THE FACULTY OFFICE OF THE ARCHBISHOP OF CANTERBURY

REVIEW OF DISCIPLINARY SYSTEM

CONSULTATION – FEBRUARY 2024

Background

The Faculty Office is consulting on making changes to the disciplinary system for notaries. This paper sets out how the disciplinary system for notaries works at present and alongside those areas the Faculty Office considers that there is room for improvement. Draft rules showing how such changes might be codified are provided in this consultation.

A complete list of questions posed in this question appears on page 27.

Background – how the present system works

The Notaries (Conduct & Discipline) Rules 2015 (as amended) provides a system both for dealing with complaints raised by clients of notaries on minor matters (such as fees or delays) as well as serious complaints where there is an allegation of professional misconduct.

The first feature of the Rules to note is that minor, or 'service', complaints are referred to one of the two members' societies for notaries, the Notaries Society or the Society of Scrivener Notaries[1]. The Rules delegate to the societies the power to investigate and hopefully resolve such complaints swiftly and without any cost to the complainant.

Where the Faculty Office, or one of the societies, receives a complaint which clearly shows, or suggests, professional misconduct, then the Faculty Office will appoint a notary who has held a notarial practising certificate for not less than five years as the 'Nominated Notary' to formally investigate the matter and if appropriate commence formal proceedings in the Court of Faculties. Guidance notes for the Nominated Notary provide help for that notary in preparing and bringing the case before the Court.

[1] The scheme is actually administered by the Worshipful Company of Scriveners for the Society of Scrivener Notaries.

Formal complaints are heard by a Judge of the Court (known as the Commissary) who sits with two Assessors, one a notary and one a 'lay' person. The Rules provide for the Commissary to manage the case and determine procedure. Where there may be a risk to the public, there is a power for the Court to suspend the notary from practice immediately. This is on an interim basis, pending the full decision of the Court. Where a formal complaint has been proved, there are a number of sanctions available to the Court, including supervision of the notary's practice, further training, suspension from practice for a period or striking-off. The Court may also order that a client who has suffered loss be indemnified. The standard of proof for findings of fact is the balance of probabilities (ie more likely than not rather than the criminal standard of "beyond reasonable doubt").

Under the Rules a Fees Order is approved which specifies fees and costs to be paid at every stage of the investigation and hearing to the Nominated Notary, to any advocate appearing before the Court, for fees to be payable to the Assessors and to cover the costs of the Court and also for the giving of Directions at any stage during the proceedings. This Order may be amended by the Master of the Faculties at any time and has been designed to ensure costs of disciplinary proceedings are controlled and proportionate.

How well is the present system working?

The Faculty Office considers that the present system is working as follows:

- The system provides a robust and just system of enforcing the rules of the Faculty Office without obvious errors or miscarriages of justice
- It is however somewhat "clunky" in that the disciplinary tribunal side of it sits as a court (the Court of Faculties) and evidence is presented before a judge and two assessors (one notary and one lay person) in a traditional format and this may be disproportionate for some cases and absolutely essential in others where the facts and law are very much in doubt. Each notary has a right to a fair hearing if to be deprived of their right to practice but lower-level cases not involving strike off or suspension for a period might not always require a full disciplinary tribunal.
- A recent case (Kerr) showed how protracted cases could become, especially if the respondent (that is to say the notary accused of misconduct) does not cooperate.
- The use of Nominated Notaries is a mixed blessing. These are experienced notaries who first investigate and then, if there is a case to answer, prosecute the case in the Court of Faculties. While, as notaries, they have a good understanding of the practice issues that arise in cases – eg examples of good and bad practice, they generally do not have litigation experience and so their aptitude and experience in presenting cases in court and dealing with court procedure

(eg preparing and agreeing bundles of evidence) can be lacking. This means that cases may not be presented as efficiently or as smoothly as would be an assistance to the judge and assessors. Some cases are presented very well, and some less so. That the "prosecutor" needs to be a notary however, reduces the pool of potential people from which to recruit. It also presupposes that others are incapable of developing a good understanding of the practice area. Barristers regularly present cases for other professional regulators (General Medical Council, Nursing and Midwifery Council, General Dental Council, Royal Institute of British Architects, RIBA etc) in areas where they have no professional experience in practice.

- Equally, the nominated notary may not have the skills to investigate a case, although experience of recent cases would suggest that this is less of a problem. Equally, they may be capable of investigating but as it is not their "bread and butter" they may not be as quick and efficient as someone who is a prosecutor by profession.
- As such it is the Faculty Office's view that the role of Nominated Notary (however termed) could be opened to non-notaries. These might be experienced investigators from other regulatory settings, and/or experienced advocates (ie drawn from the Bar).
- The possibility of splitting the work of the investigator and prosecutor has been considered – it need not necessarily be done by a single person and there are arguments in favour of the separate functions being discharged by separate people. This need not happen in every case but if the Registrar of the Faculty Office could mix and match as appropriate, that might assist in ensuring that the people with the right skill-sets are working on the relevant stage of the case.
- The rules already allow the nominated notary to instruct counsel (ie a barrister) to present the case before the court but this is not much used due to cost. Such costs will ultimately either need to be paid by the respondent notary or the Faculty Office depending on the outcome of the case.
- The Kerr case was an example of a case of seeming service level problems which in the aggregate demonstrated a failure of the notary in coping with work which was itself disciplinary. Consequently, we are giving consideration to such cases where multiple service level complaints potentially add up to misconduct. It is recognised as potential misconduct in the rules but we are considering whether the themes and patterns are picked up early enough.
- The Faculty Office cannot however become embroiled in service complaints per se – it is in any case not allowed due to prohibitions in the Legal Services Act 2007 which empower the

Legal Ombudsman to take on this work and forbid approved regulators from providing for consumer redress.

