



THE FACULTY OFFICE

MoF response to LSB First-tier complaints Consultation

The Faculty Office, on behalf of the Master of the Faculties, submits the following response to the Legal Services Board's First-tier complaints consultation on draft section 112 Requirements, Guidance and policy statement for approved regulators under the Legal Services Act.

Overview

Before we respond to the specific questions set out in the consultation paper, we would make some general comments on the proposals as they affect those whom we regulate. The number of complaints made against notaries has always been, and remains, very low both in terms of service complaints and allegations of misconduct.

With the exception of the Scrivener firms operating in the City of London and a handful of other small 'firms' of notaries in the rest of England & Wales, the overwhelming majority of notaries operate as sole practitioners. The MoF, with the approval of the LSB, provided for an Approved First-tier Complaints Procedure in the Notaries (Conduct & Discipline) Rules 2011¹ to ensure that consumers had access to a First-tier complaints procedure one-step removed from the notary the subject of a complaint (if the issue could not be settled between the notary and their client direct) operated by The Notaries Society (for members of the Society), the Incorporated Company of Scriveners (for Scrivener Notaries) or the Faculty Office (for the very small number of notaries who are members of neither representative body).

In the last year, the first-tier complaints procedure operated by The Notaries Society received just six complaints and the equivalent procedures operated by the Incorporated Company of Scriveners and the Faculty Office received no complaints. Of the 15 complaints that have not been satisfactorily resolved at first-tier and been escalated to the Legal Ombudsman (LeO) since 2019 (with a further four being premature), 12 were against one individual notary and 4 against another both of whom have also now been struck-off after disciplinary findings arising from the combined effect of the number of service complaints amounting to conduct falling seriously below the standard expected of a notary. It is also worth noting that of the

¹ A similar procedure has been in place since the coming into force of the Notaries (Conduct & Discipline) Rules 1993 for handling service complaints.

complaints that have reached LeO all relate to the small number of notaries undertaking conveyancing and/or wills & probate and none from the core role of notarial activities.

In terms of our regulated community, therefore, the draft section 112 requirements and associated Guidance and policy statement do appear to be disproportionate and will almost certainly result in resources being used to meet the requirements which would be better targeted elsewhere. We would ask the LSB to re-consider a one-size fits all approach and modify the 'expectations' to permit greater flexibility for those Approved Regulators whose regulated community do not generate significant numbers of complaints.

Turning to the specific questions:

Q1: do you have any comments on draft Paragraphs 1-6 and the associated Guidance?

Our existing requirements take account of the fact that the majority of our authorised persons are sole practitioners and that for a complaint resolution procedure to be transparent, objective and effective, efficient and fair it should be dealt with other than by the authorised person the subject to the complaint; Part B Paragraph 2(a) of the draft Section 112 Requirements would not be appropriate for our regulated community for that reason. However, our existing regulatory arrangements do meet Paragraph 2(b) provided that 'person' is deemed to incorporate a 'body'. Although the term 'body' is not used in the Act it would be helpful if the Guidance were to make it clear that an authorised person who "participates in, or make arrangements to be subject to, such procedures established and maintained by another person or body" would meet the obligations. We don't believe that the term 'body' would require an addition to the Definitions in Part A Paragraph 1 but it would provide helpful clarification in relation to those bodies already designated in our rules to undertake Approved (First-tier) Complaints Procedures.

Whilst we have no fundamental objection to the Specifications set out in paragraph 6, detailed requirements for 'learning and improvement' extrapolated from the very small number of complaints that are made and upheld about our regulated community appear disproportionate.

Q2: do you have any comments of draft Paragraph 7 and the associated Guidance?

We have no comments on draft Paragraph 7 (a) to (f), save that sub-paragraph (c)(i) assumes that the complaint will be dealt with by the authorised person themselves but, for the reasons set out above, that is not how complaints about notaries are dealt with. Sub-paragraph (g) is problematic as "senior management who are responsible for its implementation" does not apply where the authorised person is a sole practitioner and where complaints are dealt with by an external body who are responsible for the consistent implementation and review required by sub-paragraph (h).

Q3: do you have any comments of draft Paragraphs 8, 9 and 10 and the associated Guidance?

We have no comments about Paragraphs 9 and 10 which will require no change, or just minor tweaks, to our existing complaints signposting requirements. In relation to Paragraph 8 we would simply mention that in relation to the majority of notarial activities, the time of engagement '(a)' and the conclusion of the matter '(b)' will be within a few minutes of each other and an expectation that a client should be given the full complaints procedure twice is therefore disproportionate. The same, of course, is also true where any authorised person is acting as a Commissioner for Oaths. It would be helpful if the Guidance made provision for exceptions in appropriate circumstances.

Q4: do you have any comments of draft Paragraphs 11, 13 and 13 and the associated Guidance?

We agree that communication is key to ensuring public confidence in complaints processes. However, the draft Guidance as presented is predicated on an authorised person establishing and maintaining their own procedures (Part B 2(a)) for the resolution of complaints rather than the complainant being directed to procedures established and maintained by another body under Part B 2(b) and that person or body being responsible for good communication with the complainant rather than the onus being on the authorised person alone. The draft Guidance would benefit from amendment to take account of the possibility of the use of alternative procedures.

Q5: do you have any comments of draft Paragraphs 14 and 15 and the associated Guidance?

