



The Notaries Society Annual Conference at the Royal Institution in London (19 September 2019) - The Master's Address

Preliminary

This is my eleventh Annual Address to members of the Notaries Society as the statutory regulator of your profession. As last year I have been asked by the conference organisers to provide the text in late August to save conference time and lead to more focused questions on the day of the conference. These I shall endeavour to answer, assisted by the Registrar, Deputy Registrar and Chief Clerk of the Faculty Office, respectively Howard Dellar, Ian Blaney and Neil Turpin. My Address supplements the Registrar's Annual Report of 15 July 2019 for the year ending 31 March 2019, which is on the Faculty Office website.¹

Shape of the Address

First, I make some general observations about legal and constitutional matters because, idiosyncratic as is the profession of a notary public, you are part of a wider legal profession and ought in my opinion to be alarmed by what is happening around us.

Second, I shall report on what the Faculty Office has been doing over the last year and give you some figures in relation to your profession which it is our duty and privilege to regulate.

Third, I shall turn to financial matters, including budgeting.

Fourth, and primarily because this is the last time I shall be addressing you as Master before my retirement next June, I shall offer some reflections on changes that have occurred since I took office in May 2009, and identify what I see as the principal challenges that lie ahead, both for your profession and for the Faculty Office.

Much of parts 2 and 3 of this Address will be familiar ground to those notaries who serve on one or other of the two Notarial Boards or on the Council of the Notaries Society, and whose contributions I greatly value, and have done over the past decade. But I hope that its content will inform other

¹ <http://www.facultyoffice.org.uk/wp-content/uploads/2019/08/Registrars-Annual-Report-for-the-YE-31.03.2019.pdf>

notaries and show you how the Faculty Office endeavours year by year to service the notarial profession by ensuring its proper, but (to repeat a familiar phrase) not unduly heavy-handed, regulation.

Part I – some general observations

At the outset of my Address last year, I observed that these were challenging times for lawyers and the law, and gave you four examples where highly independent, cross-party, House of Commons Select Committees had expressed concern about key aspects of our justice system. A start has since been made towards undoing the senseless harm done to the Probation Service by a former Lord Chancellor; and also on addressing the inadequacies of our prisons, though the reports of the independent Inspectorate show how far there is still to go. Judges in the Netherlands have suspended the extradition of a suspected drug smuggler to the UK because they fear he will be held in “inhuman or degrading” conditions in a British prison, contrary to Article 3 of the ECHR.²

The absence of legal aid in many pretty basic areas of the law remains disquieting. I reminded you of the comment of the then retiring President of the Family Division that: “Anyone who thinks we currently have a network of courts which enables proper access to justice is deluding themselves.”³ I see little reason to suppose that there has since been any significant change. Let me cite to you the words of Lord Burnett of Maldon, the Lord Chief Justice. On 3 December 2018 he said that “large numbers of individuals and particularly those on low incomes do not have effective access to our justice systems.” A week or so later, speaking at a Press Conference on 14 December 2018, he said this:

“I would wish to record the fact that in the criminal justice sector both our Magistrates and our Crown Court Judges have been having to operate in environments which, to use a cliché, are “sub-optimal”. It really is not reasonable to expect court staff, judges or court users to attend court buildings which are in a terrible state: water coming through the ceilings, for example; jurors having to wear hats and coats in the Winter; lifts that do not work; air conditioning that does not work so that courts have to be stopped in the heat of the Summer. Now, these problems of maintenance are well recognised by the Ministry of Justice. I have spoken about them now on a number of occasions publicly. It is well known that there is a huge backlog in maintenance in the court estate, a huge backlog which, as I indicated when I gave evidence to the Justice Select Committee, will cost hundreds of millions of pounds to sort out, but it has to be sorted out because it is not reasonable to expect anybody operating in the system to operate in those sorts of conditions.”

² BBC News Bulletin, 10 May 2019, with specific reference to HMP Liverpool.

³ “Prisoner at the bar...call for courts to sit in pubs”, *The Times*, 28 July 2018.

Speaking to his fellow judges at the Mansion House on 3 July 2019, he said that the problem he had previously identified of filling vacancies in the High Court and Circuit Bench now extended to the District Bench. As he said, “Thousands of salaried and fee-paid Judges dispense justice at first instance in Her Majesty’s Courts and Tribunals, in decisions of acute importance to those involved in them.”

We all appreciate that the justice system is only one of many calls on public funds at the present time, after a decade of austerity. And the position is not helped by the rapid turn-over of Lord Chancellors, though for my part it is welcome that the post is currently held by a lawyer, even in the present somewhat unusually composed Government.

Last year I spoke of Brexit uncertainties and the unremitting call of Brexit-related demands on the time of civil servants. I had supposed that would all be over by now. How wrong I was. But frightening as were those Daily Mail headlines back in 2016 about judges as “Enemies of the People”, so too it is, to say the least, alarming to read that the theme of a forthcoming General Election may be “The People versus The Politicians”, or in an alternative version “The People versus Parliament”; or that Parliament might be suspended to facilitate a “no-deal” Brexit. By the time of your conference we may know a great deal more about the workings of our Constitution than we had ever wanted.⁴

Part II - Recent developments in notarial regulation

(a) Legal Services Board

Last year I welcomed the confirmation of the appointment of Dr Helen Phillips as chair, and she has now been joined by Matthew Hill as Chief Executive. Let us hope there may be greater continuity of personnel than in the past. The Faculty Office has continued to work with the LSB in relation to its Action Plan for us, details of which you can find on the Faculty Office website. At a meeting with the

⁴ See, for example, the analysis of our leading constitutional expert, Professor Bogdanov, writing in *The Guardian*, 6 August 2019 under the headline: “MPs can still thwart Johnson but it will be a Herculean task”; and the possibility, described in the leading article in the same paper, 10 August 2019, of a “general election framed as a contest between a brave Tory leader, determined to fulfil the will of the people, and a cowardly, unpatriotic, arrogant Europhile establishment, holed up in the Palace of Westminster”. See also the Prime Minister’s Facebook comment on 14 August 2019 that “There’s a terrible collaboration as it were, going on between people who think they can block Brexit in Parliament and our European friends” (reported in *The Guardian*, 15 August 2019).

