



Faculty of Advocates:

Update on 2016 benchmark report on the operation of the Faculty of Advocate's conduct complaints investigation & disciplinary processes

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1 Introduction

- 1.1 In September 2016, The SLCC concluded a review of the Faculty of Advocate's (FA) systems for dealing with conduct complaints and its current Disciplinary Rules, which govern the complaints handling process. The aim of the review was to benchmark the FA's current complaints handling processes for reference in any future audits and handling complaints investigations. The Faculty welcomed the review, commenting that it *"is pleased to have been able to engage in constructive discussions with the SLCC within the audit process and has valued the opportunity to discuss and consider its own functions..."*
- 1.2 During the course of the review, guided by procedural issues identified by the SLCC, the Faculty made a number of changes to its processes, to improve and update its methods and systems for handling complaints, including the creation of new leaflets and an internal review of the current rules.
- 1.3 Although the SLCC made no formal recommendations for immediate change to the Faculty's current complaints handling process, the SLCC identified that there are still improvements which could be made to the current Rules, which require approval of the Lord President before these can be implemented.
- 1.4 The SLCC identified that the Faculty should consider taking further steps in the following areas:
- Prepare and promote a set of consumer-friendly Service Standards for Advocates;
 - Create and publicise guidance and/or a tariff regarding the application of disciplinary sanctions;
 - Publish disciplinary findings on the Faculty's website;
 - Advertise the dates and names of disciplinary tribunal hearings on the Faculty's website; and
 - Put in place regular complaints handling training for advocates.
- 1.5 Both the SLCC and the Faculty agreed that the outstanding issues emanating from the original review would be revisited, with the view to publishing an update.

2 Update on the key findings

Application of the 2015 Rules

- 2.1 During the SLCC's review, the practical application of the 2015 Rules was discussed with the FA, and some of the Rules were identified by the SLCC as being potentially unclear (see table below).
- 2.2 The following table summarises the various operational issues which were discussed during the review and the current status of each of the issues:-

Rule/s	Existing Rule	Issue identified by SLCC	FA's response	Status	Timescale for completion/any issues?
2a	<i>"Conduct complaints remitted to the Faculty by the SLCC on or after 07 September 2015"</i>	<p>The date of the conduct occurring should be a relevant consideration, given the change to sanction levels in the 2015 Rules?</p> <p>The FA needs to be clear about which set of Rules would be applied where the conduct pre-dates the 2015 Rules coming into force.</p>	<p>The 2015 Rules will only apply to a complaint referred to the FA from the September date. For everything else, the 2008 Rules would apply. However, if the conduct took place before 07 September 2015, the earlier set of Rules would be applied. It is anticipated that this will be made clear in the proposed redraft of the 2015 Rules.</p>	<p>This has been reworded to state:</p> <p><i>"Conduct complaints remitted to the Faculty by the SLCC on or after 7 September 2015 in respect of conduct which took place after that date"</i>.</p>	<p>Pending approval from the Lord President</p>
3	<i>"Professional misconduct" means any conduct ... competent and responsible advocates..."</i>	<p>This amendment changes the test for Professional Misconduct from "reputable" to "responsible"? The cases of 'Sharp' and 'Sandeman' refer to 'bringing the profession into disrepute'. Is this a drafting error?</p>	<p>Yes. This is a drafting error in the Rule. Rule 3 amended to "Professional misconduct means 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".</p>	<p>Still to be changed</p>	
8	<i>"A complaint may be withdrawn by the Complainer, in writing, at any time before it is determined. Where a complaint is withdrawn by the Complainer, and unless the Dean directs otherwise, no further steps shall be taken in respect of the complaint"</i> .	<p>The process for dealing with withdrawn complaints needs to be clear. What is the situation where a complainer does not engage in the investigation, i.e. can a complaint be abandoned or discontinued for lack of engagement? A robust process should be put in place for the appropriate person within the FA to</p>	<p>The Complaints Committee has discretion not to allow a complaint to be withdrawn and will operate a public interest test. The FA will submit its own complaint to the SLCC where it is taking on the complaint in its own name.</p>	<p>CLOSED</p>	

