



BIRMINGHAM LAW SOCIETY
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**Response to Ministry of Justice Consultation on
Non-Contentious Probate: Mandating online
professional applications**

September 2020

Introduction

The Birmingham Law Society is the largest local law society representing some 5,000 legal professionals. This response has been prepared by the Society's Private Client Committee, whose members include small 'high street' practitioners to large multi-national law firms. We note that this is part of a series of changes to the Probate Service which has included the closure of our local probate registry on Bull Street, in Birmingham, however we welcome Birmingham being chosen as the location for the national centre for the Courts and Tribunals Service Centre to process all digital applications.

Response

We will respond to each of the consultation questions in turn below.

Question 1 - Do you agree that HMCTS should implement mandating of professional user applications? Please give reasons for your answer.

No, not at this stage. Whilst our members report that the online application process is helpful, some teething problems have been noted which on balance make us hesitant about whether the system is ready in its current format.

Unfortunately, our members are sceptical about the Ministry of Justice's ability to implement new IT systems and processes. Indeed, in the last two years our members have faced substantial delays when making applications; at times in excess of six months. This has improved but the waiting time is still often measured in months rather than weeks. There have been periods where there has been technical difficulties/downtime in the system. Our members have reported difficulties logging into the system and have stated that they are met with error messaging with no indication as to what the problems are, how they are being addressed or how long they will take to resolve.

Question 2 - Do you agree with the advantages identified for professional users from the online probate system?

Yes, the advantages identified in the Consultation Document should be advantages of an online service if it all works seamlessly. However, often this is not the case.

Question 3 - Are there disadvantages with the online probate system? Please give details.

Potential disadvantages can be summarised as follows:

Lack of Alternatives

If there are any system failures or problems with specific parts of the application form, practitioners will not be able to complete or submit applications. This would not only affect clients but also the practitioner's ability to complete their work efficiently. In firms where an

employee's main or sole task is the submission of probate applications a mandatory system would have a catastrophic effect on productivity in the event of a technical problem.

Taxable Estates

For taxable estates there will be a system where an online process is required for the Grant application, but the process for submitting the Inheritance Tax Return (and paying the tax) will still be by paper. Therefore, any advantage of the system for remote workers is completely negated. Further, as there have been in HMCTS, there are often problems confirming receipt of documents by HMRC. Similarly, the issuing of receipted IHT421s is often subject to delays and takes several weeks. Therefore, any time or cost saving from the online system is likely to be marginal at best.

Complex Applications

With the increased use of personal applications, the percentage of professional applications that involve unusual or complex situations is increasing as many members of the public deal with more straightforward estates themselves. The move to an online system and a general call centre has made it much more difficult to check questions of process and evidence prior to submitting. When District Probate Registry counters were still available or could be reached by phone potential difficulties could be resolved quickly and at an early stage. It is now very difficult to do this and this is only likely to become more difficult with an online process.

However, if pre-lodgement enquiries, including requests for documents to be settled can be done online (and linked to the main application) and these are dealt with on a quick turnaround (say no more than 5 working days) then this would greatly increase the attractiveness of the online process.

Urgent Applications

Some applications do need to be made on a genuinely urgent basis and if there is not an effective way to make applications urgently on the online system there is a risk that estates will be significantly prejudiced.

Physical documents

The fact that paper and documents including wills and codicils are still required to be sent by post still means the system is not truly online and delays can therefore occur.

Question 4 - Do you have any comments on the advantages to HMCTS of the online service? Do you consider there are disadvantages (please give details)?

HMCTS will need to ensure that there is a commitment to resource the online service so that it is ready to be used by professionals in the manner envisaged. Our members have found that using the online system has not yet resulted in them making less enquires by telephone or email due to the time it still takes for applications to be processed and the issues identified

in our response to question 1. Therefore, it seems unlikely that a mandatory online system will result in HMCTS receiving less emails and telephone calls unless the issues are resolved.

Question 5 - Do you disagree with any of the exceptions HMCTS proposes to make?

The system should only be mandated once it has been fully developed to make all applications possible. Exceptions may give rise to confusion and uncertainty to the professionals using the service. Until then both paper and online systems should be available to professionals. We believe consideration should be given to starting with straightforward applications and then adding more complex types of applications to the mandatory process, rather than implementing a very significant change with only very limited exceptions.

Question 6 - Are there any other exceptions which you believe should be made to the mandating of professional user applications?

If complex applications are included within a mandatory online process very clear guidance would need to be issued as to how they are catered for within the online system. In particular we have a number of concerns as to how appropriate the online system will be for limited grants.

Firstly, at present an application limited to collecting assets (*ad colligenda bona*), or to a particular part of an estate (s.113) and applications to pass over those entitled to be PRs (s.116) require a sworn affidavit (or statement of truth as it is temporarily at the moment) requesting an Order of the Court before the application the actual Grant can be made. The date of the Order and the name of the Judge or Registrar who made the Order needs to be stated on the application form. Therefore, the two-stage process of needing a to submit statements proceeding the application for an Order does not mean they can be dealt with wholly online.

It needs to be clarified whether the application for an Order of the Court has to be done by post and then the application for the Grant submitted online, or whether there will be an option to apply for an Order online as well.

Secondly, limited grants are often required urgently by their very nature. This is particularly the case for Grants *ad colligenda bona*, as otherwise the Personal Representative would simply wait to apply for a normal Grant of Representation. There needs to be a process by which these applications are identified as urgent on receipt and dealt with accordingly. If there is not the option to mark an application for a limited grant as urgent online, then it should be an exception to the rule and a postal application allowed.

Question 7 - Do you consider that any of proposals will have a disproportionate impact on individuals with protected characteristics? Are there any potential modifications that we should consider to mitigate this impact? Please give reasons for your answer.

Our members are concerned that the online process would inhibit solicitors who are visually impaired, have accessibility issues or are not computer literate. We question how HMCTS can overcome these difficulties if paper copies of probate applications are removed.

It is well documented that as a whole older individuals are more likely to find the use of new technology as an obstacle to accessing a service. Of course, this is not universal, but a mandatory online process could be indirectly discriminatory towards older practitioners. This risk can probably be mitigated within larger firms. However, the Ministry of Justice should consider whether there could be indirect discrimination for older practitioners who operate as sole practitioners.

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