

FACULTY OFFICE

APPLICATION TO LEGAL SERVICES BOARD FOR AN ALTERATION TO REGULATORY ARRANGEMENTS

Notaries (Post-Admission) Rules 2009

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 Regulations (Annex 1) and the Question and Answer guidance (Annex 2).

Reason for the proposed alteration in regulatory arrangements

The Post-Admission Rules impose a requirement that notaries complete a two year period under the supervision by an appropriately qualified Public Notary (i.e. one who holds a current practising certificate and has been in practice for a minimum of five years). This is considered an appropriate period for those newly admitted Public Notaries whose practice is solely in the reserved legal activity of notarial activities.

However, following the recommendations made in Nick Smedley's report on the smaller regulators, the proposal set out herein is that newly admitted Public Notaries who propose to engage in reserved instrument activities and/or probate activities in their capacity as Notaries (as distinct from those who are dually qualified as solicitors, licensed conveyancers or legal executives) should be required to undertake three years specific supervision in either or both of those areas under the supervision of a suitably qualified notary, solicitor or licensed conveyancer. This would be in addition to (although may run concurrently with) the current two year supervision requirement for all post-admission notaries).

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 amended rules are designed to ensure that notaries engaged in reserved instrument activities and probate activities are fully competent in the law and best professional practice. In so doing the notary is better able to satisfy the duty of care he/she has to all those who place legitimate reliance on his/her professional ability by applying the law correctly, expertly and effectively.

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

The amended rules have been made to help ensure that notaries apply the law correctly, expertly and effectively by requiring them to undertake extended supervision under the guidance of a suitably qualified professional.

(c) improving access to justice

The amended rules will have a neutral effect on the public access to notaries. Although newly-admitted notaries will have to allow for the expenditure in time in undertaking additional supervision, it is not expected that the burden will be so significant as to discourage appropriately qualified individuals from applying to become notaries.

(d) protecting and promoting the interests of consumers

The amended rules are designed to improve the standard of service that a notary is able to provide to consumers and others by virtue of his/her knowledge of the law and to ensure that the risks to consumers are minimised. As above it is not expected that the additional burden imposed on the notary through the requirement to undertake additional supervision will add significantly (if at all) to the cost to the consumer of notarial services.

(e) promoting competition in the provision of services

It is expected that the amended regulations will have a neutral effect on the competition between legal professionals. The extended period of supervision reflects the period of post-qualification experience which a solicitor must have before he or she can set up practice on their own account.

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

The requirement for additional supervision should give confidence to notaries that they are practising in accordance with the law and best practice. It is not expected that the amended rules will have an effect on the diversity of the profession.

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

It is expected that the amended regulations will have a neutral effect on the notary in facilitating and recognising the rights and duties of citizens under the law.

(h) promoting and maintaining adherence to the professional principles

The 'professional principles' are:-

- (i) that authorised persons should act with independence and integrity,
- (ii) that authorised persons should maintain proper standards of work,
- (iii) that authorised persons should act in the best interests of their clients,
- (iv) 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,
- (v) that the affairs of clients should be kept confidential.

The rationale behind the amended rules is 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 notaries ought to follow because of their membership of an ancient and distinguished profession.

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.

I have explained how the amended rules comply with the regulatory objectives.

The amended rules arise both out of the recommendations made in the Smedley Report and out of consultation with the two representative societies; they were scrutinised by the Master's Advisory Board which contains representatives of those societies. Those societies are fully supportive of the proposals. It has not been possible to consult with individuals who may be affected by the proposals as they will primarily apply to notaries who are admitted after the rules are made and thus not current members of the profession. The requirement will be set out in the information provided to prospective applicants when they apply to commence the training required prior to admission.

The amendment is targeted only at those notaries who propose to carry out reserved instrument activities and/or probate activities and therefore those identified or perceived as carrying a potentially greater risk to consumers by virtue of their handling large sums of client money and where additional specialist experience and knowledge is desirable for the better protection of consumers.

There is provision for notaries who have already been released from supervision under the current rules who have not previously conducted reserved instrument activities and/or probate activities but who subsequently wish to commence such activities as a notary public, to apply to the Master to set an additional period of supervision. The Master will have due regard to the experience of the notary (for example, in the case of dual qualified practitioners who may have conducted such activities under the regulatory regime of the SRA or Council for Licensed Conveyancers) in setting an appropriate period.

It is my opinion that it is desirable to make this additional supervision a requirement by way of rules applicable to all affected notaries who wish to undertake reserved instrument activities and/or probate activities and that it is appropriate to provide additional safeguard to consumers when choosing a professional to undertake work on their behalf.

A notary applying for release from their period of supervision will be required to provide a report from their supervisor to confirm that the supervisor has inspected the notary's books and files and the Master will have due regard to such report in deciding

whether a notary should be released from supervision. In addition, the notary will be required to attend at least one full day course relevant to the field(s) in which they are practising and report to their supervisor on the matters covered.

Once released from supervision, a notary who conducts reserved instrument activities and/or probate activities will then be required to maintain and update their knowledge and skills by undertaking additional Continuing Professional Education pursuant to the Notaries (Continuing Professional Education) Regulations 2010

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

The maintenance and improvement in professional standards can be judged indirectly through the number and type of complaints received against notaries. These complaints will be monitored under our complaints handling procedures.

I shall invite the representative societies to provide feedback on how the additional supervision requirements are working, especially through discussions at the Master's Advisory Board and the Notarial Open Forum which takes place annually and at which a wide selection of notaries are invited to meet the Master.

In addition, we monitor the activities of notaries on an annual basis to establish the range of activities which they are undertaking in their capacity as notaries and to ascertain the numbers of the profession who undertake reserved instrument activities and/or probate activities in addition to pure notarial activities. This will enable the Master to assess the number of individuals who affected and to facilitate compliance with the amended rules

Impact on other approved regulators

The amended rules will have no expected adverse effects on other approved regulators and it is not anticipated that they will give rise to regulatory conflict. As indicated above, this brings the notarial profession into closer line with the requirements of a post admission qualification period on solicitors prior to practising on their own account.

Timetable

The amended regulations are intended to commence as soon as they have been approved by the Legal Services Board.

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