		decide whether a complaint should be pursued of its own motion & to proceed to make a new complaint through the SLCC's usual eligibility process.			
9	<i>"A Complainer is presumed to have waived any right to confidentiality or privilege in respect of the Member, and the Member is entitled to rely upon and to disclose all or any information or documents that he or she considers to be necessary to answer the complaint".</i>	<p>The FA needs to be aware of third party complaints and how documentation received should be handled differently where the client is not the person complaining.</p> <p>There are further restricting provisions in Section 52 of the 2007 Act regarding duty of confidentiality? The FA needs to also be cognisant of the statutory constraints.</p>	<p>Cross copying is done routinely and openly unless there is an issue of confidentiality.</p> <p>A standard paragraph will be drafted into initial correspondence with the parties to the complaint stating: <i>"Please note that the Faculty operates an open and transparent process when administering a complaint in that copies of all information submitted will be provided to both parties unless there is an issue of confidentiality in relation to a particular document(s) which is raised by one of the parties, which may require that information is not cross-copied"</i>.</p>	<p>This has been incorporated into the leaflet "A practical guide for complaining parties and counsel".</p> <p>Unknown if this has been further incorporated into any other initial correspondence sent to the parties.</p>	
10-15	Interim suspension of advocates pending determination / final disposal of a complaint	<p>What are the parameters/rules around interim suspensions?</p> <p>What is the process for making submissions (oral/written)?</p> <p>Are the appeal/review provisions clear?</p>	Submissions will be invited by the Dean, in writing or orally, and according to the Rules. There is a petition to the Court to approve the Dean's decision to suspend on an interim basis. The advocate has an opportunity to object before the Court, which is why there is only an appeal of a review (and not an appeal to the Dean	CLOSED	

			of the original decision).		
17(b)-(d)	<i>"The Dean's Secretariat shall have the power to make such further enquiry as may be appropriate with a view to...(b) investigating the facts relevant to the complaint... (d) obtaining any material ...that may assist the Complaints Committee in its determination and disposal of the complaint".</i>	It is not clear what the output of undertaking such action is? In the absence of a report on the complaint, what documentation is prepared in advance of the Complaints Committee meeting?	After the administration and investigation, the papers are prepared in full for the Complaints Committee and accompanied by a summary highlighting the reason for the complaint coming before the Committee, what the key documents are and what outcomes are possible. There will not be an index of documents, but the Committee's papers are numbered and provided before the meeting with the summary.	CLOSED	
18(b)	No provision for oral submissions	What process is in place for oral submissions to be made to the Complaints Committee by the parties to the complaint?	Rule 18(b) amended to <i>"...the Complaints Committee may...make such further enquiries as it considers to be appropriate, including...(ii) hearing oral representations from either the complainer or the Member, or both".</i>	Still to be changed.	
18(f)	Amended existing Rule regarding reference to <i>"Where the complaint is one of Professional Misconduct..."</i>	The SLCC does not remit complaints as either a Professional Misconduct or Unsatisfactory Professional Conduct complaints, it simply refers "conduct complaints", which may be capable of meeting either of the tests.	Rule 18(f) amended to <i>"Where the complaint is upheld as one of Professional Misconduct..."</i>	Still to be changed.	

25-26	Imposition of penalties by Complaints Committee	There is no reference to training orders/legal update or any other action as might be considered appropriate by the FA.	<p>The FA will give further consideration to whether guidance should be prepared for use by the FA's decision-makers, and published for consideration by complainers and advocates.</p> <p>The FA does not wish to fetter its discretion and wishes the Rules to remain as flexible as possible. There is the risk that publishing a tariff or guidance would give false expectations, as each case will be looked at on its own facts. Reasoned decisions are provided to confirm the reasons for applying the sanction.</p> <p>The FA does not consider it necessary to specifically state that training orders are an available sanction, as this is a possibility under the existing Rules, and could be covered in a written direction.</p>	<p>CLOSED</p> <p>Although penalties are addressed in the FA's guide for complainers, there is no detail on what these penalties are.</p>	
27	No provision for the complainer to make oral or written submissions	SLCC emphasised in its sanctions guidance for RPOs, how important it is to hear on the question of sanctions (particularly vouching for compensation) from the complainer.	<p>Rule 27 to be amended to <i>"Before it imposes any penalty, the Complaints Committee shall invite comment from the Complainer within such period as shall seem reasonable to the Complaints Committee ...Thereafter, the Complaints Committee shall invite the Member to make such written or oral representations..."</i></p>	<p>This has been reworded to state: <i>"Before it imposes any penalty, the Complaints Committee shall invite the Member to make such written or oral representations in relation to penalty as he or she thinks fit and shall invite comments upon that matter from the</i></p>	Pending approval from the Lord President

