



## **Civil Justice Council response to Ministry of Justice consultation paper Fee Remissions for the Courts & Tribunals**

### **Introductory remarks**

There are many aspects about this consultation which have caused the CJC concern. The principal one is the potential impact on access to justice for those on low incomes, including the most deprived and vulnerable sections of the community.

It is appreciated that with major changes to the benefits system, the introduction of Universal Credit and the inadequacies in the current system, reform to the fee remission system became necessary. The CJC believe though that there is a very important wider context which these proposals have to be viewed in:

- Millions of households are seeing a reduction in income. The Government's own estimates suggest that 2.8 million households will see such a reduction as a result of the move to Universal Credit alone. What is clear is that budgeting will be more of a balancing act for many, and court fees may seriously deter people with such limited means from seeking access to justice.
- The proposed remission reforms are following close behind the civil justice and legal aid reforms which will mean many more litigants in person across courts and tribunals. This may mean people being deterred by the size of fees. Many people on low incomes will be deterred from engaging in litigation when faced with multiple fees, whatever the merits of their case.
- Although the wider economic context is a driver in the need to critically examine all areas of public expenditure, access to justice must be maintained. With pay freezes and real terms cuts prevalent for example, people with limited means will see court fees as a significant barrier to making claims.
- The *ONS report Poverty & Exclusion the UK and EU 2005-2011* ( January 2013) published findings on 'significant changes' in the ability of people in the UK to meet unexpected but necessary costs, which legitimate claims (and family justice cases) would constitute. Over a third of people said they would not be able to meet such expenses.
- There have recently been increases to many court fees, and this will make it harder for those losing fee waivers and remissions to gain access to justice.

Fee remissions represent less than 6% of overall fee income, and we are concerned that pressure is being brought to bear on the economically weakest areas of the

community, within which groups with protected characteristics (as defined in the Equality Act 2010) will be over-represented.

The present proposals would scrap elements of the existing remission scheme ('Remission 3'), and a brief analysis of the proposals shows that income eligibility thresholds for couples are being significantly reduced. The suggestion that these proposals "prevent fee remissions being paid to wealthy individuals" belies the impact of the proposals on large numbers of individuals who are anything but wealthy.

**Question 1 – Do you agree that there should only be one remission system in operation within HMCTS operated courts and tribunals and the UK Supreme Court? Please state the reason(s) for your answer.**

Yes. We agree there are advantages to having a single fee remission system across the courts and tribunals. We feel that a consistent approach should be taken across all jurisdictions so that there is equity, and also so that guidance can be uniform. This is fairer to the range of users – it should not be easier (say) to get a reduction in court fee based on income for an employment, debt or family related claim.

This also helps administratively – the same material can be mass produced and used by court and tribunal staff and advice providers who will be very familiar with the uniform guidance.

**Question 2 – Do you agree that disposable capital should be considered when deciding fee remission eligibility? Please state the reason(s) for your answer.**

In principle we can see the force of the argument that those with 'substantial' capital should be required to make full or sizeable contributions to court fees. However, we have worries about what constitutes 'substantial' and also how accessible such capital is to people, if held in fixed accounts, or only capable of being liquidated on incurring a substantial penalty.

Our main concerns relate to the proposed limits (see below).

**Question 3 – Do you agree with the proposed disposable capital limits? Please state the reason(s) for your answer.**

No. We regard the thresholds of the disposable capital limits as being set at too low a threshold. Court fees form but part of the costs of litigation, even for litigants in person – to require someone to invest up to half of their overall disposable capital simply on the fee to bring a claim seems disproportionate, and would have an adverse effect on access to justice. To take one example, to expect someone to cash part of their partner's £3,000 ISA in to pay up to £1,000 to pay a court fee is unacceptable (even if the ISA could be cashed in time to pay the fee to commence the proceedings or at all).

We also have reservations about the shifting proportions – the thresholds proposed vary from a quarter to a third to a half of different levels of disposable income – a much higher threshold with a more consistent proportion would seem fairer – in these proposals the more capital you have, the less you pay proportionately in court fees, which is against the spirit of these reforms.

**Question 4 – Do you agree with the proposed terms of the disposable capital test? Please state the reason(s) for your answers:**

The proposed terms of the disposable capital test demonstrate further fundamental problems with such a test. We welcome the assurances on areas to be excluded, such as land and property owned and compensation received, which is to pay for future care and loss and would be risked in litigation. There are however real problems with a number of the types of disposable capital to be considered, in particular those which cannot be readily redeemed, especially with such low “disposable” capital thresholds.

In addition we do **not** agree with the proposed intention (see paragraph 13), not to add protection for those who are saving for retirement in the context of the proposal to ignore the civil legal aid test. We are conscious that age is a protected characteristic under the Equality Act 2010, and this may give rise to charges of discrimination.

We also feel that whatever system is adopted must ensure that all potential court users are fully aware of the categories of disposable capital that are and are not considered for the purposes of fee remission. Pains must be taken to make this information widely available.

