

FACULTY OFFICE

APPLICATION TO LEGAL SERVICES BOARD FOR AN ALTERATION TO REGULATORY ARRANGEMENTS

Notaries Practice Rules Notaries (Conduct & Discipline) Rules

On behalf of the Master of the Faculties I am making the above application under Part 3 of Schedule 4 of the Legal Services Act 2007 ('LSA 2007') and the rules made by the Legal Services Board under that part. This application should be read in conjunction with the several annexes listed at the end.

Outline

Various amendments are proposed to the existing Practice Rules and Conduct and Discipline Rules. They can be summarised as follows:-

Practice Rules

- new requirement that notaries provide clients with a prescribed form of complaints information which complies with the 'signposting requirements' of the Legal Services Board both as to the right of complaint, how to complain and the right of application to the Legal Ombudsman

Conduct and Discipline Rules

- failure to observe the Practice Rules expressly made a disciplinary offence
- establishment of a revised 'first-tier' complaints procedure for handling complaints in the first instance
- provision for the Faculty Office to instigate disciplinary proceedings against a notary when in receipt of evidence of misconduct even in the absence of a complaint
- the increase in the maximum financial penalty which can be ordered as a result of disciplinary findings

In addition this application includes two complaints procedures which are to be authorised under the Conduct and Discipline Rules as part of the system of first-tier complaints handling, along with the proposed prescribed form of complaints information.

The Practice Rules 2009

The Practice Rules 2009 are the current rules which regulate how a notary must conduct his practice. The rules set out the requirements of professional practice such as the duty to act impartially with respect to notarial acts and the binding nature of undertakings. We do not propose to make substantial alterations to these rules which were only recently revised to take account of current best professional practice.

We do however apply to make a new Practice Rule 5A. This rule establishes a duty to provide instructing persons with a prescribed form of complaints information. This

prescribed form of complaints wording must contain, the rule provides, an explanation that the instructing person “has a right to make a complaint under the Conduct and Discipline Rules 20[--] and Legal Services Act 2007 and how to make such a complaint.” The prescribed form of wording (Annex 3) constitutes a part of this application. The Practice Rule 5A provides the Faculty Office (with the approval or exemption of the LSB) with the flexibility to alter the wording of the complaints information from time to time to take account of possible changes to regulatory arrangements, whether by way of fine-tuning or more radically.

Turning to the prescribed form of complaints information, this sets out for the benefit of the client how to make a complaint. This is basically as follows:-

- the client is encouraged to be in contact with the notary if he/she is dissatisfied with the standard of service
- if the client wishes to make a complaint he/she is informed that he/she may have that complaint heard according to an approved procedure
- if the client has his/her complaint considered under an approved procedure, he/she may at the end of that procedure or after a period of eight weeks from the date of making the complaint, make his/her complaint to the Legal Ombudsman, if he/she is not happy with the result
- information about how to contact the Regulator and the Legal Ombudsman is provided.

The prescribed form of complaints information permits a certain amount of variation by the notary depending upon whether he/she is a member of a representative society (either the Notaries Society or the Society of Scrivener Notaries) which has a complaints procedure approved by the Master of the Faculties and Legal Services Board.

Conduct and Discipline Rules

The Conduct and Discipline Rules 2009 are the current rules which set out the disciplinary procedures which exist for notaries. They are the rules which allow the Faculty Office to discharge its duty section 112 of the LSA 2007 to resolve complaints made against notaries. The arrangements set out in the rules break down into two main regimes. There are procedures relating to the standard of service on the one hand and procedures intended to deal with misconduct on the other, with the possibility for complaints originally treated as service complaints to be referred to be dealt with under the disciplinary regime if issues of misconduct come to light.

Since 1993 service complaints have been handled by the representative society of which the notary is a member in accordance with a written procedure authorised by the Master of the Faculties. Conduct issues are investigated by a ‘nominated notary’, an experienced independent notary appointed by the Faculty Office, who then prosecutes the case in the Court of Faculties. The Court is presided over by a judge and two assessors who hand down a written judgment which may include penalties such as striking-off a notary from the Roll of Notaries or a financial penalty.

Notaries are in an unusual position compared with the majority of legally authorised persons in England and Wales in that the majority practise as sole practitioners in their notarial capacity, even though they might also be employed by a firm of solicitors or be partners in such a firm if entitled to practise as such. For this reason the operation of an independent procedure for the handling of complaints relating to service has, in the view of the Faculty Office, been seen to provide the only credible way of addressing a client's grievance. The Notaries Society has operated a procedure for its members, and the Society of Scrivener Notaries for its own. The operation of this system has proven to be a cost-effective and expedient way of administering complaints. This application seeks to rely upon the procedures authorised by Rule 3 of the Conduct and Discipline Rules contained in annexes 4 and 5 which have been suitably amended to take into account the Scheme Rules of the Legal Ombudsman. The provision made for complaints to be handled under these procedures is made under section 112 (2) LSA 2007 and OLC Scheme Rule 3.1:

“Dealing with complaints themselves, 3.1 – Authorised persons including legal practitioners and others must comply with their Approved Regulator's rules on handling complaints, including any requirements specified by the Legal Services Board”.

