

Ministry of Justice

Revising the 'Help with Fees' remission scheme – protecting and enhancing access to justice



A response by the Association of Personal Injury Lawyers

May 2023

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation on the Help with Fees (HwF) remission scheme review. We support the review of the scheme as the current income thresholds are outdated and do not reach those in need of help to afford their court fee.

We are disappointed, however, that some of the proposals put forward in the consultation paper fail to uphold the statement that the review would make the scheme more generous and protect access to justice¹. Moreover, we are concerned that the review fails to accurately acknowledge the current economic landscape of the UK and makes wrong assumptions about compensation payments.

The Help with Fees scheme is fundamental to protecting access to justice and should be as inclusive as possible. We believe that the proposals in relation to the 'non-essential' categories of expenditure excluded from the gross monthly income threshold and the new partial remission rule will limit applicants' access to the scheme and potentially undermine claims as people will not be able to afford their court fees.

APIL has only responded to the questions within our remit.

General comments about the HwF scheme

Our members have provided us with general comments about the Help with Fees scheme. APIL is aware that this consultation has a limited focus specifically on the proposed changes, but we have included some broader comments for consideration.

A key focus of the Ministry of Justice should be to ensure that when any claim is issued online, making full use of the HwF procedure is available. It is simply wrong that many claimants have to pay the court fee however substantial and wait for a refund from the HMCTS.

The current DCP portal is incompatible with the in-person process where it is still possible to use a HwF reference. It is currently expected that firms/solicitors pay the fees and wait for the HMCTS refund which can often take many months to be processed. The ability to issue online with a HwF reference would reduce the administrative burden of running the scheme, which is also mentioned as one of the aims of this consultation.

Consultation questions

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The income test proposals

Question 1: Do you agree with our proposed methodology to set the income threshold using ONS LCF data? Please state yes/no/maybe/don't know and provide reasons for your answer.

Question 2: Do you agree with our proposed methodology to use the 5th income decile to set the income threshold? Please state yes/no/maybe/don't know and provide reasons for your answer.

Question 3: Do you agree with our assessment of 'essential' and 'non-essential' expenditure categories, as set out in Annex B, for the purposes of calculating the income threshold? Please state yes/no/maybe/don't know and provide reasons for your answer.

The answer below refers to questions 1, 2 and 3.

APIL agrees with the use of ONS LCF data to set the income threshold given its high standards of trustworthiness and quality. Nevertheless, the proposed threshold does not consider inflation and the current economic landscape in the UK. We believe there is no justification for an individual receiving the NLW to be excluded from the scheme and thought to be capable of paying a court fee that can be as high as £10,000.

We have reservations regarding the Government's assessment of essential and non-essential categories of spending. We believe it is unfair to exclude holiday-related expenditures, recreation, and culture from the calculation of the gross monthly income threshold. Establishing a connection between one's recreation and their ability to pay a court fee is not reasonable. Participation in leisure activities should not be perceived as an indicator of financial stability or an individual's capability to afford court fees. This correlation fails to recognise the diverse financial circumstances and priorities that people have.

Furthermore, the current scheme did not exclude categories of spending. The consultation paper states that the objectives of this review include simplifying the scheme, clarifying it, and reducing additional pressure on HMCTS. Adding more complexity to the analysis of pay slips and applicants' expenses would not meet that goal. The purpose of the HwF scheme is to help people who cannot afford their court fees. Excluding 'non-essential' categories of expenditure from the gross monthly income threshold creates inequalities and introduces a judgement element where some applicants are more deserving than others depending on their lifestyle and management of expenditure.

For all the reasons stated, we believe that the threshold should be set at £1,862 as this reflects what a person at the 5th decile of the 2019/20 ONS LCF data spends on goods and services. If the gross monthly income threshold is set at £1,420 for a single applicant without children, this would only amount to an annual income of £17,040. The consultation paper states that the current threshold (corresponding to around £14,040 annually) is far below the current gross annual salary of £21,674 for a person earning the National Living Wage (NLW), working 40 hours per week. The proposed new threshold would still be far below the NLW by around £4,000 and, thus exclude applicants that do need help to pay their court fees.

Question 4: Do you agree with our proposal to use the OECD modified equivalence scale to establish the Couple Premium and Child Premiums? Please state yes/no/maybe/don't know and provide reasons for your answer.

Question 5: Do you agree with our proposal to set two levels of Child Premiums – a lower premium for a child aged 0 to 13 and a higher premium for a child over 14? Please state yes/no/maybe/don't know and provide reasons for your answer.

Question 6: Do you agree with our proposal to use the 2019/20 ONS LCF data to set the income threshold and Premiums? Please state yes/no/maybe/don't know and provide reasons for your answer.

The answer below refers to questions 5 and 6.