- In addition to the formal disciplinary mechanisms of the Court of Faculties it would be helpful if the Faculty Office Registrar could apply administrative sanctions[2] for low level non-compliance, eg failure to respond to correspondence or to remedy a practice matter highlighted in an inspection. These would need to be cases where the evidence of non-compliance was clear cut and so didn't need to be assessed by a tribunal. However, unless and until the Faculty Office has the power of imposing fines, it is difficult to see other appropriate remedies that could be applied administratively. The Faculty Office does not have the power to fine but this is being sought through proposed legislation. This would reflect the administrative powers held by some other regulators.
- The Faculty Office could be empowered to apply action plans with notaries where non-compliance has been noticed. These would either be agreed with the notary or applied unilaterally (subject to a right to appeal) and help monitor improvements in the notary's practice. To a degree this happens informally already, but by attaching formal sanctions to compliance would give the practice "teeth". Breach of the actions plans could give rise to misconduct that could be escalated to the Court of Faculties or otherwise punished.
- The "rule book" is sufficiently capacious to give the Commissary powers to actively manage cases, issuing the appropriate directions and so forth.
- There is more work to be done on what the Faculty Office can do to enforce disciplinary decisions, eg when a notary has been struck off but refuses to pay court costs and compensation, or refuses to hand back files and monies to the client but our existing statutory powers would seem to fall short of giving the Faculty Office powers to seek an injunction from the High Court. Contrast this with the powers given to the Law Society/Solicitors Regulation Authority in the Solicitors Act 1974.
- Some cases indicate that mental health symptoms can be underlying or contributing causes to a failure of the notary to do a proper standard of work.
- Some thought needs to be given as to whether the Faculty Office is logging all complaint information and correspondence in a central repository and keeping abreast of KPIs so that cases do not become protracted. In particular the Kerr case showed how difficult it could be

[2] By "administrative" we mean that the officers of the Faculty Office operate them, and they are not applied judicially by a tribunal following a hearing. By way of analogy, the police can issue on the spot fines for certain offences (eg traffic offences) subject to appeal to a court. Those powers are administrative as opposed to judicial.

to maintain contact with a large number of unconnected complainants who understandably wanted to be kept abreast of their case and receive prompt redress.

- A power to remove a notary from the roll with the agreement of the respondent (together with other agreed sanctions) would be helpful. This need not preclude some decision issued by the Master of the Faculties, but it would be helpful if express provision were to be made for this.

Key performance indicators

In the period 1st April 2021 to 31st March 2022 the Faculty Office dealt with one disciplinary case based on three complaints against the same notary. There was a lengthy investigation and there were several interim Court directives and an Abuse of Process Hearing before the case finally went to a formal disciplinary hearing. One service complaint was referred to a Designated Society and one complaint was withdrawn.

The table below shows the time taken to conclude each stage of the disciplinary case until publication of the final judgment. It should be noted that the length of time taken to conclude a disciplinary case is dependent on certain factors outside of Faculty Office's control including the length of time taken by the Nominated Notary to investigate and the availability of the Commissary to set a hearing date which is convenient to all parties.

These figures are based on an average of the three complaints received *

Days	From receipt of complaint to appointment of Nominated Notary	From appointment of Nominated Notary to receipt of Written Report	From receipt of Written Report to Hearing date	From Hearing date to notice of the Order	From Notice of the Order to publication on the Faculty Office website	From receipt of judgment to publication on the Faculty Office website
Target	**28**	**42**	**84**	**14**	**7**	**7**
	38 *	180*	630*	6	30	2
Variance from target	**+10**	**+138**	**+546**	**-8**	**+23**	**-5**

In the period 1st April 2022 to 31st March 2023 were two disciplinary Hearings. One case had previously been placed on hold pending the outcome of a High Court Appeal and the other related to five complaints against the same notary which were combined during the investigation. The time taken to proceed to a hearing date in this case was further delayed due to the respondent's ill health.

Days	From receipt of complaint to appointment of Nominated Notary	From appointment of Nominated Notary to receipt of Written Report	From receipt of Written Report to Hearing date	From Hearing date to notice of the Order	From Notice of the Order to publication on the Faculty Office website	From receipt of judgment to publication on the Faculty Office website
Target	**28**	**42**	**84**	**14**	**7**	**7**
Shortest	21	225	339	3	2	2
Longest	13	528	336	6	5	1
Average	17	377	338	5	4	2
Variance from target	**-11**	**+335**	**+254**	**+9**	**+3**	**+5**

Practices of other approved legal services regulators

A survey of the disciplinary systems of the approved regulators of legal services was carried out in 2017 by the Disciplinary Tribunal Working Group chaired by the Bar Standards Board. The draft of that paper accompanies this although it is now over 5 years old. We are seeking to locate a finalised version of the paper from the Bar Standards Board.

Research

Reference to some pre-existing research on the workings of the disciplinary system in the case of the solicitors' profession can be found in annex 2 to this paper. Although not about notaries and the Faculty Office system it does provide some useful information by way of the analogy in the solicitors' sector.

