

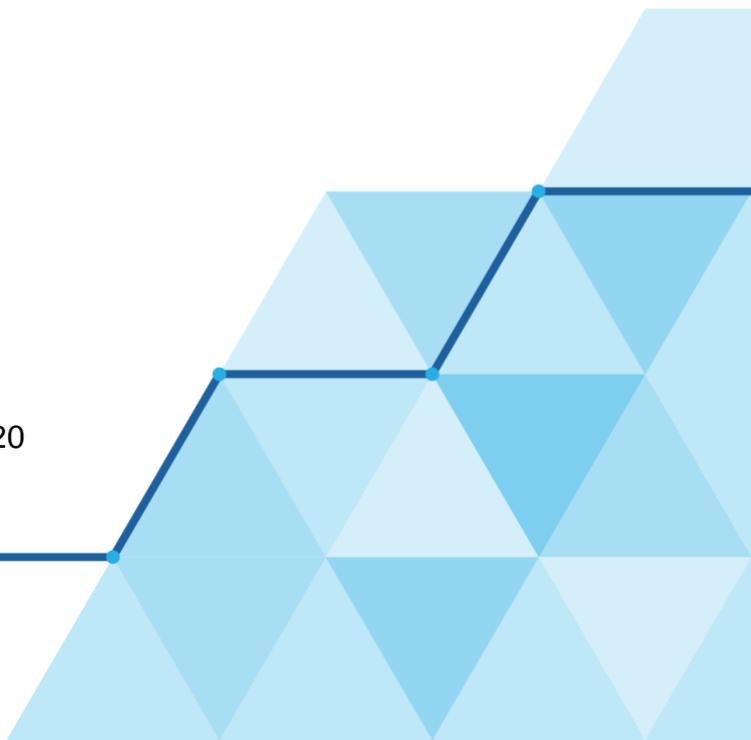


Ministry
of Justice

Non-Contentious Probate

Mandating online professional applications

This response is published on 29 September 2020

A decorative graphic in the bottom right corner consisting of a grid of light blue triangles of various sizes, some pointing up and some pointing down, creating a geometric pattern.

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Ministry
of Justice

Non-Contentious Probate

Mandating online professional applications

Response to consultation carried out by the Ministry of Justice.

This information is also available at <https://consult.justice.gov.uk/>

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Introduction and contact details

This document is the post-consultation report for the consultation paper, Non-Contentious Probate: Mandating online professional applications.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting the Civil Law Policy team at the address below:

Civil Law Policy

Ministry of Justice

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London SW1H 9AJ

Email: civil_justice_poli@justice.gov.uk

This report is also available at <https://consult.justice.gov.uk/>

Alternative format versions of this publication can be requested from [email/telephone number of sponsoring policy division].

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Background

The consultation paper Non-Contentious Probate: Mandating online professional applications was published on 10 August 2020. It invited comments from specialist probate practitioners on the Government's proposals for mandating online solicitor and other practitioner applications for grants of probate or letters of administration.

The consultation period closed on 10 September and this report summarises the responses, including how the consultation process influenced the final shape/further development of the policy/proposal consulted upon.

A Welsh language summary is being prepared for this response paper and will be available at Gov.UK with this document in due course.

A list of respondents is at Annex A.

Summary of responses

1. A total of 23 responses to the consultation paper were received. The consultation was specifically aimed at specialist professionals engaged in making probate applications and the responses reflected this professional base. Of these, 11 were from legal and accountancy professional and regulatory bodies (including three local Law Societies); 9 from law firms and 3 from individual practitioners.
2. The responses consisted of general comments on the online mandating for professional users' reforms as well as individual responses to the 7 questions posed in the consultation paper.
3. The Government is very grateful to respondents for the comments made, with more details of the points made in the section below on the responses to the individual questions.
4. Some recurring themes occurred in the responses, which will form part of the planning and implementation of the probate service in future, and in particular the online process for submitting applications. These can be broadly summarised as follows:
 - Professional users are in the main supportive of an online system for probate applications and agree in principle with the benefits that accrue.
 - There was more reservation on the online service becoming mandatory at this stage, and in particular for certain types of application e.g. complex cases. In some cases this appeared to be based on perception and isolated problems in using the system. Others had not experienced problems and welcomed the system.
 - Constructive suggestions were made on ways to further improve and develop the system, and follow on from the fruitful engagement HMCTS has had with professional users
 - A minority of respondents were opposed in principle and wanted to revert to the old paper-based system.
 - Conversely other professional users wanted remaining exceptions removed and for all probate service applications to be conducted online.

Responses to specific questions

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

This was a broad based question answered by all respondents, and a number of points made have been addressed in the general comments related above.