Again, we agree that consumer confidence in a complaints procedure is predicated on the complaint being dealt with in the terms outlined in the draft guidance – indeed the need for impartiality is the reason why our existing arrangements require that the complaint be dealt with 'externally'. Our comments under Q4 apply equally to these paragraphs.

Q6: do you have any comments of draft Paragraphs 16 and 17 and the associated Guidance?

The principle set out in the learning and improvement paragraphs is sound but does imply that the authorised person might be the subject of a number of (possibly) similar complaints from which recurring trends or systematic issues can be identified. With the exception of the two cases we referred to in our introduction, this is not the case for the majority of our regulated community. Indeed, identifying any trends at all from the very low number of complaints (upheld or otherwise) across the profession as a whole is unlikely to be possible and the Requirement to do so is disproportionate.

Q7: do you have any comments of draft Paragraph 18 and the associated Guidance?

No.

Q8: do you have any comments on the proposed draft Outcomes?

Given the provisions of the draft section 112 Requirements and associated Guidance, we consider that the draft Statement of Policy under section 49 is unnecessary and disproportionate. The Outcomes are, of course, best practice and do not, in our view, require underpinning by section 49 obligations or ‘expectations’ applicable to all Approved Regulator regardless of the size of the ‘problem’ it seeks to address. We would urge the LSB to itself take account of the first and last of the better regulation principles of proportionality and being targeted to need and avoid imposing blanket obligations.

Q9-Q14

Our comments on the draft expectations are all predicated on the basis that, for the reasons outlined above, we do not believe that the statement of policy is necessary or proportionate:

Q9: do you have any comments on draft expectations (i) and (ii)?

These are both common sense and would form part of any competent regulatory regime. Part of the current definition of notarial misconduct in the Notaries (Conduct & Discipline) Rules 2015 (as amended) is a “persistent failure to provide the standard of service reasonably to be expected by a notary” and was the basis of the two cases to which we refer in our opening comments (ie draft expectation (ii) is already provided for).

Q10: do you have any comments on draft expectations (iii) and (iv)?

With annual First-tier complaints averaging single figures across the entire regulated community, opportunities for identifying recurring issues or trends are low.

Q11: do you have any comments on draft expectation (v)?

This expectation is, again, predicated on an authorised person establishing and maintaining their own procedures (Part B 2(a)) for the resolution of complaints and takes no account of the option of “participating in, or making arrangements to be subject to, such procedures established and maintained by another person or body”. We have no issue with collecting and publishing data about the performance of the designated bodies performance.

Q12: do you have any comments on draft expectation (vi)?

Given the very low number of First-tier complaints made annually against our regulated community, we are uncomfortable with an *expectation* of collecting and collating protected characteristic/vulnerability data on complainants. We believe that requesting this information from complainants might also operate as a disincentive to some to proceed with their complaint.

Q13: do you have any comments on draft expectation (vii)?

See answer to Q11 above.

Q14: do you have any comments on draft expectation (viii)?

We have no additional comments.

Q15: do you have any comments on the proposed timescale for implementation?

We have no comments

Q16: do you have any comments on (sic) regarding equality impact and issues which, in your view, may arise from our proposed Requirements, Guidance and statement of policy? Are there any wider equality issues that you want to make us aware of?

We have no comments

Q17: do you have any comments of the potential impact of the draft section 112 Requirements, draft Guidance and draft statement of policy, including the likely costs and anticipated benefits?

We have already indicated above that we support the draft Requirements and draft Guidance in principle but consider that the draft statement of policy is, in some respects, disproportionate and unnecessary. We do not agree with the premise that the statement of policy “strikes an appropriate balance between ensuring that regulators pursue certain high-level outcomes whilst having flexibility, through the expectations, around how they do this.” The expectations are not proportionate or targeted because they impose identical sets of obligations regardless of risk or the extent of complaints made about respective regulated communities, irrespective of their specific characteristics. They will impose a disproportionate impact on the resources of smaller regulators by requiring a one-size-fits-all approach regardless of risk. Any additional regulatory costs will simply need to be passed on to the regulated community and, in turn, potentially to the client. A major part of the difficulty in this respect is because the draft documents have not been written with the situation of sole practitioners in mind. Many sole practitioner notaries are providing a valuable public service for little overall commercial reward which makes the provision of the service fragile. The evidence does not justify several of the proposed requirements, as we have explained above and, taken in the overall context of the need to maintain services which are of borderline commerciality, the current one size fits all approach is not in the public interest and would run counter to some of the regulatory objectives. We request the LSB to think again about the detail, insofar as it concerns notaries. The Faculty Office would welcome the opportunity to discuss these issues with a view to finding a good solution.

Q18: do you have any comments in respect of whether there should be different expectations on legal services providers depending on the basis on which they are providing their service?

We agree that there should not be different expectations on legal service providers depending upon the basis on which they are providing their service and that consumers should have access to appropriate complaints procedures regardless. However, we do believe that there are types of legal services which ought to be exempted from the requirements for multiple complaint signposting (ie at instruction and conclusion of a matter), particularly acting as a Commissioner for Oaths and many Notarial Activities, where instruction and conclusion are same day events.

Q19: do you have any other comments about the draft section 112 Requirements, draft (Guidance) and draft statement of policy?

No.

The Faculty Office
14 November 2023