The right for a complainant to apply to the Legal Ombudsman after a period of 8 weeks from having made a complaint has been imbedded in the written procedures, and other amendments to the procedures have been made so that they are easy to follow and designed to produce a quick outcome. The determinations of the approved procedure are not binding on either party (although the notary has a duty to co-operate with the procedure – see Rule 3.3) and the recourse of a client not satisfied with the outcome of the procedure or in cases where the notary refuses to accept the decision, is to apply to the Legal Ombudsman (as with any first-tier system). The Master of the Faculties is minded to approve the new procedures and they accompany this application as part of the change to our regulatory arrangements. In addition to the amendment of the existing procedures operated by the representative societies, Rule 3.4 establishes a ‘panel of notaries’ one of whose number will handle such complaints in the absence of such an approved procedure (either because the notary is not a member of a representative society, or the procedure has not been approved, or for any other reason, such as a conflict of interest having arisen which would render the complaint unnameable to be handled by a particular representative society). Such a member of the panel of notaries would be provided with full details of the complaint and make a non-binding determination. The complainant may again apply to the Legal Ombudsman at the exhaustion of this procedure as provided by the Scheme Rules.

We are confident that although there are in fact several procedures designed to handle first-tier complaints, the system can be made easy for the client to follow. The client is in every case to be handed a prescribed form of complaints information which is tailored to that notary's specific situation. Extraneous information, for example on the Faculty Office website, will explain that a complaints procedure exists which is operated by that notary's membership society. The system is of greater uniformity across the profession than would be the case if each notary had his/her own in-house procedure.

We also apply for the Conduct and Discipline Rules to be amended in Rules 6 and 8 to permit the Faculty Office to instigate disciplinary proceedings on receiving evidence of misconduct even in the absence of a formal complaint. Such evidence might be, for example, publications of reports in the press about a notary's misconduct. Such evidence would be subject to examination by the Court after being investigated by a nominated notary. This would empower the Faculty Office to take action to protect the public even if no person was willing to come forward to bring a complaint about the alleged misconduct.

We also apply for the definition of a 'competent complainant' to be extended to 'any person who had placed legitimate reliance on a notarial act which has been prepared, performed, authenticated, attested or verified a notary'. This corresponds with the duty imposed on a notary in Practice Rule 5 and under the general law to such a person.

Further we apply to clarify the definition of 'notarial misconduct' to make it clear that this includes contravention of the Practice Rules, thus ensuring that the Practice Rules are enforced under the Conduct and Discipline Rules and making the rules consistent with each other.

We apply to amend Rule 6.5 to permit the Faculty Office on receiving prima facie evidence of gross misconduct to suspend promptly a notary's practising certificate or impose conditions on his/her ability to practise, pending disciplinary proceedings. A right of appeal to the Master is provided. This is a measure intended for the protection of the public.

We apply to amend Rule 9.2.2 to raise the maximum monetary sum, by way of disciplinary sanction, to £10,000, as the existing sum is considered too small.

We apply for all other minor or consequential amendments which appear as track changes in Annex 2 to this application.

Compliance with the regulatory objectives

Section of the LSA 2007 requires approved regulators to comply with the following objectives:-

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

In light of the regulatory objectives I have the following comments:-

(a) protecting and promoting the public interest

The amendments to the provisions relating to the misconduct of notaries in Conduct and Discipline Rules are intended to further reinforce a robust disciplinary system for the protection of the public. The amendments to both sets of rules relating to first-tier complaints not involving misconduct are intended to adjust the current system of complaints-handling to correspond with the opening of the Legal Ombudsman. The prescribed form of complaints information in particular is designed to make it easier for clients to know how and when to complain.

(b) supporting the constitutional principle of the rule of law

The Practice Rules and Conduct and Discipline Rules play two important roles in the regulation of notaries. The Practice Rules stipulate what notarial conduct must be. The Conduct and Discipline Rules provide the disciplinary proceedings when there is an allegation of misconduct. This application contains an amendment to the Conduct and Discipline Rules which gives the Practice Rules express 'teeth'. Other amendments are intended to strengthen the Faculty Office's powers to regulate discipline, such as in the new power to act on evidence of notarial misconduct even in the absence of a specific complaint.

(c) improving access to justice

The first-tier complaints arrangements, particularly in the new requirement that notaries give clients a prescribed form of complaints information, will improve awareness amongst those relying upon the services of notaries of their legal rights of redress both through complaints procedures established by the Faculty Office and by signposting the Legal Ombudsman.