Yes, APIL is supportive of the proposal to set two levels of Child Premiums. It is sensible that the premium set for a child aged 14+ is higher due to the rise in costs from that age onwards, in particular education costs. We also agree with the use of ONS LCF data to establish the Premiums providing that they are updated to reflect the 2021/2022 ONS LCF data and inflation.

Question 7: Do you agree with our proposal to review the income thresholds (as set out in the table under paragraph 70 above) when the ONS LCF 2021/22 data is published in 2023? Please state yes/no/maybe/don't know and provide reasons for your answer.

Question 8: Do you agree with our proposal to withhold adjusting the income thresholds by inflation as explained above? Please state yes/no/maybe/don't know and provide reasons for your answer.

The answer below refers to questions 7 and 8.

No, APIL does not agree with this proposal. We do not understand the reasoning behind raising court fees in line with inflation in 2021 and not taking it into account to set the income thresholds. Failing to account for inflation when determining income thresholds will create a discrepancy between the cost of accessing justice and an individual's financial capacity to do so.

We hope to see the update of the thresholds according to the most recent ONS LCF data and a further adjustment to inflation. We suggest that the Ministry of Justice provides further information as to how inflation adjustments will be carried out once the income thresholds are updated in line with the ONS LCF 2021/22 data.

Question 10: Do you agree with our proposal to maintain the current list of means tested benefits for passporting applicants through the income test? Please state yes/no/maybe/don't know and provide reasons for your answer.

Yes, APIL agrees with this.

Question 11: Do you agree with our proposal to amend the definition of gross monthly income as per paragraph 94? Please state yes/no/maybe/don't know and provide reasons for your answer.

Yes, APIL agrees with this proposal. We believe it is sensible to amend the definition of gross monthly income in line with section 21 of The Civil Legal Aid (Financial Resources and

Payment for Services) Regulation 2013 so that there is a uniform approach in the calculation of income.

Question 12: Do you agree with our proposal to give applicants a choice between using a monthly income or a three-month average income for the income test? Please state yes/no/maybe/don't know and provide reasons for your answer.

APIL agrees with the proposal, which we believe will enhance fairness in the scheme for applicants. We believe that applicants should be given the choice of using either their income from the preceding month or an average income over the preceding three months, depending on their preference. The previous rule, which only allowed the use of the income from the preceding month, failed to consider monthly fluctuations in income. This was particularly disadvantageous for self-employed individuals, whose income can vary significantly from one month to another, and whose monthly income may not be representative of their actual financial situation.

Question 13: Do you agree with our proposal to amend the gross monthly income definition to no longer include drawings as income? Please state/yes/no/maybe/don't know and provide reasons for your answer.

Yes, APIL agrees with this proposal.

Proposals regarding the partial remissions policy

Question 14: Do you agree with our proposal to replace the fixed 50% partial remissions rule with the three-banded taper scheme set out above? Please state yes/no/maybe/don't know and provide reasons for your answer.

No, we do not agree with the proposal to replace the 50% rule for partial remissions. We believe that this does not fit with the aim stated at the beginning of the consultation paper to make the scheme more generous. It is unfair to assume that having an income higher than the threshold proposed means that applicants can afford to pay the court fee or that their percentage of payable contribution should be as high as 90%. Raising the percentage payable towards the fee to require someone to contribute £9 towards the fee for every £10 above the threshold as opposed to the previous £5 contribution actually makes the scheme more restrictive and less generous.

We are concerned that the proposed three-banded scheme would have an impact on access to justice, in particular when considering the current economic uncertainty and significant rises in food costs, bills and services.

Question 15: Do you agree with our proposal to reduce the gross monthly household income cap to £3,000 above the gross monthly income threshold? Please state yes/no/maybe/don't know and provide reasons for your answer.

Yes, APIL agrees with this proposal.

The capital test proposals

Question 16: Do you agree with our proposal to amend the definition of disposable capital to mean ‘savings and investments’ with a non-exhaustive list of included examples as set out in paragraph 119? Please state yes/no/maybe/don’t know and provide reasons for your answer.

It is somewhat unsatisfactory, but the answer to this may have to be ‘maybe’. We believe that more clarity should be provided regarding what disposable capital means considering that the non-exhaustive list in paragraph 119 is too vague. There needs to be a degree of certainty for legal representatives to be satisfied that the declarations made on their client’s application are correct to sign the statement of truth on their behalf and the same applies to applicants who might be unsure if they are declaring all their disposable capital.

Question 17: Do you agree with our proposal to maintain the principle of using three months’ expenditure to set the lower capital threshold, and accordingly increase the lower capital threshold to £4,250? Please state yes/no/maybe/don’t know and provide reasons for your answer.

Yes, APIL agrees with this proposal.