Interaction with consumer service complaints

The Legal Services Act 2007 provides that the regulatory arrangements of an approved regulator must not include any provision relating to redress. That means any provision made in regulatory arrangements (whether it is statutory or non-statutory) for redress in respect of acts or omissions of notaries and any provision connected with such provision. The Faculty Office however can:

(a) provide in its regulatory arrangements for notaries to have complaints procedures;

(b) establish a compensation fund to mitigate the hardship that a client of a notary has suffered due to negligence or fraud or other dishonesty on the part a notary or the notary's failure to account for money received by them in connection with acting as a notary;

(c) investigate a case where a notary has caused a client loss, identify that the client has a civil claim against the notary and signpost them to where they can get redress, including from an ombudsman.

The Conduct and Discipline Rules in 2015 do three things in relation to consumer service complaints:

1. It recognises that misconduct can be as a result of (amongst other things) “falling seriously below the standard of service reasonably to be expected of a notary” and so that (eg) repeated and persistent poor service is itself a matter which requires a disciplinary response
2. It allows the disciplinary Court to “indemnify” any client of the notary whom the Court finds to have suffered actual loss as a result of the Notarial Misconduct in question, ie to make the notary legally responsible for that loss
3. It provides that the Master may approve a complaints procedure operated by a “Designated Society”, either the Notaries Society or the Worshipful of Scriveners.

As to the measure in 3 above, if a client has a concern about the level of service he or she has received from a notary, they may contact the notary in question. If unable to resolve that complaint, they may apply to the Notaries Society or the Worshipful Company of Scriveners depending on the body to which the notary belongs[3]. Those Societies operate complaints procedures in relation to their members. The society may at the end of the procedure recommend to the notary some form of redress such as an apology or to pay back fees. The form of complaints procedure has been approved by the Faculty Office. The principle is that as notaries do not generally work in firms (in their capacity as a notary), the society complaints procedure takes the place of that “first-tier”, as a practice manager would in a firm. Finally, if dissatisfied with the outcome of the society’s procedure, the client/consumer may apply to the Legal Ombudsman. The Legal Ombudsman has the power to direct the legal services provider to do any of the following:

a) to apologise;

b) to pay compensation of a specified amount for loss suffered;

c) to pay interest on that compensation from a specified time;

d) to pay compensation of a specified amount for inconvenience/distress caused;

e) to ensure (and pay for) putting right any specified error, omission or other deficiency;

[3] Where a notary is a member of neither society, the complaint can be referred to a member of a panel of notaries maintained by the Faculty Office to undertake a similar process of resolution.

f) to take (and pay for) any specified action in the interests of the complainant;

g) to pay a specified amount for costs the complainant incurred in pursuing the complaint;

h) to limit fees to a specified amount.

Each notary is under a duty to give his or her client a prescribed form of words drawing to their attention their ability to complain.

The complaints procedures of the Designated Societies seem to work well in handling service matters. However, consultation will explore what stakeholders think about the system and whether any improvements can be made. In the *Kerr* case, the Commissary questioned whether the use of the approved complaints procedure was elongating the whole process for a consumer to get redress, because the complaints went to the Designated Society, the Designated Society could not resolve the matters because the notary respondent was not cooperating, so the whole matter from point of first complaining to Mr Kerr being struck off took a long time. What the Faculty Office cannot do is to take the complaints procedures operated by the Designated Societies in-house, as it is not permitted to operate a procedure for the redress of consumer complaints. It would also be inappropriate for the signposting for complaints of this nature to ask the consumer first to contact the Faculty Office and for the Faculty Office then to refer the complaint to the Designated Society. That might also be trespassing into the area of the regulator providing a system for consumer redress. The Faculty Office could do away with its official support for the complaints systems for the Designated Societies altogether. That wouldn't prevent the notary from using one of the societies to help field complaints. However, none of this would appear to help with the potential problem which is that a notary may be providing a bad service but the Faculty Office may only pick this up and deal with it as a disciplinary matter after too many service complaints have been made and are unresolved, rather than acting earlier. For that reason, perhaps a better approach would be to create a system whereby:

1. The Faculty Office investigates when a notary reports that they have had over a specific number of complaints made about them in a particular year (this is to an extent already happening but could be codified further) – it does however rely upon accurate reporting by the notary
2. The Faculty Office liaises more with the Designated Society to ascertain how many complaints have been made against specific notaries and what the pattern is. That would allow the Faculty Office to instigate an investigation before those consumer complaints have reached a critical mass and avoid a large number of service level complaints "festering" without the regulator looking at the matter from a disciplinary direction

3. For the Faculty Office to be more willing to start the disciplinary process earlier even if it may be unclear whether there is a solid disciplinary case
4. For the Faculty Office to use a more varied toolkit (see the later proposals in this paper around more administrative measures rather than a full disciplinary Court) so that an action plan is put in place for each notary which is under concern.

Generally, the Faculty Office should take advice and reconsider whether the provisions in its rules around “indemnification” are contrary to the prohibition in the Legal Services Act around providing consumer redress.

Proposals

Issue 1 – nominated notary system

The nominated notary system means that there is a limited pool of potential investigators and prosecutors. This can lead to delays while a suitable NN is identified and the chosen notary may not have the right skill-set or capacity in terms of workload to tackle the case.

Proposals

a. Remove the requirement that the case be investigated and prosecuted by another notary.

b. The Registrar may select any person that he considers to be appropriately qualified and suitable to investigate, and then, if appropriate bring the case in the Court of Faculties.

c. The "investigator" and "prosecutor" need not be the same person and arguably should not. The Registrar may appoint the same person or a combination of persons depending on the appropriateness of the case, the expense of the appointees and the qualifications of the individual appointees.