LSB in June, they indicated broad satisfaction with progress and are now preparing a formal report which is planned for release this Autumn.

I mentioned last year that there are other branches of the legal profession where there is still lacking the all-important separation between regulator and the practising profession, which had never been an issue so far as concerns notarial regulation. On 24 July 2019 the LSB published its revised Internal Governance Rules (IGRs), setting out the requirements for the Approved Regulators to ensure the separation of regulatory and representative functions. Approved Regulators have a maximum 12 months transition period in which to comply with the new rules. Commenting on the new rules, the LSB's Chief Executive said:

“Independent regulation gives confidence to consumers, providers, investors and society as a whole that the legal services work in the public interest and support the rule of law. Regulatory independence also gives the providers of legal services the certainty they need to grow and innovate.”

At the time of writing the Faculty Office has still to formally review its own compliance with the new IGRs, in a situation where the Master's position is already anomalous among regulators, since, having once been a member of a regulated profession, I do not meet their normal requirement, waived in my case, that legal regulators be headed by lay persons.⁵ We may need to review the position of the Notarial Qualifications Board, whose chair has traditionally, and usefully, been held by a legal academic who may also be, or have been, a barrister or solicitor.

There is of course a potential down-side in all this. I rejoiced with your profession in the success in the Administrative Court, last March.⁶ I congratulate the Society's legal team on their exemplary preparation for the hearing. Let me remind you of, and place on the record, three passages from the Divisional Court's judgment:

“Evidence from the notarial bodies

35. At present, all notaries are appointed by the Master of the Faculties of the Archbishop of Canterbury, who is an Approved Regulator under the Act. In the course of the public consultation which preceded the ICAEW's application, the Master of the Faculties wrote to the ICAEW expressing concerns about its proposal to regulate notaries and to license the provision of notarial services by firms led by accountants. His main concerns were: (i) what he described as the "inevitable impact" on the exercise of independent judgement of the persons providing notarial services; (ii) the risk that notarial acts would not be given the same recognition and

⁵ The LSB uses the definition of “Lay person” in paras 3(4) and (5) of Schedule 1 to the Legal Services Act 2007. The Master of the Faculties has to hold or have held high judicial office or have the qualifications required for appointment as a Lord Justice of Appeal: see section 10(4) and 23(2) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.

⁶ *R (ICAEW) v Lord Chancellor* [2019] EWAC 461 (Admin).

status in foreign jurisdictions as at present; and (iii) the risk that the respect and prestige enjoyed by English and Welsh notaries abroad would be diminished. The Master of the Faculties subsequently repeated these concerns to the LSB.

36. The Notaries Society, which represents the majority of notaries in England and Wales and has appeared in the present proceedings as an interested party, also wrote to the ICAEW, and subsequently made submissions to the LSB jointly with the other body that represents notaries (the Society of Scrivener Notaries), objecting to the proposal. Amongst other matters, their submissions referred to a decision issued by the General Directorate of Registries and Notaries of Spain relating to the rejection by a Spanish Property Registrar of a power of attorney attested by an English notary and stating (erroneously) that English notaries are not legally qualified. It was pointed out that this misunderstanding, which may be partly explained by conflation of English notaries with US notaries (who do not have to be lawyers), is widespread in civil law jurisdictions and that allowing the accountants' professional body to regulate firms employing English and Welsh notaries was likely to exacerbate this situation. The submissions also appended a letter from the President of the International Union of Notaries, who expressed the opinion that the appointment of an additional regulator of persons providing notarial services in England and Wales would cause confusion in overseas jurisdictions and would adversely affect the smooth circulation of English and Welsh notarial acts – to the disadvantage of members of the public.

37. In its application, the ICAEW emphasised that, while it was the ICAEW's intention to accredit both firms and individuals to carry out notarial activities, such individuals would have to be qualified notaries in their own right and would also be individually regulated by the Master of the Faculties. The ICAEW also said that it did not agree with the Master of the Faculties that enabling accountancy-led firms regulated by the ICAEW to provide notarial services would compromise a notary's independence or affect a notary's recognition, status, respect and prestige abroad.”

“Notarial services

56. With regard to notarial services, the Lord Chancellor referred to the concerns raised by the two professional bodies which represent the notarial profession and reiterated by the President of the International Union of Notaries. The Lord Chancellor said that he had paid particular attention to their concerns that the ICAEW's regulation of entities providing notarial services could lead to the independence of English and Welsh notarial acts being questioned, and in a worst-case scenario not being recognised, in other jurisdictions. He said that he was not convinced that the ICAEW's application provided sufficient evidence or analysis to demonstrate that there would not be such an adverse impact.”

