

STEP Consultation Response: The Justice Committee’s Inquiry into the Performance of the Probate Service in England and Wales

About Us

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

Today we have over 22,000 members in over 100 countries and over 8,000 members in the UK. Our membership is drawn from a range of professions, including lawyers, accountants and other specialists. Our members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members.

We take a leading role in explaining our members’ views and expertise to governments, tax authorities, regulators and the public. We work with governments and regulatory authorities to examine the likely impact of any proposed changes, providing technical advice and support and responding to consultations.

Purpose of this Paper

STEP responds to the House of Commons Justice Committee’s enquiry into the performance of the probate service and concerns about delays and inaccuracies. Delays in the probate service have risen sharply and this inquiry will focus on taking evidence on capacity, resources and delays of the probate service and the impact of digitalisation, including the effectiveness of the online probate portal.¹

Response Summary

STEP surveyed its members in England and Wales to gauge their experiences with the probate service and the effect that delays have had on their clients.

It was clear from the replies that there are significant issues to be addressed. Delays in grants being issued are causing real hardship for some people, as well as undermining confidence in the system and increasing the risk of ‘rogue traders’ operating in this market. This also accords with the anecdotal experience of the STEP members who have contributed to the preparation of this response.

¹ UK Parliament: <https://committees.parliament.uk/committee/102/justice-committee/news/198600/justice-committee-launches-new-inquiry-into-probate-amid-concerns-over-delays-and-consumer-protection/>

STEP believes the core problems are:

- a lack of experienced staff, which has contributed to particularly long turn-around times for complex cases and an increase in errors generally (for example, there has been noticeable increase in the number of grants issued with typos or incorrect information); and
- a lack of straightforward, efficient lines of communication with the probate registry via which practitioners and clients can help to resolve any issues and progress cases.

For context, STEP notes that the recent centralisation and digitalisation of the probate service contributed to a significant number of long-serving staff leaving (an effect that was arguably exacerbated by both steps being taken at the same time). Although welcome efforts are clearly being made to recruit, there is still a critical shortage of registry staff who have sufficient qualifications and practical experience in this area.

Until this shortage is addressed, it is difficult to see how the backlog in probate cases can be reduced or how standards of service can be improved in general.

The problems caused by the pandemic and consequent lockdowns including the move to now limited working from home did not help but are not at the root of the issues. In addition, the average number of deaths per year of 600,000 is unlikely to reduce and may even increase due to the age profile of the population.

STEP proposes a number of ways in which the situation might be improved, including:

- taking further steps to recruit experienced staff as a priority;
- training more of the probate registry's staff on how to handle complex cases
- secondment to and from the private sector to enhance junior staff's experience
- introducing new means of contact between practitioners and the probate registry so that outstanding information or queries can be addressed quickly and stopped cases can be progressed more efficiently; and
- implementing transitional measures to address urgent problems, such as outsourcing some of the complex applications to appropriately qualified legal practitioners in private practice to help clear the backlog

1. Capacity, resources and delays

Does the probate service have the necessary resources, capabilities, and expertise to process applications for probate, including complex probate, in a timely manner? If they do not, how could this be improved?

What are the principle causes of the delays in issuing grants of representation?

What is being done to overcome the current delays and are there any gaps?

What is being done to bring greater resilience to the probate system to mitigate against future delays?

What has been the impact of delays and what should the Government do to mitigate that impact?

What can be done to avoid stops?

How well is the system working for complex probate applications?

It is evident from our members' experiences, and from the probate registry's own figures, that the registry does not currently have the necessary resources, capabilities and expertise to process probate applications (and in particular complex applications) in a timely manner.

Applications take several months to be processed even in straightforward situations, whereas prior to centralisation and digitisation one might expect an application to be turned around in a week. Where the matter is more complex, the waiting times can lengthen drastically.

Those delays can have a very real impact on the individuals trying to deal with an estate (usually grieving family members struggling to come to terms with their loss) and the professionals helping them. STEP's members provided various examples of hardships that they had witnessed:

- 100% of respondents had observed cases of cancelled house sales;
- 64% of respondents observed cases of financial hardship for beneficiaries;
- 94% of respondents observed damage to the reputation of probate practitioners due to lack of public understanding of the causes of delays; and
- 62% of respondents observed greater risk of estates incurring additional interest payments on inheritance tax (IHT) being paid via the instalment option, due to delayed house sales.

STEP's members were of the view that probate registry errors, difficulties that junior registry staff had in dealing with complex cases and the registry's general practice when dealing with stopped applications were all key contributors to delays. For example:

- 76% of respondents had experienced delays because of the manner in which stopped applications are handled. In particular, the registry has a practice of putting email responses from practitioners working on stopped applications to the back of the queue of emails awaiting attention (which can add 4–6 months to the process on its own). It often fails to progress a stopped application swiftly even after the original issue that led to the stoppage has been addressed.
- 67% of respondents had experienced delays caused by stops due to probate registry errors.
- 61% felt that delays also resulted from inexperienced staff being unable to process difficult cases and leaving these for more senior colleagues to review.

In each case, the root cause of most delays appears to be a lack of suitably experienced staff. An overwhelming majority of respondents to our survey agreed that this was the fundamental issue.