Question 18: Do you agree with our proposal to replace the current ten-band threshold system with a simplified three-band structure as set out in paragraph 129? Please state yes/no/maybe/don’t know and provide reasons for your answer.

Yes, APIL agrees with this proposal. The proposed three-band structure is easier to use and more generous for applicants than the current ten-band system.

Question 19: Do you agree with our proposal to increase the age cap to align with the current state pension age of 66? Please state yes/no/maybe/don’t know and provide reasons for your answer.

Yes, APIL agrees with this proposal.

Question 20: If the definition of disposable capital is amended as proposed under paragraph 119 above, do you agree with our proposal to update the list of capital disregards to remove the following items?

- the household furniture and effects of the main or only dwelling occupied by the party
- articles of personal clothing
- tools and implements of trade, including vehicles used for business purposes.

Please state yes/no/maybe/don’t know and provide reasons for your answer.

Yes, APIL supports this proposal.

Question 21: Do you agree with our proposal to amend the list of capital disregards to include the list of payment and compensation schemes under paragraph 147? Please state yes/no/maybe/don't know and provide reasons for your answer.

APIL is pleased with this proposal to include compensation schemes in the list of capital disregards. Compensatory payments are intended to provide financial compensation for the loss or damage suffered to put the claimant in the position they would have been but for the damage. Therefore, compensation payments should never be considered capital.

Question 23: Do you agree with our proposal to introduce a 24-month time limit for existing compensation payments disregarded under the HwF scheme and (if the list of capital disregards is extended in line with our proposal above) proposed additional payments – in line with the table under paragraph 153? Please state yes/no/maybe/don't know and provide reasons for your answer.

APIL does not agree with this proposal. As stated in question 22, we believe that compensation payments should not, under any circumstance, be regarded as capital. This proposal becomes particularly problematic when considering the introduction of the 24-month time limit for personal injury compensation payments.

We believe that this proposal is unfair to the applicant as the compensation awarded is meant to return the injured person to the position that they would have been in, but for the wrong committed against them. Further, the value of the compensation awarded decided by the court is meant to last the claimant's lifetime in order to meet his needs – this cannot be considered disposable capital under any circumstance. These monies may be to significant and ongoing professional help, for example around long-term care needs. Damages may also be awarded to meeting recurring specialist equipment to help injured individuals manage their ongoing medical needs.

We do not support the rationale in the paper that 24 months is a reasonable time limit for applicants to adjust their budgeting to account for increased household expenditure caused by the personal harm suffered. There are instances where the injury suffered is catastrophic and life-changing and thus, it is unreasonable to expect that 24 months is enough for an injured person and their family to adjust to their household expenditure. These seriously injured individuals will be the most reliant on their compensation. It will be fundamental to meeting their disability needs, they will also be reliant on specialist legal and investment advice. This proposal fails to acknowledge the reality of the challenges faced in such circumstances.

Compensation should not be considered capital and used as a way to reject applications for help with court fees. APIL conducted a survey of its members in 2020 that found that claimants struggled to obtain Periodic Payment Orders (PPOs) from insurers who very frequently sought to undertake negotiations on a lump-sum only basis. 88% of the members surveyed found it difficult to obtain a PPO from an insurer. We suggest that it is far more important for the Government to take steps to encourage the use of PPOs rather than adopting proposals that would inhibit injured people to be eligible for the HwF scheme.

Proposals regarding the application process

Question 24: Do you agree with our proposal to amend the declaration and statement of truth within the HwF application to expressly allow litigation friends and legal

representatives to complete and sign on the applicants' behalf? Please state yes/no/maybe/don't know and provide reasons for your answer.

Yes, APIL agrees with this.

Question 25: Do you agree with our proposal to add a provision within the Fees Orders to state that where an application for remission is incomplete, or additional information is required, the requested information must be provided within the period notified in writing to the applicant. If information requested is not provided, the application shall be treated as abandoned? Please state yes/no/maybe/don't know and provide reasons for your answer.

APIL has no difficulty with the concept of information needing to be provided in a set period of time, although that period should never be less than 28 days. That said, this should be 28 days from receipt, given how difficult the postal system is currently. Ideally, a digital response should always be possible.

Also, in light of the postal service moving more slowly than it did in the past, contact should be made by e-mail and text message before any application is assumed abandoned.

Question 26: Do you agree with our proposals to assess applicants during the transition period as set out in the above scenarios? Please state yes/no/maybe/don't know and provide reasons for your answer.

Yes, APIL agrees with this.

Any queries about this response should be, in the first instance, directed to:

Ana Ramos

Legal Affairs Assistant

ana.ramos@apil.org.uk

APIL

3, Alder Court

Rennie Hogg Road

Nottingham

NG2 1RX

Tel: 0115 943 5403