“Notarial Services

111. The fourth reason given by the Lord Chancellor related solely to notarial activities. Again, the challenge to this aspect of the decision was confined in argument to the adequacy of the reasons given by the Lord Chancellor. Ms Lieven contended that the Lord Chancellor had failed adequately to explain why he disagreed with the LSB's assessment that the risks identified by the notaries' representative bodies were "low" and insufficient to justify refusing to designate the ICAEW as an approved regulator of notarial activities.

112. Again, we do not accept this contention. In opposing the ICAEW's application, the notaries' representative bodies had not merely expressed their concerns (shared by the Master of the Faculties who is himself an Approved Regulator) that allowing the ICAEW to regulate the provision of notarial services would give rise to a risk of the independence of English and Welsh

notarial acts being questioned in other jurisdictions. They had provided evidence in support of their concerns, including the letter from the President of the International Union of Notaries and the evidence of the Spanish decision mentioned earlier (see paragraph 36 above). The ICAEW had provided no contrary evidence of its own. Nor did the LSB point to any evidence to support its assessment of the risks as "low". That evaluation appears to have been based on nothing more than an assumption or hope that the continued involvement of the Master of the Faculties as the Approved Regulator of individual notaries would be sufficient to avoid any adverse impact on the status of English and Welsh notarial acts in other jurisdictions.

113. In these circumstances the Lord Chancellor was entitled to take the view that the arguments and evidence adduced by the professional bodies, which clearly raised a matter of public interest, were sufficiently cogent to put an onus on the ICAEW to rebut them. He was also entitled to take the view that the ICAEW had not provided sufficient evidence or analysis to do so. The Lord Chancellor explained in clear terms that this was his view, and there was nothing deficient in his explanation or reasoning."

When the ICAEW has fully and properly separated its representative from its regulatory functions, then it is to be expected that it will make a new application to the LSB, from which the notarial profession will not be immune, supported by better evidence than last time; and at that time your Society and others will need to ensure that their own evidence is as complete, up-to-date and compelling as it was last time round.

(b) New notarial regulations

In 2017-18 there were, unusually, no new notarial regulations made for England and Wales. In 2018-19 I have made the Notaries (Post-Admission Supervision and Training) Rules 2019, designed to make the supervision requirements for newly admitted practitioners more rigorous, with enhanced requirements for those engaged in probate and conveyancing, together with uniform reporting back to the Faculty Office. These came into force on 1 June 2019, so that the cohort who recently completed the UCL course have had sufficient advance notice of the new requirements. A further Order will follow very soon to cover supervisors' costs, in order to take into account the additional meetings that are now proposed.

I shall shortly be making the Notaries Practice Rules 2019 (replacing the previous rules), and amendments to the Notaries (Conduct & Discipline) Rules 2015, both designed to improve transparency, as required of all the legal regulators by the LSB, following the report of the CMA. The amended Notaries (Conduct & Discipline) Rules 2015 will come into force on 2 September 2019; the new Notaries Practice Rules 2019 will be made on 2 September 2019 but not come into force until 2 December 2019 in order to give notaries time to make the necessary changes to their Terms of Business, websites and other publicity to comply with the new transparency requirements. There has been extensive consultation in respect of all three sets of rule changes, as well as on the proposed system of Notarial Practice Authorisation (formerly called Entity Regulation). Only the last-

mentioned, designed to extend regulation to notarial practices within limited companies, general partnerships and LLPs, and to differentiate practising certificate fees by bands, to reflect individual practice receipts, proved controversial, although rather less so than we had expected. The purpose of practice authorisation is principally to align the regulatory relationship with the client contractual relationship when legal services are being delivered through a separate entity. Among other things, complaints and redress would consequently and logically be addressed by and provided to the client by the practice rather than by any individual notary, without taking away from the personal responsibility of the individual notary for the notarial act or work done and their conduct. Meanwhile, an amendment of section 57 of the Courts and Legal Services Act 1990 by Statutory Instrument under section 69 of the Legal Services Act 2007 has been drafted and is currently with the LSB, whose consent is needed before it can be submitted for approval to the Ministry of Justice. I hope to make the Notarial Practice Authorisation Rules before I cease to be Master although it is now most unlikely that the Statutory Instrument will be made this Autumn, contrary to my expectation this time last year.

(c) OPBAS (Office for Professional Body Anti-Money Laundering Supervision)

There is no sign yet that the overall scale of money-laundering has ceased to grow, and regrettably London has achieved the label of “dirty-money” capital of the world.⁷ The role of the public notary in relation both to money-laundering and its detection and control is somewhat peripheral, particularly by comparison with solicitors, accountants and estate-agents, but important nonetheless, and the Faculty Office takes very seriously its responsibility as statutory supervisory body for the notarial profession in relation to anti-money laundering. At my monthly meetings with the senior staff of the Faculty Office, OPBAS matters now always feature on the agenda.

Following last December’s comprehensive visit to the Faculty Office by a team from OPBAS, various suggestions were made as to how we might improve our regulatory system, including changes to our whistle-blowing policy, formalising risk assessments with a view to an appropriate system of supervisory inspections, mandatory AML training of staff, and verification of those notaries within the scope of the MLR. An amended AML Action plan was submitted to OPBAS at the end of June, and we are anticipating this being signed off by the end of August. You should all by now be familiar with the approved AML Guidance, prepared and issued by the AML Legal Supervisors following

⁷ The Fraud Advisory Panel is a counter-fraud charity. According to its chairman, “Corruption isn’t a single event or act; it is a process whose ultimate objective is to create a culture in which it can become the new normal. Everywhere we look in Britain today we see signs that just such a culture is beginning to take root”: reported in *The Evening Standard*, 2 July 2019.

approval by HM Treasury, a copy of which is on the Faculty Office website⁸ and I have been impressed by our Inspectors' findings that those inspected had appropriate anti-money laundering Risk Assessments in place. Last year I referred to the new requirement for DBS certificates before practising certificates can be issued.

