

The Notaries Society Annual Conference (28 September 2017)

The Master's address

Madam President, Members of the Society, thank you for again inviting me to address your annual conference. My last visit to the Mermaid Theatre was with my children to see a dire Christmas matinee performance of Treasure Island where the audience filled only two rows in this substantial auditorium and we slipped away at the interval. I hope today's conference is rather more successful than that.

I am accompanied by others from the Faculty Office, for whose work as always I am indebted, the Registrar, Howard Dellar, and his deputy, Ian Blaney, together with Stephen Borton and Neil Turpin. I am pleased that the excellent new chairman of the Advisory Board, Mark Craig, is also here, together with Michael Heap and Ann Wright who are giving us so much assistance with the vexed issue of Entity Regulation and from whom you will hear more at the end of this morning's session.

This is the ninth time I have given my annual review, an opportunity I welcome because it concentrates the mind on where we stand compared to one year ago and on what more still needs to be done. These are challenging times for lawyers and the law. The shocking reduction in the number of firms offering legal aid (20% over the past five years, the problem particularly severe outside London), together with the shameless cry of "Enemies of the People" directed at our strongly independent senior judiciary, demonstrate that all is far from well.

In a recent article, the former Chief Executive of the Financial Services Authority said this about the role of regulation, albeit in a different area:

*"In my view, we need to recognise its limitations. The best approach is a mix of principles and rules, combined with flexible supervision and determined credible enforcement. Furthermore, we need a duty of care to consumers, and a recognition of the specific needs of the vulnerable"*¹.

The modest aim of the Faculty Office in notarial regulation remains one of light touch regulation, respectful of the traditions of both branches of the notarial profession, but sufficiently rigorous to protect the public (the jargon phrase is "the consumer") both in terms of costs and standards of service, whilst combating stale traditionalism.

What I am about to say will be posted next week on the Faculty Office website, which I hope you continue to find a helpful resource, in particular for the latest version of the Rules and Regulations that govern your profession and the new Code of Practice. More information is now being posted on this website, including the new Consumers' Guide to Complaints & Discipline and the Inspectors' Annual Reports, in the interests of greater transparency to which we are committed, including now information on Core

¹ Sir Hector Sants *How to fix the broken economic system*, Church Times 15 September 2017 p.16

Metrics (which for the uninitiated means “key facts and figures explaining how Faculty Office income is spent”).

EXTERNAL APPRAISAL

As I mentioned last year, the terms of a regulatory standards action plan had been agreed between the LSB and the Faculty Office and were already being implemented. This continues to be the position. Additionally in December 2016 the Competition & Markets Authority published its final report following its investigation of legal services provision. The report said very little about the notarial profession, but we are now perforce committing time and effort to complying with a CMA Market Study Action Plan in a format devised by the LSB, and details of this are contained on the website.

PRIORITIES FOR 2017

As usual I set these at the start of the year, and they are available on the website. They include the following:

A: Monitoring the work of the Qualifications and Advisory Boards under their new chairmen, respectively Professor Rob Chambers and Mark Craig (succeeding respectively Dr Peter Smith and Colin Menzies, the former of whom paid so invaluable a role in notarial educational development over the past almost 30 years). A seamless transfer of power seems to have been achieved and I am very grateful to the new chairmen, and those who serve for no reward on those Boards for their work over the last year. In 2016 the Qualifications Board considered 71 applications (compared to 61 in the previous year) and issued 48 certificates of exemption (compared to 44 in the previous year), including those which were issued to applicants who had successfully completed the additional modules which the Board had required of them. This has remained the principal aspect of that Board’s work. The Advisory Board has been concentrating on the response to the CMA report, together with issues such as data protection, consultation with the profession, run-off cover for notaries and post admission supervision

B: Entity Regulation: work on this has progressed rather fitfully over recent years, but the addition of Mark Craig and Michael Heap to the Advisory Board, and the recruitment of Ann Wright from this autumn to the staff of the Faculty Office should mean that real progress takes place by Spring 2018. Michael and Ann have already overseen the introduction of entity regulation for the Intellectual Property Regulation Board, which regulates patent and trade mark attorneys.

C: Further revision of the Conduct & Discipline Rules, applying the lower, civil standard of proof in all disciplinary cases in line with modern best practice elsewhere. The LSB had been pressing for this change, which will come into force on 1 October.

D: Improved accounts transparency: this follows on from the recommendation in the LSB’s Regulatory Standards Report (2016). Very considerable work has been done on the production of Core Metrics, the meaning of which I have already explained, and budget

forecasting for future years, and, as you will all know, for the first time this year the whole profession has been consulted by email concerning practicing fee changes and supplied with the core metrics and draft accounts.

Items E and F: Fulfilling the LSB Action Plan and complying with the CMA recommendations are both (as already stated) well under way.

RULES

Apart from the amendment to the Conduct & Discipline Rules to which I have already referred, there have been amendments to rules 18, 19 and 21 of the Practice Rules (I urge you to check these carefully), and modest changes contained in the Notarial (Qualifications) Rules 2017. Additionally, as heralded last year, in July I made an Order designating county archives for record-storage, subject to conditions, under rule 25.1.3 of the Practice Rules.