Positive implications

- Widens the pool of potential investigators and prosecutors including to those who conduct this type of work as their main occupation. A limited pool may also lead to the same group of people being repeatedly selected – which could propagate unconscious biases.
- Allows individuals to be appointed to investigate and prosecute who have specific expertise in that area – eg a forensic accountant for a case involving allegations of improper accounting.
- Means that there is not over-reliance on a small number of experienced notaries who may be unavailable or overworked.

Negative implications

- The fees for Nominated Notaries are fixed under the Fees Order and may be less than the rates that similar investigators and prosecutors are used to. We may need to do some investigation of what the market rates tend to be. Notaries who serve as Nominated Notaries often serve due to public spirit and "giving something back to the profession" rather than for the money. Equally, there may be cost savings because an experienced prosecutor may require fewer hours to complete their task.

- Need to retain the expertise Nominated Notaries have in working out where there has been a breach of notarial practice matters. This is specialist work which an outside professional may fail to understand.

Is a rule change required?

Yes, see new terms "Investigator" and "Prosecutor" replacing "Nominated Notary" and in particular revised rules 6 and 8.

An investigator might or might not be a notary. If not a notary, they must be "such other fit and proper person having the knowledge and the expertise that the Registrar considers are suitable for investigating the case" (proposed new rule 6.12).

A prosecutor must be "…either the Investigator or such other fit and proper person having the qualifications and the expertise that the Registrar considers are suitable for prosecuting the case" (proposed rule 8.7).

Are there other ways that the Faculty Office could approach this?

The Faculty Office staff could be involved with investigating cases. However, this is undesirable for the following reasons:

- It could lead to allegations from notaries that the regulator "has it in for them" and that the investigation has been clouded by bias and impartiality. In previous disciplinary cases, respondents have alleged that the Faculty Office has intervened in a case to disadvantage the respondent and the Faculty Office has been able to demonstrate the impartiality of the process. The Faculty Office has a very small team and so it would be difficult to disaggregate its various functions including acting as clerk to the disciplinary court in such a case.
- The Faculty Office has a small team and if it were to become involved in detailed investigations, this might pull disproportionate resources away from other core work or delay the investigation process. As it stands, the Faculty Office in appointing a Nominated Notary is able to resource investigation by paying for the investigating officer's fees without pulling a frontline member of the small team into being that person. The Faculty Office would likely need to employ another person or persons to do this work, and that person might either have too much or too little work to do at any one time, which means that it is better that it is contracted for specific cases rather than the head-count being increased.

Questions

1. Do you agree with our proposal to allow the investigatory work and prosecution to be handled by different people?

2. Do you agree that the investigatory work and prosecution need not be conducted by a notary but by someone else who has expertise in that work?

3. Do you have any detailed comments about our proposed rule changes relating to splitting these roles?

Issue 2 - lack of administrative powers and sanctions

The Disciplinary Court can be too "clunky" and costly for lower-level concerns and breaches.

Proposal

a. Amend the rules to provide for an ability for the Faculty Office to apply administrative powers and sanctions for low level non-compliance, eg failure to respond to correspondence or to remedy a practice matter highlighted in an inspection. These would need to be cases where the evidence of non-compliance was clear cut and so didn't need to be assessed by the disciplinary Court.

Those powers would include:

a. A power to direct a notary to take a specific action

b. A "final warning" in the event of non-compliance with the Faculty Office's directions

c. Power to require the notary to submit to an action plan to remedy failings

d. Provision for regulatory agreements between the Faculty Office and notary which if breached could give rise to disciplinary action

The notary would be able to appeal the administrative sanction with such appeal considered by the Master.

e. In the event of non-compliance a failure to abide by the administrative sanction of the Faculty Office could be treated as misconduct and the case then referred to the Disciplinary Court for application of more serious sanctions. However such a case ought to be quicker and clearer-cut because evidence of misconduct ought to be easier to demonstrate.

f. Administrative sanctions might include:

i. Imposing a fine (but see the next section)

ii. Rebuking the notary publicly

iii. Requiring further training or supervision

iv. Requiring an apology.

Positive implications

- This would expand the Faculty Office's toolkit for dealing with poor practices and behaviour of a notary.

- It would mean that the Faculty Office would not need to engage the full rigour and resources of a tribunal procedure for there to be a sanction for bad conduct.
- It would allow for the use of action plans which set out what good conduct looks like and how it might be achieved, rather than waiting for some significant breach by the notary which would tip the matter clearly into disciplinary territory.
- It would be helpful in the Faculty Office's work as a supervisory body for anti-money laundering where it is expected that the supervisor will have the ability to actively supervise notaries and not wait until something goes terribly wrong.
- The system could have sufficient checks and balances including a right of appeal and the system would not allow the Faculty Office to apply the more draconian sanctions, eg striking-off and prohibition from practice and so would not interfere with the notary's right to a hearing in such cases.

Negative implications

- Without a power to fine, the "sanctioning" side of this is rather limited. The Faculty Office could be given more powers to direct, but the most effective administrative sanction (by which we mean "punishment") would be a fining one.
- While administrative sanctions might relieve the cost of time and money in pursuing disciplinary proceedings, they may also impose additional time and money demands on the Faculty Office if they are to be managed on top of disciplinary action.

Is a rule change required?

Yes, see proposed new rule 11.

Are there other ways that the Faculty Office could approach this?

