Written evidence from Family Law Bar Association (CTS0042)

Introductory

1. These are the Family Law Bar Association’s written submissions to the Justice Committee’s inquiry into the access to justice implications of the programme of reforms underway in Her Majesty’s Courts and Tribunals Service (‘HMCTS’), including the increasing use of digital and video technology and the closures of courts.

2. The Family Law Bar Association (‘FLBA’) represents approximately 1,800 self-employed and employed barristers with expertise and experience in the full range of family proceedings in the Family Court and in the High Court of England & Wales.

3. Members of the FLBA witness on a day to day basis many of the most sensitive cases in our justice system, and the ability of some of the most vulnerable in our society to access justice in those incredibly sensitive and personal cases.

4. The terms of reference are answered so far as relevant to family justice, family courts and the family bar and the questions below have been tailored to that context.

. Problem solving courts – the Family Drug and Alcohol Court (the ‘FDAC’)

5. Before answering the substantive questions below, the FLBA wishes to highlight concerns we have about resources directed to problem-solving courts. We are very dismayed that, despite the joint statement announcing the ambitious programme of reform to modernise HMCTS ‘Transforming Our Justice System in September 2016’\(^1\) highlighting that work was being undertaken to test and promote (emphasis ours) innovative problem solving approaches, funding for the FDAC National Unit ceased in September 2018. The FDAC was a highly successful example of a problem solving court.

6. The FDAC research undertaken by Professor Judith Harwin of Lancaster University and her colleagues, prepared for the DfE Children’s Social Care Intervention Programme, of December 2016\(^2\) demonstrated that a significantly higher proportion of FDAC than comparison families were reunited or continued to live together at the end of proceedings (37% v 25%), and a significantly higher proportion of FDAC than comparison reunification mothers (58% v 24%) were estimated to sustain cessation over the five-year follow up. Importantly, a significantly higher proportion of FDAC than comparison mothers who had been reunited with their children at the end of proceedings were estimated to experience no disruption to family stability at 3-year follow up (51% v 22%).

7. The decision to cease Government funding despite this compelling research must call into question the access to justice of the vulnerable children of parents with drug and alcohol difficulties. The FDAC National Unit was forced to close and has only been revived thanks to a group of private backers and philanthropists. The FLBA challenges whether this decision can really be said to have been guided first of all by the welfare of children.

8. We raise a note of caution in respect of another of the innovative problem solving approaches that was described as being tested and promoted: the Pause programme. The research report undertaken by the Department for Education ‘Evaluation of Pause’, July 2017,\(^3\) suggests that Pause generally had a positive and significant impact on the women engaging with the programme, many of whom had complex, multiple, and mutually-reinforcing needs. The report concluded that given the positive impact of Pause on women, and the very high likelihood of investment in the programme resulting in very significant cost savings within a relatively short time period, there is good reason to continue and expand provision of the service, provided other key recommendations are met.

9. We welcome, and indeed urge, continued funding of the Pause programme as part of the Family Court reforms. The longer-term cost savings for HMCTS are evident, and we

would be extremely troubled by any decision to cut Pause funding in a similar vein to FDAC.

The FLBA’s substantive response

**QUESTION 1:** What will be the likely effects of the reforms, both implemented and proposed, on access to justice in relation to family justice, and those who are digitally excluded or require support to use digital services in family justice?

10. We would like to emphasise the commitment set out in the joint statement announcing the ambitious programme of reform to modernise HMCTS ‘Transforming Our Justice System in September 2016’ that reforms will be guided first of all by the welfare of children. ‘This is the paramount consideration’.

11. There are many ways in which the FLBA welcomes the proposed reforms. Filing applications and documents online will be more efficient for professionals and access to electronic bundles likewise. There are a number of hearings which are administrative in nature, and it will assist the professionals to be able to attend these by video link. There may also be occasions where it will assist the parties to attend hearings by video link, especially if they have experience of domestic abuse from any other party in the proceedings, or it is difficult for them to travel to court. We are concerned however, that the reforms may lead to substantive hearings (including case management hearings) taking place other than at court, and that court closures will cause very significant problems for some parties, especially those that are vulnerable.

