



The Faculty Office

**Application made by the Master of the Faculty Office for approval of
changes to regulatory arrangements
to introduce transparency measures to be provided within
(and to make further amendments to)**

the Notaries (Practice) Rules 2014 and the Notaries (Conduct and Disciplinary) Rules 2015.

A. Introduction

1. This is an application seeking the approval of the Legal Services Board (LSB) under Part 3 of Schedule 4 to the Legal Services Act 2007 and the rules made by the LSB under that part to make amendments to:

- **the Notaries (Practice) Rules 2014** which are intended to provide consumers with greater information in the public domain about the legal services provided by notaries.
- **the Notaries (Conduct and Disciplinary) Rules 2015** in relation to:
 - regularising vires for links to any disciplinary finding from the searchable details of a notary published on the website (in "Find a Notary" or similar) and
 - publication of advanced notice of disciplinary hearingsboth of which are part of the transparency measures.

2. The application also seeks approval to three further amendments to the above rules on which the Faculty Office consulted as part of the consultation process described in more detail below and which are intended to be implemented at the same time to ease transition.

These additional changes comprise:

- (in the Practice Rules) imposing an obligation on a notary to notify the Faculty Offices of circumstances which would trigger suspension provisions (ie a "fit and proper" person review) and (in the Conduct & Disciplinary Rules) extending the circumstances for the trigger

of a possible suspension to a notary being charged of an offence (in addition to receipt of a complaint)

- (in the Practice Rules) amending the persons who may supervise a notary office to include consultants and locum tenens (but who must be notaries).

Revised rules with track changes have been published and are **attached** and a Schedule of Amendments **accompanies** this application which details (by reference to the relevant Rule) of each proposed change and the rationale for that change.

B. Background

3. In January 2016 the Competition & Markets Authority launched an investigation into the legal services market. It found that there were problems with transparency of price and quality.

The CMA published its [recommendations](#) in December 2016.

The recommendations were designed to "make sure consumers can be confident about the prices and services they can expect when they hire a lawyer."

The recommendations were also intended to ensure that consumers could be confident that they had ["the right information at the right time"](#) by:

- the publication of prices on websites
- engagement by the profession with reviews and ratings (including the publication of data to facilitate comparison tools)

4. In June 2017, and simultaneously with all the other Legal Regulators, the Faculty Office published an [Action Plan](#) outlining its proposed steps to implement the recommendations and a timeline.

The Action Plan indicated an initial intention to amend the Code of Practice to require enhanced transparency in the provision of cost/fee information and key regulatory information such as professional indemnity cover and complaint/redress.

C. Transparency Measures

5. In summary, the key intended transparency measures are:

- **Price, service, redress, complaint and regulatory statements** (before instruction) – the Faculty Office will require this information to be provided on any website and (if there is no website) in written form but does not intend to prescribe any format.
- **Cost information (on instruction)** – the Faculty Office will require the prescribed information (as described below) to be supplied on accepting instructions.
- **Third party intermediaries** – the Faculty Office is firm in its view that the above information must be provided direct to the consumer (client) by the notary who is undertaking the work and not via an unregulated third-party intermediary. This is to ensure full transparency (and protection) to the consumer (client).

Consultations

The Faculty Office has conducted two consultations:

6 **Action Plan (Autumn 2017)** - a consultation on the Action Plan and the regulatory approach to the transparency measures. After publication of the Action Plans it had become more apparent that:

- some regulators (SRA for solicitors and CILEx Regulation for legal executives) were intending to adopt a rule-based approach whilst others (such as IPReg for patent and trade mark attorneys) intended to offer guidance.
- the transparency measures (at least at present) would apply only to "domestic" legal services such as conveyancing and probate.

7 The Faculty Office sought the views of the profession on its overall approach. It also consulted with the Master's Advisory Board. In this first consultation the Faculty Office asked whether:

- the transparency measures should apply only to the providers of probate and conveyancing services (some 40 notaries). The Faculty Office determined that notarial services are largely (although not exclusively) domestic and should, therefore, be included and that this step change across the whole of the profession would be a positive response to the CMA recommendations.
- the Faculty Office should change the Notaries (Practice Rules) 2014 (as amended) to prescribe the publication of transparency information by notaries, or whether changes to the Code of Practice (which sets out best practice and sits beneath the Practice Rules) would suffice. The Faculty Office determined that that a change to the Rules would, in most instances, be the best approach, not because the Faculty Office wished to be overly prescriptive but because was of the view that a simple, proportionate and targeted rules-based system of regulation best meets the needs of notaries and consumers alike and gave certainty to what would be required. Also, amendments to the Practice Rules would demonstrate the importance of the transparency measures. The majority of the respondents to this consultation supported this view.