- The Faculty Office could consider collapsing into its administrative structure the functions of the disciplinary Court so that it has greater powers to impose more serious sanctions without a need to go through the disciplinary Court, but subject to appeal (perhaps to the Court). However, this would risk breaching the natural and human rights and legitimate expectation of notaries not to be deprived of their career and livelihood without a fair and substantive hearing and would impose greater pressure on the officers of the Faculty Office to weigh evidence and get quasi-judicial decisions right.
- The Faculty Office could be required to put all administrative sanctions before a judge of the Disciplinary Court in order to (i) have judicial oversight and (ii) prevent the Faculty Office from being seen as being "judge, jury and executioner". However, this could slow the imposition of

administrative sanctions and blur the lines between administrative sanctions and the disciplinary process itself. Instead, we would look to ensuring that administrative sanctions are exactly that, and are not on the same scale of magnitude as sanctions that could be imposed by the Disciplinary Court after a hearing.

Questions

4. Do you agree that the Faculty Office should have administrative powers and sanctions to go alongside the more serious sanctions of the disciplinary Court?

5. Have we got the proposed administrative powers and sanctions right and are the checks and balances proportionate?

6. Do you have any detailed comments about our proposed rule changes concerning administrative powers and sanctions?

Issue 3 – no power to fine

The Faculty Office differs from the Solicitors Regulatory Authority in having no statutory power to fine.

Proposals

The Faculty Office is already seeking the legal vires to amend its rules to fine by promoting a statutory order under section 69 of the Legal Services Act 2007. However this has taken a long time due to delays at the Ministry of Justice and may drag on due to the approaching General Election.

Positive implications

- A power to fine could be imposed both as an administrative sanction (below a certain value) and as a sanction of the disciplinary Court.
- The power to fine would allow the Faculty Office greater flexibility to impose a meaningful sanction in the absence of the suitability of other possible sanctions. For example, a case where a notary did not have all the proper risk assessments, procedures and controls to run a proper office but actually had committed no deliberate wrong and no client had suffered a loss might be amenable to fining rather than being struck-off or prohibited from practice for a time.

Is a rule change required?

At this time the Master has no power to fine. Should the proposed legislation pass, a further change to the rules would be required.

Negative implications

- Guidance and rules would have to set out clearly in which circumstances it would be right for the Faculty Office to apply a fine administratively (ie without a hearing).
- It should be noted that fines are not available to be spent by the regulator. They are payable to HM Treasury. Conversely, this is a positive as it removes the misapprehension that might form that the Faculty Office could profit from issuing fines.

Are there other ways that the Faculty Office could approach this?

Not as such.

Issue 4 – enforcement of judgments

For those rare cases where a notary has ceased to cooperate with the Faculty Office it can be difficult to enforce the decision of the Court, particularly in the recovery of costs and orders to wind-up practices. While the Faculty Office may appoint a litigator to seek recovery as a civil debt, there is no bespoke statutory provision for the enforcement of orders of the Court

Proposal

The draft section 69 Order referred to in Issue 3 contains a standalone provision providing for enforcement of the orders of the disciplinary Court upon application to the High Court.

Positive implications

Clarifies the legal "teeth" under which the orders of the disciplinary Court can be enforced.

Negative implications

None.

Is a rule change required?

This is the subject of proposed legislation and not a matter for rule change.

Are there other ways that the Faculty Office could approach this?

No.

Issue 5 –health

It is suspected that in a number of disciplinary cases that have been heard in the Faculty Office that poor mental health has been a cause and a symptom of practice failures

Proposals

- The Faculty Office would like your views on how best to address mental health causes of disciplinary cases.
- Potentially, the Faculty Office could be conferred with a new power in its rules to require a notary with which it has a concern to undergo an independent health survey conducted by a health professional either into the physical or mental health of the person concerned and address any outcomes by putting together an action plan to help remedy the incapability of the notary as a result of illness of a physical or mental kind. However at this stage we are not convinced that such a power is proportionate and would welcome your views.
- The Faculty Office could seek to signpost better sources of help for notaries who are struggling. It has started to do this.

Positive implications

If it were possible to "get under the bonnet" of physical and mental causes of bad practices by certain notaries, the Faculty Office might be better able to address the root cause rather than the symptom of the problem. Additionally, the Faculty Office may be better able to consider such health issues in a variety of ways during the disciplinary proceedings such as:

- Supporting requests made for an extension of time or postponement of the proceedings.
- Supporting the implementation of reasonable adjustments.
- Providing mitigating features to be considered during the determinations.
- In exceptional cases, allowing for a stay of proceedings.

Negative implications

This is a complex area and one in which the Faculty Office could only move with help and guidance from outside bodies and advisers and in concert with the representative societies. The Faculty Office's core role has been to date to set a regulatory regime in which notaries know what best practice and conduct looks like and to remedy and punish breaches. While being proactive could be beneficial it is not the regulator's role to performance manage notaries as if it were their employers. It would have to use any suggested powers and tools carefully and only where it considered that they might help in

the situation, rather than concentrating on its core roles of setting standards, policing them and rooting out bad practice.

Is a rule change required?

The Faculty Office has no firm proposals at this stage and so no. The Faculty Office have no proposal for requiring an independent practitioners' medical report, and at this stage consider that it could be disproportionate, involve human rights and EDI issues, be invasive and mired in complexity.

Conceivably it is the case at the moment that, if a complaint is made against a notary, and it appears to be related to their mental impairment, that *could* provide a good reason to impose an interim suspension of the notary pending determination of the disciplinary proceedings. The suspension could be reviewed in light of any reports provided by the notary and/or ordered by the court.