INSPECTIONS

There is still under way a fourth year of Inspections, in which, following the retirement of Robert Pickford, Tony Martin has joined Michael Pulvermacher. The Inspectors' 2016 annual report is on the Faculty Office website and I strongly recommend you all to read it, since there are a number of practical recommendations by which your practices might be improved, not least in respect of advance indication of costs and timely completion of work, especially by those few of you who carry out conveyancing and probate as notaries. My own signature is not as legible as it might be, but I also draw to your attention the Inspectors' comments on the obvious need for clarity in notarial signing, and also (for those of you who practice also in solicitors' firms) the undesirability of billing clients using stationery designed for non-notarial purposes. In an interim report on the current year's Inspections, attention has been drawn to the failure in some practices to provide the correct wording in the complaints procedure under rule 8 of the Notarial Practice Rules, the inadequacy of several computer programmes used for electronic storage of records, and occasional failure to enter sufficient information about documents being authenticated. We would welcome feed-back from those who have been inspected about their perception of the procedures, which are, I believe, unique to notarial regulation.

COMPLAINTS AND DISCIPLINE

Again this year there were no complaints dealt with under the Scrivener informal complaints procedure. Seven complaints were received by the Secretary of the Notaries Society (compared to 12 in 2016). Of these, three were settled after initial contact by the Secretary; two were not pursued by the complainant and nothing further was heard. The other two were referred to the President and Vice-President for adjudication; one was not upheld and in the other case the Notary was required to write a formal letter of apology and pay the sum of £250 as compensation for the distress caused.

On a couple of recent occasions it has been drawn to the Faculty Office's attention that the complaints procedure and the C & D Rules are not easily comprehensible to a member of the public without legal expertise. That is why a one-page Consumers' Guide to Complaints & Discipline has been produced, which is available on the website.

Turning from complaints to disciplinary matters, for the second year running, no cases have been heard by the Court of Faculties since the last annual conference. There are two cases currently awaiting a hearing before the Commissary, one a second complaint against the notary in question. Regrettably I had cause to strike from the Roll of Notaries one English notary following her conviction for serious criminal offences committed in her capacity as a probate solicitor.

CONTINUING PROFESSIONAL EDUCATION

Elaine Standish and her team, as well as other providers, have continued their valuable work in this area. I know that the new Code of Practice has featured prominently in CPE sessions. No changes to the CPE requirements are currently envisaged. However, the position will again be reviewed by the Advisory Board in 2018 to see whether we ought to be making changes, though it is improbable these would mirror those already made by the BSB and SRA which do not appear applicable to notarial circumstances. I have already mentioned the review of post-admission supervision which is underway.

THE NOTARIAL PRACTICE COURSE

48 students began the first year of the UCL course in Autumn 2016 (compared to 39 in 2015 and 21 in 2014), and, of these 48, 46 have now moved on to the second year of the course and been joined by 3 students who are re-sitting year 2. 37 students have started Year 1 this Autumn, including 2 who are re-sitting one of the modules (compared with 48 students who began in 2016). 30 students successfully completed the second year of the course (compared to 28 in 2015), and there has been a steady stream of new admissions. Thus numbers are overall consistent with previous years.

ADMISSIONS

18 new general notaries have been appointed and a further 8 are in the pipeline (totalling 26, compared to only 16 the previous year). In addition 5 Overseas Notaries have been appointed in the same period with a further 3 in the pipeline (totaling 8 compared to only 5 the previous year). 2 ecclesiastical notaries have been appointed, Your Society has limited concern with the regulation of overseas notaries, but I should mention here that a great deal of time has been spent by the Faculty Office over the last year, first, in attempts to clarify and enhance the scope of notarial regulation in the Channel Islands, much assisted by Iain Rogers contribution, especially on the education and examination front, and, second, in coming to terms with the issue of Mutual Recognition of professional occupations in the Australian State of Queensland, including the surprising discovery that the Public Notaries Act 1843 is still applicable in that State (although not in New Zealand where the Faculty Office also exercises jurisdiction, but on a less secure statutory basis).

THE SIZE OF THE PROFESSION

In the period since November 2016 793 Practising Certificates have been issued, compared to 799 in 2015/16 and 813 in 2014/15. The picture is one of fairly constant numbers, with admissions broadly keeping pace with retirements, sabbaticals or deaths, but, contrary to the hope I expressed last year, I am not yet able to report an increase in the size of the profession. Most changes of the law are good in terms of work for lawyers, and, whilst there is understandable anxiety that there may be a reduction of commercial notarial work, triggered by an exodus of client-enterprises from the City of London, I shall be surprised if BREXIT does not increase the demand for other notarial services at the humbler certification level in England and Wales, which (I should emphasise) is not in any way a justification for leaving the European Union with which notaries have so many ties.

REGULATORY THREATS

Last year I mentioned three threats to the profession. The first was the continuing ambition of Scottish notaries to be able to practice in England and Wales without any authorisation from, or regulation by, the Faculty Office. Whilst this ambition remains, there are no further developments to report.