8 **Rule Changes (concluding in February)** - a second [consultation](#) on the proposed amendments to the Notaries (Practice) Rules 2014. This consultation also included amendments to the Notaries (Conduct and Disciplinary) Rules 2015:

- (as part of the transparency programme) regularising the publication of disciplinary information.
- revising the rules for the suspension of a notary (with associated notification obligations) which were prompted by the new "fit and proper persons" requirements in the new Money Laundering and Terrorist Financing Regulations 2017 (overseen by OPBAS).

The Consultation Responses

9 In addition to the responses from the Society of Scrivener Notaries and the Notaries Society), there were 22 responses from individual notaries to the second consultation.

Overall, the position of the Faculty Office on the proposed transparency measures is largely unchanged (the earlier consultation on principles informed the approach to the rule changes) but commentary on the detailed drafting was helpful and led to some amendments.

The Faculty Office has published its [response](#) to the consultation. Further detail is set out below:

9.1 Giving proper estimates

Concerns were expressed from many consultees that it would be impossible for them to provide price information when a matter may develop in an unexpected way or where there was not the fullest information available about the instruction. However, the proposals are that either a fixed fee **or** a proper estimate is given. In the case of a proper estimate, although the estimate must be "proper" it can be subject to caveats, and the rules will not prevent revising price information in the case of developing matters. Notaries will need provide price information up front and keep the client informed so there are no "nasty surprises".

9.2 Setting out in advance the key stages of the work

The Faculty Office considered that price information is only helpful if the scope of the work is properly explained. That is why it is mandating that the "key stages of the work" and "the likely timescales for each key stage" are set out. This also helps to manage and inform the client's expectations. The client, after all, may have no idea of what the work will involve unless the notary tells him or her. Some consultees stated that they thought that setting out the "key stages of the work" was onerous for clients who had walked off the street for a straight-forward notarisatio of documents. However, the rule would only require the key stages to be set out "if more than one" which should help make the requirement manageable. If the work then transpires to be more complicated, then the notary must set out in writing the key stages.

9.3 Time in which to comply

The Faculty Office recognised that there might be times when it would not be possible to provide the client with the all the required information immediately upon accepting instructions. For instance, instructions might be accepted on the telephone and then confirmed in writing later that day. For this reason, the proposal now is that the required information must be provided "as soon as reasonably practicable".

The rules now clarify that the information must be provided upon instructions **being accepted**. There is no obligation, therefore, to provide all information to someone who is ringing around for a quote or where the notary declines the work for some reason.

9.4 **Regulatory statement**

Several consultees considered that the proposed regulatory statement, "Regulated by the Master of the Faculties through the Faculty Office of the Archbishop of Canterbury" was, although accurate, too wordy. Most notaries were keen to retain a reference to the Faculty Office of the Archbishop of Canterbury, as the Master of the Faculties was not well known to the public.

After considering the consultation replies, the Master decided that the regulatory statement should be:

"Regulated through the Faculty Office of the Archbishop of Canterbury"

which is a correct statement, not overly wordy, and retains the reference to the "Faculty Office of the Archbishop of Canterbury".

9.5 **Who is the client?**

There was a concern from some of the consultees that it is not always easy to identify who the client should be, especially when agents are acting for the ultimate beneficiary of the work. While this is a complicated area, which belies neat definitions and answers, the Faculty Office considers the revisions in the rules around third party intermediaries and the requirement to provide the client with regulatory information will help clarify this.

As much as anything they will require notaries to consider carefully who they, in their own professional judgement, regard as their client and in whose best interests they need to act.. This is particularly important since anti-money laundering regulations require a closer understanding of who is the ultimate beneficiary of transactions and more client due diligence. The Faculty Office appreciated however that the client may not be giving instructions directly but may be represented by a family member or solicitor (for example) and for this reason the Faculty Office has now amended the definition of client to include a person "on whose behalf instructions have been given...".