Are there other ways that the Faculty Office could approach this?

- Not as such, but the question is how far to go with making changes in this area without getting into performance management. There are boundaries over which proper regulation should not go, so as to avoid acting invasively and disproportionately to micro-manage practitioners.
- The Faculty Office also needs to ensure that cases do not become categorised as involving illness of a physical or mental nature in such a way as to prevent the Faculty Office taking firm action to stop misconduct, whatever the cause or mitigating factors. In this regard poor mental health might be an "explanation" for misconduct but not necessarily an "excuse".
- The judges of the Disciplinary Court are well placed to pick up on and address health issues during the course of proceedings, for example in providing for an adjournment of proceedings when there is a proper health related reason.
- The Faculty Office is actively considering mandating mental health awareness training as part of compulsory continuing professional education.

Questions

7. Do you think the Faculty Office should have a power to require a medical report on a notary about which it has a concern, either relating to their physical or mental health?

8. Do you have any other comments about the interrelationship of health and allegations of misconduct on the part of notaries?

Issue 6 – agreed penalties

There is no power to remove a notary from the roll with the agreement of the respondent

Further, where a notary both admits misconduct and accepts a penalty, there is no way at present of avoiding a full hearing, albeit that hearing is likely to be conducted expeditiously.

Proposals

This would easily be corrected through a rule change. There is no reason why a notary and the Faculty Office might not agree to a removal from the roll or some other sanction if the notary recognises that they are sufficiently culpable for misconduct and should be removed and want to forgo the cost, time and complexity of disciplinary proceedings.

The case still ought to be referred to the disciplinary Court for a finding which will be published, but the procedure for that can be streamlined and an in-person hearing avoided.

Publication is important for reasons of transparency and open justice – see also the discussion on this in *Solicitors Regulation Authority v Spector* [2016] EWHC 37 (Admin); [2016] 4 W.L.R. 16; [2016] 1 WLUK 184 (DC)

Positive implications

This would allow for the streamlining of cases where the notary admits guilt and accepts a sanction. Such cases could be considered on the papers by the Commissary alone, subject to agreement by the notary, Faculty Office, Nominated Notary and any complainants.

Negative implications

None, provided that there is still a published and enforceable sanction and justice is not conducted behind closed doors.

Is a rule change required?

Yes, see proposed rules 19.2, 19.9 and 19.10:

"19.2 Where the Respondent has does not contest the Complaint and has consented to be struck off the roll of Notaries the Court may determine the complaint without a hearing.

…

19.9 Where the Court makes a determination without a hearing the decision will be reduced to writing and the Registrar shall give notice to the parties of the Court's Order in form 6.

19.10 In any case under Rule 19.8 or 19.9 the Court's decision will be delivered or handed down in such a way that its contents are made public (this may include making the decision available to access on the website of the Court)."

See also proposed new rule 5.3.

Are there other ways that the Faculty Office could approach this?

The procedure could be made so as to require no involvement of the disciplinary Court at all, and be between the Master or Registrar and the notary. However, for the reason of consistency and justice, it would be better if such cases were to be referred to the Commissary for a reasoned judicial decision to be made. Whilst it may never be necessary to invoke it, the Commissary must have the power to reject the agreed approach where that person considers there is an exceptional reason for doing so. Otherwise it is not a "reasoned judicial decision" but simply a tick box exercise against what has already been agreed. If the Commissary refused to agree to the penalty, then the matter would have to revert to a full hearing with assessors, which hearing would have to be dealt with by the Deputy Commissary and vice versa.

Questions

9. Do you consider that a notary who admits their misconduct ought to be able to accept a penalty which is approved by the disciplinary Court rather than requiring a hearing in each case?

10. Do you have any comment on the proposed detailed rule change relating to voluntary penalties?

Issue 7 – remote hearings

From 1st March 2021 until 1st March 2022 the rules were amended by consent of the Legal Services Board to allow for that period hearings to be held by video conferencing or similar. The main reason was the impact the Covid-19 pandemic. This provision has now lapsed but would provide useful in particular circumstances.

Proposal

To make the provision (Rule 18A) permanent.

Positive implications

The benefits of this rule have been rehearsed and debated in an earlier consultation. The rule allows any party to request a hearing to be conducted remotely or the Court to order that it be, subject to appropriate safeguards and representations.

Negative implications

It is recognised that remote hearings can fall foul of technical problems and may not facilitate the full and frank exchange of information as an in-person hearing might. On the other hand, they can be easier, quicker and cheaper to arrange and may benefit all parties. The rules provide to the Commissary the necessary discretion to allow them when the circumstances are right. It is the Commissary's policy that the substantive hearing will always be conducted in person, unless exceptional circumstances prevent it, although preliminary hearings can often be handled remotely.

Is a rule change required?

Yes, there was a transitional rule – 18A – which has now expired and it is proposed to make that rule – now rule 20 – permanent.

Are there other ways that the Faculty Office could approach this?

The provision could be allowed to stay lapsed but the Faculty Office and the world at large have become to rely upon the benefits of video conferencing. Resources have also been invested to allow for remote hearings.

Questions

11. Do you agree that the provision which allows remote hearings at the discretion of the Commissary (normally only when the parties agree to it) should be made permanent?

12. Do you have any comment on the proposed detailed rule change which would make the provision to hold remote hearings in appropriate circumstances permanent?