(d) protecting and promoting the interests of consumers

The amendments made to the Conduct and Discipline Rules have been made with the protection of the consumer in mind. For instance the raising of the financial penalty which the Court of Faculties can require to be paid (either to the complainant or to the contingency fund) provides a more adequate sanction in cases where a notary is found to be at fault.

(e) promoting competition in the provision of services

It is expected that the proposed changes will have a neutral effect on the promoting competition in the provision of services, except insofar a greater awareness of complaints handling mechanisms may encourage a heightened consciousness about the standard of service provided by notaries.

(f) encouraging an independent, strong, diverse and effective legal profession

The proposed amendments have been made with the intention of improving the defence of high standards of professional practice by strengthening the powers of

prosecution available to the Faculty Office. A profession with a coherent set of professional rules backed up with clear enforcement powers is more likely to be independent, strong and effective.

(g) increasing public understanding of the citizen's legal rights and duties

The new requirement for notaries to provide instructing persons with complaint information will promote recipients' understanding of the regulatory provisions which exist to help them to rely upon their legal rights.

(h) promoting and maintaining adherence to the professional principles

The 'professional principles' are:-

- (a) that authorised persons should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice,
- (e) that the affairs of clients should be kept confidential.

The Practice Rules currently contain rules which correspond with the professional principles referred to (save in relation to advocacy, which is not relevant to the work of a notary). The changes to the Conduct and Discipline Rules should help enforce the upholding of those rules of behaviour by reinforcing the tools available to the Faculty Office in prosecuting misconduct.

Compliance of the Regulations with the Better Regulation Principles

Section 28 of the Act imposes a duty on an approved regulator, so far as is reasonably practicable, to act in a way—

- (a) which is compatible with the regulatory objectives, and
- (b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.

The approved regulator must have regard to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
- (b) any other principle appearing to it to represent the best regulatory practice.

We have explained how the proposed amendments to the Practice Rules and Conduct and Discipline Rules comply with the regulatory objectives.

The amendments to both sets of Rules and other annexes which comprise this application have been formulated after several months of consultation with the two representative societies and have been scrutinised by the Master's Advisory Board which contains representatives of those societies.

While there is a reasonable prospect that there will be resource implications to new requirement to provide complaints information to clients, as that awareness may translate into more complaints, we consider that our approach is consistent with the complaints objectives in the Legal Services Act and promoted by the Legal Services Board and Legal Ombudsman. We consider that the use of the approved procedures is the most sensible way of moderating complaints made against members of a profession the vast majority of whom are sole practitioners. The use of the approved procedures have from our own experience been a fast and cost-effective way of handling complaints.

Amendments other than to the first-tier complaints handling system which are also subject to this application are considered to be reasonable improvements on a robust system of enforcing good conduct amongst notaries and strengthen the Faculty Office judicial machinery for dealing with what are rare examples of notarial misconduct. There are few resource implications to the Faculty Office in making those changes. It is also our belief that the disciplinary system, while robust, also provides a suitable judicial forum for dealing with conduct issues, where clear procedural rules, including rules of appeal, prevent prejudice to a notary's Article 6 rights to a fair hearing. The amendments to the rules do not change this.

How will the Faculty Office determine whether the Regulations have been successful in meeting their objectives?

The complaints information provided to clients steer them towards making a complaint about the level of service direct to the approved procedure rather to the Faculty Office (thus avoiding the delay and confusion of a referrals). However, when a complaint is reviewed by one of the representative societies under the approved procedure there is a requirement that the representative society notify the Faculty Office of the type and number of complaints being received, and the outcome in each case. Along with information supplied by the Legal Ombudsman on the number of complaints against notaries received by them, the Faculty Office should be in the position of collecting information about patterns in complaint-making and complaint-handling. This will allow the Faculty Office to keep the complaints first-tier system under review. The Faculty Office will be in a good position to obtain a picture of the working of the first-tier system because those complaints will be heard not by individual practitioners but by the panel of notaries and representative societies under the approved procedures. If a serious problem is detected in the way an approved procedure is being operated the Master could, as an emergency fall-back position, revoke the authorisation and complaints which will otherwise have been handled in that matter will revert to be dealt with by a member of the 'panel of notaries'.

Impact on other approved regulators

There are no anticipated adverse implications to other approved regulators because of the proposed amendments.

Timetable

The Master intends to amend the Practice Rules 2009 and to make the Conduct and Discipline Rules in the month following their approval by the LSB. The prescribed form of complaints information and complaints procedures will be approved at the same time.

List of annexes

- 1 – Practice Rules 2009 (with amendments as track changes)
- 2 – Conduct and Discipline Rules (with amendments as track changes)
- 3 – Prescribed form of complaints information under Practice Rule 5A
- 4 – The Notaries Society Complaints Procedure
- 5 – The Scrivener Notaries Complaints Procedure 2010

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