

**EXPLANATORY MEMORANDUM TO
THE COURTS AND TRIBUNALS (FEE REMISSIONS AND MISCELLANEOUS
AMENDMENTS) ORDER 2023**

2023 No. 1094

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments (JCSI).

2. Purpose of the instrument

- 2.1 This instrument revises the Help with Fees (HwF) remission scheme, namely the scheme's (a) income test; (b) partial remissions policy; (c) capital test; and (d) application process. The amendments apply to the remission schedules, referred to herein as HwF provisions, as set out in the following orders: The Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120); The Gender Recognition (Application Fees) Order 2006 (S.I. 2006/758); The Court of Protection Fees Order 2007 (S.I. 2007/1745); The Civil Proceedings Fees Order 2008 (S.I. 2008/1053); The Family Proceedings Fees Order 2008 (S.I. 2008/1054); The Magistrates' Courts Fees Order 2008 (S.I. 2008/1052); The Supreme Court Fees Order 2009 (S.I. 2009/2131); The Upper Tribunal (Lands Chamber) Fees Order 2009 (S.I. 2009/1114); The First-tier Tribunal (Gambling) Fees Order 2010 (S.I. 2010/42); The First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (S.I. 2011/2841); The Upper Tribunal (Immigration and Asylum) (Judicial Review) (England and Wales) Fees Order 2011 (S.I. 2011/2344); and The First-tier Tribunal (Property Chamber) Fees Order 2013 (S.I. 2013/1179).
- 2.2 This instrument also amends paragraph 2.1 of the Civil Proceedings Fees Order 2008 ('on the court fixing a trial date or trial period') to extend the current hearing fee of £1,175 for multi-track cases to also apply to cases allocated to the new intermediate track (for claims above £25,000, but not more than £100,000).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument includes an amendment to the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011, which addresses an error identified by the JCSI in paragraph 3.2 of its Tenth Report of Session 2019-21.¹

4. Extent and Territorial Application

- 4.1 This instrument extends to England and Wales, Scotland and Northern Ireland insofar as it relates to the amendment of:
 - (a) the Gender Recognition (Application Fees) Order 2006;

¹ The full select committee report is available at:
https://publications.parliament.uk/pa/jt5801/jtselect/jtstatin/58/5803.htm#_idTextAnchor008.

- (b) the Supreme Court Fees Order 2009;
 - (c) the First-tier Tribunal (Gambling) Fees Order 2010; and
 - (d) the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011.
- 4.2 This instrument extends to England and Wales insofar as it relates to the amendment of:
- (a) the Non-Contentious Probate Fees Order 2004;
 - (b) the Court of Protection Fees Order 2007;
 - (c) the Civil Proceedings Fees Order 2008;
 - (d) the Family Proceedings Fees Order 2008;
 - (e) the Magistrates' Courts Fees Order 2008;
 - (f) the Upper Tribunal (Lands Chamber) Fees Order 2009; and
 - (g) the Upper Tribunal (Immigration and Asylum) (Judicial Review) (England and Wales) Fees Order 2011.
- 4.3 This instrument extends to England and Wales, and applies to England only, insofar as it relates to the amendment of the First-tier Tribunal (Property Chamber) Fees Order 2013.
- 5. European Convention on Human Rights**
- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.
- 6. Legislative Context**
- 6.1 The powers to prescribe court fees are contained within section 92 of the Courts Act 2003, sections 414 and 415 of the Insolvency Act 1986, section 54 of the Mental Capacity Act 2005, section 52 of the Constitutional Reform Act 2005, section 42 of the Tribunals, Courts and Enforcement Act 2007 and section 7(2) of the Gender Recognition Act 2004. Fees set under these powers cannot be set above the cost of the underlying service (non-enhanced fees) and statutory instruments made under them are subject to the negative procedure as per sections 108 of the Courts Act 2003, section 65(2) of the Mental Capacity Act 2005, section 144 of the Constitutional Reform Act 2005, section 49 of the Tribunals, Courts and Enforcement Act 2007, section 24(4) of the Gender Recognition Act 2004 and sections 414(6) and 415(5) of the Insolvency Act 1986.
- 6.2 The current HwF remission scheme and associated provisions in the Orders listed in paragraph 2.1 were introduced by the Courts and Tribunals Fee Remissions Order 2013 (S.I. 2013/2302). It provides for a standardised fee remission system by inserting a similar, standard schedule in each Order. A similar provision was inserted in the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 by the First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2020 (S.I. 2020/314).