Importantly, dealing with this issue will require not only an increase in recruitment but also care being taken as to the quality of that recruitment. The restrictions that STEP understands currently apply to recruitment (such as the emphasis on school leavers) need to be reconsidered, to allow more senior staff to be brought on board in order to increase the speed of case-handling. STEP understands that at present there are only 2.6 full-time equivalent registrars and deputies when there have previously been 30. That translates to a more than 90% shortfall at a time when departures of long-serving staff have meant that the rest of the probate registry workforce requires more supervision than ever. 94% of respondents recommended that the UK government should appoint more probate registrars or deputies to restore their numbers.

Based on this evidence, STEP's view is that the probate registry is currently not adequately staffed. STEP acknowledges the service will eventually benefit from appointing more staff, specifically experienced staff, to address complex questions in stopped applications and reduce delays. However, in the meantime we suggest that urgent action is required.

STEP would support the secondment of probate staff to private practice law firms in order to allow them to gain experience quickly and better understand the types of issues that can arise in probate matters and how best to solve them.

Furthermore, STEP suggests that to resolve the backlog of cases (which is not significantly reducing with current resources) consideration should be given to outsourcing complex cases to a limited number of experienced law firms for a period of time. This might be combined with the secondment suggestion, with registry staff being seconded to the relevant firms for periods of say six months at a time. To avoid a conflict of interest, any firm selected to act in this way would not be able to deal with their own probate applications. Those could be allocated to a different firm in the group chosen.

An alternative to this might be for private practice probate practitioners to be seconded to the probate registry for a fixed period so as to provide an instant (albeit temporary) boost to levels of expertise. Not only could such practitioners help clear the existing backlog but they could also pass on their experience to registry staff and assist with training.

STEP also feels that a simple way of resolving many complex and stopped cases would be to improve direct communication between case handlers and practitioners. The current system of not allowing direct phone conversations between handlers and practitioners contributes significantly to delays and makes it harder for the probate registry to progress cases, at the same time as leading to frustration among the public. 92% of respondents to STEP's survey would encourage direct forms of communication in order to better resolve complex issues in cases and to avoid stops.

2. Performance measurement and data

What mechanisms and metrics should be used to judge on a regular and ongoing basis whether the Probate Registry is performing well?

Does HMCTS have the data necessary to enable performance of the service to be monitored?

From the perspective of grieving families and those trying to assist them the most important metrics will always be:

- the speed with which probate applications are processed; and
- the accuracy of grants once issued.

As to the first of these, STEP's view is that it should be reasonable to have a target of processing applications within 28 days in non-urgent cases. STEP understands that HM Courts and Tribunals Service (HMCTS) already tracks and monitors processing times in detail.

STEP assumes that HMCTS also knows how many grants have to be corrected and re-issued, which should give at least some indication of the number of errors being made in them. Anecdotal experience of members is that there has been a marked increase in recent years in the number of grants issued with typographical errors or missing key information (such as the name of one of the executors).

3. Technological change and innovation

Does the probate portal provide improved access to justice and value-for-money?

What is the potential for technological change and innovation to improve the future operation of the probate system?

The probate portal had not been tested and developed to a sufficient level when it was launched for lay personal representatives and authorised probate practitioners.

This has resulted in a piecemeal upgrading of the software in response to criticism or operational difficulties. Many of these issues could have been avoided if the system had been properly beta-tested and used more volunteer practitioners in its design.

As it is, STEP's view is that the probate portal does not provide value for money or improved access to justice. Fifty-six per cent of survey respondents felt the portal did not improve access to justice and 63% felt it did not provide value for money. When considering value for money to date, no account appears to have been taken of the extra work, hours spent and fees incurred by authorised probate practitioners and their clients in having to use a substandard system. This is a similar state of affairs to the lack of cost/benefit analysis undertaken by HMRC in its Making Tax Digital software.

There is the potential for technological change to improve the situation; however, STEP is firmly of the opinion that technology should be introduced only once it has been thoroughly tested and if adequate thought has been given to the impact on those to whom the service is being provided, as well as on HMCTS.

4. People's experience of probate

How well are beneficiaries, executors and the bereaved protected and supported through the probate process? Are the needs of particular groups, such as disabled people or older people, appropriately considered? If not, what steps should be taken and what relevant examples of best practice exist?

How well are people protected from rogue traders? Is sufficient information and support available to individuals?

Eighty-nine per cent of survey respondents felt that the probate registry provides either no or inadequate support or protection to beneficiaries, executors and the bereaved. The application process is slow and it is difficult to engage with the probate registry to address issues when they arise.

STEP's view is that the digitisation of the probate process is also likely to have been particularly hard on those who struggle with technology, which may mean that it has disproportionately impacted disabled or older people.

In terms of rogue traders, 81% of STEP members who responded to our survey felt that individuals are either not sufficiently protected from rogue traders or are not protected from them at all.

The delays in issuing grants have exacerbated this issue by giving rogue traders space to make misleading promises on turn-around times when competing with reputable practitioners. STEP members are also aware of a marked increase in activity in the unregulated market of schemes advertised as avoiding the need for a grant entirely. Schemes like this have a number of issues, including deterring people from drafting wills and increasing the risk of IHT being under-reported. However, ongoing problems with the probate process can act as a powerful incentive for the public to explore such options.

5. Fees and thresholds

Are the fees and thresholds set at the right level?

The issue of fees and thresholds divides practitioners, with respondents to our survey being split roughly equally in their views. Thirty-six per cent of respondents felt fees and thresholds were at the correct level, 31% felt they were not and 33% were uncertain on this issue.

STEP acknowledges that fees may need to increase to reflect acknowledged increases in costs but firmly believes that levels of service must improve to justify any further increase in costs.