To recap, while there was a spectrum of views it would be fair to say that a majority felt mandating online professional user applications was agreed in principle, they argued it was premature and should be implemented in phases. Other respondents openly welcomed the proposal and others opposed it vehemently.

A number of respondents said that an efficient and reliable online system would see them supporting a mandating approach. Reservations were expressed about various aspects of the existing service. These included occasional errors, technical issues (such as screens freezing), difficulties in correcting mistakes and worries that the system was not fully suited to the level of detail required for very complex applications.

Some frustrations were expressed by both supporters and opponents of the proposals on aspects of the current system that were felt to impede full modernisation – a number cited a need for greater collaboration and combining with HMRC inheritance tax processes as well as concerns that original will documents were still required.

STEP suggested that simple probate applications could be made mandatory, but a paper-based system retained for more complex ones, and they offered to assist in setting criteria.

Other points made included longer lead-in periods for professional users to adapt, and a suggestion that the rules include a discretionary clause for the Probate Registry to suspend a mandatory system in the event of technical difficulties or a major situation arising.

Government response

The support in principle of a number of specialist practitioners to a mandatory online system is welcomed, and the concerns fully understood. The system has been developed and refined, assisted by user feedback, and concerns reflected in responses have been addressed.

It is understood that with a majority of professional users (as at June 2020) continuing to use paper-based systems the wish for caution on full implementation has been expressed. However, the vast majority of non-users have not tried to use the system as yet, and the Government's sense is that the problem is to a large degree the perception

of the service's efficiency rather than the actual performance. This may in part be to early experiences during the early stages of the online system when teething issues occasionally occurred and have since been rectified. Points made on the need for technical support are acknowledged as important.

Further work will continue as the performance of the system is constantly monitored and reviewed. HMCTS and HMRC have been discussing greater collaboration of the dual systems operating at present, and this will be pursued, although the absence of a fully integrated system does not mean the probate application service cannot function effectively as a stand-alone process in the meantime.

It is clear that the system has still to be tested by many professionals, and gain the confidence of others, but the Government's concern is that unless mandating is implemented, and very soon, the full benefits of an online system will not be achieved. The concern is that there is a danger that for some parts of the profession the move to full mandating will always seem to be premature and best deferred to another day.

Embracing a fully modernised online service is seen by most as inevitable, and for the HMCTS reform project the future operating model of the service is premised on professional user applications being almost wholly online.

The Government accepts and is determined to achieve the challenge inherent in the constructive engagement shown in the professions' responses – the need to ensure a robust, accessible, secure, user-friendly and above all reliable service which is truly fit for purpose.

Conclusion

The Government believes that the time has come for the vast majority of grants of probate (where there is a will) to be mandated to the online process when the application is from professional users. There will be some exceptions to this for highly specialist applications (see pages 11 and 12).

However, the Government notes the professions' reservations and the constructive spirit in which an incremental process has been advocated. As a result, grants of letters of administration will not be mandated at this stage (although such applications can continue to be made online apart from identified exemptions).

The Government intends to ask the President of Family Division to agree a Statutory Instrument to make the necessary changes to the Non-Contentious Probate Rules.

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

A majority of the 18 respondents to this question agreed that the advantages identified with the online system in the consultation paper offered benefits, although a number questioned whether all of these were being fully realised. A minority of respondents rejected the advantages and would prefer to continue solely with a paper-based system.

It was clear that experience of different aspects of the service vary across practitioners and in at least one case within a law firm. A number of respondents agreed with the advantages in theory, but recounted problems (some not at first hand) such as problems with tracking a particular application's progress.

However, against this a number of respondents were positive about several features of the online system – the way it reduced input errors, streamlined the process and the ability to use e-signatures.

Government response

The Government welcomes confirmation that the advantages of the online system for probate applications are recognised, and is pleased that for some users the advantages are being clearly demonstrated.

For others, the experience or perception of the service has not been as positive, and it is hard to gauge the extent to which this reflects issues in the early development stages.

The Government is clear on the advantages of the online service for professional users, and accepts that trust and confidence needs to be built for the system, and is determined to demonstrate all the advantages will be consistently realised.

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

The 16 respondents to this question provided examples of what they saw as disadvantages with the online probate system.

These divided broadly into problems seen with the concept of the service or how its configured, and those that focused on practical instances of problems encountered when using particular aspects. A minority of respondents preferred the online system and felt there were no major disadvantages.

Some respondents cited the diminished role of Probate Registries and the loss of specialist staff. A linked issue was ability to contact staff with queries on applications.

For some, the system was not geared sufficiently to particular types of applications – complex being the most referred to, but also building in provision for a genuinely urgent application.

Reference was made to the need for improved guidance and instructions, especially as the system was expanding significantly with new users testing it out. The point was made that smaller firms and solo practitioners may require higher levels of technical support. A suggestion was made that IT support should be available at all times.