(d) Inspections

The current team of Inspectors (Anthony Martin and Nigel Harding) have admirably continued the work begun by their predecessors. We have been considerably more active than in the past in following up on deficiencies (mainly quite minor) observed by the Inspectors. In one case this had led to a slight tweak to the contents of the Office Practice Course. A third Inspector at least is needed and this is actively being pursued, a difficulty being that it is considered undesirable that a person should serve as an Inspector whilst still holding office on the Council of the Notaries Society. As in previous years, the Inspectors provide an annual report on the sort of issues they encountered during their inspections, which is published on the Faculty Office website, where you can presently read that concerning the 2018 inspection-round. Do read this, because doing so should assist you to organise and conduct your own practices more effectively.

(e) Priorities for 2019

As usual I set these at the start of the year, and they are available on the Faculty Office website. At my monthly meetings with the staff of the Faculty Office, we review progress towards meeting these objectives, and I can report as follows:

(a) Computerisation

The IT project is proceeding well. The NotaryPro system has now been released to the Faculty Office for testing, and it is planned that the system will be live for this Autumn's round of practising certificate renewal.⁹

(b) Practice authorisation

I have referred above to the progress being made on this.

(c) Review of professional qualifications

A cross-Board working party is to be set up to consider a detailed paper which raises five issues:

⁸ Legal Sector Anti-Money Laundering Guidance: Approved AML Guidance, updated 6 March 2018, taking into account of the changes introduced by the Money Laundering Regulations 2017.

⁹ For more information on this, see the Registrar's article in *The Notary*, Summer 2019, Issue No.83.

1. Whether or not the profession should continue to be a graduate one, as presently required by rule 3.3 of the Qualifications Rules 2017.
2. The required syllabus and whether it is still appropriate (see schedule 2 of the Rules), especially the “core” subjects.
3. The content of the Notarial Practice Course (the year 1 “professional” subjects, Roman Law and Private International Law), and whether this continues to be appropriate.
4. The content of the Office Practice Course (rule 10.5 and Schedule 5 of the Qualifications Rules 2017)
5. The Continuing Professional Education Requirements, including a review of the Regulations themselves as well as content and delivery.

The cross-Board working party will report back to both Boards’ December meetings. Any proposals will need then to be the subject of consultation with the profession. Therefore it is unlikely that final decisions on these important topics will have been reached by the end of my Mastership.

(d) Compliance with LSB/CMA/OPBAS Action Plans

As indicated above, these time-consuming tasks are being undertaken in what I believe to be a responsible way, to the benefit, I would hope, of the notarial professions for whom they are designed and, importantly, their clients or 'consumers'.

(e) and (f) Concern overseas notaries

Therefore I shall not go into any detail, save to say that some progress has been made with respect to Jersey and Guernsey in particular. The Chief Clerk and I paid a short visit to the two islands in November 2018, the first recorded official visit to the Channel Islands by a Master of the Faculties, and we were warmly received. The Registrar and Chief Clerk are visiting Gibraltar in early October to meet with the notaries there.

(g) Increasing lay involvement and development of KPIs

We have been trying to “up our game” in respect of lay involvement, quantifiable outcomes, and transparency, all much beloved of the LSB and desirable on their own account in any event. Mark Craig, the lay chair of the Notarial Advisory Board, will now attend the monthly meetings I hold with the senior staff team, but on a quarterly basis; the former Sub-Treasurer of the Inner Temple, Patrick Maddams, has joined the Notarial Qualifications Board, bringing his considerable experience of admissions to the Bar; and we are looking for a lay “consumer champion” to join

the Notarial Advisory Board. We are in the process of devising some KPIs which should keep staff up to the mark on relatively straight-forward matters such as time-scales for particular items of work. The more observant among you will have noticed from the Faculty Office website that we are now publishing more detail on complaints, and summaries of the decisions taken at our monthly meetings, together with Minutes of the annual Notarial Forum, are now regularly uploaded.

(h) Practising certificate fee consultation

I have mentioned this matter already. Subject to LSB approval the new fee structure will be introduced this Autumn.

(f) Diversity and Equality

This is a continuing LSB priority. Last year I set out in some detail the results of the Faculty Office's 3rd triennial survey of Diversity and Equality Data (2017/18), which can still be found on the Faculty Office website. This year there is no further statistical material available about the notarial profession. As I said last year, neither the Faculty Office nor the two notarial societies have the financial resources or reach to implement an effective action plan for increasing the diversity of the profession, although the profession appears to be heading in the right direction in terms of its diversity make-up. It is hoped that the work of the Registrar's "Growing the Profession" group may be able to reach out to less well represented groups in the process.

(g) Notarial Qualifications Board

Dr Nicholas Hatzis of City University has ably chaired the quarterly meetings, where much of the work is of a repetitive, but highly important, nature, reviewing the academic qualifications and needs of future entrants to the profession. In the period since October 2018 the Qualifications Board considered 61 applications (compared to 73 in 2017) and issued 30 certificates of exemption (compared to 32 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. The Board has also been involved in the preparation of new Supervision and Training Rules and, as previously explained, is about to turn to the wider question of notarial qualifications and continuing professional education.