7. Policy background

What is being done and why?

Amendments to the HwF provisions

- 7.1 The Lord Chancellor has a duty to protect access to justice. A key element of this duty is making sure that people are not prevented from turning to the courts or tribunals for help simply because they cannot reasonably afford to pay the fee.
- 7.2 The HwF scheme supports the Lord Chancellor's duty to protect access to justice by providing individuals on low income and little to no savings with financial support towards the cost of their court or tribunal fees. In the year 2022/23 alone, HM Courts and Tribunals Service (HMCTS) successfully granted partial or full fee remission to c. 127,000 applications. This was equivalent to £80 million in fee remissions, accounting for 10% of the total value of fee charges that year (£807.4 million).
- 7.3 Given the HwF scheme's crucial role in protecting access to justice, it is imperative that it continues to accurately target and support individuals most in need of assistance. It is with this in mind that the Ministry of Justice conducted a comprehensive review of the scheme and proposed a series of reforms to achieve:
- A more generous scheme that provides more help to individuals with limited financial means.
 - A better targeted scheme that provides financial assistance to individuals who need it most.
 - A scheme that provides the best value for taxpayers' money.
- 7.4 In line with the proposals, the HwF provisions are amended as follows.
- 7.5 The income test: A series of amendments are being made to the income test to:
- (a) Raise the gross monthly income thresholds used to assess an applicant's eligibility for fee remission. For a single person without children, the threshold will increase from £1,170 to £1,420 per month. Couple and child allowances will also be increased to provide an extra £535 per month for couples, an extra £160 per month for each child under 14, and an extra £445 per month for each child aged 14 and over.
 - (b) Update the list of income payments that should not be included by the applicant in their gross monthly income calculation, namely payments intended to: (i) cover an immediate financial need e.g. Universal Credit advance payments or bereavement support payments; or (ii) cover a specific, unavoidable set of costs e.g. costs relating to disability.
 - (c) Maintain a list of means-tested benefits where those applicants who are in receipt of such listed benefits automatically pass the income test, namely: Income-based Jobseeker's Allowance, Income-related Employment and Support Allowance, Income Support, Pension Credit (Guarantee Credit), and Universal Credit with additional earnings of less than £6,000 (gross annual).
 - (d) Amend the definition of 'gross monthly income' to make it clear to the applicant what should be included, as well as allowing applicants to either provide their income figure for one month or an average of three months prior to the application being made, whichever is lower.

