to apply these provisions only to cases of lower value, distress or where there is no significant public interest involved in the complaint. The statutory right to appeal the decision will remain.

CAS strongly disagrees with this proposal. CAS notes that the statutory right to appeal any SLCC Determination is direct to the Court of Session. This is not an easily accessible route and carries the potential for any complainer to incur considerable costs as well as potential liability for judicial expenses. Many consumers may feel intimidated by the prospect of taking judicial proceedings in relation to a formal decision such as a Determination. This may particularly be the case if the appeal will require them to closely revisit issues associated with life events such as divorce and bereavement which may cause them further distress.

In practice, for most complainers, the SLCC’s Determination Committee is currently the only accessible form of review of any proposed Settlement. CAS believes that both parties should be able to request one form of internal review of any recommended outcome at Investigation stage without the need to commence judicial proceedings.

CAS considers that one of the strengths of the Determination Committee system is the fusion of the legal chair’s professional expertise and knowledge of practise norms together with the lay members views on the adequacy of the service provided. This is an important check and balance, and CAS would wish to see this retained, even in lower level cases without a significant public interest component.

CAS believes that an internal review within the Commission system is likely to be the most effective and accessible way of scrutinising the facts and findings of each case. For the reasons set out above in relation to eligibility determinations, any appeal to the Court of Session should continue to be a last resort rather than the only appeal option available in terms of the changes being proposed at this time.

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?

This proposal would allow publication of a wider range of information when the SLCC considers that it is in the public interest for it to do so. The SLCC would be able to publish information without the consent of the practitioner or firm. Decisions on what information to publish would be taken by a Determination Committee and it is proposed that the policy and criteria relating to decisions to publish would be consulted on and published by the SLCC. A mechanism to appeal any decision to publish is already provided in the Act.

In principle, CAS strongly agrees with this proposal. These changes could avoid consumers being exposed to a known risk and allow consumers to make more informed choices about which provider to choose. Last year, Citizens Advice Scotland commissioned YouGov to ask more than 1,000 people about their use of legal services. We found that overall, people struggle to know how to find or choose a solicitor to help them. Many people try and deal with issues themselves or hope the problem will go away. Consumers are often nervous about the legal system and feel intimidated by it, particularly if they haven’t dealt with it before. While most consumers who had used legal services would be happy to recommend their service provider, many people associated legal issues with difficulty and distress. While consumers valued solicitors’ professionalism and skills, they also perceived them as expensive and could be confused by legal terminology. On this basis, CAS welcomes the proposals as being likely to improve transparency and increase the information available to consumers when deciding to purchase legal services.

However, CAS notes that there is limited detail in relation to the mechanics of the proposal. We would welcome further information on what types of scenarios may be classed as exceptional, thus permitting publication. For example, would the guidance contain trigger levels as to the value or volume of complaints? Or guidance as to specific risks to consumers that would justify publication? CAS would welcome engagement with the SLCC on these issues in due course.

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?

This proposal would allow a process to be put in place for recovery of a rebate of fees where they cannot be paid by the practitioner because they are unable to pay due to death, insolvency or cessation of practice.

CAS strongly supports this proposal along with the proposal to increase the maximum value of compensation. This proposal will have a significant benefit for the small number of complainers who bring complaints against firms no longer trading or practitioners no longer in practice. Such complainers would otherwise be unable to obtain any award of fee rebates determined by the SLCC. Allowing for this recovery will assist these complainers in obtaining redress and enhance public confidence in the regulatory system.

Question 9: Please provide any further comments on the proposals set out in this consultation.

There is widespread acceptance that the current system for complaints is complex and confusing and that this impacts upon public confidence and client satisfaction. In undertaking reform of the current system for complaints, CAS would recommend approaches which enhance rather than diminish consumers’ and citizens’ rights to obtain effective and accessible redress.

CAS welcomes the majority of the reforms set out in this paper and believes that they will have the effect of making the current system more timely, efficient and responsive. However, the proposals in this paper do not fully address the significant and long-standing need for structural reform of regulation of the legal sector in Scotland. Whilst understanding the pressures on the Scottish Government as it responds to the demands of Brexit and COVID, CAS would urge the Scottish Government to bring forward fresh proposals for reform as soon as possible following the election in 2021 and the formation of a new government.

Finally, CAS endorses the views of the SLCC’s Consumer Panel in relation to the need for consumer input into reforms. It is vital that the Scottish Government gives due consideration to consumer responses and we believe that there is scope for a greater level of public engagement and input from those who use legal services, as the proposals are considered further.

**Contact information**

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1. [https://www.cas.org.uk/publications/holding-public-services-account-scotland](https:///www.cas.org.uk/publications/holding-public-services-account-scotland) [↑](#footnote-ref-2)