33-34	<p><i>"The Complainer may with leave of the Complaints Committee, appeal to the Disciplinary Tribunal against the dismissal of the complaint".</i></p> <p><i>"The Member may, with leave of the Complaints Committee, appeal to the Disciplinary Tribunal against the final disposal of the complaint".</i></p>	<p>How is this impartial if the parties can only apply for leave to the same committee that made the decision to dismiss the complaint?</p> <p>Why is the complainer unable to appeal against the final disposal (which is possible under Section 42ZA (11)-(12) for disposal in solicitor complaints)?</p>	<p>The appeal to the same Committee is usual in a court case and so the FA is following the standard model.</p> <p>Consideration will be given to redrafting the current Rule to afford complainers the same rights of appeal as those which are provided in the Rules for advocates. In light of the availability of compensation for complainers, it does appear appropriate for complainers to be given an opportunity to appeal against the penalty set by the Complaints Committee.</p>	<p><i>Complainer."</i></p> <p>This has now been amended to state:</p> <p><i>"The Complainer may, with leave of the Complaints Committee, appeal to the Disciplinary Tribunal against the final disposal of the complaint".</i></p>	<p>Pending approval from the Lord President.</p>
37	<p><i>"Leave to appeal to the Disciplinary Tribunal shall only be granted on cause shown".</i></p>	<p>This legal concept needs to be explained in lay persons terms if complainers are to be signposted to the Rules instead of being provided with separate guidance on the appeals process.</p>	<p>Rule 37 amended to <i>"Leave to appeal to the Disciplinary Tribunal shall only be granted where there is a real prospect of success, or another compelling reason to do so".</i></p>	<p>This has been reworded to state:</p> <p><i>"Leave to appeal to the Disciplinary Tribunal shall only be granted where there is a real prospect of success or another compelling reason to do so".</i></p>	<p>Pending approval from the Lord President.</p>
55	<p><i>"Any hearing before the Disciplinary Tribunal shall be held in public unless on its own motion, or on the application of the Complainer, the Member, or the Dean, the Tribunal considers that it would be appropriate for it to be held in</i></p>	<p>The parties appear to be advised when the hearing is to take place, but how can this to be said to be "in public" if the only notification of the hearing is to the parties to the complaint?</p>	<p>The hearing is not publicised other than to counsel and the complainer. There is nothing preventing either party from inviting other members of the public, but the hearing is not published on the FA's website or at Parliament House. It is, however, open to members of the public to attend, should they wish to</p>	<p>Partially complete. Dates and times of Disciplinary Hearings are now appearing on FA's website.</p>	<p>Issue outstanding:</p> <p>There is no mention of the name of the Advocate involved or the venue which the Disciplinary Hearing will be held.</p>

	<i>private</i> ".		<p>do so.</p> <p>The FA will advertise on its website, the details of scheduled Tribunal Hearings, including the date, time and venue for the Hearing and the name of the Advocate complained of. In some cases, the Tribunal may decide to hold the hearing in private, which will be decided at the start of the hearing.</p> <p>It is not necessary for the Rule to be changed if the Tribunal decides of its own motion to sit in private and does not physically meet and deals with matters electronically.</p>		
64	<i>"Before it imposes any penalty, the Disciplinary Tribunal shall invite the Member to make such written or oral representations in relation to penalty as he or she thinks fit"</i> .	What about input from complainers (particularly re: compensation – see Rule 27 above)?	<p>Prosecuting Counsel would have a role in exercising professional judgement here.</p> <p>Rule 64 is to be amended to coincide with the changes which are to be made to Rule 27.</p>	Has been amended to read: <i>"Before it imposes any penalty, the Disciplinary Tribunal shall invite the Member to make such written or oral representations in relation to penalty as he or she thinks fit. Prosecuting Counsel shall have an opportunity to offer comments from the Complainer but shall have discretion in deciding whether to do so or not"</i> .	Pending approval from the Lord President.
69	<i>"In the determination of any complaint under these</i>	This is not in-keeping with other RPOs which operate a lower	This is the standard which the FA has always applied and will continue to	CLOSED	