- 7.6 The partial remissions test: If an applicant's gross monthly income is higher than the income threshold, they may still receive partial help with their court or tribunal fee. The first amendment will replace the current partial remissions policy with a three-banded taper scheme. This means that the more an applicant earns above the income threshold, the more they will have to pay towards their fee. The second amendment will lower the maximum level of income an applicant can have before they receive no fee remission and must pay the full fee – from £4,000 to £3,000 above the gross monthly income threshold. These reforms will help ensure that the HwF scheme is focused on providing the most assistance towards individuals with the greatest need.
- 7.7 The capital test: A series of amendments are being made to the capital test to:
- (a) Amend the definition of 'disposable capital' to 'savings and investments' to make it easier for applicants to understand.
 - (b) Raise the minimum amount of disposable capital an applicant can have from £3,000 to £4,250 for the lowest of fees and remain eligible for fee remission. This will ensure that financial assistance is aimed at those most in need.
 - (c) Replace the ten-band capital threshold system, where the size of the fee determines the amount of capital an applicant can have and remain eligible for HwF, with a three-band structure. This will provide a simple system for both applicants and HMCTS.
 - (d) Raise the age cap (currently at 61 years or over) to align with the current state pension age of 66 so that applicants (or where applicable, their partner) aged 66 or over can have up to £16,000 in disposable capital and remain eligible for fee remission, regardless of the fee amount.
 - (e) Update the list containing the types of disposable capital that should not be included in an applicant's capital calculation. This will include extending the list to add 15 types of payments, such as payments relating to the Grenfell Tower fire, Windrush and Infected Blood Support schemes.
- 7.8 The application process: An amendment will be made to state that where additional information or evidence is required by HMCTS to assess HwF eligibility, it must be provided within the period notified in writing to the applicant, which will be no less than 7 days. This will create a transparent, clear and effective process for both applicants and HMCTS.
- 7.9 Based on the above changes, the Ministry of Justice estimates that the uplift to the HwF scheme is expected to cost HMCTS an additional £18m-£24m per annum in lost fee income, with a central estimate of £21m, except for the year 2023/24 when the cost is estimated at £9m-£12m (with the central estimate of £10m) due to implementation taking place part way through the financial year. This equates to an annual average of £16m-£20m per annum (with a central estimate of £18m) after conversion to real prices. The proposals will provide increased support for vulnerable individuals at the greatest risk of being denied access to justice. They will also ensure a straightforward system for applicants to understand and for HMCTS to administer.
- 7.10 Miscellaneous amendments: This instrument makes two miscellaneous amendments to the HwF provisions within the Fees Orders listed under paragraph 2.1 above:
- (a) a provision to correct a cross-referencing error; and
 - (b) a provision to clarify that an application for fee remission should be made when proceedings have commenced.

Amendment to paragraph 2.1 of the Civil Proceedings Fees Order 2008

- 7.11 The Lord Chancellor has a duty to protect access to justice and has the authority to prescribe fees under section 92 of the Courts Act 2003. The general policy on fee charging is set out in HM Treasury’s ‘Managing Public Money’ handbook, which states that fees should recover the full or at least part of the cost of the service provided.
- 7.12 The income received from court fees helps to fund the cost of running the courts and tribunals but currently meets less than half of that cost. In 2022/23, there was a net fee income of £727m against the £2.3bn gross running costs of HMCTS, a significant gap that represents a cost to the taxpayer.²
- 7.13 The amendment to paragraph 2.1 of the Civil Proceedings Fees Order 2008 will extend the application of the existing multi-track hearing fee of £1,175 so that it also applies to cases allocated to the new intermediate track. This will ensure that claimants are not required to pay any more in hearing fees under the new intermediate track than they currently do (under the multi-track).
- 7.14 The new intermediate track is part of the provisions implementing the extension of fixed recoverable costs (FRC) in civil cases. As part of the FRC reforms, there will be a new intermediate track and corresponding FRC for less complex claims valued at more than £25,000, but not more than £100,000. The extension of FRC will help to ensure that legal costs are more certain and proportionate across a wider range of civil claims and will thereby enhance access to justice. With the certainty that FRC will provide, parties will be able to make more informed choices throughout the litigation process, which will also facilitate earlier resolution of claims.
- 7.15 Income generated from fees will contribute to funding HMCTS.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act 2020.

9. Consolidation

- 9.1 This instrument is not intended to consolidate any legislation.

10. Consultation outcome

Amendments to the HwF provisions

- 10.1 The Lord Chancellor has performed his statutory obligation to consult the judiciary and specified professional bodies under section 92(5) and (6) of the Courts Act 2003, section 52(4) of the Constitutional Reform Act 2005, section 42(5) of the Tribunals, Courts and Enforcement Act 2007, and section 54(3) of the Mental Capacity Act 2005. Before publishing the public consultation, the Ministry of Justice also engaged with the devolved administrations on proposed changes to the HwF scheme.
- 10.2 The Ministry of Justice consulted on proposals to revise the HwF scheme by publishing a consultation titled “Revising the ‘Help with Fees’ remission scheme –

² The net fee income figure of £727m does not include refunds.

protecting and enhancing access to justice”. The consultation ran from 7 March 2023 to 30 May 2023.³