There was some frustration that some aspects of the process remained paper-based, particularly the requirement to send paper copies of the original will.

A number of respondents provided comments in detail on some issues that made the process less smooth, such as an option to insert free text, space for completing material, ability to delete application and start again etc.

Government response

HMCTS hold regular user feedback sessions on the online probate service, and this has proved a very useful forum in addressing some of the concerns raised here in terms of the system's user-friendliness. These will continue as the service is further refined in the light of experience and modifications. Some of the disadvantages mentioned are being and will be addressed via this process. Renewed consideration will be given to guidance and user support, although this will not extend to 24 hour technical assistance.

Other points made offer useful suggestions for the Government to consider, such as whether to build in capacity for urgent applications, although there will remain provision for follow-up calls to the Probate Service to highlight where a case is urgent and the grounds for that urgency. Another point made was the need to ensure the system works as well for complex case applications as the more straightforward ones.

Some of the comments related to features of the system which have been and are being reformed, such as the role of Registries. These aspects have been analysed as part of the overall probate project within the HMCTS reform programme, and have contributed to the efficiency savings which are enabling the investments that have taken place in the online system.

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

A number of the 18 respondents answering this question identified a range of advantages to HMCTS and by extension service users.

Costs savings were the most frequently cited benefit, although a few respondents made points relating to the adverse effects on the level of service provided. The point was made that skilled staff were still required in the new structure.

Some respondents made reference to innovations that could be developed, for example the Law Society suggested a live chat service could operate for practitioner

queries to be dealt with promptly by HMCTS staff, and statistical data could be improved and shared with users.

The point was also reiterated that integrating the probate system with that for inheritance tax would bring benefits for HMCTS, HMRC and users

Government response

Some interesting and useful suggestions were made on future developments and refinements of the service. These do not mean that the introduction of mandating needs to be held up now, but would become additional benefits as the service is used more and becomes fully formed.

The Government does not agree that the online process has had an adverse effect on the quality of the service, and considers it will increasingly lead to an improved service leading to savings of time and cost to HMCTS and professional users alike, as well as offering a number of other benefits (as outlined in the consultation paper). Specialist staff are still a key part of maintaining a high quality service.

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

Several of the 16 respondents to this question recommended that in a mandatory system there should be no exceptions, and that HMCTS should move quickly to incorporate the remaining areas of exception.

In particular, the exception causing most frustration was where there were multiple applicants (for example children of the deceased seeking probate in relation to the same deceased person). For some professional users this was a sizeable number of the overall applications they handled.

The wish was expressed by many respondents that further expansion and developments of the online service would remove the need for exemptions.

Some more general comments were made on proposed exceptions. The Law Society raised concerns about the Non-Contentious Probate Rules in relation to applications made on behalf of those holding powers of attorney. A few respondents felt that Rule 39 (Resealing under Colonial Probates Acts) applications did not need to be exempted.

Government response

The Government welcomes the general view that exceptions should be minimised and will over time disappear with technological developments enabling an expansion. HMCTS is working to constantly refine the system and build its capacity further. It is recognised that exceptions will represent extra work and cost for professional users and HMCTS alike, although at this stage they cannot be avoided for particular types of application.

The Government will discuss with the Law Society the concerns they have highlighted on the rules in relation to cases involving powers of attorney.

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

There were 17 responses to this question, with a number reiterating their belief there should be no exceptions to a mandatory online system or saying that there were no additional exceptions to suggest.

A number of respondents suggested that a further exception should be grants of Ad Colligenda Bona Grant, where limited grants of representation are required to deal with certain assets of an estate quickly. It was pointed out that the rules stipulated these should be accompanied by an affidavit and therefore remain paper-based.

Some respondents broadened this point to suggest there should be provision for all urgent applications, whether as an option on the online system or with an exception to the mandatory process if one was not available. A few respondents felt that all complex applications should be exceptions from a standard online application process.

Irwin Mitchell suggested that there should be specific dispensations for practitioners who found that in technical terms they could not use the online system, and general dispensations for instances where the online system had crashed and was inoperative for a few days.

Government response

Following practice guidance issued by the President of the Family Division in April, statements of truth can be sent as an alternative to affidavits for a range of probate applications, including those for Rule 52 (Grants of administration under discretionary powers of court, and grants *ad colligenda bona*). This guidance will shortly become a formal and permanent part of the Non-Contentious Probate Rules.

The Government will discuss with HMCTS the question of urgent applications and how the online process and overall service might better make provision for these (and how they would be defined).

Although the Government proposes to mandate online grants of probate generally, there are a number of specialist applications which it is agreed should remain paper-based for now, as they are unusual and often complex. These include applications to prove a copy of a will when the original has been lost and applications for rectification of a will. A full list of these exemptions will appear in a Schedule to the Statutory Instrument for the next set of rule changes.

