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Dear Paul

**Application to the Legal Services Board for an alteration to regulatory arrangements
Amendment to Rule 19 of the Notaries (Conduct & Discipline) Rules 2015 – Standard of
Proof**

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.

There are two proposed amendments to the Notaries (Conduct & Discipline) Rules 2015. The first is a substantive amendment to Rule 19 to replace the existing dual standard of proof with the single, civil, standard. The second amendment is to correct a typographical error in Rule 8.4.

Reason for the proposed alteration in regulatory arrangements

The proposed amendments to the **Notaries (Conduct & Discipline) Rules 2015** ("NCDR2015") are as follows:

- To amend rule 8.4:

*If the Nominated Notary upon investigating the evidence or an allegation of Notarial Misconduct considers that there is **not** a prima facie case of Notarial Misconduct he shall make a written report to the Registrar stating the reasons for his decision.*

This change is simply to insert the word 'not' to correct an error in the original drafting which was not picked up on review or during the process for submission or approval. The preceding Rule 8.3 deals with the situation where the Nominated Notary concludes that there **is** a prima facie case of Notarial Misconduct to be prosecuted. Rule 8.4 was intended to cover the situation

where the Nominated Notary decides that there is no case to answer and is required to provide a report to the Registrar to effectively set out his or her reasons for reaching that conclusion and the decision not to pursue a prosecution.

- to amend Rule 19 by removing the current rule:

19.1 Subject to Rule 19.2 the Court shall make findings of facts on the balance of probabilities.

19.2 Where the allegation made against the notary involves directly or by implication a finding of fraud, dishonesty or criminal activity on the part of the notary, the Court must be satisfied on the evidence beyond reasonable doubt.

and replacing it with:

19. The Court shall make findings of fact on the balance of probabilities.

When the 2015 Rules were prepared the Master, supported by the Commissary, felt that a dual standard would be appropriate with the criminal standard of proof being applied in any cases where the allegations against a notary amounted directly or by implication to a finding of fraud, dishonesty or criminal activity and the civil standard would apply to all other cases. The thinking behind the dual standard was, at its most basic, that the more serious allegations were likely to result in the most severe penalties and if, for example, a striking-off was contemplated, then the allegations ought to be proven beyond reasonable doubt.

You will be aware that, whilst accepting our approach during the approval process, the LSB nevertheless felt that the arrangement was 'not consistent with (its) policy position on standard of proof.' In the LSB's assessment report of regulatory sanctions and appeals processes published in March 2014, it stated that it "considers that the most appropriate standard of proof is the civil standard and that this should be introduced across all regulators, tribunal and appellate bodies."

The Master has taken account of the trend in recent case law, including in disciplinary cases relating to allegations of dishonesty, indicating that the civil standard of proof is being applied more widely in disciplinary cases across various regulated sectors (see, for example, *Re Arslan* [2016]EWHC 2862). The SRA's Disciplinary Procedure Rules apply the civil standard of proof although the Solicitor's Disciplinary Tribunal currently operate the criminal standard of proof. We are aware too that the Bar has recently consulted on this issue with a view to adopting the civil standard of proof in its own Tribunal & Adjudication Service.

Fortunately, we have not had cause to test the operation of the current Rule as no cases involving any allegation of fraud, dishonesty or criminal activity have been brought since its introduction (indeed, only one case has been heard by the Court since the coming into force of the NCDR2015). The Master, again supported by the Commissary, nevertheless feel that a move to the single, lower, standard of proof is appropriate.

Compliance with the regulatory objectives

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 amendment of Rule 8.4 of the NCDR2015 will require a Nominated Notary to justify his or her decision not to bring a prosecution where a complaint has been received and investigated which is, we believe, in the public interest. Similarly, the move to a single, balance of probabilities, standard of proof in Rule 19 is also intended to provide enhanced protection and promotion of the public interest by effectively reducing the standard of proof required in the most serious cases of alleged misconduct.

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

In practice, the proposed amendments will have only a minimal positive impact supporting the principle of the rule of law, although the requirement that a nominated notary justify not proceeding with the prosecution of a complaint will, it is hoped, provide a complainant with the confidence that a full and fair investigation has been carried out even where a decision is taken not to pursue a complaint to disciplinary proceedings.

(c) improving access to justice

The changes to the NCDR2015 are thought to have a neutral effect on improving access to justice.

(d) protecting and promoting the interests of consumers

As indicated under (a) above, the amended NCDR2015 will enhance the protections afforded to the public and consumers of the services of a notary. It is hoped that the changes will increase the confidence of consumers that a robust and transparent complaints and disciplinary process is in place which can be relied upon to prosecute allegations of misconduct where an independent investigation concludes that it is appropriate to do so.

(e) promoting competition in the provision of services

It is not anticipated that the new rule will have any effect on this aspect.

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

The proposed changes in the NCDR2015 will have a neutral effect.

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

The proposed new rules are unlikely to affect public understanding of citizens' 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; and
- (e) that the affairs of clients should be kept confidential.

All the provisions governing the conduct of a notary are underpinned by the general duty to promote and maintain those professional principles which are contained in rules made by the Master of the Faculties, in the general law, and which are common to best notarial practice internationally. The amended NCDR2015 will further encourage compliance with the

professional principles and help to facilitate a transparent and robust disciplinary process where those principles have not been met.

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.

The amendment to Rule 19 of the NCDR2015 is intended to provide a simplified basis for findings of fact in the Court and a transparent, accountable and consistent approach to considering disciplinary proceedings.

The new rules are presented after consultation with the two representative membership societies (The Notaries Society and The Society of Scrivener Notaries) who both fully support the amendment.

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

I am not anticipating any significant changes following the making of the amended NCDR2015. Fortunately, cases against notaries continue to be rare and cases involving allegations of fraud, dishonesty or criminal activity even more so. The impact will, therefore, be minimal. So far as the amendment to Rule 8.4 is concerned, this is simply to correct a typographical error in the original drafting to make it clear that a report is required where a nominated notary decides not to proceed against a notary who he was appointed to investigate.

Impact on other approved regulators

The amended rules will have no adverse effect on other approved regulators and they will not give rise to regulatory conflict.

Timetable

The amended rules are intended to be made as soon as approval has been given and then signed by the Master.

If you have any questions, please do not hesitate to contact my Senior Clerk, Neil Turpin, in the first instance. I look forward to hearing from you in due course.

Yours sincerely

A handwritten signature in black ink that reads "H J Dellar". The signature is written in a cursive style with a long horizontal flourish at the end.

H J DELLAR
Registrar