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About the Magistrates Association

The Magistrates Association (MA) is the independent membership body for the magistracy. We work to promote the sound administration of the law, including by supporting our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the magistracy, the courts and the broader justice system. With 14,000 members across England and Wales, we are a unique source of independent insight and information on the magistracy.

We have restricted our comments on the Bill to family court proceedings, as other civil proceedings are outside of our remit.

MA views on the Bill

The MA welcome the underlying aim of the Reform Agenda to improve efficiency of the justice system, while ensuring equal access for all to a fair process and outcome. We are aware of the potential for online procedures to fulfil these aims for certain proceedings within the civil and family jurisdictions. For example, we acknowledge the increased efficiency achieved as a result of the introduction of initiating a divorce application online, which has successfully reduced the proportion of forms being incorrectly completed.

However we have two main concerns in relation to this Bill: firstly that it allows rules to require parties to engage with a proceedings online and secondly, it does not reflect the fact that almost all family court proceedings cannot be appropriately dealt with online, and should therefore be excluded from the Online Procedure Rules (OPR).

Specific points

Section 1: Requirement for parties to use online processes

HMCTS have acknowledged that their Assisted Digital programme will not be sufficient to support everybody to engage with online processes, and have therefore made a commitment that “digital services will not be mandated”.¹ In relation to the Reform Agenda, it has been stated that “HMCTS will continue to make provision for litigants to continue using paper documents” in accessing family court proceedings.² It is therefore concerning that Section 1(1)(a) would allow the Online Procedure Rules Committee (OPRC) to make rules requiring certain proceedings to be initiated electronically and Section 1(1)(c) would allow rules requiring parties to participate electronically.

¹ See <https://insidehmcts.blog.gov.uk/2018/06/28/helping-people-to-use-online-services/>

² <https://www.judiciary.uk/wp-content/uploads/2019/01/family-jwow-response-1.pdf>

The Government's Impact Assessment for Assisted Digital³ states that people with disabilities are four times more likely to have never used the internet than those without disabilities. Similarly, those over the age of 65 years old are the age group least likely to be adept at using the internet. This means that the elderly and those with disabilities are most likely to not be able to use digital systems, so the most vulnerable are at risk of being disadvantaged by a requirement to access proceedings digitally. The MA would therefore argue that if a case involves an individual who cannot use digital systems due to a particular vulnerability, paper documents would have to be provided to guarantee non-discriminatory practices.

The MA is supportive of the opportunities for improved efficiency and outcomes that could come through the use of technology but it should be remembered that according to the Government's own assessment, 18% of the population are "digitally excluded"⁴ and these people cannot or choose not to engage digitally at all. They must not be prevented from accessing the justice system, and therefore alternatives to online processes must be provided.

We would also like to point out that the Government's Impact Assessment identifies that the proportion of people who are comfortable using the internet for sensitive or confidential matters is lower than the 82% who are seen as able to use digital system with only low level support. The example of internet banking shows that across all age groups, the average percentage that use this services is only 56%.

The MA believes it would be helpful if it was clearly stated in the Bill that there would not be an expectation for parties to engage with any family court proceedings online, and paper channels would always be available for anyone who chose to use them.

Section 1: Transfer of proceedings to full court hearings

Section 1(6) allows the OPR to set out circumstances under which proceedings should be transferred to a full court hearing, and therefore no longer come under the OPR themselves. Although it may be useful to provide some clarity as to when cases can be transferred, we would be concerned if this resulted in any restriction of judicial discretion in an individual case to respond to specific circumstances and make the decision that a court hearing is required.

Section 2: Designating of proceedings to be dealt with online

Section 2(1)(b) would allow the OPRC to designate any family proceeding to be dealt with online. While we appreciate the aim of the legislation to be permissive, with the details to be delegated to the OPRC, we are very concerned that there are no limits set out in the primary legislation in relation to appropriateness of online processes within family court.

The MA has raised concerns about the appropriateness of fully-video hearings in family court,⁵ and these concerns are relevant for the appropriateness of online procedures. Although it may be useful for digital systems to support hearings, we would note that discussing issues in person can resolve disputes and therefore shorten proceedings, making the process more efficient. This opportunity may be lost if the proceedings are dealt with online.

³ https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/assisteddigitalia.PDF

⁴ https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/consultationpaper.pdf

⁵ See <https://www.magistrates-association.org.uk/system/files/resources/10%20Court%20and%20Tribunal%20Reforms%20inquiry%20response%2006%2003%2019.pdf>

In particular, the MA would state that it would not be appropriate for any cases involving litigants in person, parties with vulnerabilities or where children are being heard to be dealt with online. Similarly if there are contested issues, they are most appropriately dealt with in person as bringing people together at court allows for negotiation and potentially agreement. This is vitally important in family proceedings but it simply is not going to happen when people are remote from the court and from each other.

It is important that family cases do not suffer unnecessary delay, especially when decisions about arrangements involving children are being made. But even if technology would allow a case to be dealt with earlier, fair justice for such complex decisions requires face to face participation.

It was acknowledged by the President of the Family Division that face to face hearings would normally be required “for contested cases involving the giving of oral evidence, multi-party cases, cases concerning Litigants in person, and/or cases concerning children.”⁶ We therefore propose that the Bill clearly states that online procedures are not appropriate for any contested family cases involving litigants in person or concerning children.

Section 4: Membership of the Online Procedure Rules Committee

We are very concerned that the membership of the OPRC as set out in the Bill would not necessarily ensure adequate representation from judges sitting in the family jurisdiction. At the very least there should be a family judge on the OPRC, otherwise it is not clear how the committee can make informed decisions about the appropriateness of setting out any specified hearings to be dealt with online without relevant jurisdictional expertise.

The MA would also suggest that there should be representation of the lay magistracy (as is the requirement for the Criminal Procedure Rules Committee and the Family Procedure Rules Committee (FPRC)). The unique nature of judicial office holders who are lay members of the judiciary means that it is important their voice is heard to ensure that the rules are appropriate for the cases dealt with by this majority judicial cohort.

Schedule 2: Online Procedure Rules to take precedence over Family Procedure Rules

Schedule 2 sets out that if OPR apply for any proceedings, then “standard civil, family and tribunal procedure rules do not apply to proceedings”. Although we appreciate it is important for there to be a clear process indicating which rules govern proceedings, and giving precedence to one committee does achieve that; we are concerned that the result will be the OPRC being able to make decisions about the appropriateness of online procedures for cases without input from the FPRC or other jurisdictional committees.

⁶ <https://www.judiciary.uk/wp-content/uploads/2019/01/family-jwow-response-1.pdf>