(h) Notarial Advisory Board

I have already referred to the increasing role the Board's chairman, Mark Craig, is taking in the work of the Faculty Office.

I set the Advisory Board some priorities for 2019, namely (A) Monitoring our response in relation to regulatory standards and diversity Action Plans; (B) Revision of the Code of Practice, where the original team are now preparing a revised text to accommodate various changes since the Code of Practice was first published in December 2016; (C) Advising on the new practising certificate fees (which they have done); and (D) Advising on matters arising from the OPBAS inspection. The revised Action Plan will be placed before the Advisory Board at its October meeting.

(i) Complaints and discipline

No complaints were dealt with under the Scriveners' complaints procedure. Seven matters were referred to the Secretary of the Notaries Society (compared to 10 last year) under its First Tier complaint procedure. Of these, 2 did not proceed, and 2 were resolved outside the procedure; of the other 3, 1 complaint was rejected, 1 complaint was upheld, and 1 led to the appointment of a Nominated Notary. Last year I reported that a notarial complaint had been referred to the Legal Ombudsman, and the result of this has not been notified to us.¹⁰

Turning from complaints to disciplinary matters, last year I reported that happily there were then no cases currently awaiting a hearing before the Commissary. Since that time, in 6 cases a Nominated Notary has been appointed, and of these 2 are currently awaiting determination by the Commissary, 1 is not proceeding, and the remaining 3 are still under investigation.

Last year I reported that one complaint had been received from a former notary concerning the conduct of the Faculty Office itself. One relatively small aspect of that complaint was upheld, and an apology given to the complainant. One other complaint has been received and is under investigation. Though the number of such complaints is small, we have decided that there ought to be a formal Faculty Office complaints procedure, and shortly that will be published on our website.

(j) Continuing Professional Education

As ever, I am grateful to Elaine Standish and her team, as well as other providers, for the provision of courses tailored to the needs of the profession. I have already referred to the review of CPE which will shortly commence. Last year I said that if any notaries had ideas on the matter, they should be sent to the Faculty Office by the end of 2018. There was no response at all. However, if you do now have ideas, please submit them by the end of October.

¹⁰ It may not have yet been determined. The latest data available on the LeO website covers the year to 31 March 2018.

(k) The Notarial Practice Course

At the time of writing, the new academic year at UCL has not yet begun, so there remains some uncertainty over numbers enrolling for both years one and two.

A record 57 students began the first year of the UCL course in Autumn 2018 (compared to 34 in 2017 and 48 in 2016), and of these (for a variety of reasons) 44 will be moving on to the second year of the course this Autumn. They will be joined by 2 overseas qualified notaries who will be sitting the year 2 examinations as an aptitude test under rule 8 of the Notaries Qualifications Rules 2017. 34 students¹¹ are confirmed to start Year 1 this Autumn, with an additional 13 holding provisional places pending the results of CILEX module examinations, compared to 57 who began in 2018). 32 students successfully completed the second year of the course (compared to 44 in 2018), and of the 32, 16 have already applied for admission to the notarial profession (and 14 of whom have already commenced practise¹²). Thus numbers continue to remain broadly consistent with previous years.

Last year I welcomed the number of Merits, and a few Distinctions, and I have not detected any significant change here.

(l) Admissions

Since October 2018, 28 new general notaries have been appointed and a further 14 are in the pipeline (totalling 42, compared to 45 in the previous year). In addition, 5 Overseas Notaries have been appointed in the same period with a further 6 in the pipeline (totalling 11, compared to 16 the previous year). No new ecclesiastical notaries have been appointed, but one application is pending.

(m) The size of the profession

In the period since November 2018 only 765 Practising Certificates for England and Wales have been issued, compared to 767 in 2017, 794 in 2016 and 799 the year before that. The age-profile of the profession remains troubling. As I have already mentioned, UCL numbers remain high, but the future numbers position is worrying, despite the strenuous efforts made by your Council over recent years to expand the scope of notarial work and canvass the universities for more notarial recruits. That is one of the reasons why consideration is being given to waiving the requirement that applicants be graduates (a requirement already waived in respect of chartered legal executives).

¹¹ Of the 34, 22 are women and 12 men; 7 are in their 20s, 7 in their 30s, 10 in their 40s, 6 in their 50s (the remainder have not given UCL a date of birth).

¹² The geographical spread in relation to recent new admissions is encouraging, including Sunderland, Llangurig (Powys), Ross-on-Wye, Worksop, Portsmouth and Loughborough.

Part III – Financial matters, including budgeting

The cost of regulation is of concern to all notaries who foot the bill, and indirectly to consumers of notarial services.

(a) Accounting year ended 31 March 2019

You have already had the opportunity to study the Faculty Office accounts for the year ended 31 March 2019, and the budgets for the three following years, which are posted on the Faculty Office website¹³ and have been shared with your Council. So what are the highlights and key messages?