	<i>rules the Member shall be given the benefit of any reasonable doubt”.</i>	standard of proof for complaints upheld as UPC.	apply.		
71-73	<p><i>“Where a complaint is upheld (in whole or part)...details of the determination and of any penalty or penalties imposed, shall be published in a register kept by the Faculty for that purpose and available for inspection”.</i></p> <p><i>“Where a complaint is dismissed... shall not be published in the register referred to in paragraph 66* unless the Member so requests”.</i></p> <p><i>“The Complaints Committee, or the Disciplinary Tribunal...may in its discretion order any additional publicity if it considers that the circumstances of the complaint justify additional publicity”</i></p>	<p>The Rule is unclear as to whether publication in the register relates to findings of Unsatisfactory Professional Conduct as well as Professional Misconduct.</p> <p>The register is held at Parliament House by the FA and is available for inspection. Is this sufficient publication in this day and age? Is the public aware of the register? Should the FA be more transparent about its findings against advocates, i.e. publish on its website or in the legal press?</p>	<p>The register will include reference to all conduct complaints, subject to any conditions.</p> <p>The register is hard copy only.</p> <p>The Rule already allows the FA to publish more widely if it is considered appropriate to do so. The FA is considering whether it does, as a general rule, wish to publish outside the FA. The FA is concerned that this could be considered disproportionate if the finding is one of Unsatisfactory Professional Conduct or a one-off Professional Misconduct matter. Publication could have a significant impact on the advocate and his/her livelihood.</p> <p>The public is protected by the action taken by the FA in sanctioning the advocate. Publishing the decision does not afford any additional protection. There is no direct client/advocate relationship. Solicitors instruct advocates, which also provides an additional safeguard.</p> <p>The issue of publication is an on-</p>	No change	

			going matter for further consideration by the Dean of Faculty and Faculty Council.		
	Other issues arising from Benchmarking exercise	Issue identified by SLCC	FA's response	Status	Timescale for completion/any issues?
Para 3.1-3.2	Service Standards		Following discussions with the SLCC, the FA were in the process of drafting a set of service standards.	Ongoing	
Para 3.3-3.4	Record keeping		The FA has confirmed that it is updating its IT systems and is implementing a document management project this year, which will cover all aspects of the FA's work, including complaints and disciplinary matters.	Ongoing	FA has confirmed that the doc management project is mainly complete with a few outstanding issues to be resolved.
Para 3.10	Practical guide for complainers & counsel		It is FA's intention to issue the leaflet to both complainers and advocates at the outset of the complaints investigation. The document will also be accessed through its website and linked to from the SLCC's website.	Complete	

Summary of findings

- 2.3 During the SLCC's review, the FA had agreed to amend the wording of certain Rules. The SLCC is pleased to see that many of these changes have been made. However before any changes to the 2015 Rules can be brought into force, there needs to be approval by the Dean of the Faculty, Faculty Council and the Lord President. This has not yet happened but the FA has confirmed that it is in the process of doing so.

Conduct and service standards

- 3.1 Prior to the SLCC's review, the FA had set its own conduct standards for advocates, which are publicised to the profession and the public as the 'Guide to the Professional Conduct of Advocates 2008'. The FA had made no provision, however, as to what standards are expected regarding the quality of professional services which are provided by advocates to their instructing agents and their 'clients'.
- 3.2 Following discussions with the SLCC, the FA undertook to draft a set of service standards for advocates. The intention being to assist advocates and the public in understanding what service they can expect from advocates, and also the SLCC in assessing whether an advocate might have provided an 'Inadequate Professional Service' (Section 46 of the 2007 Act). The FA had prepared a draft and sought comments from the SLCC, which were provided. To date, the service standards for advocates are still in draft form and a date for completion and publication of these standards has not yet been set.

Case management/file keeping

- 3.3 The FA has confirmed that it does not operate a dedicated electronic case recording system for dealing specifically with complaints.
- 3.4 During the review, the FA did confirm that it was in the process of updating its IT systems and was implementing a document management project in 2016, which was to cover all aspects of the FA's work, including complaints and disciplinary matters. It was envisaged that this would improve record keeping functions. As detailed in the table, the FA has advised that this project is mainly complete. The SLCC looks forward to receiving details of the changes which have been made and what improvements the FA hopes to see once the project has been finalised.