12. Many parties and witnesses involved in family proceedings, particularly public law proceedings are vulnerable and/or have very limited financial resources. They may not have access to a computer, tablet or smartphone, or indeed to wifi. It is not unusual for parents involved in these sorts of family proceedings to, for one reason or another, lack the funds to pay for a bus fare to court or top up the credit on their pay-as-you-go mobile telephone. It is also common for parents to have difficulties with literacy or language, or

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indeed cognitive or psychological problems. All these issues can mean that participation in a digital hearing is extremely difficult if not impossible for them. Additionally, an integral part of their access to justice is their access to their legal representative. Given the potential vulnerabilities of the individuals, the sensitivity of the questions raised, and the stakes which could not be higher (their children permanently being removed from their care), expecting them to receive all legal advice before or during the hearing via an internet link potentially endangers their Article 6 ECHR rights.

13. Bringing parties and their legal representatives to court makes discussion and cooperation in the management and conduct of a case easier. Professional relationships very much depend on respect and trust which are not easily built up without face to face meetings, and there are often difficult and sensitive issues which need to be discussed with clients, (sometimes at the last minute) which are best dealt with in person. If there is judicial continuity, judges are able to build up a picture of the parties to a case by observing them in court hearings, whether or not any evidence is given. None of this means that there should not be any virtual hearings; just that there should not be too many.

14. We believe that it is vital for there to be sufficient flexibility in the system so that judges and parties are faced with a genuine choice as to whether or not to hold a virtual hearing, and that there should be no pressure to do so if the case or specific hearing does not warrant it.

**QUESTION 2:** What are the effects on access to justice of family court closures, including the likely impact of closures that have not yet been implemented; and of reductions in HMCTS staffing under the reform programme? For users of the family courts, how far can online processes and video hearings be a sufficient substitute for access to family court buildings?

15. Closures of court buildings where family cases are heard have a direct effect on access to justice for those in the locality. It is important to note that family court users can be some of the most vulnerable in society, facing the most draconian interferences in their family lives. One not uncommon example would be vulnerable parents with learning difficulties whose children are the subject of an application for an interim care order: an order which
if granted may summarily remove the children from their parents and place them in foster care with limited supervised contact to their parents. The closure of the court local to those parents would significantly impact on their ability to participate in the court proceedings taking place in respect of their child.

16. Vulnerable users of family courts may well not have the financial resources, or the practical ability, to travel tens of miles to a hearing. Our very recent former President, Sir James Munby, has highlighted that those who lived in rural areas and had no access to private transport were hardest hit. The FLBA agrees with that view.

17. There are of course a wide variety of users of the family courts, and we do not seek to suggest that digital courts cannot, and should not, be common place for those whom access to justice can be safeguarded in this way, for example an equally well resourced couple at a First Appointment in financial remedy proceedings. However, in our experience, the access to justice of a very significant proportion of family court users would be threatened by court closures. Many family hearings are simply not suitable for a ‘virtual court’.

18. The other aspect we comment upon is reductions in HMCTS staffing. FLBA members witness, and experience the effects of understaffed courts on a daily basis, and the direct impact on access to justice of family court users. A few common examples may assist.

19. Insufficient security staff on the court entrance from 9-10am results in delays to pre-court conferences. This has a direct impact on either the utilisation of the court day as judges cannot hear cases promptly at 10am because litigants and/or their representatives have not been able to get through security to be able to have their necessary pre-court discussions. Plainly this may also risk the access to justice of other court users that day whose time before the court is truncated, or postponed, as a result of earlier over-running cases.

20. A further example would be insufficient administrative staff resulting in the common situation of important court documents or bundles which have been lodged with the court going ‘missing’ or court orders not being issued and sealed promptly. The former can
cause significant delays to, and impact the effectiveness of, live hearings. The latter can impact important court directions being complied with, or even the effectiveness of the next listed hearing. Online applications and e-filing of documents should assist with this, but if there are technological problems there can be times when nobody can gain access to any documents at all.

**QUESTION 3: Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication with the family law bar?**

21. We do not seek to argue that the Ministry of Justice and HMCTS have not consulted at all with regards to their proposed reforms; our concern remains the weight that has been placed upon the views of the FLBA as set out above.

**QUESTION 4: Have the Ministry of Justice and HMCTS taken sufficient steps to evaluate the impact of reforms implemented so far, including those introduced as pilots, and have they made sufficient commitment to evaluation in the future?**

22. It follows from the above that the FLBA would strongly submit that further, independent, research and piloting is required prior to adopting any reforms which may threaten the paramountcy of the welfare of children and access to justice.

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