Issue 8 – case management

Some thought needs to be given as to whether the Faculty Office is logging all complaint information and correspondence in a central repository and keeping abreast of KPIs so that cases do not become protracted

Proposals

This is happening already but it would be helpful if the model of the log and practices and procedures of logging complaints information were to be reviewed internally to ensure that they are fully understood, working and whether they might be improved. We are speaking to our IT consultant to build new modules within the existing NotaryPro system.

Positive implications

Improve coherence, efficiency and record keeping of complaints management.

Are there other ways that the Faculty Office could approach this?

No.

Issue 9 – guidance on sanctions

There is no published guidance on which sanction might be appropriate for a particular type of misconduct, eg theft of client money will lead to striking-off, absent an exceptional case.

Proposals

Consider collating existing case law and deriving common themes and practices with a view to putting together some guidance which has judicial sanction from the Commissary.

Positive implications

Assists with consistency and provides guidance to disciplinary panels, and to both complainants and respondents about what the possible outcome might be in a particular case. If more cases are going to be resolved by way of consent without a hearing (see proposal 6 above) some authoritative guidelines on penalties will be helpful. Additionally, if there is guidance which shows that a lesser penalty might be given where a notary has admitted the misconduct and has provided a full account and mitigation, for instance, that could encourage more cases to be admitted from the outset.

Negative implications

Disciplinary cases are few and so we are unsure whether sufficient certainty can be derived from the case law and care should be taken not to limit the discretion of the Court in applying an appropriate sanction.

Is a rule change required?

No, this would be guidance only.

Are there other ways that the Faculty Office could approach this?

No.

Issue 10 – no formal role for the Registrar to filter allegations of misconduct

The Registrar on receiving an allegation of misconduct must send the allegation to be investigated. There are however cases where an allegation is clearly without merit or where further information is needed in order to make a decision to send it to investigation.

Proposals

- To formally allow the Registrar the power to seek further information to clarify the allegation.
- To dismiss clearly vexatious or unmeritorious cases, subject to appeal to the Master.

Positive implications

- Puts the Faculty Office on a sounder footing when requesting further information or deciding not to remit clearly baseless cases for investigation.
- Helps deal with vexatious complaints or complaints which otherwise have no merit.
- Ensures that if a case is sent for investigation, it is at a stage where it can be properly investigated so that some of the background information gathering has been done.

Negative implications

- Gives the Faculty Office power to decline to send a misconduct allegation for investigation, which means that some cases which turn out to have some merit were disregarded at too early a stage. However, as there is an appeal to the Master, that helps reduce the risk of unfairness. The Registrar must give his or her reasons in writing. Additionally, policies and procedures can be devised to prevent the power being used unfairly.

Is a rule change required?

Yes, see proposed new rules 8.2, 8.4 and 8.5.

8.2 The Registrar may seek further information from the person making the allegation or any other person in order to clarify the basis of the allegation.

…

8.4 If the Registrar having carried out a preliminary assessment of the allegation considers the allegation to be vexatious or totally without merit, the Registrar shall write to any person making the allegation and any other party the Registrar considers fit to inform that person or persons that the allegation will not proceed any further under these Rules and the reasons for that.

8.5 Any person having made such allegation dismissed by the Registrar under Rule 8.4 may appeal to the Master within seven days of notice of dismissal having been given to the person.”

Are there other ways that the Faculty Office could approach this?

The Faculty Office could appoint someone else to give preliminary scrutiny to allegations or information about misconduct when it is first received or send all allegations for formal investigation but we consider this to be disproportionate in time and expense. Some latitude should be given to the Faculty Office determining whether an allegation should be formally investigated under the rules to screen out vexatious allegations or those without merit (eg because the subject matter is trivial and does not cause harm to the public or to a client).

Questions

13. Do you agree that the Registrar should have the formal power to seek further information to clarify an allegation of notarial misconduct?

14. Do you agree that the Registrar should have the formal power to dismiss clearly vexatious or unmeritorious cases, subject to appeal to the Master?

15. Do you have any comment on the proposed detailed rule changes which would allow the Registrar the powers mentioned in the two questions above?

General questions

16. Do you have any comments on the way in which the system for complaints and discipline for notaries in England and Wales works at present?

17. Are there ways in which our rules for discipline and complaints can be improved?

18. Do you have any other comments?

HOW TO RESPOND

Please respond in writing by 5pm on 5th April 2024 to The Faculty Office:
By email to:

consultations@1thesanctuary.com

Please put "DISCIPLINE CONSULTATION RESPONSE" in the subject line of your email

Complete list of questions:

1. **Do you agree with our proposal to allow the investigatory work and prosecution to be handled by different people?**

2. **Do you agree that the investigatory work and prosecution need not be conducted by a notary but by someone else who has expertise in that work?**

3. **Do you have any detailed comments about our proposed rule changes relating to splitting these roles?**

4. **Do you agree that the Faculty Office should have administrative powers and sanctions to go alongside the more serious sanctions of the disciplinary Court?**

5. **Have we got the proposed administrative powers and sanctions right and are the checks and balances proportionate?**

6. **Do you have any detailed comments about our proposed rule changes concerning administrative powers and sanctions?**

7. **Do you think the Faculty Office should have a power to require a medical report on a notary about which it has a concern, either relating to their physical or mental health?[4]**

8. **Do you have any other comments about the interrelationship of health and allegations of misconduct on the part of notaries?**

9. **Do you consider that a notary who admits their misconduct ought to be able to accept a penalty which is approved by the disciplinary Court rather than requiring a hearing in each case?**

10. **Do you have any comment on the proposed detailed rule change relating to voluntary penalties?**

11. **Do you agree that the provision which allows remote hearings at the discretion of the Commissary (normally only when the parties agree to it) should be made permanent?**

12. **Do you have any comment on the proposed detailed rule change which would make the provision to hold remote hearings in appropriate circumstances permanent?**

[4] This is not a Faculty Office proposal but we ask the question for completeness.