Training

- 3.5 The FA confirmed that from time to time, training programmes take place in-house for legal and lay members of the Complaints Committees and the Disciplinary Tribunal. The Faculty Solicitor maintains training for legal members through CPD. The FA has confirmed that its current lay members have been in post for a significant length of time and as such, are experienced in dealing with complaints. However, following the appointment of any new lay members, it will be necessary to run complaints handling training for these new members, as and when this becomes necessary. It is envisaged that such training would be offered in-house, but may be supplemented by training offered by the SLCC. To date, there have been no new appointments to the Complaints Committee and the Disciplinary Tribunal so such training has not yet taken place.
- 3.6 In terms of other training, the SLCC works together with the FA to deliver the following:
- Training to Faculty Devils on the complaints investigation process, complaints prevention and good practice in complaints handling;
 - Seminars on excellence in complaint handling;

- Complaint handling updates for Faculty Clerks who assist Advocates in dealing with complaints.

All of the above courses are delivered on an annual basis.

- 3.7 The SLCC and the FA also put together a jointly agreed guide for advocates about best practice in dealing with complaints, which is available to advocates through the SLCC's website [here](#).
- 3.8 One other finding from the review was that the FA does not currently offer advocates any other formal training which specifically relates to complaint handling. Following this, in December 2016, the FA and SLCC delivered training on complaints handling, which was tailored to suit advocates specifically. Going forward, it is intended that this training will be run on a more regular basis.

Communication/information services

- 3.9 The original benchmarking report recognised the steps that had been taken by the FA to update its website.
- 3.10 One issue arising from the review was that the FA had no public information its website about how the FA deals with conduct complaints. Following the review, the SLCC is pleased to see that the FA has published an information leaflet entitled 'A practical guide for complainers and counsel', which is intended to provide a simple outline of the practice and procedure that will be followed by the FA in its handling of a conduct complaint. It is FA's intention to issue the leaflet to both complainers and advocates at the outset of the complaints investigation. The document can also be accessed through the FA's website [here](#).
- 3.11 The FA has also prepared a leaflet entitled, "Why instruct an Advocate?" was to provide more information on the role of an advocate e.g. what type of work they can carry out and some detail on an advocate's duties to both the client and the Courts. The SLCC asked for and provided some suggested amendments and additional text e.g. who can instruct an advocate? The SLCC looks forward to the FA publishing this document, and will provide a link so that it can also be accessed from the SLCC's website.

4 Conclusions & Recommendations

- 4.1 A significant amount of work has already been undertaken by the FA during the course of, and following the benchmarking exercise. It is noted that not all the recommendations have been finalised, but the SLCC welcomes the ongoing commitment by the FA to implement further changes.
- 4.2 The SLCC looks forward to receiving the FA's consumer-friendly set of service standards for advocates in due course. It is intended that the SLCC will then use these standards to benchmark against when deciding complaints alleging Inadequate Professional Service (defined by Section 46 of the 2007 Act).

- 4.3 As previously stated, the FA had confirmed that it intended to put forward its proposals for changes to the 2015 Rules (as highlighted in the table at paragraph 2.2) to the Dean of Faculty and Faculty Council as soon as possible, with the intention that a proposed amended Rules document could be placed before the Lord President for approval by the end of 2016. Although the amendments of the 2015 Rules have not yet been approved, the FA has confirmed that it is in the process of doing so. In the event that the Lord President refuses the proposed Rule changes, further discussions will have to take place between the SLCC and FA.
- 4.4 Once the Rules have been approved, the SLCC will publish an amended version of the SLCC's 'Overview', reflecting the FA's proposed Rule and process changes. The document will be available on the SLCC's Handling Complaints webpage, to inform potential complainers of what they should expect from the FA's investigation process.
- 4.5 Regular liaison between the SLCC and the FA should provide reassurance that any ongoing issues will be addressed as these arise. In addition, the SLCC will continue to monitor all complaints being remitted to and disposed of by the FA.

5 Acknowledgment

- 5.1 The SLCC would once again like to thank the Dean of Faculty, the Vice Dean, the Faculty Solicitor and FA staff for their time and co-operation during this review.