Second ICAEW, the body responsible for regulating accountants as well as representing their interests, was seeking additional regulatory powers to enable it (amongst other things) to regulate notaries employed in accountancy firms. This July the ICAEW's application won the support of the Legal Services Board, despite opposition from the Faculty Office, the two notarial societies and the then Lord Chief Justice. Happily, last week the new Lord Chancellor refused the ICAEW application, in a well-reasoned letter which made express mention of the concerns expressed on behalf of the notarial profession. I take the opportunity to congratulate the two notarial societies on the clarity and cogency of the arguments they presented both to the LSB and to the MOJ. At the same time the Association of Chartered Certified Accountants is applying to the LSB to introduce approved regulatory arrangements for probate activities under which it will authorise individuals and firms to carry out probate work. Subject to any representations received from the two notarial societies, it is unlikely that the Faculty Office will be commenting on these proposals which are not seen as a significant threat to the profession, although they appear prima facie to run contrary to much of what was said in the Lord Chancellor's recent decision on the ICAEW application.

The third threat was the proposals set out in the LSB's report, *A Vision for legislative reform of the regulatory framework for legal services in England and Wales*, published on 12 September 2016 and which I summarized in my Address last year. These radical proposals for ending regulation "based on professional title", for example, barrister solicitor or notary, and creating "a single regulator covering the whole market", are presently "parked" with the Ministry of Justice, and, so one would assume, are unlikely to take legislative form (if at all) until more pressing matters such as BREXIT

have been dealt with. When in March this year, together with your President and the Chairman of the Society of Scrivener Notaries, I met with the impressively well-informed Junior Minister responsible for legal services, we emphasised the international aspect, a matter important for the Bar and absolutely critical for public notaries.

THE COST OF REGULATION

The cost of regulation is of concern to all notaries who foot the bill, and indirectly also to consumers of notarial services. As I have already mentioned, the need for greater clarity in presentation of financial information relating to the regulatory activities of the Faculty Office has already led to changes in the way we work. Because of the information which you have all already been sent at the time of Practising Certificate renewal, I can be much briefer here than would otherwise be the case.

We have moved from a calendar year accounting period to a standard April to March financial year, in line with that of the LSB and most other regulators. This has required lengthening the accounting year commencing 1 January 2016 to a 15 month period to facilitate a change of year end to 31 March, which inevitably and temporarily complicates comparison with the previous year. We have also changed accounting practice from a cash to an accruals basis (so that income from Practising Certificates received in October/November each year is spread over the appropriate period which gives a clearer indication of the real financial position).

The accounts for the 15 month period to 31 March 2017, which have been shared with you, show a surplus on the year of £26,383. If the projected draft budgets hold up, then by 31 March 2020 the accumulated deficit will have almost halved to approximately £125,000, in line with my aim to reach the point where the regulatory arm of the Faculty Office operates without any borrowing requirement from its ecclesiastical arm.

Future budgets have endeavoured to take account of the likely significant extra spend in fulfilling the Competition and Markets Authority Market Study recommendations and of the creation of an Office for Professional Body Anti-Money Laundering Supervision to be funded by a levy on the Money Laundering Supervisors, including the Faculty Office in respect of the notarial profession.

In order to cover these substantial additional costs, I reluctantly concluded that it was necessary to increase the practising fee by £30 to £520 and this has been approved by the LSB following consultation with the profession at large.

The Contingency Fund year end has also been amended so that the 2016 accounts also cover a 15 month period to 31 March 2017. This fund exists to provide cover for costs arising from disciplinary cases which are otherwise not recoverable from the notaries concerned. Unfortunately, the contribution ordered to be paid by one notary as a result of a disciplinary hearing has been left largely unsettled and it seems unlikely that the

outstanding amount of approximately £13,500 will be recovered without potentially costly debt recovery litigation. I have therefore reluctantly decided that a £10 increase to £30 is necessary this year to recoup the loss and to return the fund to our aim of around £100,000. Happily this figure of £30 is still markedly below the figure of £80 you were all required to pay in 2014 and 2015.

After a three year freeze in appointment fees, there will be small increases of the appointment fees for England and Wales from £575 to £625, and for Overseas notaries from £625 to £700, both with effect from 1 November 2017.

CONCLUSION

In a recent book, the biblical scholar Walter Brueggemann argues that justice lies in voicing and hearing the cry of the afflicted and reorganizing social power in response to that cry; and that the claims of justice must always look beyond all present arrangements to the trajectory of the possible². That may seem some way from your pre-occupations as notaries, but it may perhaps inspire you when you reflect on the more humdrum principles set out in rule 4.2 of the Practice Rules.

I end by thanking your retiring President for all she has done for notaries during her term of office, and for a constructive relationship with the Faculty Office and with me personally. She will be greatly missed, and I wish her successor well during his tenure of that important office.

Charles George QC
Master of the Faculties

² Walter Brueggemann *God, Neighbour, Empire* SCM Press (2017) pp. 65, 67