- Whereas in 2017/18 there was a surplus of £9,886, we budgeted merely to break-even in 2018/19. In the result, although income was up from £430,202 to £451,748, so too (and to a greater extent) was expenditure, which, when including my own Retainer, rose from £420,316 to £462,693. The result was a shortfall of £10,945, the result of increased costs of Inspections and Practice Authorisation preparations, the IT project and the OBPAS levy, together with increased Management Charges, principally reflecting that notarial regulation now consumes 65% of the time of the Faculty Office staff (the figure in the previous year having been 61%). I warned last year that we might end with such a deficit.
- A consequence of this is that the accumulated notaries' deficit, which, as I explained last year in the Q & A session, is in effect an interest-free loan by the Faculty Office to the notarial profession, has risen from £198,857 to £209,802.
- The aim must be to move back to surplus budgeting, leading as soon as practicable to annual reductions of this accumulated deficit, and in the longer-term its elimination. But that will take many years.
- Last year you were shown budgets showing the extensive deficits that would be involved if changes were not made to the practising certificate fee.

(b) Practising Certificate Fee for 2019/20

I have already referred to the consultation that has taken place in relation to this, including the five new proposed bands (1) up to £15,000 fee income/profit costs; (2) £15,000-£50,000; (3) £50,000-£150,000; (4) £150,000-£300,000; and (5) over £300,000; the practising certificate fees being £450, £560, £800, £1000 and £2250 respectively. This will still involve a short-fall in 2019/20, because:

¹³ <http://www.facultyoffice.org.uk/wp-content/uploads/2019/08/Faculty-Office-Budge-and-Accounts.pdf>

- we want to keep down practising certificate fees for the significant number of practising notaries (47%) who have receipts of less than £15,000 a year and whose practising fee will go down from the current £520 to £450 under the new system; and
- despite the overall projected higher return from the new practice fee, only 5 months of the new rates will go into the 2019/20 accounts and 7 months into the 2020/21 accounts.

(c) 2020/21 and beyond

Assuming no increase in fees in 2020/21 and 2021/22 (which cannot yet be guaranteed), then there should be significant surpluses of around £50,000 in both years, not least because some items of expenditure in 2019/20 (for example on the IT project) will not be repeated (or fully repeated) in 2020/21 and thereafter. The aim is to reduce the current notarial deficit from its present excessive £209,802 to under £130,000 by 31 March 2022.

(d) Contingency Fund

This exists to provide cover for costs arising from disciplinary cases which are otherwise not recoverable from the notaries concerned. Last year a small increase of £10 to the contingency fee was required to build the balance to £100,000. The resulting contingency fee of £40 was still markedly below the figure of £80 you were all required to pay back in 2014 and 2015.

- The good news is that the contingency fund balance has now reached £129,071 (against the previous £89,303), so that for 2019/20 the contingency fee can be halved to £20. Furthermore, the outstanding debt in respect of one former notary, which last year stood at £29,000 has been more than halved, as a result of the issue of a Statutory Demand in January 2019, with further small monthly payments still being received.
- However, as the Registrar warned in his 15 July 2019 Report, “with six Nominated Notaries currently appointed there is likely to be at least some call on the Fund in the coming year.”

Part IV – Reflections back and Challenges ahead

This has been the most difficult, but most enjoyable, part of this Address to compose.

When I was first introduced to the personnel at the Faculty Office in May 2009, I was wholly ignorant on two vital matters: first, what notaries public were and did; and second, what was the function of a legal regulator. Even aided (as I was) by the excellent then Registrar and Chief Clerk, Peter Beesley

and Stephen Borton respectively, by your then President, the irrepressible Tom Hoyle, and by senior scrivener notaries Nigel Ready and Bill Kennair, it was a very major “brief” to absorb, particularly with the imminent coming into force of the principal provisions of the Legal Services Act 2007 on 1 January 2010, exactly seven months after my appointment as Master of the Faculties.¹⁴

But for the hard negotiating and deft defensive footwork of my predecessor, Dr Sheila Cameron, the Faculty Office would have been stripped of its regulatory role, and the role of Master of the Faculties would have been confined to ecclesiastical matters. Sheila had begun the seemingly endless task of responding to a stream of consultation papers from the LSB, which I took over and which occupied many unhappy hours, not least because the vast majority of what was being planned had little to do with the regulation of notaries public.

I cannot overestimate the importance of the changes brought about by that legislation for the work of the Faculty Office:

- First, we lost our previous almost total control over the regulation of your profession. Henceforth, none but the very most minimal changes could be made without express LSB authorisation, which itself required written justification of the proposed changes and evidence that there had been informed consultation thereon.
- Second, regulation now had to be in accordance with the regulatory objectives in section 1 of the 2007 Act, and having regard to:

“the principle under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed...and any other principle appearing to [the approved regulator] to represent the best regulatory practice.”¹⁵

- Third, any failure to regulate satisfactorily rendered an Approved Regulator liable to the setting of performance targets and monitoring, and/or directions/or public censure/financial penalties.¹⁶ There was also now the new Legal Services Consumer Panel, and, even more significantly, the new Office of Legal Complaints was added onto our existing complaints and disciplinary procedures.¹⁷

¹⁴ Legal Services Act 2007 (Commencement No 6 Order, Transitory, Transitional and Saving Provisions) Order 2009, art.2.

¹⁵ Legal Services Act 2007, section 28.

¹⁶ Ibid. sections 31,32,35 and 37.

¹⁷ Ibid. sections 8 and 114.

And all this had to be funded by a proportionate contribution, “the levy”, raised mainly from our principal source of revenue, the practising certificate fees.¹⁸

The early years were not exactly straight-forward, as we coped with new terminology, such as “outcomes-focused regulation” and “alternative business structures”, the latter of which the profession so far has shown no inclination to adopt, although the structure of notarial businesses has become increasingly complex, hence the recent work we have been doing in relation to practice authorisation. In 2010 we were forced, rather sadly, to terminate our relationship with Cambridge University as the provider of training for would-be notaries. Autumn 2010 was therefore a worrying time with no alternative provider yet identified, a position happily resolved in 2011, thanks to patient graft by Dr Peter Smith, then chairman of the Qualifications Board, by entry into a new relationship with University College London, which has endured now for 8 years. That was not, however, the only early “hiccup”.