- 10.3 A total of 18 responses to the consultation paper were received. An online survey was also made available during the consultation period. Over 60% of the responses were from those working in the legal or public sector. Other respondents also included the main representative bodies for the legal profession.
- 10.4 Overall, respondents welcomed the Government’s review of the HwF scheme, with the majority answering ‘yes I agree’ to 23 out of the 28 questions (i.e. agreement with over 80% of the consultation questions). Respondents were particularly supportive of the proposals to update the scheme by increasing financial assistance, such as raising the income and capital threshold levels. Respondents were also supportive of proposed measures to simplify the scheme and make it more accessible, such as reducing the number of capital threshold bands and allowing legal representatives and litigation friends to complete and sign HwF applications on behalf of the applicant. Where respondents disagreed with certain policy proposals, the most pertinent related to responses submitting that the proposed income thresholds should be increased further and adjusted to take account of the rise in inflation and cost of living. The Ministry of Justice has reflected on respondents’ views and addressed them within the consultation response.
- 10.5 The Ministry of Justice carefully considered all responses put forward by stakeholders and published a detailed response on 16 October 2023 to the consultation paper alongside an updated Impact Assessment and an updated Equalities Statement.⁴

Amendment to paragraph 2.1 of the Civil Proceedings Fees Order 2008

- 10.6 Before making Civil Procedure Rules, in this instance the establishment of the intermediate track with a corresponding fee, the Civil Procedure Rule Committee must consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act 1997). The Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in the work of sub committees reviewing particular aspects of the rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government Departments and other authorities affected by rules of civil procedure.
- 10.7 The genesis of the proposals and subsequent work on the Rules was a report on extending Fixed Recoverable Costs produced by (as he then was) Lord Justice (Sir Rupert) Jackson in July 2017.⁵
- 10.8 In March 2019, the Ministry of Justice consulted on the implementation of these proposals by publishing a consultation titled “Extending Fixed Recoverable Costs in

³ The consultation document is available to read at: <https://www.gov.uk/government/consultations/revising-the-help-with-fees-remission-scheme>.

⁴ All documents are available to read at: <https://www.gov.uk/government/consultations/revising-the-help-with-fees-remission-scheme>.

⁵ The report is available to read at: <https://www.judiciary.uk/wp-content/uploads/2017/07/extended-recoverable-costs-supplemental-report-online-2-1.pdf>.

Civil Cases: Implementing Sir Rupert Jackson’s Proposals”. The consultation ran from 28 March 2019 to 6 June 2019, during which time 149 responses were received.⁶

- 10.9 Alongside a number of proposals, the consultation included a proposal to assign intermediate cases (less complex claims over £25,000, but not more than £100,000) to an expanded fast track. The Ministry of Justice proposed to retain the existing multi-track court fees for these cases and respondents did not raise an issue with this proposal. However, following further engagement, the Ministry of Justice decided to introduce a new intermediate track, which is broadly in line with Sir Rupert’s initial recommendation to introduce a new, intermediate track for claims valued over £25,000 but not more than £100,000. This was noted in the Civil Procedure Committee minutes of 7 October 2022.

11. Guidance

- 11.1 Accompanying guidance setting out the changes introduced by this instrument will be made available by HMCTS on paper forms and on the www.gov.uk website.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities, or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 In respect of the amendments to the HwF provisions, a full updated Impact Assessment was published alongside the consultation response and is submitted alongside the Explanatory Memorandum on the legislation.gov.uk website.
- 12.4 An Impact Assessment has not been prepared in respect of the amendment to fee 2.1 of the Civil Proceedings Fees Order 2008, because no, or no significant, impact on the private, public or voluntary sectors is foreseen.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 This instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Minister Freer has made the following statement:

“In my view the provisions of The Courts and Tribunals (Fee Remissions and Miscellaneous Amendments) Order 2023 have no net cost to business”.

15. Contact

- 15.1 Rezina Rai at the Ministry of Justice email: Rezina.Rai@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Cathryn Hannah, Deputy Director for Legal Support and Fees Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

⁶ The consultation documents are available to read at: <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>.

15.3 Minister Freer at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.