**Question 5 – Do you agree with the proposed evidence requirements and enforcement mechanism of the capital test? Please state the reason(s) for your answer.**

We sympathise with the wish to operate a system of producing evidence of disposable capital in a way that is not burdensome to court/tribunal users or staff. However, we have a number of reservations with the proposal that applicants simply provide a ‘statement of truth’ to declare the value of their household disposable income. In the first place, even in the best regulated of homes it can be difficult to set down all of the small historic savings and other items of disposable capital that might qualify, which may then lead to challenges on the validity of the statement. We really wonder how all of this will work in the family context, where the issue at stake will be a battle for the shared household capital. In other circumstances the reality is that couples will often not know the extent of capital the other holds.

Enforcement is another concern, with a Court/Tribunal Manager requesting documentary evidence. It is easy to imagine their difficulty in establishing ownership of second homes or capital held outside the UK. Any system that is introduced would need to be kept under review and taking advice from court users, lawyers, the advice sector and HMCTS staff on its efficiency and fitness for purpose.

**Question 6 – Do you agree that these proposals [in relation to the Income Test] strike the right balance in targeting eligibility for full and partial remission through a simple and workable system? If you do not agree, please explain why, and what alternatives you propose.**

No. There are several aspects of the proposed reforms to full and partial remission of court fees that appear to be too severe. The whole basic framework of the current structure is being revised, and this will diminish access to justice for a sizeable group of low income families.

In the first place there is a major conceptual shift from the current position where receipt of working age basic living state benefits is regarded as an automatic 'passport' to full remission. Instead, the move to a Universal Credit is not accompanied by recipients qualifying for full remission automatically. Those in receipt of means tested benefits are by definition not well off. The proposal in paragraph 20 goes against the existing convention, and the notion that keeping with the current convention "could therefore cost up to about £4m in additional full remissions" seems highly questionable – it is far more likely that people on benefits' income will simply forego cases across a range of civil, family and tribunal business.

We are also concerned about the proposed move to basing remission on gross monthly rather than gross annual income – not conceptually, but on the way that the figures translate for couples. This comparison illustrates the point:

	<i>Current annual threshold</i>	<i>Proposed annual threshold</i>	<i>Difference</i>
<i>No children</i>	£18,000	£14,940	- £3060
<i>With 1 child</i>	£20,930	£17,880	- £3050
<i>With 2 children</i>	£23,860	£20,820	- £3040

The thresholds are substantially too low, in our view, to maintain access to justice in any event. As we have said those with protected characteristics are disproportionately represented among those on lower incomes, these include those with a disability, black and minority ethnic groups, women, the young and some older people.

In relation to the partial remission proposals, the proposal to abolish the present Remission 3 scheme and extend the gross monthly income threshold for full remission to partial remission looks to be replacing one complex and cumbersome mean testing system with another, with each individual application having to be worked out in some detail. The illustrative figures suggest that the contribution payable under fee remission will be a quarter of a person's "disposable" monthly income, which set against daily living expenses makes the prospect of someone opting to bring a claim much more remote.

Our preference would be to retain the current scheme, with full remissions for all recipients of Universal Credit.

**Question 7 – Do you agree that there should be a gross monthly income cap so that those with a certain amount of income would be ineligible for a partial remission and would pay the fee in full? If so, do you agree that a single cap of £4000 is appropriate or should the Government consider varying the cap for different fee levels? Please state the reason(s) for your answer.**

We agree that an overall income cap should be a good basis for calculating whether someone would fail to qualify for a partial remission, but £4,000 is substantially too low and we would want court/tribunal managers to have discretion to make exceptions for particular personal circumstances.

**Question 8 – Do you agree with the proposed evidence requirements for the income test? Please state the reason(s) for your answer.**

The measures proposed appear reasonable, but there must be discretion. The payment of a fee is time sensitive and some potential claimants will not fit the model, for example where a potential claimant or their partner has recently lost employment.

In this context, we also note that “The proposed system is based on gross monthly income for the month preceding that in which the application is made.”

We agree with the principle that the administrative process should be straightforward for court users and court staff alike. Data protection issues inevitably arise from this process, and it is imperative that the system is conducted with scrupulous confidentiality.

**Question 9 – Do you agree that eligibility to a remission should be based on assessment of household means? Please state the reason(s) for your answer.**

There are significant problems with the concept of “household means”, as referred to above (in stark focus when the matter at issue is household assets). In principle, a system based on gross monthly income appears reasonable, subject to the concerns expressed under Question 6 above about the thresholds set for that. Special care will be needed to ensure that self-employed people receive a fair assessment given the possible fluctuations in income that may arise.

We strongly approve of the proposal for the state benefits listed in paragraph 34 (e.g. to provide care for children with disabilities) to be disregarded for the calculation of gross income. However, we refer to the comments above regarding those in receipt of any means tested benefits.