13. **Do you agree that the Registrar should have the formal power to seek further information to clarify an allegation of notarial misconduct?**

14. **Do you agree that the Registrar should have the formal power to dismiss clearly vexatious or unmeritorious cases, subject to appeal to the Master?**

15. **Do you have any comment on the proposed detailed rule changes which would allow the Registrar the powers mentioned in the two questions above?**

16. **Do you have any comments on the way in which the system for complaints and discipline for notaries in England and Wales works at present?**

17. **Are there ways in which our rules for discipline and complaints can be improved?**

18. **Do you have any other comments?**

Annex 1 – the regulatory principles

(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.

Annex 2 - research

Andrew Boon & Avis Whyte, Lawyer Disciplinary Processes: ‘An Empirical Study of Solicitors' Misconduct Cases in England and Wales in 2015’, 39 *LEGAL Stud.* 455 (2019).

Charts the histories of the Solicitors Regulation Authority and the Solicitors Disciplinary Tribunal up until 2015. It shows the expanding role of the regulatory body in actively managing conduct by, for example, requiring the appointment of a person in the firm (even in sole practitioner practices) responsible for compliance. The Legal Services Act 2007 removed a restriction on the upper limit of fine the SDT could impose but gave the SRA new powers to issue written rebukes and impose fines of up to £2,000 on individual practitioners. The author states how these powers of sanction, albeit minor, potentially deflected cases from the SDT, and the growing role of the SRA risked leaving the SDT to deal with striking-off and suspension. The article also analysis the data to show biases in the way in which cases about women were handled differently from men, and how biases could affect cases involving practitioners from a BAME background. It has data on types of cases and sanctions and the profile of firms subject to disciplinary challenge. An interesting statistic is that around 80% of respondents before the SDT in 2015 were from 2-4 partner firms. When they were from larger firms, more than one member of the firm was often involved in misconduct.

Nally, Edward: ‘Disciplinary action against solicitors and the role of the Solicitors Disciplinary Tribunal, *Medico-legal Journal*, 2017, Vol.85 (2), p.60-69

In this article Edward Nally, President of the Solicitors Disciplinary Tribunal, compares disciplinary cases amongst doctors before the General Medical Council with those for solicitors in the Solicitors Disciplinary Tribunal. In the GMC action can be taken about a doctor who is not fit for practice by reason for health, but that cannot be done for solicitors before the SDT unless the health problem has given rise to a sufficiently serious failing. So while both tribunals are there to protect the public, the SDT has now power to protect the public by reason of the diminishing health of the practitioner unless their incapacity causes a sufficiently serious breach. The only locus that the SRA can intervene in the case of a sole practitioner, whose mental capacity, under the definition in the Mental Capacity Act, is such that they are unable to carry on running their practice. They can also enter into a regulatory agreement with a solicitor who does not meet the threshold for loss of capacity but is poor in health but that requires cooperation on the part of the solicitor. Unlike the GMC for doctors, the SRA cannot require a solicitor to undergo a health assessment. In the following passage Mr Nally addressed those cases where a lingering mental health problem was liable sooner or later to cause considerable harm to the public:

"It concerned me because I had one case in particular where I felt that there was a man before us who was clearly disengaged from the process, who clearly lacked insight, clearly didn't appear to be well, but didn't acknowledge that impairment shall we say, or that trend, but it was something that we identified, and it felt sad. It would have been an injustice to say 'Well, this is going only one way. This man is going to end up with the ultimate sanction because of the way he is behaving, to-ing and fro-ing with the process'. And the costs, of course, were ratcheting up by means of the way he was engaging with things. He wasn't cooperating, he was delaying, he was adjourning everything, he was making numerous applications, and so forth, and so the costs went through the roof. It felt as though there should be some way to a put a brake on this, but what did one do with somebody who was in that state of mind, who didn't see anything wrong with himself ? That was what got me thinking whether we should look at things in our locker, in our range of sanctions, in the way we approach cases, perhaps deal with issues more sympathetically. But I must argue against myself. At the end of the day that individual was potentially dangerous to the public. The underlying illness that he didn't acknowledge but he certainly may have had was actually causing mayhem to his clients, that is to say the general public, and therefore he wasn't fit to remain in the profession. And you can easily reflect and think about a doctor, a medical professional or a dentist, a nurse, or whoever, who might fit that description beautifully, and what do you do, do you allow them to carry on? Plainly not, in the final analysis. They are dangerous to patients, and that must come first, notwithstanding the damage to the individual concerned."

Mr Nally also helps distinguish in the article between illness and disability.

Mark R. Davies: 'Solicitors, dishonesty and the Solicitors Disciplinary Tribunal', *International Journal of the Legal Profession* (1999), 6:2, 141-174

Provides a thorough although now old statistical analysis of cases in the Solicitors Disciplinary Tribunal which involved dishonesty, and looks at the causes, types and consequences of dishonesty in the solicitors profession. It is useful in considering where dishonesty is more likely to manifest itself (eg sole practitioner or small firms) and causes (eg pressure to meet billing targets).