In my Address to your Society at the Honourable Artillery Company’s Headquarters in London in September 2013, I said this:

“The past year has been a busy one for the Faculty Office, triggered not so much by any failings of individual notaries, but rather by the Legal Services Board’s report “Developing Regulatory Standards” (December 2012), which criticised certain aspects of the current Faculty Office regulatory arrangements (as it did also the arrangements for regulation of other branches of the legal profession). This LSB report, provided the focus of discussion at the Notarial Forum in January and at a meeting between the Faculty Office and your Society’s Council in April, as well as dominating the work of the Advisory Board this year. I should make plain at the outset that whilst some of the criticism was unfair and inappropriate, some (and probably the larger part) was justified and highlighted areas where we had perhaps too readily assumed that what we did seemed to work and did not warrant re-thinking. I fear that in the modern world, where the interest of the consumer is paramount, we have had to up our game.”

For me personally that December 2012 report was the low-point of my Mastership; but by working together, regulator and profession, I believe useful advances have been achieved. In my Address to your Society in Cardiff in September 2016 I was encouraged to be able to report:

“In May 2016 the LSB issued its latest Regulatory Standards Report. All regulators were assessed against five regulatory standards: outcomes-focused regulation; risk assessment; supervision; enforcement and capability and capacity. The FO scored “satisfactory” on supervision and enforcement, and “undertaking improvement and work well underway” on the other three heads. The LSB’s overall comment was that “The FO has made good progress across the regulatory standards....Whilst we consider there needs to be further focus on change, it is encouraging that progress is being made”. Further work was said to be needed in developing an understanding of the needs of consumers, greater transparency, a documented and structured approach to risk management, and ensuring a wide range of views are captured when reviewing

¹⁸ Ibid. section 173.

regulatory arrangements. The terms of a regulatory standards action plan have been agreed between the LSB and the Faculty Office and is currently being implemented. Personally I was encouraged by the results of this appraisal, but there is never room for complacency.”

Most of you already know of the work undertaken since 2016 to remedy these outstanding defects. The Faculty Office website (itself markedly improved in recent years) lists not only all the current notarial rules and regulations, but also categorises those seven which are considered the most important. All of these have been introduced or very significantly amended during the last decade, namely:

- the Notaries Practice Rules 2014 (shortly to be further amended);
- the Notaries Inspections Regulations 2014;
- the Notaries (Post-Admission Supervision and Training) Rules 2019;
- the Notaries (Continuing Professional Education) Regulations 2010;
- the Notaries (Conduct and Discipline) Rules 2015 (as amended);
- the Notaries (Practising Certificates) Rules 2012;
- and the Notaries (Qualification) Rules 2017.

The areas where I have personally been most proactive were:

- the introduction of CPE (which, though not perfect, has been thoroughly beneficial);
- the system of inspections, where, although for individual notaries the inspections are infrequent, we lead the field, I believe, amongst the smaller legal regulators;
- and changes and improvements to the Conduct & Discipline Rules, where previous defects, highlighted by a couple of challenging cases, have now, I hope, been rectified.

I stress that this has all been team-work in the Faculty Office, with invaluable contributions from its staff and from the two notarial boards. I hope and believe that the Code of Practice, introduced in 2016 and shortly to be revised by its admirable team of authors, has been and will continue to be, not only of use in the training of notaries, but also of practical use in the conduct of your notarial practices.

I inherited a regulatory system that kept its cards very much to its chest, and sometimes acted as if what had been done in the past was necessarily the best and only way of doing things. I hope the Faculty Office, prompted, as I readily acknowledge by the LSB and the CMA, has become a more open and transparent organisation. This will continue when next year, if all goes to plan, the Faculty Office becomes an incorporated entity in place of its present somewhat anomalous position.

What then are the challenges I perceive for the future. There are I think at least six:

- *First*, I remain deeply troubled by the continuing fall in the numbers of practising notaries. As I have said before, there are two reasons why the notarial profession needs to maintain, and if possible, grow its size. The first is because it is in the public interest that there should be a ready supply of notaries, although this is not achieved by numbers alone, since geographical distribution also matters. The second reason is to control the amount of the practising certificate fee. The Faculty Office has virtually no income save from practising certificate and admission fees, whereas many of its costs are fixed ones. If numbers in the profession shrink, the annual cost per notary must rise, which makes it increasingly difficult to fund regulation, when no one wants increased practising fees, particularly for those of you who earn relatively little from notarial work. Back in 2010 the Faculty Office issued 882 practising certificates for England and Wales. There followed a period when there were a significant number of retirements and only a modest flow of new notaries, and numbers fell to around the 800 mark. We are budgeting for 750 practising notaries in 2019/20, and 740 in the two subsequent years. I hope this is realistic and even perhaps pessimistic. If it is not, then real problems lie ahead.
- *Second*, and to some extent associated with the fall in numbers I remain concerned at the lack of public profile and understanding of what it is that notaries do and their integral value to individuals and companies, particularly in cross-border transactions.

Both of these concerns are areas which the Registrar intends to progress over the next year, working with the leaders of the two notarial professions.