We also strongly support the continuation of the discretion to be exercised to allow reductions or remissions of fees where there are exceptional circumstances, which may have an important role to play in people continuing to have access to justice.

**Question 10 – Do you envisage other circumstances where a contrary interest could apply? Please state the reason(s) for your answer.**

We agree that contrary interests will arise much more frequently in family justice disputes. However, there will be a number of instances where one partner can be uncooperative, or worse – see for example:  
[http://www.womensaid.org.uk/domestic\\_violence\\_topic.asp?section=0001000100220049&sectionTitle=Financial](http://www.womensaid.org.uk/domestic_violence_topic.asp?section=0001000100220049&sectionTitle=Financial)

This is another reason for ensuring that there is a readily available process for the application of discretion.

**Question 11 – Do you agree that the existing process for third party applications should be applied to all courts and tribunals subject to this consultation, and that the current practice in the Court of Protection should continue? Please state the reason(s) for your answer.**

We agree.

**Question 12 – Do you agree that providing copies of documents and searches should be exempt from the remission system? Please state the reason(s) for your answer.**

We have some serious reservations about the impact of the proposal on copying fees, given the wider context of an increase in litigants in person across all jurisdictions, as a result of the legal aid reforms. By definition those who will still qualify for fee remissions will be on low incomes, and yet to pursue a case may be required (at times by the court) to copy documents needed in the case. If the other

side in a dispute is also a litigant in person there is a much more remote prospect of the assumption made in the paper that in the majority of cases the opposing party will have sent a copy of all their documents through. For people on very low incomes a charge of £10 for copying a 20 page document may well be prohibitive.

The consultation paper does not set out any context for how widely this service is used at present, and the costs involved. Clearly we are mindful of the prospect of serial litigants arriving at counters with several binders of papers for copying which will be of little material use in a case, but there is a baby very much in danger of being thrown out with the bath water in terms of people being able to pursue a case properly.

**Question 13 – Do you envisage circumstances where charging for copy or search fees would restrict access to justice? Please state the reason(s) for your answer**

Yes. See answer to Question 12.

**Question 14 – Do you agree that the time limit for making a retrospective remission should be reduced to two months? Please state the reason(s) for your answer.**

No. We do not feel that two months is a sufficient length of time within which to obtain the necessary documentary evidence to support a retrospective remission application. We are concerned that it may take more than two months for people to realise they would have qualified for a fee remission. We are also concerned that in some cases those seeking documentary evidence will sometimes be reliant on other organisations or individuals for the production of the material and not easily able to influence the pace of this. Although we note there would be discretion to grant exemptions, we consider that the current time limit of six months should be retained.

**Question 15 – Your views are welcome on whether there are any other factors we need to take into account for claimants seeking remissions in multiple claims.**

We are concerned at the inconsistency in approach being adopted for civil proceedings as against Employment Tribunal cases, particularly given the aim of creating a single fee remissions' system. Another concern is the complexity for staff and litigants in calculating fees payable by all the individuals in a multiple action where some claimants qualify for remissions but others do not.

**Question 16 – Overall, do you agree that this provides a fair, transparent and workable structure for determining fee remissions for HMCTS and the UK Supreme Court? Please state the reason(s) for your answer.**

As outlined in answers to a number of the individual questions and the introductory remarks, we have some serious reservations about the impact of these reforms, and the detrimental impact on access to justice particularly for the most vulnerable sections of the community.

**Question 17 – Do you think the proposed remission system is likely to have any positive or adverse equality impacts? Please state the reason(s) for your answer.**

There are many studies which have indicated links between low incomes and groups defined as having protected characteristics by the Equality Act 2010. Two examples are the 2008 Leonard Cheshire Disability report *Disability Poverty in the UK* and the 2007 Joseph Rowntree Foundation report *Poverty and ethnicity in the UK*. It follows that the impact of reforms affecting those on the lowest incomes will have a particularly detrimental impact on such groups. This would be ameliorated if the thresholds were substantially greater than those proposed, so that those affected would truly be “wealthy individuals”.

As mentioned in the answer to question 4, the disposable capital test will have an adverse equality impact on older people.

The impact assessment lacks meaningful detail. For example, the equality statement annexed to the consultation paper’s impact assessment says that 30% of those impacted by the proposals will be negatively affected, but no real data is supplied on how this will affect the various protected characteristic groups.

**Question 18 – If you think the proposal is likely to have any adverse equality impacts, how could these impacts be mitigated? Please state the reason(s) for your answer.**

In the absence of further equality impact data it is difficult to say beyond the general point that reducing access to fee waivers or remissions will adversely affect a proportion of those on low incomes, and therefore increasing the scope of access is the best way of mitigating adverse equality impacts. Please also see the answer above to Question 17.

**Question 19 – Are you aware of any further evidence that could aid our analysis of potential equality impacts? If so please provide us with this evidence.**

There are a range of research publications – some of which have been referred to in this response – that would provide useful material for analysis, and this would seem to be an area ripe for research by the Ministry itself.

16 May 2013