9.6 **Regular business clients**

Several consultees, particularly those who engaged in commercial work asked that in cases where the notary had a service agreement or terms of business for work in which the notary was regularly instructed, the notary should not have to hand out the required information upon each instruction. The Faculty Office has accepted this proposal. However, when the arrangement is set up, the required information must be given and should the terms of business change, the notary will need to communicate those changes to the client.

9.7 **Publicity, websites and Third-Party Intermediaries**

One consultee identified the problem with requiring all the regulatory information on a third-party advertising platform which was a directory only. For that reason, the Faculty Office has made an exception in the case of online directories which only list the name and contact details of the notary.

There was concern from several consultees that it would not be possible to set out price information on a website as notarial work was too multifarious for all the permutations to be captured in one place. Such complexity in the legal services sector is not confined to notarial work. However, as regard

price, the rule requires as a minimum "the basis upon which the notary calculates his fees for his services" and a "brief outline of the services the notary provides...setting out the key stages of the work (if more than one) and the normal timescales...". The price information need not and cannot be exhaustive but through illustrative examples of the normal work of the notary, the client can be given an understanding of what would be characteristic. Caveats and add-ons (e.g. price will go up if more than one document) can be set out in as user-friendly a way as possible, to give information on price which need not (and indeed probably could not) be a table of fixed tariffs.

9.8 Acting as a Commissioner for Oaths

One consultee was concerned that the transparency rules needed to confirm that they did not apply to the administration of oaths where the notary, acting as commissioner, was only entitled to a statutory fee¹ and the activity was very limited in scope (e.g. administering the making of a statutory declaration for use within this legal jurisdiction).

For this reason, key parts of proposed regulations have been disapplied from cases where the notary is only acting as a commissioner for oaths. The notary will still be required to uphold the general principles, such as acting with integrity, when acting as a commissioner but the Faculty Office considers other aspects of the regulatory regime not to be applicable or realistic for the work of a commissioner.

D. Other (and ancillary) Transparency Measures

10 Disciplinary Information

As part of the transparency measures, the Faculty Office also proposed:

- the publication of advanced notice of disciplinary hearings; and
- a note of (or link to) to any disciplinary finding with the searchable details of a notary published on the website (in "Find a Notary" or similar)

with amendments to the Rules to provide clear vires.

E. Suspension Provisions

11 The Faculty Office took the opportunity to consult on three further (more minor) amendments to the Notaries (Practice) Rules 2014 and the Notaries (Conduct & Disciplinary) Rules 2015.

The amendments to the suspension provisions were in response to the OPBAS review. The amendment to the supervision of office rule reflects practical concerns recently identified.

¹ The fee is fixed by statute (£5 for the affidavit/statutory declaration and £2 per exhibit - the Commissioner of Oaths Order 1993/2297) and the same rate must be charged by all commissioners of oaths (including notaries). This statutory fee only covers the actual administration of the oath. Advice, for example, on the content or effect of an oath is not subject to the statutory provision and fees will need to be agreed as required by the Practice Rules.

The Faculty Office intends to implement these changes simultaneously as they affect the same Rules. This will avoid confusion and assist transparency.

12 To enable the Faculty Office to determine whether to suspend the notary from practice, the Faculty Office had sought to impose an obligation on a notary to notify the Faculty Office "on arrest" on suspicion of committing an offence.

There was widespread objection to notification to the Faculty Office being on "arrest" and consequently the Faculty Office amended the reference to "being charged"

The Faculty Office agrees that, at this point, the authorities will have determined that there is sufficient evidence to bring a case and the Faculty Office is properly able to determine whether an interim suspension was necessary.

There was some concern from consultees that suspension and/or disciplinary action would be automatic if a notary were to be convicted of an offence in a foreign country which might not have a counterpart in domestic law. In the published response to the Consultation the Faculty Office assured notaries that suspension was not automatic (except in case of bankruptcy) and required an assessment of what is required for the protection of the public. Additionally, all forms of suspension permitted under the rules are subject to appeal mechanisms.

What the proposed revisions are intended to allow for however, is for the Faculty Office to become aware of information which is relevant to public protection but which it may not at present be entitled to hear about.

13 A notary office will be capable of supervision (in addition to a principal and employee) by a consultant or locum tenens provided the supervisor is a qualified notaries with a practising certificate. This addresses some practical concerns.