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.

This question was answered by 15 respondents, with a majority considering that there would be no disproportionate impact on individuals with protected characteristics. This was explicitly linked to the fact that the proposals related to professional users rather than the public generally.

Other responses highlighted visually impaired and elderly practitioners being most likely to be adversely affected, although the point was made that it would be difficult and unusual to conduct modern legal practice without access to and use of electronic systems.

The Law Society said the online service should have all the usual accessibility and functionality of web platforms, e.g. large font and audio reader options as well as signposting to support services.

Government response

The responses accord with the Government's assessment of the impact of the reforms, given that they are confined to professional users only, operating in a modern business environment.

The development of the online service and its requirement to meet the Government Digital Service Standard in terms of accessibility, user experience and reliability. This is reinforced by HMCTS's user engagement, with regular meetings with representative practitioner groups as well as responding to feedback from individual users on any issues they are having.

Impact Assessment, Equalities and Welsh Language

Impact Assessment

No impact assessment has been produced for these proposals as the reforms affect a relatively small number of specialist companies and individual practitioners.

Equalities

Under the Equality Act 2010 (“the EA”), Government must consider the equalities impact of any proposed changes and have due regard to the need to:

- eliminate discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

For the purposes of the equality impact statement the relevant protected characteristics under the EA are: race; sex; disability; sexual orientation; religion and belief; age; marriage and civil partnership; gender reassignment; pregnancy and maternity.

Consideration has been given to the impact of the proposals in this consultation paper against the statutory obligations under the EA. The reforms are directed exclusively to professional users rather than the public, and the assessment is that professional users will be already using and conversant with electronic processes for conducting their business activities, and that no direct or indirect discrimination is believed to apply to protected characteristic groups resulting from these reforms. If evidence of any such discrimination were to come to light, we would consider the impact of such discrimination against the objectives pursued by the reforms and consider the potential for modifications to mitigate the impact.

Welsh Language Impact Test

In accordance with the Welsh Language Act 1993, these reforms have been assessed in terms of services provided to the people in Wales.

The proposals related to professional users only, and unlike the online probate service for applications from members of the public, there is no Welsh language facility

Conclusion and next steps

1. The Government is very grateful to everyone who took part in the consultation. The views will help to inform the future implementation of the policy, and some excellent and constructive points were made to assist medium and longer term developments.
2. There was widespread support from professional users for the principle of an online probate system, although reservations were expressed by many respondents on the question of whether it should be made mandatory now. This appeared to be shaped in part by perception of the service as well as some anecdotal examples of experience in using it.
3. The Government believes that the service has now reached a stage of sufficient maturity, reliability and robustness to warrant a move to mandating the online process for professional users for grants of probate (apart from certain defined specialist exceptions). As such, it intends to ask the President of the Family Division to make appropriate rule changes to the Non-Contentious Probate Rules. A range of complex and non-standard applications will be exempted from mandating.
4. However, a move to mandating for grants of letters of administration will not be implemented at this stage, in line with the wishes of many respondents for the move to a wholly online process to be incremental.
5. A number of the responses have highlighted issues which the Government will work with HMCTS and representative professional user bodies to address, both in the short, medium and long term. A feature of online HMCTS services, including probate, has been continual review, evaluation, refinement and engagement with users and this will continue in the short, medium and long term. That does not mean mandating needs to be delayed, however; rather that it will form a significant stage in the evolutionary path.
6. As stated earlier, many professional users are still preferring to use traditional paper-based applications, without for the majority having tried the online process. The Government's concern is that unless mandating for some processes is implemented, and very soon, the full benefits of an online system will not be achieved, including the savings anticipated in the HMCTS reform programme that formed the basis of the investment in the technology that has enabled an online system to be introduced.
7. The concern is that unless some mandating is introduced there will continue to be a slow shifting of the proportions of professionals both testing and using the system. This is despite many firms working across a number of court jurisdictions with HMCTS online applications increasing across all of them.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

Annex A – List of respondents

1. Amicus law (solicitors)
2. Katie Jones, Gough, Thomas & Scott (solicitors)
3. Gordon Dadds (solicitors)
4. Liverpool Law Society, Non-Contentious Business Committee
5. Irwin Mitchell
6. Nicola Hopper (solicitor)
7. Bar Council
8. CILEx Regulation
9. Newcastle Law Society
10. Shakespeare Martineau
11. Chancery Bar Association
12. Birmingham Law Society
13. Meridian Private Client LLP
14. Kitsons (solicitors)
15. ACCA
16. Co-op Legal Services
17. ICAEW
18. Nikki Spencer (solicitor)
19. STEP
20. Law Society
21. Thomson Snell & Passmore LLP
22. Roland D'Costa, Editor, Tristram & Cook's Probate Practice
23. Farewill



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