- *Third*, there is the fundamental need, shared between profession and regulator, to ensure that notarial authentication (essentially the demanding tasks of checking identity, capacity, authority and will, including checking that the person understands the transaction, that the document is capable of achieving its intended purpose, and that it is not part of a fraudulent scheme nor a forgery) is carried out rigorously, and without any corner-cutting or attempts to limit notarial liability. I hope that the proposed changes to the Practice Rules will be sufficient to deal with the insidious threat from “bulk authorisations”.¹⁹ It is difficult for the Faculty Office to “police” those interlopers from outside the profession who claim a right to authenticate documents, where the position is not made easier by the fact that (as I regret to have to tell you) communications from the Faculty Office to the City of London Police, even directed to the highest level, go

¹⁹ See the short article by Barry Holland in *The Notary*, Summer 2019, Issue No.83.

unanswered, and even unacknowledged.²⁰ It is for the profession itself to ensure that the highest standards of work are maintained, and that a desire to cut costs to the customer, does not lead to any lowering of standards (as has very occasionally been alleged to the Faculty Office). If the brand is to be successfully marketed, then it must be known that all notaries work to the highest professional standards. As the Italian Dino Compagni wrote of a worthy notary in the second half of the thirteenth century:

“A notary who would be greatly prized
Must be of high repute in all his ways,
Write well and ever register his deeds,
Be expert and defend his learning well,
Draw up his instruments with skill and care,
Prefer to deal with valiant men of law,
And question all with shrewdness, sense and speed”.²¹

- *Fourth*, I remain concerned that regulation by title, associated with what are now the separately defined “reserved legal activities”²², may become a major issue within the next five years. Last year, I referred to the launch by the Centre for Ethics & Law in the Faculty of Laws at UCL of what it described as “a fundamental review of the current regulatory framework for legal services,” to be led by Professor Stephen Mayson. This review is now at an advanced stage, and an interim report is due in September, followed by further meetings and discussions over the Autumn. A final report will be published, and submitted to the Ministry of Justice, in January 2020. There is likely to be a heavy focus on the issues surrounding title-based regulation and the reserved activities, as well as whether the profession of the future will require multiple regulators. Professor Mayson has already stated publicly that:

“One of the challenges for the review is I absolutely recognise the value that higher professional standards will bring to some consumers but being very cynical I don’t believe that all title holders that claim to operate at that standard actually do....To me, that’s the difference between brand and regulation, and I think at the moment we’re conflating and confusing the two.”

²⁰ “Yet again we are seeing evidence that the criminal justice system is faltering as it struggles to cope with increasing demands with diminishing resources. The consequences of years of cuts are evidenced at every stage of the process”: John Apter, national chairman of the Police Federation of England and Wales, quoted in *The Times*, 16 August 2019, under the headline “Offenders ‘rub hands in glee’ at decline in prosecutions”.

²¹ *Song on Worthy Conduct*, quoted in Iris Origo: *The Merchant of Prato, Daily Life in a Medieval City* (Penguin Classics, 2017) p.206..

²² *Ibid.* Schedule 2.

However, he accepted that:

“Then we have to be careful that we don’t throw all that brand and market value away, which is clearly producing for the UK economy, as well as for the legal professions.”

I queried last year the assumption that something is fundamentally wrong with the present system, particularly in relation to ensuring flexibility and the delivery of risk-based regulation, given all the work that all the Approved Regulators have been, and are still giving, to complying with Action Plans devised by the Legal Services Board, aimed above all at risk-reduction, transparency and competitiveness. Whilst at some stage the definition of “reserved legal activities” in the Legal Services Act 2007 probably does warrant updating, the Bar Council and Law Society are likely to strenuously resist any change to regulation by title, as I am sure will your own professional bodies. But it remains very much unfinished and threatening business, and would, almost inevitably revive the idea of a single regulator for the legal professions, or at least a substantial reduction in the number of regulators, both of which have been aspirations of the LSB in the past.

- *Fifth*, the demands of effective supervision of money laundering (and more particularly anti-money laundering) are likely to grow. Since December 2007 the Faculty Office (not specifically the Master of the Faculties) has been the “supervisory authority” for notaries under what was then the Money Laundering Regulations 2007. The scope of these regulations was extended significantly by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (amended 2018 and 2019), which have brought an additional complexity to the regulation of your profession. This is an area where there remain some differences between notaries as to the extent to which the regulations apply to them. Supervision of anti-money laundering is likely to be an increasingly troublesome and time-consuming issue for my successor.
- *Sixth*, and at a less strategic level, I have noticed over the past five years that some individual notaries are becoming less respectful in their communications with the Faculty Office, with an increasingly acrimonious tone and threat of resort to legal proceedings (which happily has not so far taken place). Complaints do need to be properly investigated (I have already mentioned the proposed new Complaints Procedure). I emphasise that the number of such correspondents is still very small, but I fear they may grow, and this absorbs time and energy which sometimes could be better used elsewhere.

So – quite a lot achieved, a great deal more still to be done.

My predecessor still speaks of the fondness she felt for the profession which she regulated; and I too have come to share this fondness. I have been privileged to learn just a little of your very special “mysteries” and have enjoyed the company and friendship of the many general notaries and scrivener notaries whom I have met at the Faculty Office or on occasions such as this.

Conclusion

I congratulate your President on completing his successful term of office, wish his successor well on taking up his new responsibilities, and look forward to attending your annual conference in London next month.

26 August 2019

CHARLES GEORGE QC

Master of the Faculties