F. Statement in respect of the regulatory objectives

14. This is given in Appendix 1

G. Statement in respect of the better regulation principles

15. This is given in Appendix 2

H. Next Steps

16. The Faculty Office proposes:

- **Timetable for Implementation:** The Faculty Office will give 3 months' notice of the rule change coming into force to enable notaries to implement the required changes although notaries have been strongly encouraged to start planning the necessary steps immediately.
- **Risk of non-compliance:** The proposed changes have been the subject of detailed consultations over a significant period of time. The Faculty Office will (working with the two Societies) seek constructive engagement with members of the profession who need support to implement the changes. A large number of notaries are also practising solicitors and will

already be familiar with the transparency principles. Going forward, the Faculty Office will review compliance primarily through its inspection programme but (in order to align with the immediate activities of the other legal regulators) it will initially focus its review on the compliance of notaries undertaking conveyancing and probate (some 45 notaries) – via a sweep of their websites. Formal guidance is not intended at this time but may be introduced if feedback, via the annual inspection regime, suggests that it is necessary.

- **Review of impact:** The Faculty Office has no present plan to review the impact of these changes within any particular timeframe. The rule changes, to introduce transparency in the manner proposed, are in response to the recommendations of the CMA and the Faculty Office seeks to align its requirements with those of the SRA and CILExRegulation. The Faculty Office will, however, keep abreast of outcomes across the profession generally.

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APPENDIX 1

Statement in respect of the regulatory objectives

The Regulatory Objectives in s1 of the Legal Services Act 2007

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law;
- improving access to justice;
- protecting and promoting the interests of consumers;
- promoting competition in the provision of services within subsection (2) of Pt 1, Section 1 of the LSA (broadly, legal activities);
- encouraging an independent, strong, diverse and effective legal profession;
- increasing public understanding of the citizen's legal rights and duties;
- promoting and maintaining adherence to the professional principles.

The key regulatory objective is, clearly, the protection and promotion of the interests of the consumer

Protecting and promoting the public interest

The CMA identified an imbalance between the public and providers of legal services. These rules will help address that and ensure they are able to make better, informed choices.

Supporting the constitutional principle of the rule of law

This objective is neutral.

Improving access to justice

Better price transparency will hopefully address the issue that legal services are perceived as unaffordable by both adults and small businesses.

The rules will also mean notaries will be able to better promote the additional benefits and protections that they provide as regulated providers of legal services.

Protecting and promoting the interests of consumers

This objective will clearly be met by the adoption of these rules. The CMA study demonstrated that the legal services market is not working well for consumers and the rules will mean that they have better information with which to make informed choices.

The further amendments concerning suspension are intended to trigger any review of "fit and proper" considerations at the earliest stage practical by imposing more stringent obligations to notify.

Promoting competition in the provision of legal services

By clearly stating price, services and quality on a website, this will enable consumers to more easily access information at a time to suit them. This will help consumers to access a wider choice of providers than they do now. This in term should help increase competition in provision of legal services.

Encouraging an independent, strong, diverse and effective legal profession

We believe that the rules are neutral on this objective.

Increasing public understanding of the citizen's legal rights and duties

The rules will ensure clients are better informed about their rights to complain and seek redress. If comparison websites start to emerge then we would expect that that rights and duties will form part of the information provided to the public and so their understanding will increase.

Promoting and maintaining adherence to the professional principles

We believe the rules are neutral on this objective.

APPENDIX 2

Statement in respect of the better regulation principles

Proportionality

The research that has underpinned the conclusions reached by the CMA identified key issues that affect the way that consumers are able to access legal services. Given these conclusions, there needed to be a fundamental change to the way that information was presented to consumers and the Faculty Office believes that the adoption of additional rules is (as described above) a proportionate response.

The Faculty Office did consider whether this should be implemented in relation to probate and conveyancing services only (which would be consistent with the SRA and CILEx Regulation) but for the reasons given considered it to be more proportionate to implement them across all legal services provided by notaries.

Accountability

The thoughts of the various stakeholders involved in this work have been carefully considered.

The Faculty Office has sought to meet fully the steps it set out in its action plans.

These rules will mean that notaries are more accountable for their charging of consumers and how that is communicated.

Consistency

The rules will apply to all notaries and to all the legal services undertaken by them.

Transparency

The Faculty Office been transparent throughout the process on the reasons for these changes being proposed.

Targeted

The rules have been targeted to address the issues raised by the CMA in their study, whilst giving notaries discretion how they are implemented.